

1952

H. C. Shoemaker et al v. State of Utah : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

IN THE MATTER OF THE REPORT
OF THE GRAND JURY; PETI-
TIONERS H. C. SHOEMAKER,
WILLIAM A. DAWSON, PHILO
T. FARNSWORTH, D. H. WHIT-
TENBURG, HARLEY J. CORLEIS-
SEN, and LAYTON MAXFIELD;
and PROVO CITY, a Municipal
Corporation of the State of Utah,

Plaintiffs and Respondents

vs.

THE STATE OF UTAH, in the interest
of the GRAND JURY PRESENT-
MENT, otherwise referred to as the
UTAH COUNTY GRAND JURY
REPORT, *Defendant and Appellant.*

Case No. 7856

BRIEF OF APPELLANT

STATEMENT OF FACTS

This appeal arises from a memorandum decision (Rec. 81-89) by F. W. Keller, District Judge of the Seventh Judicial District, filed with the county clerk of Utah County on April

17, 1952, which expunged from the records of the District Court of Utah County certain portions of a report of a Utah County Grand Jury presented in open court on the first day of December, 1951.

On August 8, 1951, a Grand Jury was duly drawn and impaneled for Utah County (Rec. 5). This body of seven citizens was duly charged by the court (Rec. 6-17) as to the duties and responsibilities under the statutes of the state of Utah. We quote this charge in part (Rec. 7):

Where, in the discharge of your statutory duties as set forth in this charge, you find conditions worthy of special comment by you, even though no indictment may be found, it is your duty to report such conditions to the Court so that proper public officers may have an opportunity to correct undesirable or questionable conditions, and so that the public of this County may be informed as to the condition of health of their government and administration.

After three and a half months of deliberation, the Grand Jury in response to the charge of the Court presented a report entitled, "Grand Jury Presentment," (Rec. 21) which was signed individually by each of the grand jurors. This report is made up of seven divisions. Division 1 deals with findings and recommendations concerning Utah State Training School (Rec. 22); division 2 is composed of findings and recommendations concerning the Utah State Hospital (Rec. 30); division 3 is composed of findings and recommendations concerning the operations of the State Road Commission in Utah County (Rec. 39); division 4 deals with the affairs of Utah County (Rec. 45); division 5 concerns the Alpine School District (Rec. 47);

division 6, the findings and recommendations concerning law enforcement in Provo City (Rec. 48); and division 7 concludes with general recommendations of the Grand Jury (Rec. 51).

After the presentment had been preferred to the court and made public, H. C. Shoemaker, William A. Dawson, Philo T. Farnsworth, D. H. Whittenburg, Harley J. Corleissen and Layton Maxfield filed a petition to expunge the grand jury report. In addition, a Motion to Expunge was filed on behalf of Provo City. In each case, the motions were supported by affidavits by those seeking expunction (Rec. 54-73). In response to the aforementioned motions, a motion to strike paragraphs, 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the petition of H. C. Shoemaker, et al., and the affidavits in support thereof, and part of paragraph 2 of the Provo City motion and the affidavits of W. J. Farley and Clair M. Aldrich in support thereof, was filed on behalf of the people of the state of Utah. The matter was subsequently submitted to the Honorable F. W. Keller, District Judge sitting specially for the Fourth Judicial District. On April 15, 1952, the Honorable Judge Keller rendered a memorandum decision, the effect of which was to grant the Motion to Strike filed on behalf of the people of the state of Utah and to expunge a part of the grand jury presentment, as follows (Rec. 89):

1. That portion thereof dealing with the American Fork Training School and its administration under the title, "Findings and Recommendations Concerning the Utah State Training School.
2. That portion thereof dealing with the activities of the State Road Commission in Utah County under

the title, "Findings and Recommendations Concerning the Operations of the State Road Commission in Utah County.

Except as indicated in the two paragraphs next above, the motion of the Commissioners to expunge the entire report of the grand jury is denied.

I order expunged from the grand jury report all of that portion thereof under the title, "Findings and Recommendations With Respect to Law Enforcement in Provo City," except paragraph three and the last paragraph under that title.

From this decision this appeal is made.

