



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 37 | Number 3

Article 3

4-1-1959

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Recommended Citation

Lewis P. Watts Jr., *Grand Jury: Sleeping Watchdog or Expensive Antique*, 37 N.C. L. REV. 290 (1959).

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GRAND JURY: SLEEPING WATCHDOG OR EXPENSIVE ANTIQUE?

LEWIS POINDEXTER WATTS, JR.*

Recent newspapers carried the story of a North Carolina grand jury that reported:

It is the unanimous feeling of the members of this grand jury that there has occurred an unnecessary waste of time and a consequent waste of taxpayers money in the performance of a function of questionable value or usefulness.¹

According to one source, "impatience with the grand jury has led to suggestions for its replacement with a committing magistrate since at least as early as 1828."² As part of the extensive movement for legal reform that characterized the 1920's and early 1930's, there were numerous proposals and analyses relating to criminal law and procedure in general³ and the grand jury in particular.⁴ The major legal appraisals of the grand jury's role in our criminal law stem from this period.⁵ By 1931 twenty-four states were said to have dispensed with the requirements

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The basic research reflected in this article was done by the author as a member of the staff of the Institute of Government as part of its court study project undertaken to provide objective data for the North Carolina Bar Association's Committee on Improving and Expediting the Administration of Justice in North Carolina.

¹ Winston-Salem Sentinel, Mar. 14, 1959, editorial page.

² White, *In Defense of the Grand Jury*, 25 PA. B.A.Q. 260 (1954). Compare ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 191 (1947): "Back as far as 1825, Jeremy Bentham is said to have stated that the grand jury had outlived its usefulness for over a century." See generally Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L., C. & P.S. 26, 28, 32 (1955).

³ ALL CODE OF CRIMINAL PROCEDURE (1930); CLEVELAND FOUNDATION, CRIMINAL JUSTICE IN CLEVELAND (1922); ILL. ASS'N FOR CRIMINAL JUSTICE, THE ILLINOIS CRIME SURVEY (1929); MO. ASS'N FOR CRIMINAL JUSTICE, THE MISSOURI CRIME SURVEY (1926); MOLEY, OUR CRIMINAL COURTS (1930); MOLEY, POLITICS AND CRIMINAL PROSECUTION (1929); NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORTS (14 reports, issued 1930-31); POUND, CRIMINAL JUSTICE IN AMERICA (1930); WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION (1929); MORSE & BEATTIE, SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN OREGON, 11 ORE. L. REV. [Supp.] 1 (1932).

⁴ Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163 (1932); Dession & Cohen, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687 (1932); Hall, *Analysis of Criticism of the Grand Jury*, 22 J. CRIM. L., C. & P.S. 692 (1932); Miller, *Informations or Indictments in Felony Cases*, 8 MINN. L. REV. 379 (1924); Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403 (1931); Morse, *A Survey of the Grand Jury System* (pts. 1-3) 10 ORE. L. REV. 101, 217, 295 (1931); Nahum & Schatz, *The Grand Jury in Connecticut*, 5 CONN. B.J. 111 (1931).

⁵ See citations in note 4 *supra*.

for indictment in greater or less degree;⁶ but depressions, wars, and cold wars have diverted the nation's energies to the extent that there has been no fundamental change in our situation since that time. The appendix of a recent legislative council report gives the following breakdown of jurisdictions based on statutory and constitutional provisions in effect in 1957 (forty-eight states plus the federal government):⁷

- 21 jurisdictions: information stated to be available in all criminal prosecutions
- 2 jurisdictions: indictment requirements exist, but may be waived in all cases
- 4 jurisdictions: indictment required for either capital crimes or for capital crimes and those punishable by life imprisonment; information or indictment for other crimes
- 22 jurisdictions: indictment requirements exist to greater or lesser degree, usually as to felonies, though waiver of indictment in all but capital cases is often allowed

The debate on the usefulness of the grand jury continues among the legal scholars, but, if anything, the grand jury has more defenders now than thirty years ago.⁸

HISTORY IN ENGLAND AND AMERICA

As the powers of the grand jury stem from the common law rather than being set out in any detailed⁹ grant of statutory or constitutional authority, it is important to trace the history of this body in both England and in America and examine the precedents for its actions.

Historical Functions

Historically the grand jury has served two basically different but related functions.

⁶ NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 126 (1931).

⁷ MD. LEGISLATIVE COUNCIL RESEARCH DIV. REP'T No. 32, THE GRAND JURY 33-36 (1958).

⁸ Kennedy & Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 CALIF. L. REV. 251 (1955); Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?* 55 COL. L. REV. 1103 (1955); McClintock, *Indictment by a Grand Jury*, 26 MINN. L. REV. 153 (1942); Slovenko, *The Jury System in Louisiana Criminal Law*, 17 LA. L. REV. 655, 656-66 (1957); Younger, *The Grand Jury Under Attack* (pts. 1-2), 46 J. CRIM. L., C. & P.S. 26, 214 (1955); *Some Aspects of the California Grand Jury System*, 8 STAN. L. REV. 631 (1956); Comments, 8 MIAMI L.Q. 584 (1954), 52 MICH. L.R. 711 (1954); Comment, *The Propriety of the Grand Jury Report*, 34 TEXAS L. REV. 746 (1956); Notes, 8 BAYLOR L. REV. 194 (1956), 39 CALIF. L. REV. 573 (1951), 2 DRAKE L. REV. 28 (1952), 44 J. CRIM. L., C. & P.S. 49 (1953), 45 KY. L.J. 151 (1956), 37 MINN. L. REV. 586 (1953), 7 S.C.L.Q. 455 (1955). For recent comment, see note 159, *infra*.

⁹ *E.g.*, U.S. CONST. amend. V: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger . . ."

One is *accusatory*. The grand jury considers the bills submitted by the solicitor; if it finds probable cause,¹⁰ it makes the formal accusation of crime which brings the defendant into the criminal court. The chief reason for retaining the grand jury as an accuser historically was to protect defendants from unjustified prosecutions at the hands of an overzealous prosecutor in the days before our public prosecutions of today.¹¹ A few speak of the *protective* function of the grand jury,¹² but most writers think of this as an integral part of the jury's accusatory procedure.

The other function is *investigatory* or *inquisitorial*.¹³ In the beginning the jurors inquired among themselves for knowledge of crimes committed within the county.¹⁴ Later they sat as an inquest and heard witnesses in this regard.¹⁵ Also, the grand jury served as a kind of supervisor of the local government machinery, apparently with the power to make necessary investigations.¹⁶ With the professionalization of law enforcement and the rise of the modern police force, there has been a steady decrease in the need for the grand jury as an investigator of private crimes, and the investigatory function of the grand jury is today

¹⁰ The more general way of putting this is that "the grand jury ought to find an indictment when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury." ALI CODE OF CRIMINAL PROCEDURE [Official Draft, 1930] § 140, commentary (1931). This appears, however, to be merely a more elaborate way of stating the concept of "probable cause," and the American Law Institute adopted this shorter phrasing in § 140.

¹¹ JOYCE, INDICTMENTS § 61 (2d ed. 1924); POUND, CRIMINAL JUSTICE IN AMERICA 109 (1930); see 4 BLACKSTONE, COMMENTARIES *312-17.

¹² E.g., Note, 37 MINN. L. REV. 586 (1953).

¹³ State v. Wilcox, 104 N.C. 847, 850, 10 S.E. 453, 454 (1889) (dictum): "There can be no question about the fact that at common law a grand jury was charged especially with inquisitorial duties, and where there is probable cause to suspect that the law had been violated they were considered bound by their oaths to institute inquiry and investigation."

¹⁴ Harris, The Role of the Grand Jury in North Carolina Local Government 3-4 (unpublished thesis in University of N.C. Library, 1942). Major reliance was placed upon this carefully digested analysis of various source materials of early legal history such as EDWARDS, THE GRAND JURY (1906); HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1922); POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1903); STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY (9th rev. ed. 1913); S. & B. WEBB ENGLISH LOCAL GOVERNMENT FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT: THE PARISH AND THE COUNTY (1906). Unless one becomes expert in this field, accurate generalization is impossible. A brief tracing of the history of the grand jury was a standard article in many of the materials researched, and the differences led only to confusion. Error often resulted from a false "evolution" imposed on various separate events and the telescoping of centuries of experiment and variation into a seemingly consistent pattern. One of the best short histories was found in MATTHEW BENDER & Co., GRAND JURORS' MANUAL 3-8 (1958), which appears to be either a quotation or a paraphrase of "Bracton's account, as stated by Mr. Reeves in his History of the English Law (Book II, page 3)." For citation to a recent history, see note 159(1) *infra*.

¹⁵ See 4 BLACKSTONE, COMMENTARIES *301.

¹⁶ Harris, The Role of the Grand Jury in North Carolina Local Government 8-12 (unpublished thesis in University of N.C. Library, 1942); cf. Hale v. Henkel, 201 U.S. 43, 59 (1906).

thought of mainly as a check on the efficiency and honesty of public officials.¹⁷ In some states the jurors are by statute restricted to this area in their independent investigations.¹⁸

As investigators the grand jurors can usually go from such routine activities as inspecting the courthouse to the presenting of public officials for malfeasance in office. The exact limits on the powers of the grand jury are usually not clear and vary from state to state.¹⁹ Until the middle of this century there had been a considerable judicial tendency toward restricting the grand jury's investigative function in this country,²⁰ but the reverse may now be true.

England

The modern grand jury stems directly from the "grande inquest" of twenty-three men which sheriffs began to appoint during the time of Edward III in the fourteenth century. This one jury selected from the county at large began to displace, over a period of a century or two, the juries of twelve men for each hundred and of four men for each township²¹ that had entered the governmental machinery shortly after the Norman Conquest. The grande inquest absorbed in time most of the duties of the former juries except, notably, the police functions of the hundred juries. Borrowing from the patterns established by the older juries, this grand jury or "jury of presentment" both inquired into criminal cases and supervised the whole administration of local government.²²

As power in local government affairs began to shift from the sheriff and his courts and juries to the king's justices of the peace,²³ the importance of the grand jury in county government lessened somewhat.²⁴ The American revolutionaries who constitutionally guaranteed the existence of the grand jury, for example, thought of its value mainly as an agency to protect the citizen from unjust political prosecutions.²⁵ Since that time, though, neither in England nor America have those in control of government very often pursued policies that were seriously at variance with the will of the people. Thus it is difficult to estimate what deterrent effect, if any, the grand jury may have had upon

¹⁷ WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 193 (1929).

