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Over a four-year period the city of Philadelphia had entered into contracts with Marbelite Company, a New York corporation, for traffic signal equipment. Acting pursuant to section 8-409 of the Philadelphia Home Rule Charter,[1] the city controller served the treasurer of Marbelite, in Philadelphia,[2] with a subpoena requiring him to produce certain corporate records and to testify concerning requisitions for payments on the contracts. Refusing to comply with the subpoena, the treasurer returned to New York.[3] The

* 413 Pa. 9, 195 A.2d 780 (1963).

1. PHILADELPHIA HOME RULE CHARTER § 8-409 (1951) provides:

"*Power to Obtain Attendance of Witnesses and Production of Documents.* Every officer, department, board or commission authorized to hold hearings or conduct investigations shall have power to compel the attendance of witnesses and the production of documents and other evidence and for that purpose it may issue subpoenas requiring the attendance of persons and the production of documents and cause them to be served in any part of the City. If any witness shall refuse to testify as to any fact within his knowledge or to produce any documents within his possession or under his control, the facts relating to such refusal shall forthwith be reported to any one of the Courts of Common Pleas of Philadelphia County and all questions arising upon such refusal . . . shall as promptly as possible be heard by such court. If the court shall determine that the testimony or document required of such witness is legally competent and ought to be given or produced by him, the court may make an order commanding such witness to testify or to produce documents or do both and if the witness shall thereafter refuse so to testify or so to produce documents in disobedience of such order of the court, the court may deal with the witness as in other cases."

Section 6-402 specifically authorizes the controller to subpoena any person to obtain evidence in connection with payments demanded from the city, but provides no enforcement procedure.

2. Since the powers conferred by the Charter do not extend beyond Philadelphia's geographical limits, the subpoena is invalid unless served within the city limits. PHILADELPHIA CHARTER COMMISSION, REPORT TO THE VOTERS BY THE PHILADELPHIA CHARTER COMMISSION 260 (1952).

3. Counsel for the treasurer of Marbelite appeared before the controller to deny the validity of the subpoena, arguing that service on a foreign corporation extended the controller's jurisdiction beyond the city limits. Brief for Appellant, p. 16a, Hemphill v. Lenz, 413 Pa. 9, 195 A.2d 780 (1963) [hereinafter cited as principal case].

controller then filed a petition in the Court of Common Pleas of Philadelphia County and obtained an order to show cause why the treasurer should not be compelled to obey the subpoena. The treasurer appeared specially to contest the court's jurisdiction on the ground that he had not been served with the court's process. The common pleas court overruled this objection, apparently reasoning that, because of the treasurer's evasive tactics to avoid process, registered letters mailed to the company's New York office supplied notice of the impending proceeding and sufficed to give the court jurisdiction.[4] On appeal to the Supreme Court of Pennsylvania, *held,* reversed, one judge dissenting. A judicial proceeding for enforcement of an administrative subpoena under section 8–409 must be commenced by service of process from the enforcing court.

While the power to issue subpoenas[5] is inherent in courts of record,[6] administrative agencies require statutory authorization to issue subpoenas.[7] Most federal and state agencies, including municipalities, are given broad authority to issue subpoenas.[8] While the United States Supreme Court at one time limited the use of administrative subpoenas to inquiries involving a specific breach of the law,[9] the Court has since repudiated this restrictive view,[10] thus

This objection probably was not well taken because the treasurer was served within the city and Marbelite had contracted to observe the provisions of the Philadelphia Home Rule Charter. Brief for Appellee, p. 5. The point was not raised on appeal.