STATEMENT OF POINTS

I

A GRAND JURY IS EMPOWERED TO MAKE A REPORT OF ITS INVESTIGATIONS EVEN THOUGH IT DOES NOT RETURN AN INDICTMENT.

ARGUMENT

POINT I

A GRAND JURY IS EMPOWERED TO MAKE A REPORT OF ITS INVESTIGATIONS EVEN THOUGH IT DOES NOT RETURN AN INDICTMENT.

It is the view of appellant that this appeal raises one question, viz., the power of a grand jury to make a report in

the nature of a presentment without returning an indictment. In other words, the power of a grand jury to make report of conditions existing within public institutions and offices investigated by the grand jury and concerning which the grand jury has received evidence, even though, in the opinion of the grand jury, the evidence received does not warrant the return of an indictment.

Appellant contends for the affirmative of this proposition and respectfully submits that the common law and the law of jurisdictions which proceed under statutes, which for all practical purposes are identical to those of the State of Utah, governing the deliberations and procedures of grand juries, support appellant's position.

Appellant will discuss the law as it relates to this problem under two principal heads, viz., the power of the grand jury at common law, and the power of the grand jury under the modern codes.

(A) At Common Law

It can be safely asserted that at common law the power of a grand jury to make presentment was not confined to an accusation of crime. Indeed, we find that the grand juries made use of the presentment not only as an adjunct of criminal procedure, but made use of it as an essential part of the administration of the affairs of local government. See W. S. Holdsworth, *A History of English Law*, vol. X, pp. 146-151.

In discussing the use made of the presentment (Vol. X, pp. 147-148) Holdsworth says, quoting in part from Webb, *The Parish and the County*, 454:

Some times these presentments took the form of complaints that particular statutes had not been enforced by the justices and the other officials responsible for seeing to their observance. "In 1700 when royal proclamations had vainly endeavoured to keep down 'the excessive price of corn,' by fulminating against forestalling and regrating, the Essex Grand Jury drew attention to, 'the very great neglect of several Constables in this County,' and incidentally to the remissness of the justices themselves in not making arrangements to insist on the licensing, according to law, of 'badgers, jobbers, and drovers.'

The most important class of cases to which this procedure was applied was the class of cases concerned with the maintenance of roads, bridges, gaols, and other county buildings. Inhabitants were presented for not repairing their highways; counties were presented for not repairing bridges, gaols, or houses of correction; and disputes between different districts were fought in proceedings initiated in this manner. So normal was this procedure in these cases that it was approved and encouraged by the Legislature. * * *

Again, at page 149, of the same volume:

This machinery of presentment, of which so much use was made, had three good results. * * * In the second place, it gave the inhabitants of the county, who were chosen to serve on the grand jury, an opportunity of expressing their views upon the conduct of the local government; and therefore it was a check on the autocratic power of the justices.

In volume I of the same work, at page 322, we find further comment:

The grand jury of modern times still retains some traces of antiquity which have been lost to the other

varieties of the jury. They consider the evidence in secret, and the court does not control or advise them as to their findings in the individual cases which come before them. It merely charges them generally as to the nature of the business which they are about to consider. They can always act if they please on their own knowledge; and Holt tells us that they often so acted at the end of the seventeenth century. They can act at the present day in much the same way as they acted in the thirteenth century.

From the foregoing account and the footnotes contained in the cited text it becomes apparent that the presentment was used without as well as in conjunction with indictments; and when used alone it was for the purpose of calling the attention of the crown and the local inhabitants to conditions for which the officers of the local units of government were responsible.

Chancellor Kent, in speaking of the English common law, says:

* * * It has proved to be a system replete with vigorous and healthy principles, eminently conducive to the growth of civil liberty; * * * . It is the common jurisprudence of the United States, and was brought with them as colonists from England, and established here, so far as it was adapted to our institutions and circumstances. *Commentaries on American Law*, by James Kent, vol. 1, p. 343.

This, no doubt, is the same common law referred to in *People vs. Green*, 1 Utah 11, 13, wherein the court was of the opinion that the common law was most positively extended over the Territory of Utah by the Congressional Act of September 9, 1850.

Where not specifically restricted by statute the grand jury functions with the same common law powers today as it did at common law. *O'Regan v. Schermerhorn*, 25 N. J., M. 1, 50 A. 2nd 10, 20, 25.