¹⁸ See Note, 17 N.C.L. REV. 43, 49 (1938).

¹⁹ *Id.* at 46-49.

²⁰ *E.g.*, Lewis v. Board of Comm'rs of Wake County, 74 N.C. 194 (1875); see also Petition of McNair, 324 Pa. 48, 187 Atl. 498 (1936) (restrictive).

²¹ 4 BLACKSTONE, COMMENTARIES *302 indicates, however, that the four men were chosen from the county at large.

²² Harris, *op. cit. supra* note 16, at 7.

²³ BEARD, THE OFFICE OF JUSTICE OF THE PEACE IN ENGLAND 55, 59 (1904).

²⁴ Harris, *op. cit. supra* note 16, at 11-14; see Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L., C. & P.S. 26-32 (1955).

²⁵ See ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 140, 180 & n.218 (1947).

political or other unjustified prosecutions. Ironically, the possibility of hysteria of English grand juries during World War I was said to be one of the factors which led to its suspension during the war, and this paved the way to the virtual abolition of that body in 1933 as a depression measure.²⁶

America

The tendency of our founding fathers to reappraise old institutions and their functions led to the growth of a dispute between legal authorities whether the jury still retained its powers relative to investigation of local government conditions or whether it should act exclusively as a branch of the court in the prosecution of criminal cases.²⁷ The case of Peter Zenger had emphasized the grand jury's protective function in its accusatory role, overshadowing its other ancient responsibilities.²⁸ Following this trend to limit the jury to the role of accuser, there then were attacks on the grand jury's efficiency as an accusing body. As indicated above, the grand jury has decidedly declined in importance in the last hundred years, and has fared particularly ill in the western states, where the institution had no chance to grow roots before being attacked.²⁹ The states have been free to abolish the grand jury, as a majority of the members of the United States Supreme Court have continued to hold that the Fifth Amendment to the United States Constitution applies only to the federal government.³⁰

The American Law Institute in 1930 proposed as part of a model code:³¹

Section 113. Prosecution by information or indictment. All offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment or by information.

Section 114. When grand jury to be summoned. No grand jury shall be summoned to attend at any court except upon the order of a judge thereof when in his opinion public interest so demands, except that a grand jury shall be summoned at least once a year in each county.

The times were such that there was ferment for law reform.

It was in the year 1923 Judge Learned Hand had written:

Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the in-

²⁶ *Id.* at 161 n.120.

²⁷ Younger, *supra* note 24, at 30-31.

²⁸ Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?* 55 *COL. L. REV.* 1103, 1108-09 (1955).

²⁹ Younger, *supra* note 24, at 37-39 & 49 n.107.

³⁰ *Hurtado v. California*, 110 U.S. 516 (1884); see *Adamson v. California*, 332 U.S. 46 (1947).

³¹ ALI CODE OF CRIMINAL PROCEDURE (1930).

nocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.³²

The grand jury today is neither doing an effective enough job to arouse much praise nor is it visibly doing a poor enough job to receive violent criticism. The spread of efficient totalitarian governments since 1930, however, has somewhat tempered the attack of those taking extreme positions in favor of "efficiency" in law enforcement and legal procedure.³³

Two New York County grand juries showed spectacular success in 1935 and 1936 investigating criminal infiltration into labor unions and trade and protective associations; the special prosecutor appointed was Thomas E. Dewey.³⁴ This achievement gave a great impetus to the campaign of the Grand Jury Association of New York County, which had already been campaigning for over twenty years³⁵ to preserve the grand jury and increase its powers. This association is active today and firmly believes in the jury's value in the screening of routine criminal accusations as well as its value as an independent citizens' group to investigate organized crime and for corruption and inefficiency in local government.³⁶ The New York organization takes the position that the jury gets its "leads" through screening the apparently routine cases, and that a jury callable only upon formal occasions or in emergencies will not be effective enough.³⁷

There is reason to believe, though, that the experience in New York County is somewhat different from that in the rest of the country. The successful New York grand juries are taken from "blue-ribbon" panels which are carefully screened.³⁸ It seems unlikely that the New York jurors selected in another manner would have been so consistently effective. The question has been raised whether an attempt to duplicate the "blue-ribbon" selection might not result in the same group of men being called with onerous frequency. In New York County itself in

³² *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923).

³³ See McClintock, *Indictment by a Grand Jury*, 26 MINN. L. REV. 153, 157 (1942): "[W]hen rights of individuals have been completely subordinated to the will of the executive in many countries, and when fears are expressed in our own country that the expansion of the executive power is endangering the rights of the individual, it would be the height of folly to make any attempt to eliminate it so long as any substantial part of the people continue to regard it as a bulwark against executive tyranny. Our concern now is to investigate what reforms in the system are constitutionally possible, and desirable."

³⁴ Younger, *supra* note 24 (pt. 2) 214, 219.

³⁵ GRAND JURY ASS'N N.Y. COUNTY FUND CORP., MANUAL FOR GRAND JURORS 70 (1957); Younger, *supra* note 24, at 49, apparently is in error when it states the founding date as 1915 rather than 1913.

³⁶ See The Panel, Jan. 1956, p. 5, col. 1 & 2 (Vol. 25, No. 1).

³⁷ *Id.*, June 1956, p. 9, col. 3 (Vol. 25, No. 2).

³⁸ GRAND JURY ASS'N N.Y. COUNTY FUND CORP., MANUAL FOR GRAND JURORS 4-7 (1957).

1956 grand jurors were given a guarantee made possible only by a sixty per cent increase in the panel since 1949: upon the end of his service, a grand juror would not be called for service again for at least eighteen months.³⁹ Also, a doubt has been voiced as to the effectiveness of "blue-ribbon" jurors as investigators in smaller communities where jurors would likely be friends or acquaintances of public officials whose administration might be subject to investigation.⁴⁰ Nevertheless, at least some selective screening of grand jurors would be favored by most people,⁴¹ and there is evidence that the caliber of grand jurors throughout the country often is somewhat higher than that of petit jurors.⁴²

The story in Michigan is quite different from that in New York. The information early replaced the indictment in that state and the provisions for the calling of grand juries became more or less antique curiosities.⁴³ A need was felt for a substitute investigatory body to check for corruption and inefficiency in local government, and the legislature finally passed a one-man grand-juror law⁴⁴ in 1917 which the bar had sponsored. As construed, the law gave any judge the power to hold secret hearings, issue indictments, grant immunity from prosecution to witnesses with vital testimony, and yet retain his judicial immunity from suit and his power to punish summarily for contempt. Moreover,

³⁹ The Panel, Jan. 1956, p. 1 col. 2 (Vol. 25, No. 1).

⁴⁰ Morse, *A Survey of the Grand Jury System* (pt. 2), 10 ORE. L. REV. 217, 237 (1931); cf. MOLEY, *POLITICS AND CRIMINAL PROSECUTION* 144 (1929). Often those who would abolish the grand jury as an accusing body insist it should be retained as an investigatory body on the ground that it is a nonpolitical agency representing the citizenry. See WILLOUGHBY, *op. cit. supra* note 17, at 192-94.

⁴¹ Morse, *supra* note 40, at 236-39.

⁴² ORFIELD, *op. cit. supra* note 25, at 147. The bias against "blue-ribbon" petit jurors illustrated by the issues in *Moore v. New York*, 333 U.S. 565 (1948) and *Fay v. New York*, 332 U.S. 261 (1947) (both 5 to 4 decisions) does not seem to carry over to the grand jury. In North Carolina, the Bar Association's Committee on Improving and Expediting the Administration of Justice in North Carolina (hereafter called Court Study Committee) left the grand jurors and petit jurors to be drawn from the same jury panel rather than provide any special selective screening for grand jurors. The New Jersey plan provided for separate lists, which would seem to give their jury commissioners the opportunity more or less to hand-pick the grand jurors. See SUPREME COURT OF N.J., *A MANUAL FOR THE USE OF THE JURY COMMISSIONERS IN THE STATE OF NEW JERSEY* 10-11, 33 (Rev. ed. 1954).

⁴³ The material on Michigan's system is based on SCGLIANO, *THE MICHIGAN ONE-MAN GRAND JURY* (1957).

⁴⁴ Compare Younger, *supra* note 24 at 27: "In Connecticut, through long practice, it [the grand jury] had almost ceased to exist as an investigating body. Each town in the state still elected two persons each year to serve as jurors, but they no longer met as a body unless summoned by a court. Indictment by a full jury was mandatory only in case of crimes punishable by death or life imprisonment. In all other cases it became the practice for individual jurors or the district attorney to sign a complaint when they received information of a crime. Grand jurors in Connecticut tended to become informing officers with an annual term of office, possessed of the authority to make complaints individually, a power which they did not have at common law. As a result of such a system, they met infrequently as a body and through disuse lost most of their broad powers of initiating investigations."

there was nothing to prevent the judge from trying the defendants whom he indicted. After several prolonged, sensational and expensive investigations in the 1940's which resulted in substantial publicity for the judges and prosecutors concerned and a case in the Supreme Court of the United States that questioned the constitutionality of placing so much power in one man,⁴⁵ the Michigan legislature converted to a severely hobbled three-man judge-juror system in 1949. In 1951, after a second bitter political battle, the Michigan legislature restored the more flexible one-man-judge-juror, but surrounded him with certain restrictions designed to discourage protracted publicity-seeking investigations and provide certain procedural safeguards lacking in the original act.

Despite the intense partisan campaign waged against the judge-juror in Michigan, it is interesting that no one seriously suggested the revival of the twenty-three man independent grand jury to be called on a one-time-only basis. The very nature of the common-law grand jury would seem to provide insurance against the evils complained of, but it was assumed without question that the ancient grand jury was too cumbersome a body to perform the investigative function which the one-man grand jury had performed almost too well.

