

1952

H. C. Shoemaker et al v. State of Utah : Brief for Plaintiffs and Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Clifford L. Ashton; C. M. Aldrich;

Recommended Citation

Brief of Respondent, *Shoemaker v. State*, No. 7856 (Utah Supreme Court, 1952).
https://digitalcommons.law.byu.edu/uofu_sc1/1757

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

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. WHITTEN-
BURG, HARLEY J. CORLEISSEN,
and LAYTON MAXFIELD; and
PROVO CITY, a Municipal Corpor-
ation 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,

Defendants and Appellants.

Civil No.
7856

BRIEF FOR PLAINTIFFS AND RESPONDENTS

CLIFFORD L. ASHTON,
Attorney for

H. C. Shoemaker, William A.
Dawson, Philo T. Farnsworth,
D. H. Whittenburg, Harley
Corleissen and Layton Max-
field,

Plaintiffs and Respondents.

Clerk, Supreme Court, Utah

C. M. ALDRICH,

Attorney for Provo City

Plaintiff and Respondent.

FILED

OCT 2 - 1952

INDEX

Page

TABLE OF CONTENTS

| | |
|---|----|
| STATEMENT OF CASE | 1 |
| POINTS RELIED ON | 4 |
| ARGUMENT | 5 |
| POINT I. THE UTAH STATUTES DO NOT AUTHORIZE A GRAND JURY TO MAKE A REPORT IN WRITING | 7 |
| POINT II. THE GREAT WEIGHT OF AUTHORITY AT COMMON LAW DOES NOT PERMIT A GRAND JURY TO MAKE A WRITTEN REPORT WHICH CRITICIZES AND CONDEMNS BUT FAILS TO INDICT OR MAKE A WRITTEN ACCUSATION OF A PUBLIC OFFENSE UPON WHICH A COMPLAINT MAY ISSUE | 10 |
| CONCLUSION | 30 |

CASES CITED

| | |
|---|----|
| Attwood v. Cox, 88 Utah 437, 55 P. 2d 377 | 9 |
| Bennett v. Kalamazoo Cir. Ct., 150 N. W. 141, 182 Mich. 200 | 22 |
| Bryant v. Crossland, 182 Ky. 556, 206 S. W. 791 | 9 |
| Coons v. State, 191 Ind. 580, 134 N. E. 194 | 30 |
| Eason v. State, 11 Ark. (6 Eng.) 481, 482 | 5 |
| In Re Gardner, 31 Misc. 364, 64 N. Y. S. 760 | 16 |
| In Re Healy, 293 N. Y. S. | 20 |
| In Re Hefernan, 125 N. Y. S. 737 | 18 |
| In Re Jones, 92 N. Y. S. 275 | 12 |

INDEX—Continued

| | Page |
|--|------|
| In Re Report of Grand Jury of Baltimore City, 152 Mary. 616, 137 A. 370 | 23 |
| Irwin v. Murphy, 127 Cal. App. 651, 19 P. 2d 292 | 21 |
| Oleson v. Pincock, 68 Utah 507, 251 P. 23 | 9 |
| People v. McCabe, 148 Misc. 330, 266 N. Y. S. 117 | 19 |
| Re Crosby, 126 Misc. 250, 213 N. Y. S. 86 | 19 |
| Re Funston, 133 Misc. 620, 233 N. Y. S. 81 | 19 |
| Re Grand Jury Report, 204 Wis. 409, 235 N. W. 789 .. | 26 |
| Re Osborne, 68 Misc. 597, 125 N. Y. S. 313 | 16 |
| Re Report of Grand Jury, 152 Fla. 154, 11 So. 2d 316 .. | 27 |
| Re Wilcox, 153 Misc. 761, 276 N. Y. S. 117 | 19 |
| State v. Bramlett, 166 S. C. 323, 164 S. E. 873 | 25 |
| West v. Territory Arizona, 4 Ariz. 212, 36 P. 207 | 9 |

TEXTS AND STATUTES

| | |
|---|----|
| American Juris. Vol. 24 page 859 | 29 |
| 22 A. L. R. 1366 | 28 |
| 106 A. L. R. 1388 | 28 |
| 120 A. L. R. 437 | 28 |
| Holdsworth History of English Law, Vol. X, pages 150-151 | 6 |
| Utah Code Annotated 1943 | |
| 88-2-1 | 11 |
| 105-7-2 | 7 |
| 105-7-3 | 8 |
| 105-19-1 | 7 |
| 105-19-3 | 8 |
| 105-19-5 | 8 |
| 105-19-7 | 8 |

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. WHITTEN-
BURG, HARLEY J. CORLEISSEN,
and LAYTON MAXFIELD; and
PROVO CITY, a Municipal Corpor-
ation 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,

Defendants and Appellants.

Civil No.
7856

BRIEF FOR PLAINTIFFS AND RESPONDENTS

STATEMENT OF CASE

The case is accurately stated in Appellants' brief. How-
ever, we desire to supplement some of the additional facts
which seem to be of importance.