In the early days of the Utah Territory (1863) we find that a Federal Grand Jury considered it its duty to make public note of the conduct of the Territorial Governor, Stephen S. Harding. Tullidge, *History of Salt Lake City*, pp. 322, 323. We quote in part the Presentment of Governor Harding:

Therefore, we the United States Grand Jury for the Third Judicial District for the Territory of Utah, present his 'Excellency' Stephen S. Harding, Governor of Utah, as we would an unsafe bridge over a dangerous stream—jeopardizing the lives of all who pass over it, or, as we would a pestiferous cesspool in our district, breeding disease and death.

This presentment was spread upon the records of the court in response to the request of the Grand Jury. Chief Justice Kinney in discharging this jury said, in part:

I am well persuaded that in no spirit of malice or undue prejudice have you been induced *to call the attention of the Court and people* to what you regard as the official misconduct of the Executive, but only as the deliberate result of your investigations for the public good. (Emphasis supplied).

Our statute 88-2-1, Utah Code Annotated, 1943 provides as follows:

The common law of England so far as it is not repugnant to, or in conflict with, the constitution or laws of this state, and so far only as it is consistent

with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, is hereby adopted, and shall be the rule of decision in all courts of this state.

By the plain words of the statute the common law of England becomes the rule of decision in all the courts of this state, insofar as it is not in conflict with nor repugnant to the constitution and laws of this state and the United States.

We have seen that at the English Common Law it was a settled practice for the grand jury to make public note of discrepancies existing within the local organs of government; further, that a Federal Grand Jury in territorial Utah found it its duty to call public attention to the faults of the territorial governor, and their action approved by the court in so doing.

Our constitutional provision, Article 1, § 13, provides in part:

* * * The grand jury shall consist of seven persons, five of whom must concur to find an indictment; but no grand jury shall be drawn or summoned unless in the opinion of the judge of the district, public interest demands it.

Certainly, the common law use of presentments is not repugnant to, nor in conflict with this section. That the statutes of this state, as they relate to the functions of the grand jury, are likewise free from conflict with the common law of England, is shown in the next succeeding subdivision of this brief by judicial authority interpreting statutes identical to our own. We think the constitution and laws of the state of Utah are more in aid of the common law than in derogation of it.

Therefore, it is respectfully submitted that we cannot but conclude that a grand jury, called in the state of Utah, has common law authority, sanctioned by statute, to return a presentment in the nature of a report even though an indictment does not or cannot follow it.

(B) Under Utah Statutes

Chapter 19, Title 105, Utah Code Annotated, 1943, as amended, defines the powers and duties of grand juries in Utah. Pertinent provisions of this chapter are herewith set forth.

105-19-1, as amended by Chapter 13, § 1, Laws of 1947, provides:

The grand jury may inquire into all public offenses within the jurisdiction of the court committed or triable within the county, and present them to the court by indictment, or by an accusation in writing.

105-19-4.

The grand jury shall not be bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may require the prosecuting attorney to issue process for the witness.

105-19-7.

The grand jury must inquire into the case of every person imprisoned in the jails of the county on a criminal charge and not indicted or informed against; into the conditions and management of the public prisons within the county; and into the willful and

corrupt misconduct in office of public officers of every description within the county.

105-19-8.

They shall also be entitled to free access at all reasonable times to the public prisons, and to an examination without charge of all public records within the county

Appellant finds no Utah case which resolves the question at bar, nor any Utah case which interprets the provisions of the statutes above quoted. However, the question raised in this appeal has received judicial determination in jurisdictions whose statutes, governing the functions of grand juries, are in purpose and effect identical to our own. It is to be observed that nowhere in Utah law, constitutional or statutory, is there provision proscribing the use of a presentment in the nature of a report.

We direct the court's attention to the law in the State of California; and in doing so we set forth the following provisions of the Penal Code of California which are counterparts of those of the State of Utah set forth above.

Section 915.

The grand jury may inquire into all public offenses committed or triable within the county, and present them to the court by indictment.

Section 920.

The grand jury is not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evi-

dence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

Section 922.

If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow-jurors, who must thereupon investigate the same.

Section 923.

The grand jury must inquire into the case of every person imprisoned in the jail of the county on a criminal charge and not indicted; into the condition and management of the public prisons within the county; and into the willful or corrupt misconduct in office of public officers of every description within the county.

