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Recommended Citation

Harold L. Cross, *Some Twilight Zones in Newspaper Libel*, 1 Cornell L. Rev. 238 (1916)
Available at: <http://scholarship.law.cornell.edu/clr/vol1/iss4/6>

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Some Twilight Zones in Newspaper Libel

BY HAROLD L. CROSS¹

In a country which has constitutional guaranties of freedom of speech and of the press—an organic law which declares that “every citizen may freely speak, write and publish his sentiments on all subjects”—there is probably no field of jurisprudence which possesses more interest, more transcendent importance than that of defamation, which declares when, under what circumstances and to what extent one has been guilty of an “abuse of that right” of freedom of speech and press, for which he is “responsible”.^{2a}

Because of that tremendous importance, and it is as essential to curb and punish the acts of those who have abused that right as it is to nourish and safeguard that right in the absence of abuse, it has been difficult and is becoming increasingly difficult for the courts and journalists to steer a safe and true course between the Scylla of undue restraint and the Charybdis of abuse. That difficulty has been to a large degree the source of many highly technical and some even highly illogical principles of the substantive law of defamation and of pleading and practice in libel cases. As a practical consideration, that conflict between undue restraint and abuse in its larger aspects and for reasons which are apparent is confined to the newspaper field.

It is not the purpose of the writer technically to discuss or to comment at length upon any of the numerous principles of newspaper libel law which are of far-reaching importance, but which are thoroughly established and generally known. It is his purpose to point out several of the many “twilight zones” of newspaper libel, briefly to state the problems presented, and in a general way, urge the reasons and considerations which it would seem on principle should determine the disputed questions one way or the other. In that field of jurisprudence there are many questions remaining undetermined which bear a weighty significance in the intricate, complex and necessarily rapid work of publishing a great daily newspaper.

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^{2a}Constitution of New York, Article I, section 8.

The Effect of Code of Civil Procedure, section 535

That section, adopted many years ago, worked a revolution in the form of a plaintiff's pleading in a libel action. On the whole its effect has been salutary. It provides: "It is not necessary, in an action for libel or slander, to state, in the complaint, any extrinsic fact, for the purpose of showing the application to the plaintiff, of the defamatory matter; but the plaintiff may state generally, that it was published or spoken concerning him; and, if that allegation is controverted, the plaintiff must establish it upon the trial. In such an action, the defendant may prove mitigating circumstances, notwithstanding that he has pleaded or attempted to prove a justification."

Its purpose is plain. The office of the "inducement", so-called, under the old pleading, was to connect the defamatory words with the plaintiff by setting forth extrinsic facts showing that those words applied to the plaintiff; that is to say, to state the extrinsic facts showing that the words *in fact* related to him. Under the code section the "inducement" is unnecessary to accomplish the purpose it formerly served. That purpose is now accomplished by the mere allegation that the words were published of and concerning the plaintiff.

In two respects that section has been thoroughly and beyond all question accurately construed by the courts.

(1) The allegation that the defamatory words were published of and concerning the plaintiff is in all cases and under all circumstances sufficient as a matter of pleading to show that the words *in fact related to the plaintiff*.²

(2) A complaint is fatally defective despite the presence of that allegation where other averments in the complaint demonstrate that such allegation is false.³ This is true whether such falsity is demonstrated by allegations in the complaint of extrinsic facts⁴ or by the statements contained in the published matter complained of.⁵

But beyond those two thoroughly established principles comes a "twilight zone". What is to be said of a case of a newspaper article which is so obscure in its reference to the plaintiff that no reader could, by any possibility, from a perusal of the published words

²Weston v. Commercial Advertiser Assn., 184 N. Y. 479 (1906).

³Fleischmann v. Bennett, 87 N. Y. 231 (1881); Corr v. Sun Printing and Pub. Assn., 177 N. Y. 131 (1904); Pagan v. Evening Journal Co., 129 App. Div. (N. Y.) 28 (1908); Knickerbocker v. Press Pub. Co., 143 App. Div. (N. Y.) 138 (1911).

