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RECENT DECISIONS

TRADE REGULATION — TRADING STAMPS — EXCHANGE OF STAMPS FOR STAMPS NOT UNFAIR COMPETITION — Merchants Green Trading Stamp Company, being engaged in the business of promoting the sale of retail merchandise through the use and distribution of trading stamps, sought to enjoin Vornado, Inc., from exchanging its own stamps for those of Merchants. Merchants Green Trading Stamp Company had expended considerable funds in advertising its trading stamp business. Exclusive territorial franchise agreements had been made with retail merchandisers, in conjunction with the establishment of several redemption centers. Vornado, Inc., issued its own stamps with food purchases made by customers at any of its stores, exchanging books of any other trading stamps with food purchases of \$5.00 or more. The exchanges were carried on on a one-for-one basis, but in no single transaction was more than one book of a competitor's stamps exchanged. Plaintiff alleged that Vornado, Inc., had appropriated its advertising and redemption system, and thus Vornado was destroying the plaintiff's trading stamp business. On motion for interlocutory injunction before the Hudson County Superior Court, it was held: that the injunction should be denied. The exchanging by Vornado of its stamps for those issued by the plaintiff was the exercise of nontortious business ingenuity which lacked any malicious intent or unfair means. *Merchants Green Trading Stamp Co. v. Vornado, Inc.*, 75 N.J. Super. 523, 183 A.2d 489 (Hudson County Ct. 1962).

In recent years the courts have confined their decisions dealing with trading stamps to the issue of the constitutionality of state statutes prohibiting their distribution and the problem of violation of Fair Trade Laws. This is the first case in many years in which the rights of the stamp holder is the controlling issue. In an identical case another New Jersey county court has recently granted an injunction prohibiting the exchange of stamps. This Morris County Court case¹ must have accepted the plaintiff's contention that the limitations imposed upon the use of their stamps by the trading stamp company were enforceable. But in the *Merchants* case, the court steered away from this problem. To reach its result the court was required to distinguish between *Sperry & Hutchinson Co. v. Siegel, Cooper & Co.*,² and *Sperry & Hutchinson Co. v. Louis Weber & Co.*³ The 1923 *Siegel* case turned upon the intent held by Sperry & Hutchinson in attempting to redeem stamps purchased from another after the issuer had assigned the redemption obligation. Sperry & Hutchinson had its employees pose as customers in order to deceive the redemption center. The court held that Sperry & Hutchinson had used these expressly nontransferable stamps to its own advantage and to the detriment of the redemption center, and therefore was not entitled to have the stamps redeemed. In the 1908 *Weber* case the trading stamp company was granted an injunction prohibiting Weber from sending out agents to sell or exchange Weber's stamps for partly filled books of the plaintiff. Once Weber had exchanged these stamps he would then resell them at a lower price. Thus, Weber deliberately entered into a course of conduct logically calculated to injure the plaintiff. It was an intentional appropriation of the plaintiff's stamps, and direct interference in its contracts and business. But in *Vornado*, the court found no scheme to injure the trading stamp company as in *Siegel*, and no direct interference with, or appropriation of, the stamps as in *Weber*. Vornado, Inc., had forthrightly offered to exchange its stamps for those of the plaintiff. No artifice was used to induce plaintiff to redeem its stamps, nor was an attempt made to obtain the stamps by inducing the

¹ Letter from the Hon. Thomas J. Stanton, Judge, Morris County Superior Court, to Stephen Bower, November 30, 1962, on file in the Notre Dame Law Library. Judge Stanton stated that there had been a motion for an interlocutory injunction before him, which was decided from the bench, and with no opinion being filed.

² 309 Ill. 193, 140 N.E. 864 (1923).

³ 161 Fed. 219 (C.C.N.D. Ill. 1908).

retail merchants in the system to sell directly to Vornado in violation of their contract with the trading stamp company.

The court relied upon *Sperry & Hutchinson Co. v. Fenster*⁴ and *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*⁵ to answer the plaintiff's contention that Vornado's activity was an illegal appropriation of the promotional and advertising aspect of the issued trading stamps. In the former case, the court granted an injunction to a trading stamp company prohibiting Fenster from using plaintiff's stamps for his advertising purposes. The stamps had been obtained from retail merchants in violation of the contract that they had with the trading stamp company. The court reasoned that since the retail merchants had paid consideration for the privilege of giving out the stamps and since Fenster knew that the licenses were for a limited use, Fenster could not obtain the benefits of the contracts without providing his own consideration. Fenster was not allowed to reissue these stamps and thus obtain the benefits of the extensive advertising promotion of the trading stamp company. In the *Mechanics' Clothing Co.* case, the court refused to allow the defendant to advertise that he had a special arrangement with the trading stamp company whereby the defendant was allowed to give double the usual amount of stamps. The Mechanics' Clothing Co. had obtained some of its stamps from licensed retail merchants and some from customers. This was considered a "fraudulent scheme and unwarranted attack upon the business of the [trading stamp company]."⁶ The activity in the *Vornado* case is far from that in *Fenster* and *Mechanics' Clothing Co.*; Vornado had only advertised that it would exchange its stamps for those of any trading company.⁷ Therefore, the court concluded that there had been no intent to appropriate the advertising benefits of the trading stamps, nor any attempt to reissue the stamps which might incidentally result in a promotional advantage.

Having concluded that there had been no malicious intent to injure the trading stamp company, and that the means used were honest and forthright, the court said that the exchanging of the stamps alone could not amount to a tortious act. The difference, said Judge Pashman, "may be fairly characterized as competitive directness . . . as opposed to and contrasted with deceptive and fraudulent self-dealing. . . ."⁸

The court admitted that it had not dealt with the problem as to whether or not the relationship arising between the trading stamp company and the buying public was entitled to judicial protection. But it is submitted that this question is unavoidable, since the authority that it relied upon was factually distinguishable from the *Vornado* case. In the long line of *Sperry & Hutchinson* cases⁹ the courts were only concerned with the use of the stamps in their capacity as advertising and promotional devices — that is, the use of the stamps as evidence of a right to be honored on redemption was *not* the main inquiry. The cases were more concerned with the interference with, or perversion of, the contracts that the trading stamp company had made with its retail merchants. The court in the *Vornado* case found that there had been no illegal activity relating to the merchant-trading stamp company contracts, either in interference with the contract, or in appropriation of advertising benefits. Thus, the narrow issue should have been whether Vornado could legally take the trading stamps from the buying public for redemption. This inquiry will have to be answered before this case can be laid to rest. The contemporaneous

4 219 Fed. 755 (E.D.N.Y. 1915).

5 128 Fed. 800 (C.C.D.R.I. 1904).

6 *Id.* at 804.

7 *Merchants Green Trading Stamp Co. v. Vornado, Inc.*, 75 N.J. Super. 523, 183 A.2d 489, 495 (Hudson County Ct. 1962).

8 *Id.* at 495.

9 *Sperry & Hutchinson Co. v. Fenster*, 219 Fed. 755 (E.D.N.Y. 1915); *Sperry & Hutchinson Co. v. Louis Weber & Co.*, 161 Fed. 219 (C.G.N.D. Ill. 1908); *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 135 Fed. 833 (C.C.D.R.I. 1904); *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 128 Fed. 800 (C.C.D.R.I. 1904); *Sperry & Hutchinson Co. v. Siegel, Cooper & Co.*, 309 Ill. 193, 140 N.E. 864 (1923).