In its findings under the headings noted in Appellants' brief the jury freely indulged itself in commenting on the administration and operation of the institutions named. It also made recommendations as to fiscal, medical, inventory, telephone service and various personnel matters. Much of this certainly appears to be harmless. However, the grand jury did not limit itself to general recommendations and observations—it also undertook to criticize and condemn the administration of some of the State institutions and law enforcement in Provo City. This condemnation either by design or inadvertence cast strong inference of incompetence, maladministration and even possible public offenses without specifically naming the individual responsible and, in most cases, without even fixing a time or place. As a result the inescapable impression is frequently given that present administration officials are at fault.

The jury, for example, inferred immoral sex practices by "male employees" with "feeble-minded girls" at the American Fork Institution, and stated that such conduct is "reprehensible and should be condemned" (R. 25). No employee was named, and no time or place was fixed. It was simply a general castigation of "some employees" with the sage observation that "where there is smoke there is fire" (R. 26).

The jury also reported that "we listened to testimony establishing that certain types of feeble-minded patients had been improperly housed—" and "we have heard convincing proof of punishment of feeble-minded children by

incarcerating them in a bare room at the school—" (R. 27). At another point in the "presentment" the jury reported "There is evidence of maladministration at the American Fork Training School" (R. 23). These comments on secret evidence or information obtained outside of the jury room by the grand jury were not related to any specific time or place or administration.

In referring to the Road Commission, the jury stated that a State Road truck had been sold by the "then District Superintendent to his son at a price far below its real value" (R. 39). Whether this "then District Superintendent" is the same one whose son allegedly purchased a truck from the Road Commission as appears at another page in the "presentment" is not clear. In any event, the "then District Superintendent" is not named and no time or place is fixed. There are also general comments relative to "highly irregular" practices. The clear inference is that the "highly irregular" practices were done with Commission approval and the jury concludes that while the acts were not indictable, they were "inexcusable irregularities" and "we strongly condemn" (R. 41).

While the "presentment" tends to praise the officials of Utah County by stating "generally we find that County affairs have been capably and efficiently administered by the respective County officers * * * and we commend them" (R. 42), it refers to unintentional law violations, with comment that the grand jury has no authority to indict because these violations are misdemeanors (R. 43). On the other hand, in referring to law enforcement in

Provo City the observation is made that "the general morale within the Provo City Police Department *seems to be at a low ebb*" (R. 48). A reference is then made to a specific drunken driving case which the City Attorney is supposed to have improperly reduced to reckless driving. This specific instance was "strongly condemned" (R. 49).

The foregoing recitations of the facts "presented" by the Grand Jury are simply stated to demonstrate the type report made, and do not include all the objectionable matter.

POINTS RELIED ON

POINT I.

THE UTAH STATUTES DO NOT AUTHORIZE
A GRAND JURY TO MAKE A REPORT IN
WRITING.

POINT II.

THE GREAT WEIGHT OF AUTHORITY AT
COMMON LAW DOES NOT PERMIT A GRAND
JURY TO MAKE WRITTEN REPORTS WHICH
CRITICIZE AND CONDEMN BUT FAIL TO IN-
DICT OR MAKE A WRITTEN ACCUSATION
OF A PUBLIC OFFENSE UPON WHICH A
COMPLAINT MAY ISSUE.

ARGUMENT

Introduction, definitions, and statutory provisions.

The Utah statutes do not in any way use or refer to the word "presentment." The only use of this word appears in the Utah Constitution, wherein it is provided:

"No person shall be held to answer for a *capital*, or *otherwise infamous crime*, unless on a *presentment* or *indictment* of a Grand Jury, except in cases arising in land or naval forces or in the Militia when in actual service in time of war or public danger."

Undoubtedly the use of this word as set out in the Constitution necessarily implies its common law meaning, which in turn presupposes grand jury action. See *Eason v. State*, 11 Ark. (6 England) 481, 482.

Historically, at common law a presentment was prepared by the grand jury whereas an indictment was prepared by the King's counsel. The presentment differed from the indictment in form only. It was in fact an informal accusation of a crime in writing addressed to the attorney general. On this "presentment" the attorney general based an indictment. See *In re Gardiner*, *infra*, and Words and Phrases, volume 33, page 457 and following.

A so-called "presentment" not dealing with public offenses or crimes, but dealing generally with administrative matters, and condemning and censuring without actually accusing of a public offense was not tolerated at English Common law. It is true, as indicated by Appellants in their brief, that for a time there were isolated instances of public

censure of constables and criticism of road conditions by Grand Juries. However, even these isolated instances are not applicable precedents because the limited practice was abolished by statute. W. S. Holdsworth in Vol X of A History of English Law, page 150 states:

“Nevertheless this modified system of presentment by high and petty constables lasted till 1827, when it was abolished by a statute passed in that year.”

At page 151 of the same Volume he states:

“The use of the machinery of presentment to enforce duties to repair highways was abolished in 1835.”

Inasmuch as the statutes of England, insofar as they are applicable to general common law principles became a part of the common law, it must be concluded that as early as 1835 presentments of the type referred to by Appellants in their brief were in fact not permitted.