4. Principal case at 12, 195 A.2d at 782. PA. R. CIV. P. § 2079(a)(2), requires that out-of-state service on nonresident defendants be made either personally or by registered letter mailed by the sheriff to the defendant. Although the controller mailed at least two registered letters to the treasurer, he failed to send them through the sheriff's office. Hence, the controller failed to follow either method prescribed by § 2079. The trial judge ruled that this failure was inconsequential. Brief for Appellant, p. 20a, principal case. *Cf.* PA. R. CIV. P. § 126, which directs a trial judge to disregard errors or defects in procedure which do not affect the substantive rights of the parties. It seems evident that the continuing business relationship between Marbelite and the city would bring the company within the reach of Pennsylvania's long-arm statute. See PA. STAT. ANN. tit. 15, § 3142 (1958). A provision in the contract with Marbelite, appointing a city officer as agent for the company to receive service of process might have enabled the city to avoid altogether the need for out-of-state service. See National Equip. Rental Ltd. v. Szukhent, 375 U.S. 311 (1964); Comment, 39 N.Y.U.L. REV. 733 (1964).

5. The term subpoena, as used hereafter, includes a subpoena *duces tecum.*

6. Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 266 U.S. 42, 65-66 (1924) (dictum); Commonwealth v. Willard, 39 Mass. (22 Pick.) 476-77 (1839).

7. *In re* Application of Clark, 65 Conn. 17, 31, 31 Atl. 522, 524 (1894); Commonwealth *ex rel.* Margiotti v. Orsini, 368 Pa. 259, 263, 81 A.2d 891, 893 (1951).

8. For a comprehensive review of subpoena powers under all major federal statutes, see Rogge, *Inquisitions by Officials—A Study of Due Process Requirements in Administrative Investigations,* 47 MINN. L. REV. 939 (1963). An illustrative state statute is PA. STAT. ANN. tit. 71, § 200 (1962), set forth in note 23 *infra.* See also Ebel, *Investigatory Powers of City Councils,* 38 MARQ. L. REV. 223 (1955).

9. Harriman v. ICC, 211 U.S. 407 (1908). Although the decision rested on statutory construction, the Court's language suggested that the prohibition against subpoenas in solely investigatory proceedings was constitutionally required. *Id.* at 419-20.

10. United States v. Morton Salt Co., 338 U.S. 632, 642 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-09 (1946) (dictum).

permitting issuance by agencies in purely investigatory proceedings. Where issuance is authorized by statute, state court decisions generally uphold the validity of an administrative subpoena unless "the futility of the process to uncover anything legitimate is inevitable or obvious . . . ."[11]

The effectiveness of a subpoena lies in the power of the issuing tribunal to compel compliance. Unlike courts of record, however, administrative agencies generally have not been empowered to punish noncompliance by fine or imprisonment.[12] For example, federal agencies must invoke the aid of federal district courts to enforce subpoenas.[13] In 1894 the Supreme Court endorsed this indirect enforcement procedure in *ICC v. Brimson*,[14] and in dictum proscribed direct agency enforcement of subpoenas.[15] The Court concluded that administrative tribunals could not be granted authority to compel obedience because subpoena enforcement requires a final determination, essentially judicial rather than administrative, that the subpoenaed party is under a legal duty to comply.[16] Congressional adherence to the indirect enforcement procedure has forestalled a test of the *Brimson* dictum, itself now questionable.[17] However, some states have provided for direct agency enforcement,[18] and some have even delegated this power to municipalities.[19] In these states the courts generally require explicit statutory authority,[20] although one court has held that direct enforcement power is inherent in

11. Matter of Edge Ho Holding Corp., 256 N.Y. 374, 381, 176 N.E. 537, 539 (1931). See 1 DAVIS, ADMINISTRATIVE LAW § 3.04 (1958), for a discussion of recent trends in federal and state decisions. The validity of the subpoena was not questioned in the principal case.

12. See 8 WIGMORE, EVIDENCE § 2195(4) (McNaughton rev. ed. 1961).

13. *E.g.*, 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958) (FTC); 48 Stat. 899 (1934), as amended, 15 U.S.C. § 78u(c) (1958) (SEC); 26 Stat. 743 (1891), as amended, 49 U.S.C. § 12(3) (1958) (ICC); 72 Stat. 792 (1958), 49 U.S.C. § 1484(c) (1958) (CAB); 49 Stat. 455 (1935), as amended, 29 U.S.C. § 161(2) (1958) (NLRB).