Morris County Court case that was not published apparently took this approach — it held that the trading stamp company could obtain an injunction to prevent Vornado from exchanging its stamps for those of S. & H.

Merchants Green Trading Stamp Co. contended that the buying public takes the trading stamps subject to the following terms: 1) the title to the stamps remains in the trading stamp company; 2) the stamps are not transferable without the written consent of the company; 3) the only right which the customer acquires is to paste the stamps in the collector's book, and present them for redemption.¹⁰ The courts generally have agreed that a trading stamp is not property, in the full sense.¹¹ The cases reach no agreement as to what it actually is. Instead of labeling, one court has characterized the stamp in this manner:

The trading stamp, when issued, represents a closed transaction between the merchant and the company, as well as an outstanding obligation to redeem the stamp. As a token or voucher of the sale and use of so much advertising, the trading stamp is necessarily a consumable article — an article designed for a single use in an advertising scheme.¹²

Since it appears that stamps are evidence of a contractual obligation, the pivotal inquiry will be the extent of their legal enforceability. The trading stamp company contends that the stamps are nontransferable. If this is so, and this term is legally binding upon the customers who receive these stamps, then Vornado's right to redemption is voidable. If the stamps are nontransferable as per the terms of the agreement between the trading stamp company and the buying public, it must be shown that they were accepted as such. The trading stamp company relies upon its recital of the stamps' terms contained in their collection books.¹³ The

¹⁰ Merchants Green Trading Stamp Co. v. Vornado, Inc., 75 N.J. Super. 523, 183 A.2d 489, 490 (Hudson County Ct. 1962).

¹¹ Sperry & Hutchinson Co. v. Louis Weber & Co., 161 Fed. 219, 221 (C.C.N.D. Ill. 1908). In Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 135 Fed. 833, 834 (C.C.D.R.I. 1904), the court said, "A trading stamp is not ordinary property. It is sui generis. It represents a . . . complicated transaction. . . ." In Independent News Co. v. Williams, 293 F.2d 510 (3rd Cir. 1961), Section 2-403(2) of the Uniform Commercial Code was not applied to trading stamps; this section provides "(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." But the trading stamp case holds that a person may acquire title for redemption, but not necessarily for promotional purposes. Thus, there was no totality of rights entrusted and the Uniform Commercial Code could not apply.

¹² Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 135 Fed. 833, 834-35 (C.C.D.R.I. 1904).

¹³ In MacDonald Plaid Stamp Saver Book the following appears:

[T]he following rights and conditions are expressly reserved by this company, which the persons acquiring [the stamps] expressly accept. . . . [A]t all times the title thereto being expressly reserved in this company. . . . The only right you acquire in Plaid stamps is to paste them in MacDonald Plaid Stamp saver book and present them to us for redemption. . . . If the stamps or saver books are transferred without our consent, we reserve the right to restrain their use by, or take them from, other parties.

Top Value Stamp Book has these instructions:

[T]he following rights and conditions . . . are expressly reserved by this company . . . and are binding on the merchant's customers. [A]t all times the title thereto (the stamps) being expressly reserved in this company . . . subject to the rights of the merchants and their customers under the contracts with this company. . . . [They are] evidence of cash payment. The only right which you acquire in said stamps is to paste them in Top Value Stamp books and present them to us for redemption. . . . [No] further use . . . without our consent in writing. . . . [I]f the stamps or books are transferred without our consent, we reserve the right to restrain their use by, or take them from other parties.

The S. & H. Stamp Book contains terms which are identical almost to the wording that appears in the above examples.

courts have made several comments in their opinions on this problem. In the second *Mechanics' Clothing Co.* case it was said, "[S]ince counsel for the complainant (the trading stamp company) concede it, a collector of trading stamps may transfer them to others for the same purpose for which they were originally issued, namely, for redemption."¹⁴ *Sperry & Hutchinson Co. v. Fenster* clearly states, "The right to redeem the stamps is a property right transferable by possession. . . ."¹⁵ Finally, in the first *Mechanics' Clothing Co.* case the court said, "A collector of the stamps is doubtless a holder for value, and there appears to be no reason why he cannot transfer a stamp, with his rights of redemption, to any person and upon such terms as he may see fit."¹⁶ Although these statements give strong support to the proposition that the stamps are transferable if for redemption, it must be kept in mind that these comments were only dicta. If the trading stamp company can show that there was assent to the saving booklet's terms courts would undoubtedly acquiesce in the limitation. This is precisely what appears to have happened in the unreported New Jersey Superior Court case.¹⁷ The trading stamp company argued that even if the customers were unaware of the limitations contained in the booklet, that their acceptance of the stamps constitutes the same sort of unsigned contract as a manufacturer's warranty or a train ticket. Judge Stanton must have accepted this reasoning because he granted a temporary injunction against Vornado, Inc., from exchanging its stamps for those of Sperry & Hutchinson.

There are several factors which operate to prevent the trading stamp company from effectively asserting acceptance by the buying public. First, the face of the stamp itself gives no indication of any limitation on transferability. The stamp, if anything, appears to be a thing of value itself — the face of the most common trading stamps carries the words, "CASH VALUE 1 MILL."¹⁸ Thus, the only argument that the trading stamp company can make must be based on the written limitations printed in their saving books.

Second, if the question of nontransferability is to turn upon the effectiveness of an outside writing, the trading stamp company will have a difficult time showing assent. It is almost impossible to see when and how the buying public could have agreed to the written terms in the saving books. Similar types of adhesion contracts have met with great disfavor with the courts and writers.¹⁹ An example of this attitude appears in *Henningsen v. Bloomfield Motors, Inc.*:

Clauses on baggage checks²⁰ restricting the liability of common carriers for loss or damage in transit are not enforceable unless the limitation is fairly and honestly negotiated and understandingly entered into. If not called specially to the patron's attention, it is not binding. It is not enough to show the form of a contract; it must appear also that the agreement was understandingly made.²¹

Thus, even though the trading stamp company has made its limitation on transferability of the stamps clear in its saving books, there appears to be no opportunity for adequate assent on the part of the buying public. The retail

¹⁴ *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 135 Fed. 833, 833-34 (C.C.D.R.I. 1904).

¹⁵ *Sperry & Hutchinson Co. v. Fenster*, 219 Fed. 755, 757 (E.D.N.Y. 1915).

¹⁶ *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 128 Fed. 800, 803 (C.C.D.R.I. 1904).

¹⁷ See note 2 *supra*.

¹⁸ Top Value stamps, Plaid stamps, and S. & H. Green stamps.

¹⁹ 1 WILLISTON, CONTRACTS § 90B (3rd ed. 1957).