The word “presentment” then, as it refers to anything less than a crime or public offense is actually a misnomer. Certainly, the written report of a grand jury publicly made, dealing with administrative matters and condemning or censuring without in fact charging a public offense is not, properly speaking, a presentment as it was known at common law.

The question then in reality, is not whether the grand jury is authorized to make a so-called “presentment,” but

whether or not it can make a written report, not charging an offense, but condemning public officials generally.

POINT I.

THE UTAH STATUTES DO NOT AUTHORIZE A GRAND JURY TO MAKE A REPORT IN WRITING.

There are several statutes specifically dealing with a grand jury's rights and obligations relative to its report to the court. 105-19-1 of Utah Code Annotated 1943, provides as follows:

"The Grand Jury must 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*."

It will be observed that both "indictment" and "accusation in writing" refer to "public offenses."

In 105-7-2 the legislature has further indicated what is meant by an "accusation in writing." That statute is as follows:

"An accusation in writing against any district, county, precinct or municipal officer, or an officer of any board of education, for any high crime, misdemeanor or malfeasance in office *may be presented* to the district court by the *Grand Jury* or by the district attorney or by the county attorney of the county in which the officer accused was elected or appointed.

The next section, 105-7-3, provides:

“The accusation must state the offense charged in ordinary and concise language.”

The statutes then provide that the accusation in writing be presented by the foreman to the court and filed with the clerk (105-7-4). The next section provides for the appearance of the defendant *to answer the charge* (105-7-5).

Thus the statutes in our state provide for *indictment* or *written accusation* charging either a crime or a malfeasance for which removal will lie.

Other Utah statutes relating to the question are as follows:

105-19-3:

“In the investigation of a charge *for the purpose of indictment* the Grand Jury must receive no other evidence than such as shall be given by witnesses produced and sworn before them. * * * The Grand Jury must receive none but legal evidence and the best evidence and degree to the exclusion of hearsay or secondary evidence.”

Section 105-19-5 provides:

“The Grand Jury ought to find an indictment when all the evidence before them taken together if unexplained or uncontradicted would, in their judgment, warrant a conviction by a trial jury.”

Section 105-19-7 specifically directs the grand jury to inquire into the case of * * *

“every person imprisoned in 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 wilful and corrupt misconduct in office of public officers of every description within the county.*"

105-19-7 has a historical background. Inspection of the jails was made a specific duty to correct two possible abuses: 1. Holding prisoners without bail or charge, and, 2, detecting cruel and inhuman punishments.

The provision relating to *wilful* and *corrupt* misconduct in office of public officers of course relates to either a specific public offense or a malfeasance in office. Malfeasance in office is, by definition, wilful *and* corrupt. (So held in *Attwood v. Cox*, 88 Utah 437, 55 Pac. 2d 377.)

Thus in *Bryant v. Crossland*, 206 S. W. 791, 182 Ky. 556, the Kentucky Supreme Court said that misfeasance and malfeasance in office are public offenses. Misfeasance and Malfeasance in office, while not specifically defined by our statutes, are considered public offenses. Thus in 105-7-2, *supra*, the grand jury is specifically empowered to make an accusation in writing relative to malfeasance in office.

What is a public offense? Of course, it is not that which a grand jury or any other group believes is censurable. It is that which the law has made a crime or one for which removal will lie. Thus in *West v. Territory, Arizona*, 36 P. 207, 4 Ariz. 212, the Arizona Supreme Court said that the term "public offense" has the same meaning as "crime."

In *Oleson v. Pincock*, 251 P. 23, 68 Utah 507, the Utah Supreme Court held that "public offense," as used in Compiled Laws of 1917, Section 8714, authorizing arrest without

warrant for public offenses committed in an officer's presence, includes every such offense constituting misdemeanors and not merely breaches of the peace, for which an arrest can be made in the officer's presence under common law.

It must, therefore, be concluded that the Utah statutes do not authorize a grand jury to do more *than indict* or make a *written accusation*, charging a specific public offense involving wilful and corrupt misconduct.

POINT II.

THE GREAT WEIGHT OF AUTHORITY AT COMMON LAW DOES NOT PERMIT A GRAND JURY TO MAKE WRITTEN REPORTS WHICH CRITICIZE AND CONDEMN BUT FAIL TO INDICT OR MAKE A WRITTEN ACCUSATION OF A PUBLIC OFFENSE UPON WHICH A COMPLAINT MAY ISSUE.

Clearly, the English common law did not provide for written reports to be made by the grand jury. Furthermore, a "presentment" was never a written report commenting on matters generally. It was a *written accusation* addressed to the prosecuting attorney *charging a crime*. See *supra*. Of course, under a practice which permits and authorizes the prosecuting attorney to sit with the grand jury, there is no need for the jury to address written communications to him, as there was under the old English common law system. The grand jury now consults with the District Attorney and frames an indictment in the first

instance. It would seem, therefore, that the necessary conclusion which must be reached is that at English common law written reports commenting generally on administrative matters and censuring and condemning public officers without charging a specific public offense were unknown. Furthermore, a "presentment" was not a written report. It was a written accusation charging a crime upon which an indictment could be based. Therefore, so far as the English common law is concerned, the use of the word "presentment" to identify a written report on general conditions, is a complete misnomer.