14. 154 U.S. 447 (1894).

15. "Such [an administrative] body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." *Id.* at 485.

16. *Ibid.*

17. The contempt power is not exclusively judicial; Congress can punish for contempt of its committees. Jurney v. MacCracken, 294 U.S. 125 (1935). Many commentators argue that the enforcement power can be delegated to federal administrative agencies. *E.g.*, Benton, *Administrative Subpoena Enforcement*, 41 TEXAS L. REV. 874, 883 (1963); Note, 71 HARV. L. REV. 1541, 1552 (1958).

18. *E.g.*, MICH. COMP. LAWS § 257.322 (1960) (automobile license appeal board granted power to punish for contempt); TENN. CODE ANN. § 63-124 (1955) (state board of optometry granted power to punish for contempt); TEX. REV. CIV. STAT. ANN. art. 5190 (1962) (industrial commission granted power to punish for contempt). Apparently no due process objection to contempt citations imposed by state agencies has reached the Supreme Court. However, some state courts have invalidated statutes investing boards with the power to punish for disobedience. *E.g.*, People v. Swena, 88 Colo. 337, 296 Pac. 271 (1931); Langenberg v. Decker, 131 Ind. 471, 31 N.E. 190 (1892).

19. See generally Ebel, *supra* note 8, at 235 & nn. 104-13.

20. See, *e.g.*, In the Matter of Blue, 46 Mich. 268, 9 N.W. 441 (1881).

agencies authorized to issue subpoenas.[21] Nevertheless, most states permit only indirect enforcement, perhaps reflecting a general attitude that the power to punish for contempt should be limited to an independent judiciary and not entrusted to an indefinite number of loosely supervised, semi-political public officials.[22] However, the subpoena enforcement procedures in both the Pennsylvania Administrative Procedure Act[23] and section 8-409 of the Philadelphia Home Rule Charter[24] requiring indirect enforcement are similar to those followed by federal agencies and most states.

Utilization of the indirect enforcement procedure raises the question of whether the jurisdiction of the enforcing court is dependent upon additional service of process on the subpoenaed party when an agency, rather than the court, initially issues the subpoena. Had the Philadelphia Home Rule Charter directed the controller to secure subpoenas from the court of common pleas, no question regarding that court's jurisdiction would have arisen in the principal case, since the treasurer was served with the subpoena within the territorial jurisdiction of the court. Some jurisdictions have restricted authority to issue subpoenas to the courts,[25] but judicial control over issuance has proved an ineffective check against potential abuse of the subpoena power.[26] Unless the subpoenaed party objects, a court usually cannot test a subpoena's validity and, thus, is not in a position to govern its issuance. Indeed, judges seldom issue subpoenas; almost uniformly the clerk of the court issues a blank subpoena to a party upon request.[27] In New York, for example, an

21. In the Matter of Hayes, 200 N.C. 133, 156 S.E. 791 (1931) (Industrial Commission administering the Workmen's Compensation Act).

22. "The subpoena power 'is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. . . .' " United States v. Minker, 350 U.S. 179, 187 (1956). Perhaps the dictum in ICC v. Brimson, 154 U.S. 447 (1894), has persuaded state legislatures to enact the indirect enforcement procedure. See note 15 *supra* and accompanying text. See also 8 Wigmore, *op. cit. supra* note 12, for a collection of cases and statutes.

23. PA. STAT. ANN. tit. 71, § 200 (1962), provides:

"Every administrative department, every independent administrative board and commission, every departmental and administrative board and commission, and the several workmen's referees, shall have the power to issue subpoenas, requiring the attendance of witnesses and the production of books and papers pertinent to any hearing before such department, board, commission, or officer, and to examine such witnesses, books, and papers. Any witness, who refuses to obey a subpoena issued hereunder, or who refuses to be sworn or affirmed, or to testify, or who is guilty of any contempt after summons to appear, may be punished for contempt of court, and, for this purpose, an application may be made to any court of common pleas within whose territorial jurisdiction the offense was committed, *for which purpose, such court is hereby given jurisdiction.*" (Emphasis added.)