Taking the United States as a whole, there is possibly less agitation now for the outright abolition of the grand jury than at any time in the last hundred years or more. Nevertheless, the inexorable movement seems to be in the direction of by-passing the jury in the accusation process either by virtue of waiver of indictment or by suspension of the indictment requirement in all or in all but capital or serious felony cases. On the other hand, the experience of the 1920's with gangsterism and allied political corruption in our urban areas and the experience since the 1930's with burgeoning bureaucracy seems to be leading to a renaissance of the investigative powers of the jury in many states.⁴⁶

⁴⁵ *In re Oliver*, 333 U.S. 257, 268-70, 272-73 (1948) (dictum). The holding of the case was confined to ruling unconstitutional a summary contempt conviction of a witness the judge decided was giving false and evasive answers. As this occurred during the secret hearing, it resulted in the denial of a public trial and an opportunity to present an effective defense.

⁴⁶ The bulk of the material in the legal periodicals has for a number of years now been on the subject of the grand jury's investigative powers rather than on its inefficiency as an accusing tribunal. There is no general agreement on this point, and runaway grand juries still have their critics. The major areas of conflict are:

(1) Power to call witnesses independently of the court or prosecuting officer. (a problem only in a minority of states—which include North Carolina; see JOYCE, *op. cit. supra* note 11, § 94; ORFIELD, *op. cit. supra* note 25, at 160; Note, 17 N.C.L. REV. 43, 51 (1938).)

(2) Power to investigate generally for suspected hidden crimes and conspiracies, even when irregularities are known, when there is no clear indication of any specific violation or violator. (Younger, *The Grand Jury Under Attack* (pts. 1-2), 46 J. CRIM. L., C. & P.S. 26, 214 *passim* (1955).)

(3) Power to make general reports of criticism of (a) public officials or (b)

THE GRAND JURY IN NORTH CAROLINA

Constitutional Basis

The provisions of the Constitution of North Carolina bearing on the grand jury are contained in the following two sections of Article I:

Sec. 12. *Answers to criminal charges.* No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment, or impeachment, but any person, when represented by counsel, may, under such regulations as the Legislature shall prescribe, waive indictment in all except capital cases.⁴⁷

Sec. 13. *Right of jury.* No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal.

Although the words "grand jury" do not appear in the constitution, it has been held that the words "indictment" and "presentment" import the idea of a common-law grand jury.⁴⁸ At common law the number of jurors could vary from twelve to twenty-three;⁴⁹ thus the General Assembly could specify the empaneling of eighteen grand jurors only.⁵⁰ An attempt by the legislature, though, to provide for a return of an indictment upon the concurrence of nine jurors was held unconstitutional since twelve was the number required at common law.⁵¹

Sections 12 and 13 are construed together by the North Carolina Supreme Court, and as a result the "other means of trial, for petty misdemeanors," is held to allow trial upon the warrant in inferior courts as well as trial without a jury.⁵² "Petty misdemeanors" as used in the constitution may embrace any misdemeanor.⁵³ Upon an *appeal* to the

others without presenting them for crime. (Kuh, *supra* note 28.)
note 28.)

(4) Power to bring in private stenographers, accountants, or detectives to aid in investigations. (Note, 37 MINN. L. REV. 586, 600-02 (1953).)

For a newly added category, see note 159(2) *infra*.

⁴⁷ Section 8 of the Declaration of Rights, N.C. Const. of 1776 declared "that no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment."

⁴⁸ *State v. Barker*, 107 N.C. 913, 12 S.E. 115 (1890).

⁴⁹ 4 BLACKSTONE, COMMENTARIES, * 302.

⁵⁰ N.C. GEN. STAT. § 9-24 (1953); *State v. Wood*, 175 N.C. 809, 95 S.E. 1050 (1918).

⁵¹ *State v. Barker*, 107 N.C. 913, 12 S.E. 115 (1890).

⁵² *State v. Crook*, 91 N.C. 536 (1884). The grand jury is considered part of the superior court system, and its indictment is the normal method of instituting a criminal accusation in a trial held there in the first instance. See *Lewis v. Board of Comm'rs of Wake County*, 74 N.C. 194, 197-98 (1876) (dictum). The legislature has specified no indictment provisions for any inferior court.

⁵³ *State v. Lytle*, 138 N.C. 738, 51 S.E. 66 (1905). The court rejected the argument that "petty misdemeanors" was intended to cover only misdemeanors within the jurisdiction of a justice of the peace by pointing out that before the Constitution of 1868 we adhered to the common law in punishing corporally misdemeanors that were infamous or done in secrecy or malice. Petty misdemeanors

superior court, there is a jury trial de novo.⁵⁴ There is no indictment in the superior court for the action is still founded on the warrant under the theory of derivative jurisdiction.⁵⁵ Where, however, there was no trial below and thus no "appeal," the supreme court held unconstitutional a statute authorizing a trial on the warrant in superior court upon the *transfer* of a case from below on a request for jury trial.⁵⁶

The constitutional provision allowing waiver of indictment in all except capital cases was added by amendment approved by a vote of the people in November 1950.⁵⁷ However, the 1951 statute⁵⁸ implementing the provision provides for an information signed by the solicitor which "shall contain as full and complete a statement of the accusation as would be required in an indictment"⁵⁹ (1) in felony cases and (2) when the defendant pleads not guilty⁶⁰ in misdemeanor cases. Waiver of the indictment must be by the defendant *and* his counsel⁶¹ whether

were the ones not punished corporally. After 1868, imprisonment in the state's prison was substituted for the corporal punishment. In 1891, the dividing line between felonies and misdemeanors was drawn on the basis of the type of punishment; this had the effect of making felonies out of many of the more serious misdemeanors. N.C. GEN. STAT. § 14-1 (1953).

As a matter of practice, the General Assembly has a habit of declaring in acts creating inferior courts that all misdemeanors are "petty" so that they may be tried without indictment on the warrant and without a mandatory jury trial. As noted in the text, upon a *transfer* of a case to the superior court, an indictment is required. Also, in counties where there is no inferior court established, misdemeanors above the jurisdiction of a justice of the peace must of necessity be prosecuted upon indictment in the superior court. See Hall, "The Effect of Inferior Criminal Courts, Mayors' Courts and J.P. Courts on the Superior Court Criminal Dockets in North Carolina," (Part III of *The Administration of Criminal Justice in North Carolina*), 24 POPULAR GOVERNMENT [Special Issue 8S] 35 (May 1958).

⁵⁴ N.C. CONST. art IV, § 27 (applies to justices of the peace in criminal cases, but principle is observed for all inferior courts).

⁵⁵ For recent complications in this area, see note 159(3) *infra*.

⁵⁶ State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

⁵⁷ N.C. Sess. Laws 1949, ch. 579; N.C. SECRETARY OF STATE, NORTH CAROLINA MANUAL—1951, at 241.

⁵⁸ Now codified as N.C. GEN. STAT. §§ 15-140, -140.1, -140.2 (1953), replacing former § 15-140 which allowed waiver of indictment in misdemeanor cases "upon a plea of guilty, or a submission, or a plea of nolo contendere . . ." N.C. Pub. Laws 1907, ch. 71.

⁵⁹ N.C. GEN. STAT. §§ 15-140 & -140.1 (1953).

⁶⁰ The statute does not set out the procedure where there is other than a plea of not guilty to a misdemeanor charge. Presumably the plea of guilty or nolo contendere could be made on the basis of the written accusation contained in the warrant, as done in inferior courts. Section 15-140 previous to 1951, in substance allowing waiver of indictment only in guilty-plea misdemeanor cases (see note 58 *supra*), did not specify the use of any information. See discussion in note 61 *infra*.

⁶¹ N.C. GEN. STAT. §§ 15-140 & -140.1 (1953). The former legislation had also required consent of counsel. The present statutes provide for counsel to be appointed by the court if necessary, as did the previous one, though the stipulation that such counsel not be paid is now eliminated.

The recommendations of the Court Study Committee would not affect the present law governing waiver of indictment in felony cases, but they contemplate several changes in misdemeanor cases:

[Grand Jury] Recommendation No. 5: That in all cases where a misdemeanor is charged a defendant may in writing waive the issuance of a warrant or criminal summons as well as the finding of a bill of indictment;

the charge is a felony or a misdemeanor and regardless of the plea. In the case of felonies, though, the requirement is added that a written waiver by both the defendant and his counsel be on the face of the information.

Selection Procedures

Although there are a bewildering number of local modifications,⁶² the general law on drawing grand jurors is as follows. Twenty days before a regular term of court at which criminal cases will be tried, or a special term for which a grand jury has been ordered by the Chief Justice, a child not more than ten years old shall draw thirty-six scrolls containing names of persons on the jury list from partition No. 1 of the jury box and place them in partition No. 2. At the term of the court in question, the judge shall direct the thirty-six names be put in a box or hat and be drawn out by a child under ten years of age. The first eighteen shall constitute the grand jury, and the balance shall be available as petit jurors for the first week of the term. Additional petit jurors for that or any succeeding week will be drawn anew from partition No. 1.⁶³

that the waiver of indictment may be written either upon a warrant or upon an information signed by a solicitor provided there is a proper charge of the offense; and that in all cases, regardless of plea, the waiver must contain, be written in connection with, or be attached to a sufficient description of the crime charged so as to serve as a formal written accusation on which judgment may be entered and be a record of the defendant's having been placed in jeopardy.