²⁰ This same theory on lack of assent has been applied to limitations on parcel checkroom tickets, *Klar v. H. & M. Parcel Room*, 270 App. Div. 538, 61 N.Y.S.2d 285 (1946), *aff'd*, 296 N.Y. 1044, 73 N.E.2d 912 (1947); *O'Brien v. Pennsylvania R.R.*, 184 F. Supp. 305 (S.D.N.Y. 1960). Also to storage warehouse receipts, *French v. Bekins Moving & Storage Co.*, 118 Colo. 424, 195 P.2d 968 (1948); *Brasch v. Sloan's Moving & Storage Co.*, 237 Mo. App. 597, 176 S.W.2d 58 (1943). Automobile parking lot or garage tickets have been handled similarly, *Kravitz v. Parking Service Co.*, 29 Ala. App. 523, 199 So. 727 (1940); *Miller's Mutual Fire Ins. Ass'n of Alton, Ill. v. Parker*, 234 N.C. 20, 65 S.E.2d 341 (1951).

²¹ 32 N.J. 358, 161 A.2d 69, 90-91 (1960).

merchants do not inform the buying public of the terms contained in the saving books. At the time of the transfer from the merchant to the customer there is nothing in the sense of a bargained-for transaction, or an understanding as to the restrictions on the stamps. Coupled with the objective appearance of the stamp itself, this places the company in an untenable position when it urges assent.

The third factor is the general knowledge that trading stamps are transferred by the buying public. There is no way to establish the degree of such activity, but there can be no denial that it does happen. Such passive acquiescence can arguably amount to a waiver of the term.

Consideration of the three factors above can only lead the courts to hold the nontransferability clause in the saving book to be unenforceable if the stamps are transferred for redemption. There is no indication on the face of the stamp to give any idea of this limitation; there is no actual understanding and consent to the limitation at the time of issuance of the stamps to customers; and the trading stamp company's inaction when it must have known of the transfers²² could easily amount to a waiver. The dicta in the older cases²³ is against the position of the trading stamp company. The distinction made in these cases between the use of the stamp for redemption and for advertisement will continue. As long as the transfer is for redemption purposes only, the courts should not allow the trading stamp companies to avoid their obligation by claiming that the stamps are subject to the written limitations contained in their saving books.

Stephen C. Bower

EMINENT DOMAIN — URBAN REDEVELOPMENT — CONDEMNATION OF PREDOMINANTLY VACANT AREA WITH NO PHYSICAL BLIGHT. — Pursuant to the provisions of General Municipal Law § 72-n,¹ the City Planning Commission approved a plan for the reclamation of a 100-acre area in the Carnarsie section of Brooklyn. The designated area, 75% vacant, was comprised of lots small in size. It had a poorly designed street pattern. The plaintiffs were owner-occupants of

²² An example of this would be the community-wide project to collect a mountain of trading stamps to obtain something for the city's use. This group collection plan is also used by many churches.

²³ *Sperry & Hutchinson Co. v. Fenster*, 219 Fed. 755, 757 (E.D.N.Y. 1915); *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 135 Fed. 833, 833-34 (C.C.D.R.I. 1904); *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 128 Fed. 800, 803 (C.C.D.R.I. 1904).

¹ N.Y. GENERAL MUNICIPAL LAW § 72-n provided:

Prevention of the development of slums and blighted areas and the promotion of the orderly growth of municipalities through the clearance and redevelopment of vacant or predominantly vacant areas. 1. Legislative finding and declaration as to purpose of act. a. It is hereby found and declared that there exist in many municipalities within this state vacant or predominantly vacant areas characterized by the following conditions, factors or characteristics or combinations thereof, with or without tangible physical blight: (1) subdivision of land into lots of such irregular form and shape or such insufficient size, depth or width as renders them incapable of effective or economic development; (2) obsolete and poorly designed street patterns with inadequate access to such vacant or predominantly vacant areas or street widths or block sizes which are unsuitable for appropriate development in such areas; (3) unsuitable topographical, subsoil and other physical conditions impeding the development of appropriate land uses; (4) an obsolete system of utilities serving the area; (5) buildings and structures unfit for use and occupancy as a result of age, obsolescence, dilapidation, inadequate maintenance, or other factors affecting their physical condition; (6) dangerous, unsanitary or otherwise improper uses and conditions which adversely affect the public health, safety and general welfare; and (7) scattered improvements which, because of their incompatibility with an appropriate pattern of land use and streets, retard the development of the land.

b. It is hereby further found and declared that, by reason of such conditions, factors or characteristics or combinations thereof, with or without

68 residential properties, in sound and sanitary condition, clustered together in groups throughout the area. There was no tangible physical blight. Finding that many commercial establishments had been obliged to leave their present sites within the inner areas of New York City because of displacement by clearance for public improvements, and finding, also, that the designated area was connected by rail with transportation facilities appropriate for industrial use, the Commission proposed the private redevelopment of the area as an industrial park. Plaintiffs sought judgment declaring General Municipal Law § 72-n unconstitutional on its face and as applied to that area. The Court of Appeals of New York, affirming a dismissal of the complaint, *held*: that the statute was constitutional since the condemnation of predominantly vacant, non-slum, private property for redevelopment by private interest as an industrial park constituted a valid taking for a public purpose. The Supreme Court of the United States denied an appeal for lack of a substantial federal question. *Cannata v. City of New York*, 24 Misc. 2d 694, 204 N.Y.S.2d 982 (Sup. Ct. 1960), *modified and aff'd*, 14 App. Div. 2d 813, 221 N.Y.S. 2d 457 (1961), *aff'd*, 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903, *appeal denied*, 371 U.S. 4 (1962).

The power of eminent domain is the right of the state to take private property for public use. This power is qualified by the constitutional right that "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."²

The keystone of the power of eminent domain has been the concept of "public use." This concept is not synonymous with "public purpose." Formerly, the taking of private property merely because it served a purpose which, in some way, was public in nature, was not sufficient to justify the exercise of this power. In *People ex rel. Adamowski v. Chicago Land Clearance Commission*,³ Justice Klingbiel discussed the distinction between public "use" and public "purpose." Speaking in the dissent, he said that

. . . A mere public purpose for the taking [of land] is not equivalent to a public use of the land. The power of eminent domain exists not to remedy evils but to acquire property needed for public use. It is the proposed use or development of the property which must be looked to in determining whether it may be taken by condemnation. The fact that general prosperity and public welfare will be promoted is not enough.

Traditionally there have been certain particular uses, public in character, for which private property may be taken.⁴ The public use requirement has been served when the condemned land is subsequently put to an actual use by the public, as when property is condemned in order to provide a public highway.⁵ During the post-war era of the 1940's, urban society was plagued by the menace of slum areas. Simultaneously, the need for increased housing facilities became apparent. Urban

tangible physical blight, such areas impair or arrest the sound growth of the community and tend to create slums and blighted areas. . . .

g. It is hereby further found and declared that it is necessary to clear, replan and develop or redevelop such vacant or predominantly vacant areas for residential, commercial, industrial, community, public or other uses or combinations of such uses in order to promote and protect the public health, safety and general welfare; . . .

This statute has been recodified in the "Urban Renewal Law," N.Y. GENERAL MUNICIPAL LAW §§ 500-525 (Supp. 1962).

2 U.S. CONST. amend. V.

3 14 Ill. 2d 74, 150 N.E. 2d 792, 797 (1958).

4 See JAHR, LAW OF EMINENT DOMAIN § 10 (1953), where the author lists, as generally recognized public uses, those relating: (1) specifically to the affairs of direct governmental administration; (2) to public travel and communication; (3) to navigation; (4) to public health; and (5) to education.