24. Note 1 *supra*.

25. N.Y. Sess. Laws 1886, Ch. 543 (now N.Y. GEN. CITY LAW § 7).

26. Traditionally, potential abuse of the subpoena power has been a judicial concern. See note 22 *supra*. This theme is also present in the principal case. See notes 30 & 31 *infra* and accompanying text.

27. *E.g.*, FED. R. CIV. P. 45(a); 12 PA. R. CIV. P. 4018; MICH. RULES 506.2.

attorney to a court proceeding is empowered by statute to issue subpoenas.[28]

Under the New York statute and similar provisions in other states,[29] a lawyer seeking judicial aid to enforce a validly served subpoena need not serve the subpoenaed party with additional process or a complaint. Admittedly, issuance by an attorney occurs only after the proceeding is before the court. Nevertheless, the lawyer's relation to the court resembles closely that of the administrator under the indirect enforcement procedure: both complete and serve subpoenas without the court's knowledge, but both must apply to the court for enforcement. Although the administrator, unlike the lawyer, is not an officer of the court, this distinction seemingly does not demand an additional procedural requirement for judicial enforcement of the administrative subpoena. Furthermore, a requirement that additional process be served upon a subpoenaed person before enforcement proceedings may be instituted provides no safeguards that are not already present in the indirect enforcement procedure. Judicial control over the subpoena is necessarily maintained at the enforcement stage, when the subpoenaed party is before the court. Upon proper objection the judge can modify or quash an oppressive or unwarranted subpoena. Therefore, the Pennsylvania court was unnecessarily restrictive in its attitude of "utmost caution"[30] toward the use and enforcement of an administrative subpoena simply because, in the abstract, "the subpoena power is fraught with the possibilities of abuse."[31] Actions to enforce judicial or administrative subpoenas are only ancillary to a main proceeding. Accordingly, once a subpoena itself is validly served, it seems anomalous to impose a requirement of acquisition of jurisdiction by another service of process in a subsequent subpoena enforcement proceeding. The anomaly is even greater when this requirement is imposed only in proceedings to enforce administrative subpoenas.[32]

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28. N.Y. Civ. Prac. Law § 2302.

29. *E.g.*, Fed. R. Civ. P. 45(f); Pa. R. Civ. P. 4019; Mich. Rules 506.6.

30. Principal case at 12, 195 A.2d at 782. Seemingly, the court reasoned that the possibilities of abuse raised a presumption against jurisdiction which the Home Rule Charter failed to rebut specifically.

31. *Ibid.* "Possibilities of abuse" exist at every level of government; however, there is no reason to suppose that the potentiality for abuse is greater at the municipal level. See Ebel, *supra* note 8, to the effect that city councils have, on the whole, wisely used the subpoena power. Historically, local officers have been invested with the power to subpoena. See *In re* Application of Clark, 65 Conn. 17, 31 Atl. 522 (1894). Moreover, the presence of the subpoena power in the Philadelphia Home Rule Charter represents a policy assessment that the need for the power outweighs any attendant risk of abuse. The Home Rule Charter enjoys the stature accorded a state legislative enactment. *In re* Addison, 385 Pa. 48, 57, 122 A.2d 272, 276 (1956).