⁴Fleischmann v. Bennett, *supra*, note 3; Corr v. Sun Printing and Pub. Assn., *supra*, note 3.

⁵Bosi v. Herald, 33 Misc. (N. Y.) 622 (1901); Maglio v. Herald, 93 App. Div. (N. Y.) 546 (1904).

associate the plaintiff with them—where it appears from the complaint itself that no evidence could be given upon the trial that would show the plaintiff to have been injured by the publication sued upon?

It is true beyond all question that "a newspaper article may be so general and indefinite in its terms that no one reading it could understand that it applied to any particular person."⁶ In the case of such an article, is the mere allegation that the words were published of and concerning the plaintiff sufficient to save the complaint from fatal defectiveness on demurrer? In such a case can there be any allegations which will save the complaint?

It is submitted that on principle such an article is not rendered actionable because of the presence in the complaint of the allegation permitted by the Code of Civil Procedure, section 535; that it cannot be made actionable by any allegations whatever. The authorities have not settled the question.

At the outset it must be conceded that the allegation that the article was published of and concerning the plaintiff is not a conclusion of law, but is an averment of fact, the truth of which is admitted by demurrer, except where the complaint contains other statements which show that averment to be false.⁷

That this is so, is apparent from the code section itself which provides: "If that allegation is controverted, the plaintiff must establish it on the trial." It is true that in *Bosi v. Herald*, *supra*, and in several other cases, the contrary is stated, but those were instances where other allegations in the complaint showed that averment to be false. Upon demurrer, therefore, the defendant publisher of such an article admits, as a matter of law and as a matter of fact, that the article was *in fact* published of and concerning the plaintiff; that, *in fact*, it related to him. It is submitted, however, that the defendant upon demurrer concedes only that and nothing more. On the other hand, it must be admitted that a plaintiff to succeed must establish:

- (1) That the libel was *in fact* published of and concerning him.
- (2) That the libel was of such a character that it described him with sufficient certainty to enable readers to apply to him the defamatory imputation.⁸

⁶Mr. Justice Patterson in *Nunnally v. Tribune Assn.*, 111 App. Div. (N. Y.) 485 (1906).

⁷*Weston v. Commercial Advertising Assn.*, *supra*, note 2; *Nunnally v. Tribune Assn.*, *supra*, note 6.

⁸*Stokes v. Morning Journal*, 72 App. Div. (N. Y.) 184 (1902).

Upon demurrer to a complaint containing the allegation provided for by the code section, the defendant, as above stated, admits the first element above stated, but it is submitted that he does not admit the existence of the second element. If the second element does not exist, the plaintiff has no action, because the highest and most indispensable element in all tort actions, *damage to the plaintiff*, has not been created. It is necessary to bear in mind the distinction between the fact that an article was in fact published of and concerning the plaintiff and the impression produced upon the mind of the reader that the article was published of and concerning the plaintiff. That distinction seems fundamental and manifest. Concretely, it may be illustrated as follows:—A's place of business is robbed. A reporter interviews A and asks him if he suspects any person, whereupon A replies, "Yes, this is the man who did it; here is his photograph." The reporter recognizes the individual whose photograph it is and proceeds to tell that individual of A's accusation. The reporter writes up a story, giving all the facts above stated, but mentioning no names or other matters which could serve as means of identification. The man accused by A, the man whose photograph was shown, brings an action against the newspaper, alleging that the article was published of and concerning him. The defendant knows that the article was published of and concerning the plaintiff. The plaintiff also knows it and could easily prove it on the trial by the testimony of the reporter. It is apparent, however, that no reader could by any possibility know that the publication in fact related to the plaintiff.