5 See generally, 2 COOLEY, CONSTITUTIONAL LIMITATIONS pp. 1124-1141 (8th ed. 1927); 1 LEWIS, LAW OF EMINENT DOMAIN IN THE UNITED STATES §§ 250-315 (3rd ed. 1909); 11 MCQUILLAN, MUNICIPAL CORPORATIONS §§ 32.39-32.64 (3rd ed. 1950); MILLS, LAW OF EMINENT DOMAIN §§ 10-29 (1879); 2 NICHOLS, EMINENT DOMAIN, §§ 7.1-7.627 (3rd ed. 1950).

redevelopment statutes were passed to alleviate both problems.⁶ With the advent of urban redevelopment, the "public use" concept in the early decisions⁷ dictated that the removal of slum areas had to be accompanied by the erection of low-cost housing. With the passage of time, however, the concept of "public use" was expanded. The principle that only the taking of the property, as distinguished from the subsequent use, need be in the public interest, was evolved.⁸ Thus, since the requirement of public use is satisfied by the slum clearance itself, rehousing is no longer required. The resale of the property to private interests does not destroy the public use.⁹

These slum clearance cases are posited on the principle that the clearance itself constitutes a public use because it results in the protection of the public from conditions existing in slums which threaten their health and safety. In *Berman v. Parker*,¹⁰ however, this concept of "public use" was expanded. In that case the owners of a department store sought to enjoin the condemnation of their property under the District of Columbia Redevelopment Act of 1945.¹¹ The project proposed was the clearance of a slum area consisting primarily of deteriorated houses, for private redevelopment. The Court was called upon to determine whether the commercial property of the plaintiffs was so connected with the slum area so as to make rehabilitation of that area impossible without the inclusion of the land occupied by the store. Affirming, but only as modified, the judgment of the District Court¹² in permitting such condemnation, the Supreme Court spoke of public use in terms of its being synonymous with public purpose. In so doing, it rejected the limited interpretation of the District Court, which upheld the Act upon the narrow interpretation, authorizing seizure of property only for the purpose of eliminating conditions injurious to the public health, safety, morals and welfare. Speaking for the Court in *Berman*, Mr. Justice Douglas stated¹³ that

. . . We think the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums. Property may of course be taken for this redevelopment which standing by itself, is innocuous and unoffending.

In spite of its broad language, however, it must be remembered that *Berman* involved the clearance of a slum area.¹⁴ Nonetheless, equating "public use" with

6 The first state to pass an urban redevelopment law was New York. N.Y. UNCONSOL. LAWS § 3301 (McKinney 1942). The statute was declared constitutional in *Murray v. LaGuardia*, 291 N.Y. 320, 52 N.E. 2d 884 (1943), *cert. denied*, 321 U.S. 771 (1944).

See 8 HASTINGS L. J. 241, 267-270 (1957) for a listing of all state redevelopment statutes.

7 See, e.g., *New York City Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E. 2d 153 (1936).

8 The clearance of the slum itself effectuates the requirement of public use. *People ex rel. Tuohy v. City of Chicago*, 394 Ill. 477, 68 N.E.2d 761 (1946); *Chicago Housing Authority v. Berkson*, 415 Ill. 159, 112 N.E.2d 620 (1953); *Randolph v. Wilmington Housing Authority*, 139 A.2d 476 (Del. 1958).

9 *Herzinger v. Mayor & City Council of Baltimore*, 203 Md. 49, 98 A.2d 87 (1953); *Murray v. LaGuardia*, *supra* note 6. Incidental private benefit will not invalidate a project which has a public purpose as its primary objective. *Denihan Enterprises, Inc. v. O'Dwyer*, 302 N.Y. 451, 99 N.E. 2d 235 (1951); *Opinion of the Justices*, 88 N.H. 484, 190 A. 425 (1937). Public purpose is not destroyed if the land is ultimately used for private profits by the erection of office buildings or other commercial structures. *Schenck v. City of Pittsburgh*, 364 Pa. 31, 70 A.2d 612 (1950); *State ex rel. Dalton v. Land Clearance for Redevelopment Authority of Kansas City, Mo.*, 270 S.W.2d 44 (Mo. 1954). *But see*, *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956); *and*, *Adams v. Housing Authority of City of Daytona Beach*, 60 So. 2d 663 (Fla. 1952), where a subsequent sale to a private enterprise was held unconstitutional.

10 348 U.S. 26 (1954).

11 60 Stat. 790, D.C. CODE §§ 5-701-5-719 (1951).

12 *Schneider v. District of Columbia*, 117 F. Supp. 705 (D.D.C. 1953).

13 *Supra* note 10 at 35.

14 In the area under consideration, it was found that "64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had

"public benefit" or "public advantage," courts, and particularly legislatures, have thus sought to justify the condemnation of predominantly vacant areas, commonly termed "blighted areas."

Slum areas are those found to be harmful to the health and safety of the public because of the existence of such conditions as deteriorating buildings, inadequate housing, insanitary accommodations, a high rate of mortality, prevalence of disease, and a high crime rate. A blighted area, on the other hand, is an area found to be detrimental to sound economic growth because of the existence of various factors set out in statutes.¹⁵ Most often the term "blighted" is used in reference to areas predominantly vacant.¹⁶

State legislatures have been willing to extend the power of eminent domain to the condemnation of "blighted areas" for redevelopment projects.¹⁷ Speaking of blighted areas as those predominantly vacant areas detrimental to sound community growth because of variously enumerated conditions,¹⁸ legislatures have authorized their condemnation as serving the public welfare. Thus the Legislature of New York amended the General Municipal Law by the addition of § 72-n in 1958. Setting forth several factors,¹⁹ the Legislature stated that, "with or without tangible physical blight," vacant or predominantly vacant land characterized by these conditions would be subject to clearance, replanning and redevelopment. Although other states have statutes embodying similar factors for the finding of a blighted area,²⁰ they do not go so far as to permit a taking of such an area in the complete absence of physical blight. This *carte blanche* delegation of power to condemn land not physically blighted seems to be carrying the authority of *Berman* farther than the Supreme Court had intended. The fact that the statute stated that such a clearance is necessary for the prevention of slums²¹ is not persuasive. Yet the Supreme Court denied the appeal in *Cannata* on the grounds that it presented no substantial federal question.²²

Berman seems to have authorized the extension of the "public use" concept to include the condemnation of blighted areas.²³ But even in granting judicial recognition to the condemnation of blighted areas, *Berman* decided the validity of such a taking in an area which, in addition to having factors of blight, was characterized by marked physical deterioration.²⁴ In *Cannata*, on the other hand, there existed no such tangible physical blight. In upholding the constitutionality of the taking in that situation, it would seem that the Court of Appeals of New York has

outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating." *Supra* note 10 at 30.