Section 924.

They are also entitled to free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records within the county.

Under these provisions the case of *Irwin v. Murphy*, 129 Cal. App. 713, 19 P2d 292 (1933), California District Court of Appeals, was decided; (hearing denied by the Supreme Court in April of the same year.) In that case an action of libel had been filed against members of a grand jury for San Francisco County, because the grand jury had returned a report to the court condemning the local prize fight game as a "racket." The report further stated that gambling cliques "and other evil influences" dominated the boxing clubs; that the boxing commissioner was unfit; that the testimony of a certain referee, before the grand jury, was in conflict with other testimony; that certain referees were selected as a money getting scheme.

The report noted that the evidence received by the grand jury justified these conclusions but did not warrant the return of an indictment. In addition the grand jury made certain recommendations, among which were: that the Governor request the resignation of the boxing commissioner, that the license of Irwin, a referee, be perpetually revoked. The report was concluded with suggestions as to remedies to ameliorate these conditions. This report was caused to be openly published by the grand jury. After deciding the report was privileged, the court specifically determined that the grand jury had not exceeded its powers in returning a report without finding an indictment, and at page 293, said:

In the Matter of Tyler, 64 Cal. 434, 437, 1 P. 884, 887, it was said: "A grand jury should never forget that it sits as the great inquest between the state and the citizen." From the foregoing it is manifest that a grand jury is inherently a body of inquisition empowered to make full and diligent inquiry into public offenses triable within the county. This idea is carried out in the provisions of the Penal Code. Section 920 places the duty of investigation with the grand jury, and demands that this body not only hear and weigh incriminating evidence, but that it shall hear evidence which it may have reason to believe will explain or clear away any pending charge. Section 922 again places upon the grand jury the duty of investigating a charge where any member has reason to believe that a public offense has been committed.

The appellant concedes, as he must, the foregoing. Thus conceding, he would limit any report of the grand jury to an indictment, presentment, accusation, or an express report ignoring the charge. In other words, appellant argues that when the commission of a public

offense is being inquired into or investigated the power of the grand jury is limited to a definite charge, whether by indictment or otherwise, against the person being investigated; that if the grand jury does not find sufficient evidence to indict, the power of the body terminates and any act thereafter is in excess of jurisdiction. We think this too narrow a construction to be placed upon the powers of a grand jury. As a matter of routine, if nothing further, the power to investigate includes as an integral part thereof the right and duty to report the result of such investigation. The duty of a grand jury is to protect the citizen against unfounded accusation. *Matter of Tyler, supra*. Such a duty, coupled with the power of investigation, almost demands completeness of disclosure on matters investigated. It seems futile to attempt demonstration of the obvious. Law and common sense combine to compel the conclusion that, if a grand jury is authorized and bounden to inquire of public offense, a necessary element of this power must be the power and duty to disclose the result of the inquiry.

This case stands today as the law in California, and it is interesting to note that the court, while vigorously establishing the right of a grand jury to make a report without returning an indictment, does not limit the scope of such report to the censure of public officers only, but approves the censure of the erring private citizen as well.

The State of New York, it seems, has dealt with the question under consideration more than any other jurisdiction. In this connection it is again to be observed that the statutes of New York which pertain to grand juries provide for substantially the same procedure as do their counterparts in the Utah Code. We set forth the pertinent provisions of the New York Criminal Code of Criminal Procedure.

Section 260.

The grand jury must inquire,

1. Into the case of every person imprisoned in the jail of the county, on a criminal charge, and not indicted; and
2. Into the wilful and corrupt misconduct in office, of public officers of every description, in the county.
3. The grand jury may inquire into the condition and management of the public prisons in the county.

Section 261.

They are also entitled to free access, at all reasonable times, to the public prisons, and to the examination without charge, of all public records in the county.

