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Civil Procedure And Evidence—Subpoena in Non Judicial Proceeding

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jury and is not inconsistent with the power of the Appellate Division as a branch of the Supreme Court.

Subpoena in Non-Judicial Proceeding

Under a New Jersey statute⁹⁹ allowing freeholders to petition for an investigation into municipal expenditures, the Superior Court of New Jersey appointed an "expert" to take testimony concerning the alleged corruption in Jersey City. In *In re Klein*,¹ appellant, who formerly had contractual dealings with that city, sought to have a subpoena, issued pursuant to this inquiry, vacated on the ground that the investigation was not an "action, suit or special proceeding" within section 310 of the Civil Practice Act.² This section deals with the taking of depositions for use outside the state.

A subpoena will be granted only in judicial proceedings wherein issue is joined and the evidence sought is relevant to the issue.³ A judicial proceeding is one which investigates, declares and enforces liabilities as they stand on past or present facts and under laws supposed already to exist.⁴ In administrative proceedings, which are quasi-judicial, the elements of investigation, declaration and enforcement of liabilities must still be present.⁵ This is in accord with sections 4 and 5 of the Civil Practice Act.⁶

In examining the New Jersey statute involved in the instant case, the majority held that it lacked all of the essential elements, and was therefore, non-judicial in character. The court pointed out that the New York counterpart of this statute,⁷ which leaves out all discretionary elements and requires that an injunction be

99. N. J. REV. STAT. §40:6-1.

1. 309 N.Y. 474, 131 N.E. 2d 288 (1956).

2. N. Y. CIV. PRAC. ACT §310. In what cases depositions may be taken. A party to an action, suit or special proceeding, civil or criminal, pending in a court without the state, either in the United States or in a foreign country, may obtain by the special proceeding described in this article, the testimony of a witness and, in connection therewith, the production of books and papers, within the state, to be used in the action, suit or special proceeding.

3. The question of whether a subpoena should issue is a matter of procedural law to be determined by New York, the forum, rather than by New Jersey law. See 3 BEALE, CONFLICTS OF LAWS §584.1, 589.0, 590.1.

4. See *In Matter of Isaacs*, 148 App. Div. 157, 132 N.Y.S. 1023 (1st Dep't 1911) *Bernard v. Lefcourt*, 233 App. Div. 609, 253 N.Y.S. 383 (1st Dep't 1931) *Matter of Intercean Mercantile Corp. (Hoops)*, 203 App. Div. 284, 197 N.Y.S. 706, (1st Dep't 1923) 236 N.Y. 587, 142 N.E. 295.

5. *Hecht v. Monaghan*, 307 N.Y. 461, 121 N.E. 2d 421 (1954), 4 BUFFALO L. REV. 26 (1954).

6. N. Y. CIV. PRAC. ACT §4. The word "action," when applied to judicial proceedings, signifies an ordinary prosecution in a court of justice by a party against another party for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense.

7. N. Y. CIV. PRAC. ACT §5. Every other prosecution by a party for either of the purposes specified in the last section is a special proceeding.

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granted restraining the corrupt practices, was a proceeding obviously judicial. As a further consideration, it was shown that this court's determination was in harmony with the decisions of the highest court of New Jersey, which has failed to brand this purely investigative proceeding judicial.⁸

In dissenting, Judge Desmond argues that it is in the interest of public policy to construe liberally section 310 so as to cover every kind of judicial proceedings, and he concludes, from his reading of the New Jersey cases⁹ and from his comparison with the New York law, that this proceeding is judicial. Though the policy argument of the dissent is most persuasive, neither the New Jersey cases nor the New York law appear to support the view as to the judicial character of this proceeding. But since both states recognize the necessity of this type of legislation as a watchdog over municipal affairs, and since the subpoena power is essential to the effective operation of the law, perhaps the better solution is to give the broad interpretation urged by the dissenters.

8. N. Y. GENERAL MUNICIPAL LAW, §4. *Masset Bldg. Co. v. Bennett*, 4 N.J. 53, 71 A.2d 327 (1950); *Matter of Wellhofer*, 10 N.J. 321, 91 A.2d 338 (1955); *Tiene v. Jersey City*, 13 N.J. 478, 100 A.2d 518 (1953); *Matter of Tiene*, 19 N.J. 149, 115 A.2d 543 (1955).

9. *Ibid.*