15 See, e.g., *supra* note 1.

16 Even when referring to predominantly vacant areas, many statutes state that conditions of physical blight must be found in the occupied section of the designated area. See, e.g., CAL. HEALTH & SAFETY CODE §§ 33041-044; and N.J. STAT. ANN. 40:55-21.1 (Supp. 1961). Under such statutes, the vacant areas might well be included under the general slum clearance provisions by application of the area concept. [See *Kaskel v. Impellitteri*, 306 N.Y. 70, 115 N.E.2d 659 (1953), *cert. denied*, 347 U.S. 934 (1954).] Some courts have asserted this view. See, e.g., *Randolph v. Wilmington Housing Authority*, *supra* note 8 at 484.

17 See generally, CONN. GEN. STAT. ANN. § 8-124 (1958); DEL. CODE ANN. tit. 31, § 4501 (1953); ILL. ANN. STAT. ch. 67½, § 64 (Smith-Hurd 1959); PA. STAT. ANN. tit. 35, § 1702 (Supp. 1961). Some statutes provide for the reclamation of blighted areas in terms requiring some type of physical deterioration in addition to a finding of the other statutorily defined factors. They speak of these factors as a basis for condemnation when found in areas having substandard or abandoned buildings. California, New Jersey, *supra* note 16.

18 See, e.g., *supra* note 1.

19 *Supra* note 1.

20 *Supra* note 16.

21 *Supra* note 1.

22 371 U.S. 4 (1962).

23 Public use has been spoken of as a concept that changes with the needs of the times. *Schenck v. City of Pittsburgh*, *supra* note 9.

24 See *supra* note 14.

extended the *Berman* doctrine. The majority of the Court, however, speaking through Chief Judge Desmond, summarily dismissed the contention that the absence of tangible blight should have any bearing on the constitutionality of the condemnation, by stating that "We agree with the courts below that an area does not have to be a 'slum' to make its redevelopment a public use. . . ." ²⁵ However, Judge Van Voorhis, dissenting in *Cannata*, fully recognized the extension being made by the decision of the majority, and put the question of the constitutionality of such an extension in the following words: ²⁶

Conceding that the power of eminent domain has been extended to the elimination of areas that are actually slum the question here is whether this power can be further extended to the condemnation of factories, stores, private dwellings or vacant land which are properly maintained and are neither substandard nor insanitary, so that their owners may be deprived of them against their will to be resold to a selected group of private developers whose projects are believed by the municipal administration to be more in harmony with the times.

In *Schneider v. District of Columbia*, ²⁷ the court issued a cogent warning which still demands the attentive ear of courts and legislatures alike:

These extensions of the concept of eminent domain, to encompass public purpose apart from public use, are potentially dangerous to basic principles of our system of government. And it behooves the courts to be alert lest currently attractive projects impinge upon fundamental rights. . . . In these principles lies one of the critical differences between our system of government and the totalitarian systems.

Although the constitutionality of most statutes providing for the condemnation of blighted areas has not yet been ruled upon, many cases have upheld the constitutionality of the conditions ²⁸ set forth in these statutes for redeveloping predominantly vacant areas. Under most of these decisions, however, the courts have been able to justify the clearance and redevelopment on the basis of slum clearance, in itself a public use. ²⁹ Yet, citing many of these very same cases, ³⁰ the majority in *Cannata* justifies the taking of a non-slum area having no physical blight. There have been cases in which the courts have spoken, by way of dictum, of the taking of land having no tangible blight; ³¹ but, before *Cannata*, no case went so far as to permit the taking of land where there did not exist a combination of both the factors prescribed by statute for blight and actual physical deterioration. The constitutionality of these factors as the basis for the condemnation of vacant areas has been upheld in some cases, at least where a combination of many of the factors establishes a menace to the people of the community, so as to require redevelopment

²⁵ *Cannata v. City of New York*, 182 N.E.2d at 397.

²⁶ *Id.* at 398.

²⁷ 117 F. Supp. 705, 716 (D.D.C. 1953).

²⁸ *Graham v. Houlihan*, 147 Conn. 321, 160 A.2d 745, *cert. denied*, 364 U.S. 833 (1960); *Wilson v. Long Branch*, 27 N.J. 360, 142 A.2d 837, *cert. denied*, 358 U.S. 56 (1958); *Gohld Realty Co. v. City of Hartford*, 141 Conn. 135, 104 A.2d 365 (1954); *People ex rel. Gutknecht v. City of Chicago*, 3 Ill. 2d 539, 121 N.E.2d 791 (1953); *Oliver v. City of Clairton*, 374 Pa. 333, 98 A.2d 47 (1953).

²⁹ In *Graham v. Houlihan*, 160 A.2d at 747, the fact was stated that as the result of "the 1955 flood, the first floors of 70 per cent of these buildings are under water, and the buildings are vulnerable to future flooding." In *Wilson v. Long Branch*, 142 A.2d at 855, it was stated that "58% of all the residential structures in the project area" had characteristics of slums. In *Gohld Realty Co. v. City of Hartford*, *supra* note 28, the vacant area was part of the general slum area to be redeveloped. In *People ex rel. Gutknecht v. City of Chicago*, *supra* note 28, the statute involved permitted the taking of physically deteriorating properties. In *Oliver v. City of Clairton*, *supra* note 28, over 50% of the dwellings in a predominantly vacant area were substandard.

³⁰ "The condemnation by the city of an area such as this so that it may be turned into sites for needed industries is a public use (see *Graham v. Houlihan*, . . . ; *Wilson v. Long Branch*, . . . ; *Berman v. Parker*, . . .)" 182 N.E.2d at 397.

³¹ *Gutknecht v. City of Chicago*, *supra* note 28.

as a compelling community economic need.³² Still others maintain that prevention of slum areas serves a public use.³³

On the other hand, not all courts view the provisions relating to blighted areas as clearly constitutional. Courts have often declined to express opinions as to the constitutionality of blighted area provisions when called upon to decide whether slum clearance statutes are valid.³⁴ In *Randolph v. Wilmington Housing Authority*,³⁵ the court had to rule as to the constitutionality of a statute providing for the condemnation of private property for slum clearance and private redevelopment. In finding the statute constitutional as applied to that purpose, the court refused to express an opinion on its constitutionality as applied to blighted areas, but stated:

There are other sections of the act the application of which would certainly raise much more doubtful questions. For example, the act undertakes to grant the power of eminent domain to eliminate a "blighted area," as that term is defined in § 4501. A "blighted area" is one embodying "any combination" of ten factors or conditions set forth in the section. Only two of these appear to have any direct relation to public health, safety or morals, i.e., unsanitary or unsafe conditions, and conditions endangering life or property by fire or other causes. . . . The other factors, such as "defective or inadequate street layout," "diversity of ownership," "tax or special assessment delinquency exceeding the fair value of the land," "unusual conditions of title," "improper subdivision," etc., have no direct relation to public health, safety or morals. They seem to reflect the idea that the State may take A's property away from him for such diverse reasons as that it is not used in the most efficient or economical manner, or is in a district improperly or inartistically laid out, or in an area including some properties having "diversity of ownership," and may sell it to B so that B may develop it in a more efficient manner.