Let us take a particular publication. A newspaper says, "Yesterday at Fourteenth Street and Broadway, New York, a homicide was committed. A stocky man with dark hair is suspected of having committed the deed". A stocky man with hair of that hue, knowing that he is under suspicion, but considering that that suspicion is unwarranted, commences a libel suit and alleges that the words were falsely published of and concerning him, charging him with murder. The defendant demurs, thereby admitting that in fact the words did relate to that stocky man. It seems apparent that no reader could, by any possibility, from a perusal of those two sentences, associate that stocky man with the defamatory imputation and that, therefore, the man has not been injured and no action should lie. Upon the trial of such an action no witness, whose testimony could be obtained, could testify to facts which would show that, from a perusal of the article, he derived a defamatory imputation upon the plaintiff. The only person who, by

any possibility, could so testify, would be one who was present with a "stocky man with dark hair," known to him to be the plaintiff, on the occasion of his visit to Broadway and Fourteenth Street and who participated in or observed all of the transactions there resulting in the death of the victim. Even if such an impossible witness should attempt to testify to such an inconceivable state of affairs, his testimony would defeat the plaintiff because if the matters stated in the article are false, as the plaintiff claims, such a witness would know them to be so and the article would, therefore, not injure the plaintiff in his estimation; and since, if the matters stated in the article are true, such a witness would know them to be and the plaintiff would have nothing of which to complain. Hence the article could not affect the reputation of the plaintiff in the mind of such a witness and the plaintiff would not be damaged. Occasionally, in such cases, complaints contain allegations to the effect that readers understood that the article related to the plaintiff. This is not an allegation of fact but a mere conclusion, and, furthermore, it is apparent from the complaint itself in such a case that no testimony could be given in support of such an allegation. Witnesses would not be allowed to testify on the trial that they recognized the plaintiff as the person referred to in the article.⁹

Sometimes a plaintiff in such a case claims that upon the trial for the purpose of showing that readers might have recognized him, evidence could be offered of prior or simultaneous publications in other newspapers describing and identifying the plaintiff as the subject of the incident narrated in the article complained of. For instance, some other newspaper says, "A murder was committed to-day at Broadway and 14th Street. John Doe is suspected." Such a plaintiff would contend that readers of such other newspaper would know of the crime and of the identity of the suspected miscreant; that such readers perusing the defendant newspaper would recognize the crime and from it would arrive at the conclusion that the "stocky man with dark hair" of the plaintiff is the "John Doe" of the other newspaper. Although that contention seems unsound, it must be admitted that it received a measure of support in the case of *Van Ingen v. Mail & Express Co.*,¹⁰ decided in 1898 by a divided Court

⁹People v. Parr, 42 Hun (N. Y.) 313 (1886), where the court said: "The testimony of witnesses that they recognized Oppenheim as referred to was only a statement of their opinion and this matter was not one for experts. * * * If this kind of testimony were proper, then the defendant could have offered witnesses to testify that they did not recognize Oppenheim as the person referred to, but such testimony would be plainly improper." Stokes v. Morning Journal, 66 App. Div. (N. Y.) 569 (1901).

¹⁰156 N. Y. 376 (1898).

of Appeals, three judges dissenting. The view of the majority was, "I am unable to satisfy myself that the plaintiff had not the right to show all the circumstances existing at the time, including the state of the public mind, the knowledge it must have acquired from previous publications, and any other extraneous matter which would tend to point out the person to whom the defendant's article was intended to apply. Can it be, where two newspapers are published in the same locality, one irresponsible and the other responsible, and the former has published an article severely reflecting upon a party it named, that the other may follow by a publication of the same transaction, omitting the name, and the party injured will, in an action against the latter, be prohibited from introducing the publication by the former as a circumstance showing the state of the public mind, and how the second publication would be understood by persons reading it? I think not. I cannot believe that a newspaper can publish a libel which its editor knew at the time related to a particular individual, and would be so understood by the public by reason of a former publication, and then properly have the publication excluded, although it would show that the community would recognize the plaintiff as the person alluded to in its article. In other words, it seems to me that a defendant cannot publish a libel of another and shield himself by not disclosing the name of the person to whom it was intended to refer, when he knows and understands that by reason of former publications the public mind is in a condition where it would necessarily understand the article as applying to him alone."¹¹ In that case, however, it is a significant fact that the prior libels were proved by the *defendant's* counsel on cross-examination. The majority judges held that, by such cross-examination, the defendant opened the door for the introduction of the prior libels.