The case of *In Re Jones*, 101 App. Div. 55, 16 N. Y. Anno. Cas. 15, 19 N.Y. Crim. Rep. 59, 92 N.Y.S. 275, 181 N.Y. 389, 74 N.E. 226, (1905), dealt squarely with the point here in issue. In that case, the grand jury, in the exercise of its inquisitorial powers, made a "report or presentment" censuring public officials for the improper performance of their duties, without indicting them. The public officials criticized moved to expunge the report. The motion was denied. The court interpreted the above quoted statutes and reasoned as follows:

We may assume that these powers are conferred for some purpose. Official inquiry intends either official action or official report. As such powers are limited to inquiry, and the grand jury has no executive or administrative authority in the premises, the result of any inquiry must be report or statement which shall call attention to the wrong. The grand jury can but report to the court to which it was returned, and by

which it is discharged. Such reports are commonly termed "presentments." * * *

I think, therefore, that any final finding upon the exercise of these inquisitorial powers may be called a presentment, and that it may be regarded as final, and not improper, because an indictment cannot or does not follow it. * * *

Such inquiry as is required by sections 260 and 261 may reveal misconduct, inattention, or shortcomings of public officials, and the report or presentment might be colorless or ineffective unless it specified individual delinquencies. I think that in such a case the grand jury can properly point out those individuals who, as officials, are deemed responsible, and that the presentment may stand though it be not followed by an indictment. It may be pertinent to call attention to the fact that inefficiency, carelessness, or neglect may require correction, and yet not justify indictment, and to the fact that not all willful or corrupt misconduct in office can be presented in the first instance by indictment; * * *

The decision in the Jones case (*supra*) remains the law today in the state of New York, being the only case of its kind, in that jurisdiction, decided by an appellate tribunal. In addition, subsequent cases have affirmed this decision, the most comprehensive of which is that of *In Re Healy*, 161 Misc. 582, 293 N.Y.S. 584, (1937), where all the New York cases to that date, dealing with the question, are reviewed.

The years intervening between the Jones and Healy decisions produced six cases in which the New York County Courts passed on motions to expunge grand jury presentments, returned without indictments. The first of these was *Re Heferman*, 125 N. Y. S. 737, (1909), where expunction

was granted. The report here expunged recited no facts in support of its criticism of certain borough officials. In 1910 the case of *In re Osborne*, 68 Misc. 597, 125 N.Y.S. 313, was decided. In this case, the court found there had been no evidence heard on which to base the presentment, and also decided that the conduct of the Attorney General, the subject of the report, was not of sufficient general interest to warrant the return of a presentment. Next came *In re Woodbury*, 155, N. Y. S. 851, (1915). The motion for expunction was granted, but again on special facts. In passing on this question the court, at page 853, said:

It is unnecessary, in my determination of this question, to decide whether "presentment" and "indictment" are synonymous. Much has been learnedly written on this subject, and the weight of authority still seems to be that the grand jury has a right to make presentments, even though they be not followed by an indictment; but the courts seem to be equally emphatic in insisting that a presentment cannot be used by the grand jury merely as a guise to accuse and thereby compel a person to stand mute, if the presentment would warrant an indictment so that the accused might answer, and that when a presentment is merely a guise used by the grand jury to accuse, the presentment should be expunged from the record.

In 1925 the case of *Re Crosby*, 126 Misc. 250, 213 N.Y.S. 86, again held a grand jury authorized to make presentments, but said such a right should be used with caution, and a presentment or report of a grand jury should present facts obtained as a result of inquiries authorized under Section 260, New York Criminal Code of Criminal Procedure. The next two cases reported before the decision in the Healy case (*supra*)

were those of *Re Funston*, 133 Misc. 620, 233 N.Y.S. 81, (1929), and *Re Wilcox*, 153 Misc. 761, 276 N.Y.S. 117, (1934). Both of these cases were critical of the use of the presentment, but it is submitted that the facts of each of these cases would warrant decision under the doctrine laid down in *In re Jones* (supra).

In 1937 a vigorous reaffirmation of the *Jones* decision appears in the case of *In re Healy*, above cited.