88-2-1 of the Utah Code provides as follows:

"The common law of England insofar as it is not repugnant to, or in conflict with, the Constitution or laws of the United States, or 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 of all courts of this State."

If this statute be construed as adopting the English common law as distinguished from common law generally as it existed in 1896, it must of course be concluded that there is neither statutory nor common law authority for a written report identified as a "presentment" or otherwise which does not charge a public offense upon which a complaint or an indictment may be laid.

→ The cases in New York are discussed herein at some length because of the development in the law which has taken place before that court. Originally the New York

courts held that a motion to expunge the report of a grand jury which criticized and condemned individuals without charging a public offense upon which an indictment could be based would be denied on the grounds that a grand jury had authority to make such a report because of its broad inquisitorial powers. The first case of importance so holding was *In re Jones*, 92 N. Y. Supp. 275. It has frequently been quoted as a landmark case and Respondents believe has erroneously been relied upon.) In that case the grand jury made a report criticizing the actions of the clerk of a *Board of Supervisors of Nassau County*. This clerk made a motion to set aside and quash the "presentment," which motion was denied. The Supreme Court of New York, Appellate Division, in January, 1905, affirmed the action of the lower court with one justice dissenting. In the majority opinion, the court said:

"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. While it is true that the Code of Criminal Procedure does not in terms provide for a report as the result of this inquiry nor directly provide for a presentment, yet it is significant that the term is used in contradistinction to an indictment in section 250, which reads as follows:

"The grand jury must appoint one of their number as clerk, who is to preserve minutes of their proceedings (except of the votes of the individual members on a presentment or indictment), and of the evidence given before them."
 "* * * but, while a report or presentment

of a grand jury neither calls upon a person nor suffers him to answer, it may be that the court in its inherent power might, on the application of one aggrieved, refer or resubmit the matter to the further inquiry of the grand jury, or of a grand jury, in order that justice be done after a full hearing. I think that if under the guise of a presentment, the grand jury simply accuse, thereby compelling the accused to stand mute, where the presentment would warrant indictment so that the accused might answer, the presentment may be expunged; but I do not think that a presentment as a report upon the exercise of inquisitorial powers must be stricken out if it incidentally points out that this or that public official is responsible for omissions or commissions, negligence or defects."

Justice Woodward, who was the dissenting Justice, disapproved of the majority ruling and commented at some length on the common law background and his reasons for holding that such a report was not authorized and should be expunged on proper motion. (His dissenting opinion is herein quoted at some length because it is Respondents' opinion that this opinion more nearly represents what the law has become in New York State, and that it has been frequently quoted in the cases which represent the great weight of authority in this country.) At page 278 he states:

"* * * In determining the powers of the grand jury under the laws of this state, whether regulated by statute or usage constituting the common law, we have a right to consider what that body might do under this indefinite power of making presentments if that power be conceded. If it has the right to censure the petitioners in the matter now before us, it is difficult to conceive of any limi-

tation upon the powers of the grand jury. It may establish its own standards of right and wrong, and may subject the citizen to the odium of a *judicial condemnation without giving him the slightest opportunity to be heard*; oftentimes working, in the public estimate, as great an injury to his standing and character as though he had in fact been accused of a crime. This is a perversion of the essential spirit of the grand jury system, which had for its object the protection of the citizen against an open and *public accusation of crime, and from the trouble, expense, and anxiety of a public trial, before a probable cause is established by the presentment and indictment*. Jones v. Robbins, 8 Gray, 329, 344. It cannot be that it was ever contemplated that this body, created for the protection of the citizen, was to have the power to set up its own standards of public or private morals, and to arraign citizens at the bar of public opinion, without responsibility for its abuse of that power, and without giving to the citizen the right to a trial upon the accusations. . .

(* * * * *)

“There are two great purposes—one to bring to trial *those who are properly charged with crime*, the other to *protect the citizen against unfounded accusation of crime*. When the grand jury goes beyond this, and attempts to set up its own standards, and to administer punishment *in the way of public censure*, it is defeating the very purposes it was intended to conserve; and its action cannot, therefore, be lawful. Section 6 of article 1 of the state Constitution provides that ‘*no person shall be held to answer for a capital or otherwise infamous crime*’ * * * unless on presentment or indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions.’ * * *

In other words, a ‘presentment on indict-

ment,' as applied to the citizen by our Constitution, contemplates, in substance, the same thing. It contemplates an accusation of crime, to be followed by an answer on the part of the person thus formally accused, with an opportunity to be heard in his own defense before a jury of his peers. The terms are, in their relation to the individual, synonymous. *No one would contend that a citizen could be indicted for anything less than a crime, or that, if indicted, he could be denied an opportunity to answer and to appear in his own defense before a jury; and it seems to be equally clear that there is no constitutional right to make a presentment against an individual in a case where an indictment would not lie. The rights of the citizen are the same under either an indictment or a presentment. There is the right to answer and to appear in person and by counsel, and to have a trial by jury in any case in which an indictment might properly be made. 'An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a crime.'* * * *