In other cases, courts have looked upon similar statutes as attempts to exercise an unconstitutional control over privately owned property in order that the condemning agency might devote the land acquired to a use it considers more beneficial.³⁶ In *Hogue v. Port of Seattle*,³⁷ where an entire suburban area was declared to be a blighted area for the purpose of redevelopment, the court refused to allow the taking of such property. It held that a private landowner had the right to use his land for any lawful purpose, and the state had no right to take it merely because it may devise a plan for putting the property to some higher or better economic use. Similarly, in *Crommett v. City of Portland*,³⁸ the court stated that "Taken alone, the redevelopment of a city is not, in our view, a 'public use' for which either taxation or taking by eminent domain may properly be utilized."

The status of the law in dealing with the condemnation of blighted areas is not yet clear. There are many courts which have found no obstacle in upholding the taking of blighted areas, as defined by statute.³⁹ Other courts are still troubled by the constitutional limitations imposed by the "public use" requirement.⁴⁰ They are especially hesitant about upholding the validity of taking when factors, other

32 *Redevelopment Agency of the City and County of San Francisco v. Hayes*, 122 Cal. App. 2d 777, 266 P.2d 105, cert. denied, sub nom., *Van Hoff v. Redevelopment Agency*, 348 U.S. 897 (1954).

33 Courts have justified the taking of blighted areas as being directly related to slum clearance. ". . . we are aware of no constitutional principle which paralyzes the power of government to deal with evil until it has reached its maximum development." *People ex rel. Gutknecht v. City of Chicago*, 121 N.E.2d at 795.

34 *Papadinis v. City of Somerville*, 331 Mass. 627, 121 N.E.2d 714 (1954).

35 139 A.2d 476, 484 (Del. 1958).

36 Opinion to the Governor, 69 A.2d 531, 536 (R.I. 1949). See *Grubstein v. Urban Renewal Agency of Tampa, Florida*, 115 So.2d 745 (Fla. 1959).

37 341 P.2d 171 (Wash. 1959).

38 150 Me. 217, 107 A.2d 841, 852 (1954).

39 See *supra* note 28.

40 See *supra* notes 34 and 36.

than physical blight, are the sole basis of condemnation.⁴¹ But in spite of this uncertainty, *Cannata* seems to extend the *Berman* decision by going farther in the process of land socialization by upholding the constitutionality of a statute permitting the condemnation of property "with or without tangible physical blight."

In *Berman*, the Supreme Court stated that eminent domain was merely a means to the exercise of the police power. Many states have approved the redevelopment of blighted vacant areas on this authority. But such an assimilation of the objective of police power⁴² with the public use requirement of eminent domain, sacrifices a traditional safeguard against the unconscionable taking of private property. Keeping the distinctions between the two powers in mind, courts, when determining the limits to be imposed upon redevelopment agencies, should distinguish between the regulation or destruction of property for the promotion of the general welfare, as opposed to the condemnation of property for public use.⁴³ Dissenting in *People ex rel. Adamowski v. Chicago Land Clearance Commission*,⁴⁴ Justice Klingbiel stated that

Whenever a police regulation bears a substantial relation to the health, safety, morals and welfare of the public it must be sustained. . . . It will be observed, therefore, that the police power is subject in its exercise to constitutional limitations of a different nature than those which attach to the power of eminent domain. . . . Where it is sought to *take* private property, rather than merely to regulate its use, a different test applies. It is not enough to show a general relationship to public health, safety, morals, or welfare. The inquiry relates, instead, to the proposed use of the property.

Many decisions seem to allow the government agencies the same broad powers in eminent domain, under a standard of reasonableness, that exist under the police power under that same standard.⁴⁵ How far this approach could lead can be seen in Puerto Rico, where any private property may be taken for general economic reconstruction of the island.⁴⁶

Briefly, to summarize this development, we find that mere taking was first accepted as fulfillment of the "public use" requirement for the exercise of the power of eminent domain in cases of slum clearance.⁴⁷ Extended to apply to the taking of blighted areas, this principle has been upheld by some courts, but primarily because of the prevalence of actual slum conditions in addition to findings of other factors of blight.⁴⁸ But by its decision in the *Cannata* case, the New York Court of Appeals seems to say in effect that *any* taking of property is a public use if *any* public benefit results. The words of warning found in the *Schneider* case⁴⁹ should be recalled in this connection.

Under our democratic form of government, the power of eminent domain is permitted only when exercised for a public use. Its exercise, therefore, should

41 Although not found in any decisions, perhaps one of the reasons for this hesitancy is that such factors as irregularity in street patterns, diversity of ownership, and irregularity of lot shapes seem hardly a tenable ground for the condemnation of land, especially today, when one considers the waning popularity of row-housing with suburban planners and also the increased demand for single family residences in outlying areas. With gridded street patterns on the decline, all lots and streets planned by city architects are of irregular pattern and design.

42 See generally, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

43 The limitation of reasonableness placed upon the exercise of the police power, as distinguished from the dual limitations of public use and payment of just compensation, placed upon the exercise of the eminent domain power, are discussed in SOUTHWEST LEGAL FOUNDATION, PROCEEDINGS OF THE 1959 INSTITUTE ON EMINENT DOMAIN, pp. 1-37.

44 150 N.E.2d at 798.

45 See *Belovsky v. Redevelopment Authority of City of Philadelphia*, 357 Pa. 329, 54 A.2d 277 (1947); *Schenck v. City of Pittsburgh*, 364 Pa. 31, 70 A.2d 612 (1950); *People ex rel. Adamowski v. Chicago Land Clearance Commission*, 14 Ill. 2d 74, 150 N.E.2d 792 (1958).

46 *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir. 1946).

47 Cases cited notes 8 and 9 *supra*.

48 *Supra* notes 28 and 29.

49 *Supra* note 27 and accompanying text.

at all times be consonant with the constitutional protection afforded private ownership of property. Carrying the present trend typified by *Cannata* to its logical conclusion, it would be possible for the government authority to take all private property just so long as it could be shown that the public could benefit.

Writing in the 19th century, Judge Cooley said that "... a due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it."⁵⁰ Nonetheless, since the *Berman* case, the Supreme Court has dismissed appeals in cases⁵¹ involving the condemnation of blighted areas, as it denied an appeal in *Cannata*, for want of a substantial federal question. Furthermore, that Court has denied certiorari and left undisturbed the judgments in several other cases.⁵² If the inherent right of private ownership of property is to be protected, if public use now means public benefit or public advantage, then perhaps the time has come for the Supreme Court to re-evaluate the present status of the power of eminent domain, and its expansion since *Berman*, especially in the light of the *Cannata* extension of the power to the redevelopment of privately owned property having no physical blight. Failing to do this, there is essentially no effective restriction on the power of government to take the private property of its citizens and transfer it to others to further plans and programs which it considers to be servient to the public interest.

Frank J. Miele

APPEAL AND ERROR — GRAND JURY — PETITIONERS HAVE NO RIGHT TO APPEAL FROM A DENIAL OF THEIR REQUEST FOR A SPECIAL GRAND JURY INVESTIGATION. — A group of five residents and taxpayers in Philadelphia brought a petition to convene a special grand jury to investigate alleged corruption in the city government. From an order of the Court of Quarter Sessions of Philadelphia County dismissing the petition, the residents and taxpayers appealed. The Supreme Court of Pennsylvania, acting on a motion to quash, *held*: appeal dismissed. Appellants, having no more than a public interest in the proceeding to convene the grand jury, are not "parties aggrieved." *Appeal of Hamilton*, 407 Pa. 366, 180 A.2d 782 (1962).