In that case the grand jury had returned a report censuring the vice-chairman of the Queens County Democratic Committee, who was not a public officer. Healy moved the court to expunge the report from the record. The motion was granted because Healy was a private person and not a public official. The court explicitly sustains the use of presentments, and comments on the soundness of the decision in the *Jones* case (supra), as follows:

That there is some diversity of opinion among the decisions is apparent. Numerically, the number of decisions which condemn the submission of presentments far exceeds those which have sustained the use of presentments. As a matter of fact, as has been pointed out, the only appellate court in our state which has passed upon the question has sustained the use of presentments. *Jones v. People*, supra. Notwithstanding the splendid, well-reasoned dissenting opinion of Mr. Justice Woodward, I am inclined to believe that the prevailing opinion expresses the intention of the Legislature when it formulated the provisions of section 260 of the Code of Criminal Procedure. Under that section the grand jury must inquire, among other things, into the condition and management of the public prisons in the county. If the only result of inquiry

with reference to the public prisons is limited to the findings of an indictment or silence on the part of the grand jury, then that subdivision of section 260 of the Code of Criminal Procedure will be almost valueless, but, if the view adopted by the court in *Jones v. People*, supra, is to prevail, then very valuable and salutary results may come from intelligent investigations by grand juries. Prison conditions may be deplorable due to overcrowding, lack of adequate sanitary facilities, the age of the buildings, and to many other factors which may contribute to such conditions, yet in no such instance might the grand jury be warranted in finding an indictment. Certain it is with the passing of time all structures become obsolete. Education and a better understanding of criminology and penology may well authorize a grand jury to submit a presentment urging the erection of modern structures conducive to a better and more enlightened treatment of prisoners. It would be most unfortunate if such valuable contributions resulting from intelligent investigations expressly directed to be made by our grand juries should be lost because of the theory that a grand jury may not hand up a presentment. So, also, it is entirely conceivable that public officials, while not guilty of criminality, may be found to be so lacking in understanding or appreciation of the duties which are part of their office that a grand jury may be discharging a very high form of public service if they report findings based upon a fair, honest, and thorough investigation of all the facts. Not long since a Queens county grand jury conducted an investigation into certain charges which were made with reference to the New York Parental School. As a result of a careful and painstaking investigation, a presentment was submitted to this court which did not criticize or censure any individual or individuals, but it did boldly and fairly criticize the conditions under which the institution was operated

and did make certain recommendations relative to the continuance of the operation of the school, or in the event that such recommendations were not followed, that the institution be closed. The result of that presentment is that the institution is no longer operated; the taxpayers of the city of New York will be saved millions of dollars; and the great investment which the taxpayers have in the land and buildings will be placed to some beneficial use.

The advantages to the people of the state in giving power to our grand juries to investigate in accordance with the provisions of section 260 of the Code of Criminal Procedure far outweigh any consideration for the feelings of public officials who may be criticized by such grand juries. The caliber of the membership of the grand juries is a matter which lies within the control of the courts. The selection of men of experience, of integrity, of high citizenship, of courage, of honesty, and with a reputation for fair dealing, is a problem easily solved by those whose privilege and duty it is to select and determine the membership of our grand juries. And it is only fair to assume that grand juries so selected will confine their presentments to matters which are properly subject to their consideration. Under the law of our state there is always available to the grand juries sitting at any term of court the advice of the district attorney and of the justices of the Supreme Court and the judges of the County Court.

Long ago it was said that "public office is a public trust." Any public official should at all times be willing to render promptly an account of such trusteeship. No matter what his office may be, he is but the servant of the people, and in accepting such office he must be presumed to know that his acts in office are subject to the scrutiny provided by section 260 of the Code of Criminal Procedure. If he administers his office

with a high regard for the trust which has been placed upon him by those who elected or appointed him, then he need have no concern about investigation; if he fails the trust, then, of course, he should have no complaint if the interests of the people are best served by disclosing his failure to fulfill the responsibilities and obligations of the office which he has assumed.

Two later cases appear in New York sustaining the doctrine laid down in the Jones and Healy cases. In *People v. Doe*, 176 Misc. 943, 29 N.Y.S. (2d) 648, (1941), the court had occasion to define the power of a grand jury and, at page 650, said:

The right of a grand jury to hand up a presentment involving the conduct of public officers in the discharge of their official duties was approved by the Appellate Division in *Matter of Jones v. People*, 101 App. Div. 55, 92 N.Y.S. 275, and was considered by this Court in *Matter of Healy*, 161 Misc. 582, 293 N.Y.S. 584, in which it was held that such presentments are limited to the acts of public officials, and may not be used against private individuals. It must be presumed that the Grand Jury and the attorney general will be guided in their acts by these decisions.