According to the commentary of the Subcommittee on the Jury System, "the need for counsel may be too rigid a rule in many simple cases," and the omission to specify consent of counsel in misdemeanor waivers was intentional. Since the 1950 constitutional amendment providing for waiver of indictment specified representation by counsel, this recommendation would require constitutional change before it can be realized—if this is the only valid basis for a misdemeanor-waiver statute. *State v. Jones*, 181 N.C. 543, 106 S.E. 827 (1921) (alternative holding) did in fact sustain the constitutionality of N.C. Pub. Laws 1907, ch. 71 (codified as § 15-140 until 1951) allowing waiver of indictment in guilty-plea misdemeanor cases. This was upon the theory that N.C. CONST. art. IV, § 12 allowing waiver of jury trial in any court included within its sweep the lesser waiver of indictment. There was no specific mention of N.C. CONST. art. I, §§ 12 & 13. The holding in *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952) did not expressly overrule *State v. Jones*, but the two decisions are incompatible. As of this writing, the proposals for constitutional amendment introduced on behalf of the Court Study Committee and the Constitutional Commission have not touched the parts of Art. I, §§ 12 & 13 relevant to this discussion.

⁶² N.C. GEN. STAT. §§ 9-4 & -25 (1953 & Supp. 1957). Section 9-25 sets out nineteen variant grand jury procedures affecting thirty-three counties. In addition to this, as indicated in the annotations to the section in the General Statutes, there are counties that have special acts governing grand jury procedure which are not reflected in § 9-25, e.g., Mecklenburg County. The 1959 General Assembly is in the process of making further changes, e.g., H.B. 30 (Greene County). The local modifications set out in § 9-4 in general merely authorize the drawing of a larger panel than under the general provisions. The annotations under N.C. GEN. STAT. § 9-3 (1953) indicate there are also local modifications concerning the drawing of the jury panel not shown in § 9-4.

⁶³ N.C. GEN. STAT. §§ 9-3 & -24 (1953).

The above procedure contemplates a completely new grand jury each term of court. Another section,⁶⁴ however, contains modifications that affect many counties. Perhaps the most popular modification is the one by which nine jurors are chosen at the beginning of terms roughly six months apart so that there are staggered one-year periods of jury service.⁶⁵ In this fashion, half of the jury always consists of experienced jurors.

The North Carolina court has more or less consistently held that variations in procedure in selection of the jurors, as distinguished from having disqualified persons on the jury, that did not amount to fraud or bad faith would not sustain a motion to quash the indictment.⁶⁶ The court has construed the provisions as to jury selection to be directory rather than mandatory.⁶⁷ Systematic exclusion of a race or class from the grand jury panel is of course a denial of due process of law under the federal precedents as to any defendant indicted who is a member of the excluded race or class.⁶⁸ A member of a minority group, though, has no right to have representatives of his group on the jury—merely the right that they not be deliberately excluded.⁶⁹

Unlike many states which provide for a system of challenges to the grand jury panel or of individual jurors before the grand jurors are sworn,⁷⁰ objections to jurors *or* to the panel are to be made in North Carolina by timely motion to quash the indictment in the individual

⁶⁴ N.C. GEN. STAT. § 9-25 (Supp. 1957); see note 62 *supra*.

⁶⁵ *Ibid.* The recommendations of the Court Study Committee on the grand jury, adopted by the North Carolina Bar Association, are built upon the Committee's recommendations adopted with regard to selection of petit jurors. See note 42 *supra*. Those recommendations call for jury commissioners appointed by the judiciary who can hold no other public or political office, preparation of the "raw" jury list from reliable sources, advance elimination of persons ineligible or deceased and of persons who wish to avail themselves of a valid exemption, the drawing of jurors' names in open court in the presence of a judge, and the elimination of tales jurors. See Grand Jury Recommendation No. 1:

That grand jurors serve a term of one year; that the names of nine jurors be drawn for grand jury service at intervals of approximately six months each as a part of a regular drawing of a jury panel; that a Superior Court judge may order that vacancies caused by the failure or ceasing to serve of any grand juror be filled; and that such vacancies may be filled either with a juror from the regular panel or with one drawn from the jury list, in the discretion of the judge.

Cf. State v. Stevens, 244 N.C. 40, 92 S.E.2d 409 (1956) (drawing of extra juror).

⁶⁶ State v. Mallard, 184 N.C. 667, 114 S.E. 17 (1922); State v. Daniels, 134 N.C. 641, 46 S.E. 743 (1904). *But see* State v. Griffice, 74 N.C. 316 (1876).

⁶⁷ State v. Haywood, 73 N.C. 437 (1875); see generally numerous cases cited in North Carolina Annotations to ALI Code of Criminal Procedure §§ 119 & 120, commentary (unpublished ms. in files of Institute of Government, c. 1933).

⁶⁸ Eubanks v. Louisiana, 356 U.S. 584 (1958) (Negroes); Hernandez v. Texas, 347 U.S. 475 (1954) (American of Mexican descent); see also State v. Perry, 248 N.C. 334, 103 S.E.2d 404 (1958).

⁶⁹ Akins v. Texas, 325 U.S. 398 (1945); see Note 33 N.C.L. REV. 262, 264 & n.10 (1955).

⁷⁰ See State v. Griffice, 74 N.C. 316, 318 (1876) (dictum); ALI CODE OF CRIMINAL PROCEDURE [Official Draft, 1930] §§ 119-21, commentaries (1931).

case.⁷¹ Formerly, defects of a certain category were supposed to be raised by plea in abatement, but an 1883 statutory change⁷² provided that all exceptions to grand jurors should be taken by motion to quash the indictment.⁷³ A later statute⁷⁴ provided that no indictment would be quashed nor any judgment arrested on the grounds that any juror had failed to pay his taxes the preceding year (no longer a disqualification)⁷⁵ or was a party to any suit pending and at issue. As there is no

⁷¹ N.C. GEN. STAT. § 9-26 (1953); *State v. Griffice*, 74 N.C. 316 (1876).

⁷² *State v. Gardner*, 104 N.C. 739, 740, 10 S.E. 146 (1889): "Prior to that time the old distinction, that a motion to quash was proper when the defect complained of was apparent on the face of the record, while a plea in abatement was the appropriate proceeding, where it was necessary to prove matters *de hors*, the record, had not been uniformly observed, but had been adverted to in a number of cases." Cf. *State v. Seaborn*, 15 N.C. 305 (1833) (motion in arrest of judgment).

⁷³ N.C. GEN. STAT. § 9-26 (1953): "All exceptions to grand jurors for and on account of their disqualifications shall be taken before the [petit] jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived. . . ." *State v. Gardner*, *supra* note 72, held that the motion to quash would lie as a matter of right prior to arraignment and entry of the plea as at common law, but that up till the swearing and impaneling of the petit jury the judge had the *discretion* to allow a defendant to withdraw his plea and make a motion to quash by virtue of the statute.

⁷⁴ N.C. Pub. Laws 1907, ch. 36, § 1, amending section now codified as N.C. GEN. STAT. § 9-26 (1953).

⁷⁵ N.C. Sess. Laws 1947, ch. 1007, § 1, amending N.C. GEN. STAT. § 9-1 (1953). As for qualifications of jurors, the section in its present form requires those making up the jury list every two years to "cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries." The section further provides that lists of names may be procured from sources of information deemed reliable, and that there should be excluded from the list all persons convicted of any crime involving moral turpitude or adjudged to be non compos mentis. N.C. GEN. STAT. § 9-6 (1953) disqualifies those having suits pending and at issue from the jury panel (not the jury list), but is no longer a cause for quashing an indictment as noted above. See also *State v. Oldham*, 2 N.C. 450 (1796). *But see State v. Liles*, 77 N.C. 496 (1877).

Other disqualifications that have been imposed by case law include those set out in *Hinton v. Hinton*, 196 N.C. 341, 586, 145 S.E. 615 (1928) (alien) (petit jury), and *State v. Levy*, 187 N.C. 581, 122 S.E. 386, 389 (1924) (atheist) (petit jury) (dictum).

Compare Court Study Committee recommendations on the qualifications and exemptions of petit jurors (adopted also for grand jurors):

Recommendation No. 6: That the statutory qualifications of jurors include requirements that they be citizens of the United States, under 70 years of age; and that it be specified that a plea of *nolo contendere* to indictment charging the commission of a crime involving moral turpitude is grounds for disqualification of a juror.

Recommendation No. 7: That statutory exemptions from jury duty be limited to those persons whose relation to the courts or law enforcement makes it improper that they sit on a jury and those persons whose occupations are so essential to the public safety or welfare as to make it imperative that they be free to pursue their ordinary duties; and that it be left to the sound discretion of the jury commission or the judge to excuse any person when the community interest, or undue personal hardship, justifies such action.

Recommendation No. 7 is in sharp contrast with present N.C. GEN. STAT. § 9-19 (Supp. 1957), which sets out a lengthy list of those exempt by virtue of their occupation or other condition.

system for challenging jurors, the state would have no opportunity to disqualify a panel or object to a juror in a particular case as in some states;⁷⁶ however, under our procedure the state may submit another bill if the original one is returned as not a true bill.⁷⁷

Organization and Proceedings

The North Carolina statutes are silent as to most of the details to be followed in the organization of the grand jury. Several statutes mention the foreman;⁷⁸ apparently he is to be appointed by the judge, but this is not specified.⁷⁹ In the absence or inability of the foreman to serve, a statute does provide that the judge shall appoint an acting foreman.⁸⁰ Unlike many other states, there are no provisions for interpreters or for stenographers to make transcripts of testimony.⁸¹ Presumably the fore-

⁷⁶ ALI CODE OF CRIMINAL PROCEDURE [Official Draft, 1930] § 120, commentary, at 460-61 (1931); see *State v. Griffice*, 74 N.C. 316, 318 (1876).

⁷⁷ *State v. Lewis*, 226 N.C. 249, 37 S.E.2d 691 (1946); *State v. Harris*, 91 N.C. 656 (1884). When another bill is submitted to the jury, witnesses must again testify before the jury would be empowered to find a true bill. *State v. Ivey*, 100 N.C. 539, 5 S.E. 407 (1888). Where the same bill is sent back to the jury several times for reconsideration, it is fatal even though literally a fresh bill was submitted each time. *State v. Ledford*, 203 N.C. 724, 166 S.E. 917 (1932).

⁷⁸ N.C. GEN. STAT. §§ 6-56, 9-25, -27, 11-11, 15-141 (1953 & Supp. 1957).