In all states, citizens are given the constitutional right to petition the state government or bodies thereof for the redress of grievances.¹ The first problem, therefore, is to examine whether a petition by a citizen to convene a special grand jury to investigate alleged corruption in city government is an acceptable method of exercising this constitutional right.

The Supreme Court of Pennsylvania, in the *Philadelphia County Grand Jury Investigation Case*² recognized the right of a group of seventy citizens and taxpayers to present a memorial asking that a special grand jury investigation be made

50 2 COOLEY, *op. cit. supra* note 5, p. 1129.

51 *Fellom v. Redevelopment Agency*, 157 Cal. App. 2d 243, 320 P.2d 884, *appeal dismissed*, 358 U.S. 56 (1958).

52 *Wilson v. Long Branch*, *supra* note 28; *Redevelopment Agency of the City and County of San Francisco v. Hayes*, *supra* note 32; *Graham v. Houlihan*, *supra* note 28.

1 *E.g.*,

"The people have the right . . . to make known their opinions to their representatives, and to petition for the redress of grievances." N.J. CONST. art. 1, § 18.

"The citizens have a right in a peaceable manner . . . to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance." PA. CONST. art. 1, § 20.

2 347 Pa. 316, 32 A.2d 199 (1943).

of the city Registration Committee.³ The memorial was granted, but on appeal by the Registration Committee, a writ of prohibition was issued. In refusing to allow the investigation, the court did not question the right of the Committee to present the memorial to the Court of Quarter Sessions, rather, the writ was issued because the memorial did not allege sufficient facts.

In the *Petition of Hamilton*,⁴ a group of citizens and taxpayers presented a petition to the Presiding Judge of the Court of Quarter Sessions of Philadelphia County. The petition alleged that a high degree of corruption existed in the government of the city of Philadelphia and asked that a special grand jury be convened. After hearing the evidence offered the presiding Judge, *without* questioning the right of the citizens to present the petition, determined that a grand jury investigation was not warranted. On appeal to the Supreme Court of Pennsylvania, the right of the citizens to initiate the proceedings below was, again, not questioned.⁵

Other states have likewise determined that citizens may exercise their right to petition for redress of grievances by seeking the aid of the grand jury. The Supreme Court of Alabama stated that public policy *demands* that a citizen be able to request an investigation by a grand jury of alleged crime or corruption in his city or state.⁶ In *Brack v. Wells*,⁷ the Supreme Court of Maryland outlined the procedure a citizen must follow in seeking the aid of a grand jury. The court said that a citizen desiring to bring a grand jury's attention to alleged violations of criminal laws should exhaust his remedy before the magistrate and state's attorney, and, if relief cannot be had there, the citizen may then ask the foreman of the grand jury to hear his petition.

The only way that the states qualify the citizen's right to seek the aid of the grand jury is in relation to the manner in which his petition must be presented. In Alabama, he may petition the grand jury directly.⁸ In Maryland he must first present his petition to the magistrate or state attorney general and only if these sources fail to act on it, may he then petition the grand jury directly.⁹ Finally, in Pennsylvania, he must present his petition to the magistrate, attorney general, or District Attorney and rely on one of these men to take his petition to the grand jury, for he himself has no right to directly approach it.¹⁰

In recognizing the constitutional right of a citizen to petition for the redress of grievances by seeking the aid of the grand jury, a problem exists as to whether the states further protect this right by insuring that the petitioning citizen's complaint will not be dismissed without first being heard by the grand jury — or at least affording the right of review by an appellate court.

Alabama guarantees the citizen that his petition will be heard and an investigation will be granted or denied by the grand jury itself.¹¹ Maryland assures the citizen that if his petition is not acted upon by the magistrate or attorney general, he may present it directly to the grand jury for its determination.¹² At least one state has gone even farther than Alabama and Maryland. The Oklahoma Constitution, art. 2, § 18 states: ". . . [O]r such grand jury shall be ordered by such judge upon the filing of a petition signed by one hundred resident taxpayers of the community; . . ." In interpreting this provision, the Supreme Court of Okla-

3 There appears to be no significant difference in the terms petition and memorial. In the Philadelphia County Grand Jury Investigation Case, 346 Pa. 316, 32 A.2d 199 (1943) the Committee filed a memorial, whereas in the *Petition of Hamilton*, — Pa. D. & C.2d — (Ct. Q. Sess. 1961), the citizens and taxpayers filed a petition seeking similar court action.

4 — Pa. D. & C.2d — (Ct. Q. Sess. 1961).

5 Appeal of *Hamilton*, 407 Pa. 366, 180 A.2d 782 (1962).

6 *King v. Second Nat'l Bank and Trust Co.*, 234 Ala. 106, 173 So. 498 (1937).

7 184 Md. 86, 40 A.2d 319 (1944).

8 *King v. Second Nat'l Bank and Trust Co.*, *supra* note 6.

9 *Brack v. Wells*, 184 Md. 86, 40 A.2d 319 (1944).

10 Note, *Obtaining a Grand Jury Investigation in Pennsylvania*, 35 TEMP. L.Q. 73 (1961).

11 *King v. Second Nat'l Bank and Trust Co.*, *supra* note 6.

12 *Brack v. Wells*, *supra* note 9.

homa said that the ordering of a grand jury and the presentation of such petition to it is mandatory and not within the discretion of the judge to whom the petition, signed by one hundred resident taxpayers, is presented.¹³

In all of the states that have decided the question, except Pennsylvania, the right of the citizen to petition the grand jury to investigate alleged crime or corruption is protected to the extent that his petition will not be denied on the determination of one man alone, but rather, will be accepted or rejected by the grand jury itself.¹⁴ Pennsylvania, by its Supreme Court's decision in *Appeal of Hamilton*, appears to be the only state in which a citizen's right to seek the aid of the grand jury for redress of alleged crime or corruption is lost upon a denial of his petition by the presiding judge to whom it is presented. "In the absence of statutory authority, no one has the right to appeal in proceedings of such a character, unless he is authorized to act in matters relating to the 'public welfare,' or has some personal right, necessary to be specially protected. This personal right, or beneficial interest, must be distinct from that of the general public and different therefrom in kind and substance."¹⁵

The problem raised by the decision and the court's reasoning in *Appeal of Hamilton*, then, is whether, in light of the recognition by all states that citizens may exercise their constitutional right to petition for the redress of grievances by seeking a grand jury investigation of alleged crime or corruption and in light of the protection given this right by all states examined except Pennsylvania, the Supreme Court of Pennsylvania was correct in its determination that citizens could not appeal from a denial of their petition by a presiding judge.

Research has failed to disclose any decision prior to *Appeal of Hamilton* dealing with the right of a citizen and taxpayer to appeal from a denial of a grand jury investigation under the facts of *Hamilton*. This is so, perhaps, because in those states other than Pennsylvania where such petitions have been made, the citizen is assured that his petition will ultimately be decided upon by the grand jury itself.¹⁶ Apparently the court in *Hamilton* is the first to deny citizens and taxpayers the right to appeal on ground that they had no more than a public interest in the proceeding.