At page 280 the dissenting Justice said:

"* * * If there has been no crime or offense, the grand jury, designed for the protection of the citizen, has no right to *create an offense unknown to the law for the purpose of administering punishment by way of censure, for this a 'government of laws, not of men,'* to quote the preamble of the Constitution of Massachusetts and the language of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 163, 2 L. Ed. 60. The rule is not different because the accusation takes the form of a presentment rather than of an indictment, *which as I have already suggested, are synonymous terms as used in our jurisprudence,* and particularly so since the adoption of our Code of Criminal Procedure * * * If the

acts charged do not constitute a crime, then there is no indictment before the court, and the petitioners clearly *have a right to be relieved of the odium of a judicial censure, where the document in which such censure is contained is a mere impertinence, without authority of law.* * * *

In an earlier New York case, *In re Gardiner*, decided in 1900, and cited in 31 Misc. 364, 64 N. Y. Supp. 760, the grand jury made a "presentment" criticizing the District Attorney. The District Attorney made a motion to set aside or quash. The court, in granting the motion, said:

"Sometimes, however, our grand juries make a sort of general presentment of evil and evil things to call public attention to them, yet not an instruction for any specific indictment. No one could be called to answer to such a presentment. * * * While it may be observed that the court had tolerated rather than sanctioned such presentments of things general, yet the *grand jury should never, under cover of a presentment, present an individual in this manner; for if it have legal evidence of the commission of a crime, it should find an indictment against him upon which he could be held to answer, and if it have no such evidence, it ought, in fairness, to be silent. The powers of the grand jury extend only to questions of crime.* Its functions are not executive, but *judicial.* It is in fact a preliminary tribunal, and it is furnished with inquisitorial powers only for the purpose of examining into crimes."

The next case of importance after the *Jones* case was *Re Osborne*, 68 Misc. 597, 125 N. Y. Supp. 313, decided in 1910. In that case the grand jury had filed a report reflecting upon the professional integrity of the *prosecuting*

attorney. He had made a motion to strike from the record. The court in sustaining his motion said:

“It has become a custom of almost invariable occurrence that the grand jury, at the close of its term, makes a presentment on some subject on which, frequently, no evidence has been heard. This, no doubt, proceeds from the zeal of its members to promote the general welfare by calling attention to certain conditions which they believe should be remedied. So long as they are confined to matters of general interest they are regarded as harmless, even though a waste of time and effort, and after the ephemeral notice of the day has passed they are allowed a peaceful rest. But it is very different when the motives and conduct of the individual are impugned, and he held to reprobation, without an opportunity to defend or protect his name and reputation, for it must be borne in mind that if the gentlemen of the grand jury were to meet as an association of individuals and give expression to the sentiments contained in a presentment, little attention would be paid to them, and a healthy regard for the responsibility of utterances injurious to the individual would, in all probability, restrain exaggerated and unfounded statements. The mischief arises from a prevalent belief that a grand jury making the conventional presentment speaks with great authority, and acts under the sanction of the court, thereby giving to its deliverance a solemnity which impresses the mind of the public. This is a grave error. The powers and duties of a grand jury are defined by law. No matter how respectable or eminent citizens may be who comprise the grand jury, they are not above the law, and the people have not delegated to them arbitrary or plenary powers to do that, under an ancient form, which they have not a legal right to do.”

The court in the *Osborne* case, *supra*, referred to the *Jones* case, *supra*, and after discussing the majority opinion remarked that the dissenting opinion of Justice Woodward was founded on better reason and then ordered that the paper entitled a "presentment" be stricken and expunged from the records. The court in the *Osborne* case thus repudiated the majority opinion in the *Jones* case and adopted the dissenting opinion of Justice Woodward. (1909)

In re Hafernan, 125 N. Y. Supp. 737, the grand jury had made a presentment charging certain borough officials with neglect of their duties and of the public interest. A motion was made to set aside and expunge this from the record on the ground that it was "inadvisedly made by the grand jury in excess of its powers." The court in granting the motion said:

"* * * They are not part of the administrative government of a great municipality. They have the fullest and amplest power to investigate, as it is their solemn and prescribed duty to do, into 'the wilful and corrupt misconduct in office, of public officers of every description, in the county.' Finding any such evidence of wilful and corrupt misconduct, it would be their clear duty to indict. Then the official could have his day in court, where he would receive either the condemnation which he deserved if his actions have been unlawful, or the vindication that he would desire in case he was blameless. From a grand jury, obviously nothing but the fairest consideration of any questions submitted to them is expected. The Star Chamber of the olden days no longer exists, and any action on the part of a grand jury which would partake of the character of the proceedings of that ancient and abhorred system would not be tolerated today."

To the same effect see *Re Crosby* (1925) 126 Misc. 250, 213 N. Y. S. 86, *Re Funston* (1929) 133 Misc. 620, 233 N. Y. S. 81, *People v. McCabe* (1933) 148 Misc. 330, 266 N. Y. S. 363, and *Re Wilcox* (1934) 153 Misc. 761, 276 N. Y. S. 117. In all these cases the court expunged from the record a so-called "presentment".