⁷⁹ SIMMS & SIMMS, NORTH CAROLINA MANUAL OF LAW AND FORMS 506 (10th ed. 1951); North Carolina Annotations to ALI Code of Criminal Procedure § 125, commentary (unpublished ms. in files of Institute of Government, c. 1933): "In this state it is the settled practice for the judge, usually on the recommendation of the clerk to appoint the foreman from the group selected as grand jurors; so settled, in fact, that the reports are practically devoid of illustrative cases." One case noted, however, was *State v. Weir*, 12 N.C. 363, 366 (1827) (dictum): "To this objection the record furnishes an answer that there was a foreman to the grand jury, as appears both from the list of their names and his indorsement upon the bill of indictment, and *he could be appointed only by the court . . .*" (Emphasis added.) See also *State v. Weaver*, 104 N.C. 758, 762, 10 S.E. 486, 488 (1889) (dictum). Appointment by the court is the prevailing practice in this country, though a few states allow the jurors to select their own foreman. See ALI CODE OF CRIMINAL PROCEDURE [Official Draft, 1930] § 125, commentary (1931); Harris, *The Role of the Grand Jury in North Carolina Local Government 27-28* (unpublished thesis in University of N.C. Library, 1942). One authority states it was the common-law practice for the grand jury to elect its own foreman. Nahum & Schatz, *The Grand Jury in Connecticut*, 5 CONN. B.J. 111, 130-31 (1931).

⁸⁰ N.C. GEN. STAT. § 9-27 (1953). Compare FED. R. CRIM. P. 6(c) (judge appoints deputy foreman as a matter of course rather than in the absence or inability of the foreman to serve); accord, ALI CODE OF CRIMINAL PROCEDURE § 125 (1930).

⁸¹ See ALI CODE OF CRIMINAL PROCEDURE [Official Draft, 1930] §§ 130-31, commentary (1931); FED. R. CRIM. P. 6(d); N.Y. UNIVERSITY SCHOOL OF LAW INSTITUTE PROCEEDINGS, VOL. VI, FEDERAL RULES OF CRIMINAL PROCEDURE 153-54 (1946). The scope given in North Carolina to the requirement of secrecy of grand jury proceedings would probably preclude the jury from having a stenographer to take a transcript of the testimony. Although the holdings barring solicitors entry into the jury room have indicated that part of the basis is fear the solicitor will try to influence the jury, the secrecy element is a material one. See *State v. Crowder*, 193 N.C. 130, 136 S.E. 337 (1927); *Lewis v. Board of Comm'rs of Wake County*, 74 N.C. 194 (1876); cf. *State v. Ledford*, 203 N.C. 724, 166 S.E. 917 (1932); *State v. Branch*, 68 N.C. 186 (1873). If an interpreter were essential, the judge would have to rely upon some rather vague common law for his decision. Cf. *State v. Antonio*, 11 N.C. 201 (1825) (2 to 1 decision that alien defendant not entitled to petit jury *de medietate linguae*). JOYCE, INDICTMENTS §

man has the authority without the aid of a statute to appoint one or more jurors to keep minutes for use in preparing the reports of the grand jurors.⁸² There is an oath provided⁸³ for the law enforcement officer who is appointed, apparently by the sheriff,⁸⁴ as an officer of the grand jury to carry all papers to and from the grand jury and the court.

The statutes of general applicability do not directly require the court to charge the grand jury after its members have taken their oaths, though the oath itself speaks of "true presentment make of all such matters and things as shall be given you in charge"⁸⁵ The charge is specifically required in several counties under local provisions⁸⁶ and its existence is recognized for the entire state in at least one other section of the statutes.⁸⁷ At the common law a charge was required; at one time in England the charge consisted of about 240 different sections.⁸⁸ *American Jurisprudence* takes the position that the oath administered by a judicial officer could technically stand for the requisite charge, and that in any event an indictment would not be quashed because of the failure of the judge to charge the jurors at the beginning of their term of service.⁸⁹

Under the general law in North Carolina, the completely new jury would be charged at the beginning of each term of court at which a grand jury was called.⁹⁰ Presumably grand jurors who serve staggered one-

147 (2d ed. 1924) states that the weight of American authority allows stenographers in the grand jury room, and on this basis necessary interpreters might be permitted to aid the jury if sworn to secrecy. The secrecy requirement is not absolute. See *State v. Broughton*, 29 N.C. 96 (1846) (during investigation of murder for which D eventually indicted, D was witness before grand jury; grand juror permitted to testify at trial that D "betrayed unusual anxiety to fix it upon" another).

⁸² The jury is not required to keep any records, and in the absence of proof to the contrary it will be presumed that it acted properly. *State v. Cox*, 28 N.C. 440 (1846); North Carolina Annotations to ALI Code of Criminal Procedure § 129, commentary (unpublished ms. in files of Institute of Government, c. 1933).

⁸³ N.C. GEN. STAT. § 11-11 (1953).

⁸⁴ *SIMMS & SIMMS, op. cit. supra* note 79, at 507; *cf. State v. Perry*, 44 N.C. 330, 334 (1853).

⁸⁵ N.C. GEN. STAT. § 11-11 (1953).

⁸⁶ *Id.* § 9-25.

⁸⁷ *Id.* § 9-28. See *State v. Wilcox*, 104 N.C. 847, 849, 10 S.E. 453 (1889) (dictum): "The grand jury are 'returned to inquire of all offenses in general in the county, determined by the court into which they are returned,' and are sworn diligently to inquire and true presentment to make of all such matters and things as are given them in charge. It is the duty of the presiding judge to give them in charge the whole criminal law, whether general or local in its operation." Compare ALI CODE OF CRIMINAL PROCEDURE § 127 (1930): "After the grand jurors are sworn the court shall charge them concerning the offenses that may be considered by them and concerning their duties in respect thereto."

⁸⁸ *Harris, The Role of the Grand Jury in North Carolina Local Government 8-9 & 9 n.40* (unpublished thesis in University of N.C. Library, 1942). The detailed charge consisted of questions as to how various public officials were performing specific duties and whether they were committing specific offenses as well as general questions on crime in the county.

⁸⁹ 24 A.M. JUR., *Grand Jury* § 45 (1939).

⁹⁰ N.C. GEN. STAT. § 9-24 (1953); *SIMMS & SIMMS, op. cit. supra* note 79, at 506.

year terms hear at least a charge every six months when new jurors are selected; where all jurors serve for a full year, they may hear only one charge, or, more likely, one at the beginning of each term of court.⁹¹

In taking testimony, the grand jury is traditionally alone with one witness at a time. The requirement of secrecy is written into the oath.⁹² Unlike many other jurisdictions,⁹³ the solicitor here does not present the case for the state. Apparently a grand jury could call a solicitor before it to ask a question, but North Carolina cases warn that the solicitor must stay neutral.⁹⁴ As prosecutor, he is suspect; he might try to influence the jury in favor of finding a true bill.⁹⁵ In contrast to North Carolina, the prosecutor in many other places works closely with the grand jury—particularly in advising the jury as to questions of law.⁹⁶ The judge is the one to perform this duty here.⁹⁷

⁹¹ See notes 62 & 65 *supra*. Several of the local modifications in N.C. GEN. STAT. § 9-25 (Supp. 1957) provide that the judge shall charge the jury or that he may deliver additional charges, or both. Compare Grand Jury Recommendation No. 2 of the Court Study Committee:

That a Superior Court judge preside at the installation of new grand jurors, appointing the foreman for a six-month period (ordinarily from among those jurors with half their term already served); that the judge may but need not charge the jury at any other time than this; that to supplement the charge a handbook for grand jurors be prepared which briefly sets out their duties and the procedures they should follow as well as a concise statement of the elements of the more common crimes they will encounter in passing upon bills of indictment; and that the judge in his discretion need not cover in his charge material in the handbook but may concentrate upon any special problems the jury might face.

⁹² N.C. GEN. STAT. § 11-11 (1953): “. . . the State's counsel, your fellows' and your own you shall keep secret . . .”

⁹³ See ALI CODE OF CRIMINAL PROCEDURE [Official Draft, 1930] § 135, commentary, at 493-96 (1931); FED. R. CRIM. P. 6(d).

⁹⁴ See *State v. Crowder*, 193 N.C. 130, 133-34, 136 S.E. 337, 338 (1927) (dictum that would not quash indictment because of mere presence of solicitor; holding that indictment quashed because solicitor “advised and procured” the finding of a true bill).

⁹⁵ *State v. Crowder*, *supra* note 94.

⁹⁶ See ALI CODE OF CRIMINAL PROCEDURE [Official Draft, 1930] § 135, commentary, at 496-97 (1931); Kaufman, *The Grand Jury—Its Role and Its Powers* [Charge to the Grand Jury], 17 F.R.D. 331, 336 (1955).

⁹⁷ *Lewis v. Board of Comm'rs of Wake County*, 74 N.C. 194, 198-99 (1876) (dictum):

. . . A Solicitor is not a judicial officer. He cannot administer an oath. He cannot declare the law. He cannot instruct the grand jury in the law. That function belongs to the Judge alone. If the grand jury desire to be informed of the law or other of their duties, they must go into court and ask instructions from the bench.

So the Solicitor has no business in the grand jury room. He is not a component part of that body. It is true, the grand jury is a component part of the Court, but it is an independent and self-acting body, clothed with the very highest functions, and, as such, is responsible to the law and to society. None but witnesses have any business before them. No one can counsel them but the Court. They do not communicate with the Solicitor, but with the Court, either directly or through an officer sworn for that purpose. They act upon their own knowledge or observation in making presentments. They act upon bills sent from the Court, with the witnesses. The examination of witnesses is conducted by them, without the advice or interference of others. Their findings must be their own, uninfluenced by the promptings or sugges-

Limitations on Independent Investigations and the Calling of Witnesses

The heart of a grand jury's power to make independent investigations lies in its authority to call witnesses free from control by the court. There is some dispute in and out of North Carolina whether a grand jury would have an unrestricted and inherent common-law right to call witnesses while conducting a general inquisition, though the majority rule probably grants the jury this power.⁹⁸ Even assuming this historical power in the jury here, it is necessary to explore the North Carolina statutes and cases interpreting them for changes they might make.