The rule said to have been adopted in that case seems both unsound and unjust because (1) it seems to fly in the face of all principles law governing liability in tort actions in permitting a plaintiff to make out a case against a particular defendant by proving acts of third persons (which may in themselves have been lawful acts) for which the defendant was not responsible, over which it has no control and of which it may not even have known.; (2) it is grossly prejudicial to permit a jury to view the statements in other newspapers, when it is engaged in the act of fixing damages for the injury caused by the defendant's statements. Statements in other publications

¹¹Martin, J., in *Van Ingen v. Mail and Express Co.*, 156 N. Y. 376 (1898), at page 387.

might be grossly defamatory, far more so than the defendant's statements. The jury under such circumstances might be, indeed inevitably would be prejudiced. The rule in England is flatly *contra*.¹² The dissenting judges in the *Van Ingen*' case (Bartlett, Haight and Vann, JJ.) were agreed that "These statements or interviews contained direct attacks and charges upon plaintiff by name, and must have confused and influenced the jury when considering the article involved in this action. This evidence was purely hearsay. This rule (referring to the doctrine of the English case cited above and contrary to the view of the majority judges in the *Van Ingen* case) is founded in reason, as it would be most unjust that a defendant in a libel suit should be confronted by independent libels he had not published, and subjected to the peril of submitting them to the jury."

However it may be in a case where prior or simultaneous publications of an identifying nature are involved, it would seem clear that where they are not involved and the article is of the general and indefinite type above described, no extrinsic facts can exist which, if pleaded and proved by competent evidence upon the trial, would show that the readers could associate the plaintiff with the article. It would, therefore, seem, on principle, that a demurrer to a complaint, setting forth such an article, should be sustained. In the usual case where the plaintiff is identified in the article by name or otherwise, it is of course true that, when the plaintiff has once proved that the article was in fact published of and concerning him, it follows as the night the day, without the necessity of proof, that readers might have been able to associate him with the defamatory imputation, but that is not so where the article contains no means of identification whatever. In such a case in the last analysis this situation is presented;—the plaintiff knows the article related to him and so does the defendant, but no one else, from a perusal of the article, knows that fact. Therefore, there is no injury. In legal contemplation, it might be said, there is no "publication." Several analogous situations may be noted.

(1) A writes a defamatory letter concerning B. He walks over to B and hands the letter to him without communicating its contents to any one else. Thus, A and B know the facts, but no one else does. That B has no action is elementary; there was no "publication".

(2) A, in the presence of several persons, utters regarding B defamatory statements in a foreign language, understood by A and B, but not by any of the other persons present. The same rule applies.

¹²*Bourke v. Warren*, 2 Car. & Payne 307 (1826).

(3) A, in the presence of a blind man, says to B, "You have committed murder." A does not mention B's name and the blind man does not know who is present. Again the same rule applies.

The authorities are not conclusive upon the question whether or not a demurrer will lie in such a case. So far as they go, they seem to indicate that the courts will not sustain a demurrer.

There are many instances in which defendants have sought to limit the effect of the Code of Civil Procedure, section 535, where the plaintiff was merely not named or where the means of identification were slight. Such cases are not in point in the present inquiry, because, if the slightest means of identification in the minds of readers are present, a complaint containing the allegation permitted by the code is thoroughly and admittedly sufficient for reasons already discussed.

Only two cases in New York have been discovered after an exhaustive search in which the precise question under discussion here was raised and presented to the court for determination.¹³ Those cases, it must be conceded, are contrary to the contention that a demurrer will lie. Both of those cases, however, were decided by the intermediate appellate court in the second judicial department of New York. Without doubt, the earlier *Townes* case was regarded as decisive of the *Bresslin* case, but it is significant to note that Mr. Justice Jenks, who concurred in the *Townes* case, dissented as presiding justice in the *Bresslin* case. In the *Townes* case the article was to the effect that Edison had declared that he would "pursue the man who misled his son with his last dollar. Edison calls them crooks. * * * * They are crooks of the most dangerous pattern. I know every one of them. I have looked them all up." The defendant's demurrer was overruled upon the ground that "the article is libelous *per se*, and obviously refers to some person or persons. The allegation that it refers to the plaintiff is an allegation of fact (Code Civ. Proc., section 535) which the demurrer necessarily admits."