In the *Crosby* case, *supra*, the court expunged from the records a grand jury report which lauded the high character of certain officials but at the same time criticized them for the *prevalence of gambling and houses of prostitution*. The presentment apparently also contained *numerous philosophical observances*.

In the *Funston* case, *supra*, the court indicated that a "presentment" could not be used by the grand jury to attack the name of a citizen or to charge a public official *with misconduct without giving him a chance to be heard*. The court, therefore, expunged the presentment.

In the *McCabe* case, *supra*, the court, in expunging the "presentment" from the record said:

"A presentment is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes—the right to answer and to appeal. It accuses, but furnishes no forum for a denial. No one knows upon what evidence the findings are based. An indictment may be challenged—even defeated. The presentment is immune. It is like the 'hit and run' motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed."

In the *Wilcox* case, *supra*, the presentment charged gross irregularities on the part of certain election inspectors. This was ordered expunged on petition of one of the inspectors involved.

In the *Healey* case, 293 N. Y. S. 584, a New York Court *by dicta* indicated that because of New York statutes and broad inquisitorial powers of grand juries in that jurisdiction could make a written report criticizing public officials but not private individuals. The motion to expunge was granted and the court indulged in strong language criticizing a "presentment" which referred to the private individual. The writer is at a loss to understand the distinction drawn by the dicta used. In any event the N. Y. statutes apparently do not provide for removal proceedings for conduct of public officials who are guilty of wilfull and corrupt misconduct. In Utah the statutes so provide so that even the New York dicta is not applicable.

The *Jones* case, *supra*, went to the New York Supreme Court, which court refused to review because it claimed lack of jurisdiction.

Thus in New York the numerical majority of the courts follow the dissenting opinion in the *Jones* case, and one court, perhaps two, by dicta, follow the majority opinion. It therefore, of course, must be concluded that there is no settled law in New York, and any decision relied upon from that jurisdiction is unreliable, and certainly is not the law, even in that state.

There is a California case which seems to collaterally hold, at least by way of dicta, that the grand jury has a

right to make a so-called "presentment". That case is *Irwin v. Murphy*, 129 Cal. App. 657, 19 P. (2d) 292. This case was an action for libel based upon the report of a grand jury investigating the death of a professional boxer. The report criticized the boxing officials, referees and promoters. One of the offended parties brought an action for libel and slander. The court sustained a demurrer to the complaint on the ground that the publication of the grand jury was privileged. This was the only question which was directly before the court.

The California case, *supra*, and one or two of the New York cases which seem to follow the majority opinion in the Jones case, *supra* apparently make up Appellants' case authorities. The *Jones case* is not controlling New York law, and the other cases involve collateral matters and therefore rulings which did not arise out of direct attacks. On the other hand, all the other cases which counsel can find, and which arise out of direct attacks, as in the instant case, have squarely ruled that the grand jury may not make written reports which do not charge a public offense.

In *Ex parte Robinson* decided in January, 1936, 165 So. 582, 231 Ala. 503, the Alabama Supreme Court had before it this same question. There the grand jury had criticized the conduct of the *City Commissioner* but had returned no indictment. The Commission had moved the Circuit Court to expunge from its records the grand jury's report. The Alabama Circuit Court reviewed the cases and indicated that there was no question but that the Circuit Court had the power to expunge the report and that it should have done so. It therefore issued a writ of man-

damus ordering the court to do so. The Alabama court referred to the California case of *Irwin v. Murphy, supra*, and said:

“* * * That opinion also justifies grand juries in making such reports. That is the only case we have seen which does so (not subsequently overruled), but the question was collateral, as in our Parsons Case, *supra*, which does not, as we have shown, go the extent of saying that the grand jury has that legal right.”

The court then went on to comment on the great weight of authority and said:

“On the other hand, *where the question has arisen on direct attack, as here, with one accord, the cases hold that the officer when he is thus criticized has the right in such a proceeding as this to have the report expunged.* In one case it is thus expressed: ‘While it may be observed that the court has tolerated, rather than sanctioned, such presentments of things general, yet the grand jury should never, under cover of a presentment, present an individual in this manner for, if it have legal evidence of the commission of the crime, it should find an indictment against him upon which he could be held to answer, and, if it have no such evidence, it ought, in fairness, to be silent.’ * * *” (Italics added.)