According to statute, witnesses may be summoned by the clerk or they may be bound or recognized by some justice of the peace to appear before the grand jury.⁹⁹ Where summoned by the clerk, the witness is

tions of others or the opportunity thereof. We know there have been wide departures from the principles here announced, in this and, perhaps, in other judicial districts. It has become necessary, therefore, to review the ground and recur to the earlier and more correct practice as it was established by those who have gone before us and has been handed down by tradition and the recollection of the oldest members of the Court.

Despite this strong dictum, it seems many of the "departures" castigated above have continued in practice to this day. The judge may not be at hand if the jury needs advice as to a minor legal technicality, and the solicitor may be. For a presentation of actual activities of Durham and Orange county grand jurors over a number of years, as reflected in jury reports entered in the minutes of the courts, see generally Harris, *op. cit. supra* note 88, at 72-120.

Field experience gained by lawyers working on behalf of the Institute of Government in connection with its survey for the Court Study Committee indicates that in actuality the grand jury must cooperate with and rely upon the solicitor. There was a great deal of feeling that allowing the solicitor to examine witnesses, as in federal courts, would speed up the process of extracting the testimony the grand jury must evaluate. It was pointed out by solicitors, however, that grand juries usually meet at the beginning of a term of court—which is a solicitor's busiest time. Taking these factors into consideration, the Court Study Committee evolved Grand Jury Recommendation No. 3:

That a Superior Court judge may call the grand jury into session at any time; that administrative procedures be established to allow but not require the solicitor or his assistant to conduct the presentation of the evidence for the State upon the submission of a bill of indictment; that this presentation may be prior to the beginning of a criminal session of Superior Court in a county; and that the solicitor or his assistant retire during the deliberations of the grand jury upon the bill.

⁹⁸ Note, 37 MINN. L. REV. 586, 592-93 (1953); see *United States v. Thompson*, 251 U.S. 407 (1920); *Hale v. Henkel*, 200 U.S. 43 (1906); *Lewis v. Board of Comm'rs of Wake County*, 74 N.C. 194, 196-98 (1876) (dictum) inveighs strongly against inquisitions not particularly directed at a specific person suspected of crime upon facts within the knowledge or observation of the jurors. McKeithen, *The Authority of the Grand Jury*, August 1956 (mimeographed version of speech to Conference of Superior Court Judges, in University of N.C. Library) tends to accept the position of this case. See also Note 17 N.C.L. REV. 43, 45-46 (1938). *State v. Wilcox*, 104 N.C. 847, 850, 10 S.E. 453, 453-54 (1889) (dictum) on the other hand recognizes a common-law right of the jury to conduct general inquiries but stated this power had been limited under the laws of North Carolina. For one of the more restrictive cases, see *McNair's Petition*, 324 Pa. 48, 187 Atl. 498 (1936).

⁹⁹ See N.C. GEN. STAT. § 6-56 (1953). Compare dictum in *Lewis v. Board of Comm'rs of Wake County*, 74 N.C. 194, 198 (1876)—three years prior to passage of act now codified as § 6-56). The provisions allowing justices of the peace to bind over or recognize witnesses who testified at the preliminary hearing to appear before the grand jury is little used today, as the solicitor normally endorses

not entitled to his fee unless the clerk was commanded in writing by either the foreman of the jury or by the solicitor to summon the witness, such command having to state the names of the parties against whom his testimony may be needed.¹⁰⁰ Perhaps the only result of there being no prospective defendant to name would be that such witnesses would not be paid by the state.¹⁰¹ In a widely quoted dictum, however, the North Carolina court has spoken apparently of this provision as a limitation on the power of grand juries to call witnesses.¹⁰²

Several other statutes carry certain implied limitations. One seems to contemplate that presentments, only used after independent investigations, be in existence before a subpoena is issued for a witness.¹⁰³ This could be construed as showing legislative intent that juries present only upon information already known to one of their number or upon other reliable information which incidentally comes to the knowledge of the grand jury. Whether such a statutory restriction, if it exists, is constitutional is only a guess.¹⁰⁴ Whatever the answer here, a witness called during a general inquisition could probably, as a matter of due process of law, make the grand jury divulge the object of its investigation before being forced to answer a particular question.¹⁰⁵

The foreman of the grand jury may administer the oath to any

on the bill those witnesses he wishes the clerk to subpoena. There was once a rather direct relationship between the justices of the peace, the historical conservators of the peace below the superior court level, and the grand jury which was charged to inquire into criminal offenses within the county. As indicated previously, professionalization of law enforcement bodies and the supplanting of the justice of the peace by other inferior courts have combined to diminish the jury's effectiveness in routine criminal matters. Here, at least, the jury is clearly relinquishing initiative it once had. See Harris, *op. cit. supra* note 88, at 73. N.C. Sess Laws 1955, ch. 869 deleted the requirement from N.C. GEN. STAT. § 15-161 (Supp. 1957) that the grand jury receive a copy of names of defendants tried by justices of the peace.

¹⁰⁰ N.C. GEN. STAT. § 6-56 (1953).

¹⁰¹ Lewis v. Board of Comm'rs of Wake County, 74 N.C. 194, 195-96 (1876) (dictum) stated that there was a common-law duty of witnesses to appear in criminal cases whether paid or not, and based its restrictive language cited in note 98 *supra* apparently upon what was considered to be common-law limitations upon the investigative powers of the grand jury.

¹⁰² State v. Wilcox, 104 N.C. 847, 850, 10 S.E. 453, 453-54 (1889) (dictum). The court did not cite the provision of law it thought restricted the common-law right of the jury to call witnesses freely.

¹⁰³ N.C. GEN. STAT. § 15-139 (1953): "In issuing subpoenas for witnesses whose names are indorsed on presentments made by the grand jury, the clerk of the court shall . . ." (Emphasis added.)

¹⁰⁴ The statute could well be held only directory in its provisions. Yet if the provisions were held mandatory, it might be invalidated. The court could easily find the grand jury's functions to be imbedded in the constitution by the use of the word "presentment" in N.C. CONST. art. I, § 12, and then hold in accord with the dictum in *Wilcox* rather than the one in *Lewis* as to the common-law powers of the jury. See note 98 *supra*. Nevertheless, the tenor of both cases was restrictive, and other cases have long reflected a judicial tendency toward placing the power to call witnesses in outside hands. See, e.g., State v. Cain, 8 N.C. 352, 353 (1821) (dictum). On the constitutional question, compare State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906) with State v. Barber, 107 N.C. 913, 12 S.E. 115 (1890).

¹⁰⁵ Cf. Watkins v. United States, 354 U.S. 178 (1957).

witness whose name is indorsed on a bill by the solicitor or by direction of the court.¹⁰⁶ It seems thus witnesses independently called by the grand jury would need to have their oaths administered to them by the clerk. Although the clerk has long had the power to administer oaths to grand jurors,¹⁰⁷ this inconvenience would appear to be in line with some of the limitations on the scope of the grand jury's power to make independent investigations.

One of the most direct of all limitations on the jury has nothing to do with the calling of witnesses. By an amendment to G.S. § 9-28 enacted in 1949:

It shall not be necessary for any grand jury in any county to make any inspections or submit any reports with respect to any county offices or agencies other than those required by the first paragraph of this section, nor for any judge of the superior court to charge the grand jury with respect thereto.¹⁰⁸

The inspections required by the first paragraph of the section included only the county home, the workhouse, and the jail. The amendment calls into question the continuing effectiveness of other sections which ostensibly still require the jury to investigate into orphans' estates¹⁰⁹ and homes for fallen women.¹¹⁰

The power of the jury to make independent investigations is clear when the knowledge of a crime or criminal neglect comes from the personal knowledge or information of a juror, who, of course, may be sworn as a witness.¹¹¹ Beyond that, great controversy arises. It is fairly certain, though, that the jury may act upon credible information, such as testimony of a witness called in connection with another case.¹¹² Apparently, however, the jury is not the normal body to handle unverified complaints; these are supposed to be investigated by law enforcement officers or the solicitor in North Carolina.¹¹³ There exists

¹⁰⁶ N.C. GEN. STAT. § 9-27 (1953).

¹⁰⁷ *State v. Allen*, 83 N.C. 680 (1880); see *State v. Roberts*, 19 N.C. 540 (1837).

¹⁰⁸ N.C. Sess. Laws, 1949, ch. 208.

¹⁰⁹ N.C. GEN. STAT. §§ 33-50 & -51 (1950).

¹¹⁰ N.C. GEN. STAT. § 134-66 (1958). See Grand Jury Recommendation No. 6 of the Court Study Committee:

That G.S. § 134-66 be repealed; and that G.S. § 33-50 be rewritten to provide for more efficient supervision of orphans' estates than that exercised by grand jurors.

¹¹¹ *State v. Cain*, 8 N.C. 352 (1821); *State v. Ivey*, 100 N.C. 539, 541, 5 S.E. 407, 408 (1888) (dictum); see N.C. GEN. STAT. § 15-138 (1953).

¹¹² Note, 17 N.C.L. REV. 43, 45-46 (1938).