32. *Compare* the principal case *with* United States v. Vivian, 224 F.2d 53, 57 (7th Cir. 1955):

"It would frustrate the theory and purpose of § 235(a) [of the Immigration and Nationality Act of 1952] if every rejected subpoena would have to be subjected to a separate civil proceeding accompanied by issuance of process bottomed on

In the principal case, the court might have construed section 8-409 of the Philadelphia Home Rule Charter[33] so as to reach a different conclusion. The statute stresses a speedy determination and outlines few procedural steps, thus suggesting that a complete civil action is not contemplated. Moreover, the Pennsylvania Administrative Procedure Act,[34] which the court seemingly rejected as an aid in interpreting the Home Rule Charter,[35] expressly provides that initial issuance of the subpoena by an agency confers jurisdiction on the referrant court to enforce compliance. Despite apparent ambiguity in many federal statutes,[36] this more liberal view also prevails in the federal courts because, as the Court of Appeals for the Seventh Circuit has stated, "pyramiding summonses on subpoenas serves no useful purpose."[37] It may be that the Pennsylvania court was concerned that, without an additional service of process, a subpoenaed party might not receive fair notice that an enforcement proceeding had been commenced against him. However, a registered letter informing the subpoenaed party of the enforcement action constitutes reasonable notice,[38] and this procedure had been employed by the city controller.[39]

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a complaint. . . . Application to the district court was the statutory § 235 method of enforcing a subpoena by an order of court decreeing compliance. Clearly, enforcement by such an order ought to be a sure expeditious way of gaining obedience because disregard of the district court's order constitutes contempt. To construe the judicial aid mentioned in § 235 as requiring resort to instituting a new law suit requiring service of process, at its threshhold, would frustrate the clear purpose of § 235. Again we point out [the subpoenaed witness] is only sought as a witness and in an entirely different proceeding against other persons now awaiting her attendance to give testimony. On her theory every witness could forestall the government and force it to institute as many law suits as there are witnesses in any given case."

33. Note 1 *supra.*

34. Note 23 *supra.*

35. Principal case at 13 n.5, 195 A.2d at 782 n.5.

36. United States v. Vivian, 224 F.2d 53, 57 (7th Cir. 1955), *cert. denied*, 350 U.S. 953 (1956); Goodyear Tire & Rubber Co. v. NLRB, 122 F.2d 450 (6th Cir. 1941); Cudahy Packing Co. v. NLRB, 117 F.2d 692 (10th Cir. 1941); United States v. Tyson's Poultry, Inc., 216 F. Supp. 53 (W.D. Ark. 1963).

37. United States v. Vivian, *supra* note 36, at 57. Similar federal holdings include the cases cited in note 36 *supra.* A state case taking the opposite view is Brovelli v. Superior Court, 56 Cal. 2d 524, 364 P.2d 462 (1961) (suggestion that valid service of both subpoena and order to show cause are prerequisites to judicial enforcement of administrative subpoena).

38. "Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit." International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

39. Note 4 *supra.* The method of subpoena enforcement under the Philadelphia Home Rule Charter actually gives the subpoenaed party a second opportunity to comply because he will not be held in contempt of court unless he disregards a court order compelling him to appear before the administrative agency. This procedure affords the subpoenaed party protection against inadvertent failure to respond initially to the subpoena. Compare N.Y. CIV. PRAC. LAW § 2808(b), under which failure to comply initially with an authorized, nonjudicial subpoena may have immediate consequences: the court can order the subpoenaed party to pay the issuer of the subpoena fifty dollars as well as impose costs not exceeding fifty dollars.

Although under the Pennsylvania long-arm statute[40] the nonresident subpoenaed party in the principal case may now be served with process conferring jurisdiction on the court, the holding not only discourages respect for the administrative subpoena[41] but also impairs efficient disposition of administrative affairs.[42] In the interest both of effectuating the subpoena power and of promoting only meaningful procedure, courts should rule that valid service of the subpoena is sufficient to confer jurisdiction on the court in an enforcement proceeding.

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40. Note 4 *supra.*

41. "A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty. . . ." United States v. Bryan, 339 U.S. 323, 331 (1950).

42. A strong argument in favor of direct subpoena enforcement by an administrative agency is the potentially long delay in obtaining a final judicial order. See Benton, *supra* note 17, at 886-87.