One of the cases most often quoted on the proposition that a grand jury has no right to make a “presentment” is the case of *Bennett v. Kalamazoo Circuit Judge*, decided in Michigan in 1914, 182 Mich. 200, 150 N. W. 141. In that case the grand jury made a written report to the Circuit Court in which they criticized the conduct of the prosecuting attorney. They did not return an indictment against

him. He requested the Supreme Court for a writ of mandamus to compel the Circuit Judge to strike from the files of the court the grand jury's report. The court granted the writ of mandamus and said:

"A review of all the cases cited upon both sides of the question, and such others as we have been able to examine, leads us to the conclusion that inherently, apart from statutory sanction, the grand jury has no right to file such a report, unless it is followed by an indictment. The evils of the contrary practice must be apparent to all. While the proceedings of the grand jury are supposed to be secret, it is clear that in the present instance that secrecy was not inviolate, for the objectionable report found its way into the press of Kalamazoo within a few hours after it had been filed. Whether the matter contained in such report be true or false, it can make no difference with the principle involved. In either event the accused person is obliged to submit to the odium of a charge or charges based, perhaps, upon insufficient evidence, or no evidence at all, without having the opportunity to meet his accusers and reply to their attacks. This situation is one which offends every one's sense of fair play and is surely not conducive to the decent administration of justice. Upon the coming in of said report, we are of the opinion, that it was the duty of the trial court to have refused to accept it, or file it with the records of his court. Having received and filed it, upon the application of the petitioner, it was plainly his duty to have expunged it from the files. The writ will issue as prayed." (Italics added.)

In Re Report of Grand Jury of Baltimore City, decided by the Court of Appeals of Maryland in 1927, 152 Mary. 616, 137 A. 370, the grand jury made a final report

to the court containing the criticism of the methods of construction and the material used in the Clifton Park High School. It also alleged lack of proper supervision in the construction and made recommendations as to how such work should be done in the future. Some of those offended by the order made a motion to expunge the report from the record. The lower court refused to grant the motion and on appeal the Court of Appeals of Maryland reviewed many of the cases, citing with approval those cases holding that a grand jury has no right to make a "presentment" which does not constitute, for practical purposes, an indictment. The court also pointed out that a "presentment" and an indictment as defined at common law were practically the same thing except that a "presentment" was an informal charge made by the grand jury to the prosecuting attorney upon which presentment the prosecuting attorney could base an indictment and that the use of the word "presentment" to identify a written report of a grand jury which does not charge in indictable offense is in fact a misnomer. The court said:

"The report in the present case does not charge any violation of law, but is a censure of the conduct of persons engaged in the public business, impugning their integrity and fairness and pointing them out as *public servants whose official acts should merit condemnation at the hands of the people*. The function of the grand jury is to investigate violations of the criminal law, and in performing this function their inquisitorial powers are unlimited. If, however, having exercised these powers in any given case, there is lacking sufficient evidence to indict, their duty in that particular case ceases, and, under their oath, nothing transpiring within their body should be made public. It is apparent that this should

be so, for the protection of the good name and reputation of the people, otherwise a condition would exist which the establishment and zealous maintenance of the grand jury was intended to prevent; namely, that of having an individual publicly charged with misconduct without probable cause. If there is sufficient evidence of the commission of a crime, it is the duty of the grand jury to indict, that is, to take such action as will bring the party to trial; if there is not, the citizens are and should go protected against accusations by that body which do not mount up to a criminal offense."

In *State v. Bramlett*, decided in 1932 by the Supreme Court of South Carolina, 166 S. C. 323, 164 S. E. 873, the grand jury made a report which they called a "presentment" in which they cited alleged misconduct of the *sheriff*. He made a motion to strike on the grounds that the grand jury had no authority to make such a "presentment". The Supreme Court of South Carolina clearly held that a grand jury had no authority to make such so-called "presentments"—that the only presentment they could make was one stating a public offense upon which an indictment could be drawn.

"But a grand jury transcends its powers and exceeds its duty when in its presentment it expresses its opinion of the force and *effect of the evidence which it has heard*, *ex parte*, or has itself collected in its investigations, or when it discusses that evidence, and/or, when it *presents an officer or person by name, and with words of censure and reprobation, without presenting him for indictment, or without finding a true bill against him* on a bill of indictment in its hands. Even then it should be careful to refrain from any expression of opinion of the guilt of the person, or any words of condemnation. The

reason for this rule of law is obvious. (*Italics added.*)

* * * * *

“These rights and guaranties would be denied him if the grand jury in its presentment to the court could prejudge the question of his guilt or innocence by the expression or suggestion of the strength of the evidence which its investigation has disclosed. Its province is to present the person for the definite crime to which it thinks the evidence points, with the names of the witnesses, and/or the documentary evidence in proof of the charge. If the grand jurors are acting on an indictment already given them, their return of ‘True Bill’ or ‘No Bill’ expresses their *prima facie* reaction to the *ex parte* evidence. Beyond this they have no right nor power to go.”