¹¹³ *Lewis v. Board of Comm'rs of Wake County*, 74 N.C. 194, 197-98 (1876) (dictum). There is some fear that the jury might be unduly influenced by malicious private complaints. The first clear restrictions on the power of the grand jury to hear private complaints that gained currency were imposed in Justice Stephen Field's famous 1872 charge to a San Francisco grand jury. Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L., C. & P.S. 26, 40-41 (1955); Comment, 38 J. CRIM. L., C. & P.S. 43, 45 (1947). This charge is printed in Field, *Charge to Grand Jury*, 30 Fed. Cas. 992 (No. 18, 255) (C.C.D. Cal. 1872). Federal

in many quarters a great fear of the grand jury's potential for calling public attention to minor defects in the machinery of government. Perhaps any good the jury might accomplish would be outweighed by the loss of confidence of the people in their officials—who may have acted wisely or at least in good faith under their responsibility of balancing budgets and competing interests.¹¹⁴ In addition, there is a notion, justified or not, that the grand jury might become a headline-hunting "investigation committee" unless stringent checks are applied to the scope of its investigations.¹¹⁵

Indictment Procedure

Bills of indictment must be submitted to the grand jury by the solicitor,¹¹⁶ and the names of witnesses should be indorsed on them.¹¹⁷ The foreman is to note which witnesses actually testified, though this provision was held to be directory when tested by a motion to quash the indictment.¹¹⁸

On a motion to quash the court generally will not gainsay the grand jury as to the sufficiency of the evidence supporting the return of a true bill. There is a presumption in favor of the sufficiency and regularity of the evidence received.¹¹⁹ Only where all¹²⁰ of the witnesses testifying before the grand jury are incompetent, as where none of them are sworn,¹²¹ will the motion to quash succeed. If the *witnesses* were competent, the fact that all of their *testimony* was incompetent under the rules of evidence will be no objection.¹²² The *Code of Criminal*

statutes punish as an obstruction of justice any attempt to influence grand or petit jurors, 18 U.S.C. §§ 1503-04 (1952), and a letter from a prospective defendant requesting permission to make a statement to the grand jury as to his case or that the jury consider the statements made in his letter was held to fall within the statute. *Duke v. United States*, 90 F.2d 840 (4th Cir.), *cert. denied* 302 U.S. 685 (1937). Now, however, the statute exempts the mere communication of a written request to appear before the grand jury. 18 U.S.C. § 1505 (1952). *Cf. People v. Parker*, 397 Ill. 305, 74 N.E.2d 523 (1947), *aff'd by an equally divided court*, 334 U.S. 816 (1948) (letter accusing private citizens and public officials of crime is contempt of court). See note, 33 *ST. JOHNS L. REV.* 320 (1959).

¹¹⁴ See McKeithen, *op. cit. supra* note 98, at 7-11.

¹¹⁵ *Ibid.*; *Lewis v. Board of Comm'rs of Wake County*, 74 N.C. 194, 197 (1876) (dictum): "The law denounces such inquisitorial powers, which may be carried to the extent of penetrating every household and exposing the domestic privacy of every family. The repose of society as well as the nature of our free institutions forbid such a dangerous mode of inquisition." Compare discussion in text of the Michigan one-man grand jury.

¹¹⁶ *State v. Cain*, 8 N.C. 352 (1821); see N.C. GEN. STAT. § 15-137 (1953).

¹¹⁷ N.C. GEN. STAT. § 9-27 (1953); *cf. N.C. GEN. STAT. § 15-138* (1953).

¹¹⁸ *State v. Hollingsworth*, 100 N.C. 535, 6 S.E. 417 (1888).

¹¹⁹ *State v. McEntire*, 4 N.C. 267 (1815); see *State v. Coates*, 130 N.C. 701, 41 S.E. 706 (1902).

¹²⁰ Where defendant's wife, not qualified to testify against him, was one of the several witnesses who testified before the grand jury, this did not constitute grounds for quashing the indictment. *State v. Coates*, *supra* note 119.

¹²¹ *State v. Barnes*, 52 N.C. 20, 21 (1859) (dictum).

¹²² *State v. Levy*, 200 N.C. 586, 158 S.E. 94 (1931) (all evidence considered was hearsay); *accord, Costello v. United States*, 350 U.S. 359 (1956).

Procedure of the American Law Institute instructs the grand jury to indict on what the jurors "believe to be sufficient legal evidence," but since the secrecy of the jury's deliberations keeps this from being subjected to effective review, the section adds that "no indictment shall be quashed or judgment or conviction reversed on the ground that there was not sufficient legal evidence."¹²³ Assuming the testimony unobjectionable, the jury presumably is to indict upon a finding of "probable cause"; the *Code* specifies this.¹²⁴ North Carolina has no direct statutory statement, but would probably be in accord.¹²⁵ Again, there could be no effective check upon the requirement.

The juror acting as foreman is to return all bills of indictment in open court except in capital cases, when the entire grand jury, or a majority of the jurors, is to return the bill in a body.¹²⁶ This return in open court is the effective accusation;¹²⁷ the signature of the solicitor or even of the foreman on the bill is not absolutely essential.¹²⁸ The normal procedure is for the solicitor and foreman to sign at the bottom of the indictment, and for the foreman to note the witnesses who appeared and to indorse his name beneath the line stating "—A True Bill" on the reverse of an indictment form.¹²⁹

There is no requirement that the names of the jurors concurring be listed.¹³⁰ At least twelve jurors must find a true bill,¹³¹ but upon return in open court this is presumed. A defendant would have to show affirmatively that fewer than twelve jurors concurred in finding a true bill to sustain his motion to quash.¹³²

There is no express rule as to the return of a bill found not a true bill, although the grand jury often will report such cases to the court.¹³³ Other states which restrict the right of the solicitor to submit new bills upon the same facts naturally provide a means of keeping records as to a defendant on whom a true bill is not found.¹³⁴

Presumably if the evidence of the state is conflicting or unsatisfactory, the jury would simply not find a true bill in the case. There is some

¹²³ ALI CODE OF CRIMINAL PROCEDURE § 138 (1930); see note 159(4) *infra*.

¹²⁴ *Id.* § 140.

¹²⁵ See note 10 *supra*.

¹²⁶ N.C. GEN. STAT. § 15-141 (1953).

¹²⁷ *State v. Calhoon*, 18 N.C. 374 (1835); *State v. Cox*, 28 N.C. 440, 445 (1846) (dictum).

¹²⁸ *State v. Shemwell*, 180 N.C. 718, 104 S.E. 885 (1920) (solicitor); *State v. Calhoon*, *supra* note 127 (foreman). See also *State v. Sultan*, 142 N.C. 569, 54 S.E. 841 (1906).

¹²⁹ Just as the signatures under the indictment are not essential, the indorsement is not essential. *State v. Sultan*, *supra* note 128, at 573, 54 S.E. at 842-43 (dictum).

¹³⁰ *Cf. State v. Cox*, 28 N.C. 440 (1846) (presentments).

¹³¹ *State v. Barber*, 107 N.C. 913, 12 S.E. 115 (1890).

¹³² *State v. McNeil*, 93 N.C. 552 (1885).

¹³³ See *State v. Ledford*, 203 N.C. 724, 166 S.E. 917 (1932); *State v. Brown*, 81 N.C. 568 (1879).

¹³⁴ See ALI CODE OF CRIMINAL PROCEDURE [Official Draft, 1930] §§ 142 & 146, commentaries (1931).

authority elsewhere, though, that the jury may seek other clarifying evidence if it wishes,¹³⁵ and that the jury may even allow the accused to appear before it to explain away the state's evidence.¹³⁶ No direct North Carolina statement has been encountered on this subject.¹³⁷

The grand jury traditionally has had the authority to indict or present only for crimes committed within the county.¹³⁸ There is a statutory presumption, which becomes conclusive unless attacked by plea in abatement, that the act occurred within the county as specified in the indictment.¹³⁹ There are several other statutes changing or clarifying the common-law venue rules as to offenses affecting more than one county.¹⁴⁰ In two specific instances the grand jury is given the power to indict for offenses that occurred wholly outside the county. First, in lynching cases the superior court in any adjoining county shall have full jurisdiction.¹⁴¹ Second, where, after felony indictment, the defendant consents to a change in venue for trial, the grand jury in the county to which the cause is removed would have the power to find another indictment in the event defects show up in the original one.¹⁴²

Presentments and Reports

The words "present" and "presentment" can have more than one meaning. As used in the oath for jurors, the foreman and other jurors:

shall diligently inquire and true presentment make of . . . things
. . . given you in charge; . . . you shall present no one for envy,

¹³⁵ Field, *Charge to Grand Jury*, 30 Fed. Cas. 992 (No. 18,255) (C.C.D. Cal. 1872).

¹³⁶ Kaufman, *The Grand Jury—Its Role and Its Powers* [Charge to the Grand Jury], 17 F.R.D. 331, 336 (1955); see ALI CODE OF CRIMINAL PROCEDURE [Official Draft, 1930] § 139, commentary (1931). *But see* EDWARDS, *THE GRAND JURY* 103 (1906).

¹³⁷ So far as calling additional witnesses is concerned, this apparently would be permissible under N.C. GEN. STAT. § 6-56 (1953), for there would be a party to name as prospective defendant in the summons. *Cf.* note 101 *supra*. As a matter of practice, the accused is rarely, if ever, permitted to testify in his behalf, and there is some feeling this procedure turns the jury from an accusing jury into a trial jury. In a case where codefendants were each called before the grand jury to testify against each other, the court upheld the indictment but criticized this procedure. *State v. Frizzell*, 111 N.C. 722, 16 S.E. 409 (1892). The danger pointed out here, however, was the possibility of self-incrimination, which would not apply if the accused came voluntarily before the jury.

¹³⁸ 4 BLACKSTONE, COMMENTARIES *303.

¹³⁹ N.C. GEN. STAT. § 15-134 (1953).

¹⁴⁰ N.C. GEN. STAT. §§ 15-129 to -131, -133 (1953).

¹⁴¹ N.C. GEN. STAT. § 15-128 (1953); *State v. Lewis*, 142 N.C. 626, 55 S.E. 600 (1906) (upholding constitutionality by split decision).