That same year a Grand Jury of New York County investigated certain charges publicized by Knight, an attorney, and found them baseless and returned no bill. In what amounted to a presentment the grand jury requested transmission of the minutes to the presiding judge of the appellate division "for appropriate action against Knight." Applicant moved to quash the presentment. The motion was denied. Application of Knight, 176 Misc. 635, 28 N.Y.S. (2d) 353. In doing so

the court, at page 356, sustained the grand jury's right to make a presentment, saying:

No one may validly press the argument that a grand jury does not have the right to communicate its findings in an appropriate case to the proper authority charged with a duty in connection with the matter reported. It might be more correct to say that the grand jury had a duty in such a case rather than a right. * * * The petitioner deems the report to be a "wholly false and libelous document" and states in his petition that its continued presence in the files of this court constitutes a violation of his rights. The petitioner's opinion of the action taken by the grand jury cannot be the criterion in the court's determination.

It is worthy of note that the presentments under consideration by the New York County Courts during the thirty-four years separating the Jones and Healy decisions (*supra*) were expunged because they were largely philosophical dissertations against sin without basis in evidentiary fact, and in *In re Woodbury* (*supra*), the presentment was procedurally defective in that it was not signed by the whole of the grand jury.

In other jurisdictions we find decisions critical of the presentment, but these, we think, are distinguishable from the cases in New York and California, and the case instantly at issue, either on statutory grounds or because of their interpretation of the common law. It remains, therefore, because of the distinct similarity between the New York, California, and Utah statutes, and the effect of the decisions of New York and California interpreting such statutes, that these decisions are more in consonance with what the effect of the Utah law

is than are decisions from jurisdictions where differences in the statutes or in the interpretation of the common law exist.

Poston vs. Washington, Alexandria & Mt. Vernon Ry. Co., 36 App. D.C.359, 32 L.R.A. (NS) 785 (1911), was a libel case wherein a presentment against a private citizen was expunged. This case was decided under the provisions of Pollard's Code of the Laws of Virginia wherein Section 3983 specifically limits the use of the presentment. We quote that section *in toto*:

The grand jury shall inquire of and present all felonies, misdemeanors, and violations of penal laws, committed within the jurisdiction of the respective courts wherein they are sworn; except that no presentment shall be made of a matter for which there is no corporal punishment, but only a fine, where the fine is limited to an amount not exceeding five dollars.

In State vs. Bramlett, 166 S.C. 323, 164 S.E. 873 (1932), a presentment was expunged, but the court there proceeded under statutes wholly unlike our own and reached its decision on the basis of an interpretation of the common law, which interpretation appellant thinks was misleading, because it was too restrictive in scope.

In re Report of Grand Jury of Baltimore City, 152 Md. 616, 137 A. 370 (1927), was a case where the Maryland court expunged a presentment which it found to be but a censure of public officials, and also proceeded on the premise (which appellant submits was erroneous) that the presentment was unknown at common law, except as an instrument to initiate prosecution for crime.

Four other cases which denounce the use of the presentment are *Coons vs. State*, 191 Ind. 580, 134 N.E. 194, (1922), *In re Grand Jury Report*, 204 Wisc. 409, 235 N.W. 789 (1931), *Rector vs. Smith*, 11 Iowa 302 (1860), and *Bennett vs. Kalamazoo Circuit Judge*, 183 Mich. 200, 150 N.W. 141, (1914). In the Bennett case, the court found there were but two matters upon which a grand jury could return a presentment, viz., trespass on public lands and violation of the election laws. Because of the differences heretofore mentioned, appellant submits that these seven cases are without pertinence to the Utah County Grand Jury Presentment.

(C) The Utah County Grand Jury Presentment

This document, preferred to the court after three and one-half months of taking testimony, investigations and deliberations, in itself is a testimony to the conscientious and honorable manner in which the grand jury did acquit the duties devolved upon it by law.

In the instance of each institution, made a subject of the report, the grand jury made no statements except such as were based on facts disclosed as a result of their investigations and the testimony received of sworn witnesses. Appellant believes this fact to be apparent from a mere reading of the report. The report is not composed of irresponsible claims, calumny, nor even of merely well-meaning philosophical observations. It is respectfully submitted that this is not the kind of document which, "under the guise of a presentment," is used as an improper means to make accusation, or to ridicule the public servant.