In *Re Grand Jury Report* decided by the Supreme Court of Wisconsin in 1931, 204 Wis. 409, 235 N. W. 789, the grand jury made a report in which it criticized the conduct of a certain individual without returning an indictment against him. This individual made an application to expunge and strike the report from the record which motion the lower court denied. The Supreme Court of Wisconsin, on appeal reversed the case and directed the lower court to expunge the report from the files. The court, in making its decision, said:

“The controlling issue involved in this appeal is whether or not the grand jurors had the right to file the report in question with the court. The petitioner urges that the report should have been stricken out in its entirety or at least those portions thereof which he claims refer to him, the portions being specifically set out in the petition which he filed. This raises the question as to whether or not a grand jury has legal authority to file a report other than

the report of progress and the returning of indictments. It is a fact that at various times courts have accepted such reports made by grand juries, and this seems to have been done upon the theory presented and very ably discussed by the learned trial court in his opinion at the time of his decision upon petitioner's application. At times these reports have gone unchallenged. At other times they have been challenged, and requests have been made to strike them from the files. *When an issue has been joined, the rulings of courts of last resort in the vast majority of instances have been to the effect that a grand jury has no authority to make a report criticizing individuals either by name or by inference, and that the grand jury's powers and authority are limited to those conferred upon it by law.*" (Italics added.)

The court then cited with approval the many other cases holding that a grand jury has no right to make written reports criticizing the conduct of individuals without in fact returning a true bill or indictment against such individuals.

The appellant has cited as authority a Florida case, *In Re Report of Grand Jury*, 152 Fla. 154, 11 So. (2nd) 316. In this case the jury addressed a *written report to the Governor* urging the *removal* of a public officer for his misconduct in office. The majority of the Florida Supreme Court would not grant a motion to expunge and said:

“* * * Their investigation must be directed to detecting unlawful offenses; they will not be permitted to become the tool of blocs and groups to pry into personal affairs or to oppress some one. Neither will they be permitted to speak of the *general qualification or moral fitness* of one to hold an office or position but whether or not a county office is being

*conducted according to law and good morals is at all times within the jurisdiction of the grand jury to investigate. When they find that the law has been violated, it is their duty to indict but when they find charges made to be without foundation, it is as much their duty to exonerate as it is to indict in the first instance. * * ** (Italics added.)

Two of the judges dissented from even this limited "presentment" on the grounds that the grand jury had no authority but to indict and said:

"It appears to be the theory, *upon which all the cases hereinbefore referred to were decided*, that it is beyond the province of a grand jury to present an officer or other person by name and with words of censure and reprobation without presenting him for indictment, because to do so is to besmirch and hold to reprobation the accused without opportunity to defend or protect his name and reputation."

This case is at most authority for the proposition that a written report may be made charging misconduct in office upon which a removal may be based. Two of the justices dissented to even this limited right to present.

The right of a grand jury to make "presentments" which do not charge a public offense but simply censure, is discussed in three American Law Report Annotations: 22 A. L. R. 1366, 106 A. L. R. 1388, 120 A. L. R. 437. In 106 A. L. R. 1388 the commentator states the general rule as follows:

"A person censured, criticized, or ridiculed in a report by a grand jury, or of a committee appointed by it, may have the report expunged from the offi-

cial records where it does not amount to an indictment or presentment. * * *

In commenting on this quotation it is important to point out that the word "presentment" is used in its common law sense, that is, a written charge by the grand jury to the prosecuting attorney, charging a public offense, and not a written report censuring public officials for matters which do not constitute public offenses or do not constitute actions upon which a removal proceeding may be based.

The general rule is also stated in Volume 24, *American Jurisprudence*, at page 859, as follows:

"A presentment is distinguished from an indictment in that the former is an informal accusation, made by the grand jury on its own knowledge, to be used by the prosecutor as the basis for a true bill or indictment. In its stricter meaning, a presentment has been said to be an accusation by the grand jury *sua sponte*, made *ex mero motu*, whereas an indictment is a written accusation, preferred to the grand jury and presented upon oath at the instance of the government. Although presentments or reports may be returned *in those cases authorized by statute*, it appears that the practice has largely fallen into disuse in this country; and in the absence of statute, a grand jury *has no right to file a report reflecting on the character of conduct of public officers or citizens, unless it is followed by an indictment*. It is the right of a person censured or criticized by a report of the grand jury to have it expunged from the official records. A libel may be predicated on a report not amounting to an indictment or presentment, since such report, being extrajudicial, is not privileged, although there is some authority that a report filed in good faith is not actionable without proof of malice. * * *

The Indiana Supreme Court has held with the courts herein relied on. See *Coons v. State*, 191 Indiana 580, 134 N. E. 194, wherein a report charging a judge with bias and with favoring criminals and calling for his resignation was held unauthorized.

CONCLUSION

From the historical and statutory viewpoint it must be concluded that, with the exception of the Jones case and the one or two New York cases that indirectly seem to follow the majority opinion of that decision, and with the exception of the Irwin and New Jersey case, which were actions for libel, there is no authority which will support a grand jury report which holds up for ridicule and public censure individuals and public officials without giving them a right to defend. On the other hand, all other authorities in many jurisdictions where the question has arisen, directly, have repudiated this unfair practice and have granted motions to expunge or quash or strike the report so made.

We therefore respectfully submit that this Court should affirm the decision of the lower court.

CLIFFORD L. ASHTON,

Attorney for

H. C. Shoemaker, William A. Dawson, Philo T. Farnsworth, D. H. Whittenburg, Harley Corleissen and Layton Maxfield,

Plaintiffs and Respondents.

C. M. ALDRICH,

Attorney for Provo City

Plaintiff and Respondent.