¹⁴² N.C. GEN. STAT. §§ 15-135 & -136 (1953). Compare Grand Jury Recommendation No. 4 of the Court Study Committee:

That any person charged with a crime may waive in writing venue requirements (or their equivalent) relating to either indictment or trial or both; and that a judge be authorized in his discretion to order a person executing such a waiver to another county where speedy and impartial trial or indictment and trial may be had.

hatred or malice; neither shall you leave anyone unrepresented for fear, favor, or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.¹⁴³

The word "indictment" is not used in the oath. Thus, a presentment can broadly mean the presenting or reporting of any matters whatsoever to the court. In a narrower sense, though, "presentment" is often used in contrast to "indictment"; the presentment is the accusation of crime which the jury initiates on its own motion.¹⁴⁴ The word is used in this sense in article 14 of the criminal procedure chapter of the General Statutes and in the constitution.¹⁴⁵

In addition to returning indictments and presentments, the jury is required to make certain inspections and report to the court.¹⁴⁶ These special reports are the only ones required of the jury, yet it is customary for juries to submit general reports detailing their activities during the times of their tenure.¹⁴⁷ These reports are given in open court and are entered on the minute docket, and can often run from vague general praise of the government of the county to sharp criticism of conditions or even of certain officials. It sometimes may happen that officials are criticized for acts which technically constitute crimes, yet no formal presentment is made.¹⁴⁸

Although there is some dispute, it seems the jury had the early common-law right to make critical reports, but this was sharply limited or abolished during the nineteenth century.¹⁴⁹ Other than make the special reports required by statute and pass on bills submitted by the solicitor, the North Carolina jury may, as a technical matter, have to choose between making a presentment of a crime or taking no action.¹⁵⁰ In many states critical references to officials or private individuals may be ordered expunged from the reports when no presentment follows up the criticism.¹⁵¹ On the other hand, there is growing modern sentiment in favor of restoring to the jurors the power to report at least on public

¹⁴³ N.C. GEN. STAT. § 11-11 (1953).

¹⁴⁴ *State v. Morris*, 104 N.C. 837, 839, 10 S.E. 454, 455 (1889) (dictum).

¹⁴⁵ N.C. CONST. art. I, § 12.

¹⁴⁶ N.C. GEN. STAT. § 9-28 (1953) (county home, workhouse, and jail); N.C. GEN. STAT. §§ 33-50 & -51 (1950) (orphans' estates); N.C. GEN. STAT. § 134-66 (1958) (homes for fallen women). See note 110 *supra*.

¹⁴⁷ Harris, *The Role of the Grand Jury in North Carolina Local Government* 72 (unpublished thesis in University of N.C. Library, 1942).

¹⁴⁸ *Id.* at 72-78, 83-84, 110.

¹⁴⁹ Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?* 55 COL. L. REV. 1103, 1105-10 (1955).

¹⁵⁰ No North Carolina case dealing with this subject has been discovered. The philosophy of some of the restrictive dicta concerning the power of the jury to call witnesses in independent investigations may carry over into this area. In the face of the entrenched practice, however, this seems somewhat unlikely.

¹⁵¹ See Kuh, *supra* note 149, at 1110-31; Notes, 28 N.Y.U.L. REV. 442 (1953), 102 U. PA. L. REV. 254 (1953), 38 VA. L. REV. 950 (1952).

officials.¹⁵² With our growing population and an increasing lack of day to day contact between the government and those governed at the local level, the need for "watchdog" grand juries has been felt.¹⁵³ A related area in which there is a conflict in the authorities is the liability of an individual juror for libel on the basis of defamatory jury reports to which he assented.¹⁵⁴

Under the English common law, presentments did not seem to be effective in themselves as a basis for arrest or trial.¹⁵⁵ Yet, in our early North Carolina history we did allow direct prosecution upon this instrument;¹⁵⁶ however, local juries were poor legal draftsmen in the days when drawing indictments was a fine art and it became necessary to provide, in 1797, that no one be arrested or tried on a presentment.¹⁵⁷ It is not clear today what discretion a solicitor has to disregard a presentment of the grand jury and refuse to submit a bill.

The grand jury would be required to call at least one witness upon considering the bill submitted as a result of the presentment, no matter how many had testified during the previous hearing.¹⁵⁸

CONCLUSION

The genius of the common law has been its way of adapting old forms to new situations. The grand jury is an excellent example of this. Historians find antecedents of the jury system existed in England long before the time William the Conqueror imported his idea of questioning local residents periodically about local affairs as a method of centralizing his administration. As centuries went by, the grand and petit juries split and their criminal law functions became fixed. The importance of the jury in local government, however, fluctuated with the struggles for power among the sheriffs, landed gentry, justices of the peace, Parliament, and various kings.

By Blackstone's time, the jury's power in English local government

¹⁵² See, e.g., *In re Presentment by Camden County Grand Jury*, 10 N.J. 23, 89 A.2d 416 (1952).

¹⁵³ Kuh, *supra* note 149, at 1117-18. But the "watchdog" should not become a "professional" through holding over too long. The peculiar virtue of the grand jury is that it is a nonpolitical lay group. See Kuh, *supra* note 149, at 1119, 1125.

¹⁵⁴ See Notes, 8 FLA. L. REV. 343 (1955), 31 MINN. L. REV. 500 (1947).

¹⁵⁵ 4 BLACKSTONE, COMMENTARIES *301; cf. HOUSEL & WALSER, DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES § 222 (1938) taking the position that today "presentment" is no more than a report by the grand jury and of no legal force.

¹⁵⁶ *State v. Thomas*, 236 N.C. 454, 458, 73 S.E.2d 283, 286 (1952) (dictum). One hangover of the prior rule that the presentment was effective to begin prosecution is that a presentment will bar the running of the statute of limitations. N.C. GEN. STAT. § 15-1 (1953); see *State v. Morris*, 104 N.C. 837, 10 S.E. 454 (1889).

¹⁵⁷ *State v. Thomas*, *supra* note 156, at 458, 73 S.E.2d at 286 (dictum); see N.C. GEN. STAT. § 15-137 (1953).

¹⁵⁸ See *State v. Cain*, 8 N.C. 352 (1821); cf. note 77 *supra*.

had greatly waned, and the *Commentaries* treat only the grand jury's function in the procedure of criminal accusation. In America, on the other hand, there had been something of a revitalization of the grand jury's role in government. The more informally organized local governments of the colonists were well suited to the potentialities of the jury.

Two factors, though, acted to restrict the power of this strong American grand jury: our judges and lawyers began to read and follow Blackstone; and judges and other elected officials operating under a Jacksonian spoils system found the grand jury a nuisance on occasion. The astonishing part is that the grand jury has survived so long with so many of its ancient wide powers preserved at least in vestigial form.

New situations arising in urban life in this century have brought the grand jury back into greater prominence. It is inefficient, but democracy often is deliberately so with its checks and balances.

The grand jury will likely disappear from the scene more and more in routine criminal cases, but in the states where it is firmly established it will expand to serve as an emergency check on the honesty and efficiency of those in control of local government. The regular law enforcement agencies are not the best ones to police their bosses. Also, the jury may serve limited usefulness on occasion by making broad investigations in controversial areas. Despite conservative abhorrence of the excesses possible here, public exposure sometimes becomes necessary. The jury's contribution in this field, however, will vary greatly with local factors.

There may not be a rational justification for the existence of the grand jury, but its institutional tenacity and flexibility over the centuries makes it something not to be lightly cast away. The court reform proposals of the North Carolina Bar Association did not seek to alter any of the basic powers of the grand jury in North Carolina. Moreover, there was no attempt to spell out the existing powers which at present are more potential than actual. Any codification would act to limit future possibilities.

The present ambiguous situation may be desirable from the standpoint of the common-law tradition. North Carolina has not yet become urbanized or industrialized to the extent that many states have, and the future fabric of its society and government cannot now be known. If in the future the grand jury becomes a burdensome institution, the North Carolina court has many deliberate dicta and statutory inferences to rely upon in sharply restricting the power of the jury. If, on the other hand, there arises a need for an aggressive grand jury, perhaps to act as a citizens' group to combat evils not now conceivable, the dicta of the past one hundred years can be rather readily distinguished, and there are

many venerable authorities to support the common-law independence of the grand jury. There may be local confusion at times as to what a particular grand jury can do, but a decision by a judge in each case to settle the confusion is surely better than having the certainty of a rule fixed in darkness.¹⁵⁹

¹⁵⁹ The following material of recent issue came to the attention of the author after the above manuscript was sent to the printer:

(1) Whyte, *Is the Grand Jury Necessary?* 45 VA. L. REV. 461 (1959), should be referred to with regard to several of the above footnotes. Its detailed discussion of the English (pp. 462-66) and Colonial history (pp. 466-71) of the grand jury is especially instructive. The article also compiles a rather complete listing of the various advantages and disadvantages of the grand jury (pp. 486-89).

(2) Note, 34 N.Y.U.L. REV. 606 (1959) discusses a new area of controversy over the grand jury. See note 46 *supra*. Jencks v. United States, 353 U.S. 657 (1957) and the "Jencks Statute," 18 U.S.C. § 3500 (Supp. V, 1958), may conflict with traditional requirements of secrecy of grand jury testimony.

(3) N.C. JUDICIAL COUNCIL, SIXTH REPORT 7-8 (1959) (Recommendation X) urges an amendment to N.C. CONST. art. IV, § 12 to stipulate that the superior court should uniformly have concurrent original jurisdiction with inferior courts. At present, in some counties the inferior courts have exclusive original jurisdiction over certain offenses. The superior court, exercising derivative jurisdiction only, can hear these offenses *de novo* on appeal from a conviction when the offenses are sufficiently alleged in the warrant. See *State v. Cooke*, 248 N.C. 485, 103 S.E.2d 846 (1958). As for a particular crime charged below, since the court has gained jurisdiction over the offense by the defendant's appeal, the solicitor may ignore the warrant and submit a bill to the grand jury. *State v. Jones*, 227 N.C. 47, 40 S.E.2d 458 (1946). Since this could not be done if the warrant were fatally defective, however, this seems merely to give the solicitor a choice of forms. Any variant or related offense that would be technically a different crime from that brought forward on appeal could not be tried in superior court, as exclusive trial jurisdiction would lie in the inferior court. *State v. Cooke*, *supra* at 488-89, 103 S.E.2d at 848-49 (*dictum*).

In the majority of counties, however, where the superior court does have concurrent jurisdiction with inferior courts, there could be no such objections to trial of related offenses by indictment originating in the superior court. Moreover, if there were a fatal defect in the warrant not observed until after conviction below, a bill properly charging the offense could be submitted for trial on the merits in superior court to save the useless dismissal and sending of the case back to the inferior court. N.C. JUDICIAL COUNCIL, SIXTH REPORT 8 (1959).

(4) In connection with competency of evidence considered by the grand jury. note 123 *supra*, see *Lawn v. United States*, 355 U.S. 339 (1958).