In addressing itself to the Utah State Training School at American Fork, the grand jury reported the existence of unsanitary conditions, overcrowded dormitories, "dirty and disorderly conditions prevailing in the kitchen, the barbershop, the storerooms, the maintenance shop, the dairy colony and the farm colony, which no alert and efficient administration would tolerate." (Rec. 23). The grand jury further found evidence of drunkenness of employees while on the job, a practice at the school of employees taking the feeble-minded girls for rides at night, no inventory or control of the supplies at the school, and that from the failure to keep a controlled inventory, the state had suffered the loss of \$700.00 in supplies, that only a feeble effort had been made to rectify this condition, but at the time of the report, the system was wholly inadequate. Certainly, not the least important of these conditions is the following: (Rec. 27)

* * * We have heard convincing proof of punishment of feeble-minded children by incarcerating them in a bare room at the school where they are left for hours without food and care.

The attention of the Public Welfare Commission was directed to these conditions among others, and nine objective and constructive recommendations were made which, if followed, would rectify the deficiencies existing at this institution.

Those parts of the report which concern the activities of the State Road Commission in Utah County and law enforcement in Provo City are set forth in the same objective spirit, and are likewise bolstered by facts found after pains-

taking investigation and conscientious interrogation of sworn witnesses. In each of these instances the attention of the proper officers and governing body is directed to the conditions enumerated, and recommendations are made for their correction.

Should the conditions encompassed in this presentment go unnoticed? Should the people and the heads of their government not be apprised of maladministration in administrative agencies? As a matter of public record, it is observed that the three grand juries called in Salt Lake County over the last twenty-five years have considered it their right and duty to present to the public a report of their investigations. In this day of vast administrative machinery in government, where abuses and maladministration may creep in and remain for periods of time without notice, the need for the inquisitorial powers of a body of citizens composing a grand jury, and the right to make public note of the results of their investigations, certainly is as important as it was in common-law days. At common law, it was this instrument of presentment which was used for the precise purpose of calling the attention of the crown and the citizenry to failures in law enforcement and maladministration in local government. Holdsworth, *A History of English Law*, supra. At common law names were named and public officials were called to account. In this respect, it is interesting to note that throughout the entire presentment of the Utah County Grand Jury not one individual name is used. Even if the Utah County Grand Jury had seen fit to make individual references, the cases of *In re Jones and Irwin vs. Murphy* (supra) would have sustained their right to do so.

The sage observation of Justice Terrell, of the Florida Supreme Court, in the case of *In re Report of Grand Jury*, 152 Fla. 154, 11 So. 2nd 316 (1934), at page 319, is illustrative of the point.

Every person who assumes the duties of public office does so with the knowledge that his official conduct is constantly under scrutiny by the public. For the purpose of detecting abuses of the trust so imposed, the law has erected what may be termed a three way switch, one of which leads to the Governor's office, one to the grand jury room, and one to the primary. Rectitude of official conduct is the only refuge from a plethora of light from these sources. At any rate, it is idle for one to think that he can administer the affairs of his office with one strabismic eye on the grand jury and the Governor and the other in pursuit of a course of conduct contrary to public morals. Public office is the most important trust democratic government vests in the citizen. It is important because the integrity level of the political unit rises and falls with that of its official leadership. The honest officer is not averse to having the light turned on and if he objects, there arises a shadow of suspicion that may prompt a grand jury inquisition.

CONCLUSION

Appellant respectfully submits that an analysis of the English Common Law supports the fact that the grand jury grew up with vast inquisitorial powers and that the necessary adjunct of those powers was the right and duty to make report of the results of its inquisitions. Further, that the presentment

was not, and is not, an instrument to be used only for the accusation of crime.

It is also submitted that the effect of the Utah statutes, pertaining to grand juries, is the same as that given their counterparts, by respectable authority, in other jurisdictions.

Appellant believes that a determination of the legal and social considerations involved in this problem leads to the affirmation of the right and duty of a grand jury to make a presentment in the nature of a report of its investigations, even though an indictment does not or cannot follow.

Therefore, it is asked that this court reverse the decision of the lower court and remit these proceedings.

Respectfully submitted,

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