The law is clear that a party, to appeal, must have an "interest" in the proceeding.¹⁷ Generally, the right must rest on some legally recognized interest in the matter.¹⁸ The issue then appears to be whether some public interests should also be legally recognized interests such as will enable the party with such interests to appeal.

As was previously said, citizens have a constitutional right to petition a branch of their state government for redress of grievances, and a petition asking the court to convene a grand jury to investigate alleged crime or corruption is a legally recognized method of exercising this right. It would seem that, the court in *Hamilton* should have at least considered that the interest in the result of the proceeding might be legally recognized in that the right to bring the petition was granted by the state constitution.

It is true that in some situations citizens have been given the right by statute to petition for the removal of certain public officials, and have been denied the right to appeal from an adverse determination of that petition. A good example is the case of *Kenny v. Hickey*¹⁹ wherein a citizen brought an action, pursuant to a right given him by statute, to remove the trustee of a county hospital. In deny-

13 Ogden v. Hunt, 286 P.2d 1088 (Okla. 1955).

14 King v. Second Nat'l Bank and Trust Co., *supra* note 6; Brack v. Wells, *supra* note 9; Ogden v. Hunt, *supra* note 13.

15 Appeal of Hamilton, 407 Pa. 366, 180 A.2d 782, 783 (1962).

16 *Ibid.*

17 See generally, 3 DAVIS, ADMINISTRATIVE LAW, §§ 22.01 *et seq.* (1958).

18 See, e.g., *In re Estate of Verbeck*, 114 Ohio App. 155, 180 N.E.2d 615 (1961).

19 60 Nev. 187, 105 P.2d 192 (1940).

ing his appeal, the Supreme Court of Nevada said: "His status is nothing more than a dissatisfied party. It does not appear that he might be remotely interested as a taxpayer, if such were entitled to appeal herein, which we do not decide."²⁰ Taxpayers have also been denied the right of appeal where they were not parties to the action below. In *Amherst v. Wragg*,²¹ a citizen and taxpayer asked the city solicitor to institute an injunction proceeding against the board of trustees, its clerk, the mayor and the village clerk from entering into a contract for the construction of an electric generating plant. The proceeding was instituted by the solicitor but the defendant's demurrer was sustained. The taxpayer asked the solicitor to appeal but he refused. The taxpayer, then, without having made application to intervene in the lower court, filed an appeal. This appeal was dismissed on the grounds that the taxpayer was not a party to the original litigation.

In both of these cases the rights and interests of the parties are distinguishable from those of the parties in *Appeal of Hamilton*. In the *Hickey* case the rights of the appellant were similar to those of the appellants in *Hamilton* in that in both cases the parties had the right to initiate the proceedings in the lower court. The interests of the parties in these cases, however, were not the same. In *Hickey*, the denial of the appellant's request did not have any effect on him as a taxpayer. In the words of the court, "it does not appear that he might be remotely interested as a taxpayer. . . ."²² In *Hamilton*, however, the denial of the appellants' petition for the investigation of the allegedly corrupt city government had the effect of denying the appellants their rights as taxpayers to guard against the mismanagement of the city affairs and the misappropriation of the city tax funds. In the *Wragg* case, the appellant was not a party to the action below whereas in *Hamilton* the appellants instituted the proceedings.

Dealing with the question of whether an interest may be both publicly and legally recognized so as to give a party standing to appeal, a court recognized that certain types of public interest are more important and demand greater protection than others.²³ In the *Kensington Club Case*,²⁴ a case cited in *Hamilton*, the facts were as follows: The owner of the Kensington Club applied to the Liquor Control Board for a liquor license and his application was denied. An appeal was made to the Court of Quarter Sessions and, with only one of the three judges sitting, the decision of the Liquor Control Board was reversed. On appeal, the court reversed and remanded stating that it must be heard and decided by the appellate court *en banc*. In reaching this decision the court said that the grant of a liquor license ". . . is a subject of paramount importance to the public . . ."²⁵ and public welfare demands that the whole tribunal be called upon to adjudicate the question.

The significance of the *Kensington* case in relation to the point in question is the stressing by the court of the importance of the public interest involved in the particular proceeding. It would seem that if the Supreme Court of Pennsylvania was unwilling to allow a question of such great public importance to be decided by only one of the three appellate court judges, the question of grand jury investigation into alleged corruption in city government should not be a matter for final decision by one judge. Certainly the harm to the public that results from a corrupt city government is as great, if not greater than the public harm resulting from an indiscriminate allocation of liquor licenses. Chief Justice Bell in his dissenting opinion in *Appeal of Hamilton*, emphasized the point made here when he stated:

If the petitioners have, as they have, a standing in the lower Court to petition for a grand jury proceeding, they should have a right and a

20 *Kenny v. Hickey*, 60 Nev. 187, 105 P.2d 192, 193 (1940).

21 72 Ohio App. 303, 51 N.E.2d 420 (1941), *aff'd*, 139 Ohio St. 371, 40 N.E.2d 149 (1942).

22 *Kenny v. Hickey*, *supra* note 20.

23 *Kensington Club Case*, 164 Pa. Super. 401, 65 A.2d 428 (1949).

24 *Ibid.*

25 *Id.* at 431.

status in a matter such as this, to appeal to this Court from the refusal of the lower Court to convene a special grand jury. . . . (I)t is imperative that such right exist in order to adequately protect their community. Were it otherwise, a District Attorney — if he were of a complacent nature, or lazy, or incompetent, or mistaken about the law, or his powers or duties, or motivated primarily by political considerations, — could with impunity refuse to petition for, and a Judge with similar traits could refuse to convene a special grand jury, no matter how great and widespread were the alleged crimes and corruption nor how great the necessity for such investigation. If such were the law, law abiding citizens of the community would in such instances have absolutely no redress or protection.²⁶

It would seem that the court in *Hamilton* failed to consider that: 1) A public interest in a proceeding may also be, because of its nature and importance to the public welfare, a legally recognized interest such as will give the parties standing to appeal. 2) A liberal interpretation of Article 1, Section 20 of the Constitution of Pennsylvania, would have allowed appellants, who had been denied redress by the presiding judge, to present their petition directly to the grand jury.

Neither of the solutions proposed would have been in conflict with accepted principles of law. It has been seen that certain public rights demand greater protection than others,²⁷ and that some states, faced with the question of protecting a citizen's right to petition for the convening of a grand jury to investigate alleged crime or corruption, have done so to the extent that the citizen is assured that the grand jury itself will make the final determination as to whether or not an investigation is warranted.

In conclusion it is suggested that either a liberal judicial interpretation of Article 1, Section 20 of the Constitution of Pennsylvania or legislative adoption of a statute similar to that in force in Oklahoma²⁸ would eliminate the most striking fault of the decision reached in the *Appeal of Hamilton*, namely, the inability of the citizens and taxpayers to protect themselves from corrupt city officials in the event that the District Attorney or the presiding judge or both possessed the traits enumerated by Chief Justice Bell in his dissent.

Robert M. Hanlon

26 *Appeal of Hamilton*, 407 Pa. 366, 180 A.2d 782, 802-803 (1962).

27 *Kensington Club Case*, 164 Pa. Super. 401, 65 A.2d 428 (1949).

28 Okla. Const. art. 2, § 18.