In the *Bresslin* case the article asserted that the plaintiff had been accused of larceny. The only statements regarding the plaintiff were that he was "a stocky man with a blank expression", a "deaf and dumb man", a "stranger". The defendant's demurrer was overruled at special term upon the ground that the statements in the article "are sufficient to permit the allegation provided for in section 535 of the Civil Code." Of course, the

¹³*Townes v. Evening Journal Pub. Co.*, 109 App. Div. (N. Y.) 852 (1905); *Bresslin v. Tribune Assn.*, N. Y. L. J. Je. 8, 1915.

defendants in the *Townes* and *Bresslin* cases did not contend for a rule contrary to that proposition. *What they did contend was that no reader could have known that the plaintiff was the person referred to.* The distinction between the two propositions has been pointed out above. But in neither of the two cases cited was that distinction commented upon, discussed or rejected by the courts. The Appellate Division affirmed the special term order in the *Bresslin* case without opinion, the presiding justice dissenting. On the other hand, there seems to be no decision in New York supporting to the full extent the doctrine that a demurrer should be sustained; yet there are utterances by high appellate courts in this state logically supporting such doctrine, although the precise question was not presented for determination. Thus, in *Stokes v. Morning Journal Assn.*¹⁴ the court said: "The plaintiff was bound to prove to the satisfaction of the jury that the libel was spoken of and concerning the plaintiff, and was of such a character that it *described* the plaintiff with sufficient certainty to enable his personal acquaintances *on reading it* to apply to him the slanderous imputation; otherwise, however gross the charge, it is no libel upon him."

So, in *Corr v. Sun Printing and Pub. Ass'n.*,¹⁵ Bartlett, J., used these words: "It is doubtless true that an action for libel may be maintained where the plaintiff is not named but is identified by circumstances contained in the article which are capable of direct proof that the plaintiff was the person to whom reference was made."

The only decision in this state in which the doctrine contended for by the defendants in the *Townes* and *Bresslin* cases, *supra*, was discussed by the court, is *Nunnally v. Tribune Ass'n.*,¹⁶ where Mr. Justice Patterson said at page 489: "We may assume that a newspaper article may be so general and indefinite in its terms that no one reading it could understand that it applied to any particular person, and it may be that by selecting himself as the person referred to in the defamatory matter when it may apply as well to any of an indefinite number of other persons, something more would be required from a plaintiff in pleading than the formal statement authorized by the section of the Code cited. But we conceive the rule to be, under the Code, that where it appears on the face of the complaint that evidence may be given by a plaintiff which will undoubtedly connect him with the alleged libelous matter, such a complaint is sufficient where it charges that the matter was published of and concerning him."

¹⁴*Supra*, note 8.

¹⁵*Supra*, note 3.

¹⁶*Supra*, note 6.

In that case the court held that the article contained statements which could serve as means of identification in the minds of readers. Mr. Justice Patterson's language would indicate that, if those means of identification had not existed, "something more would have been required from the plaintiff". It would also appear from the language of Mr. Justice Patterson that, where it does not appear on the face of the complaint that evidence may be given by a plaintiff which will undoubtedly connect him with the alleged libelous matter, a demurrer would lie. Two judges of the Appellate Division (Ingraham and Clarke) concurred in the result of the *Nummally* case, but not in the opinion. The reason why they did not concur in the opinion may be found in the opinion of Mr. Justice Ingraham in his strong dissenting opinion in the case of *Nummally v. New-Yorker Staats-Zeitung*,¹⁷ a case involving a similar publication and the same question of law. In that dissenting opinion that learned justice said: "There is nothing here to connect this person spoken of with any particular woman, so that the proof of any existing fact could show that it applied to the plaintiff."

From the state of the authorities it seems to be true that, so far as New York is concerned at least, this question remains substantially undetermined.

Other considerations depending upon the determination of that question are of great practical interest. If a demurrer in such a case is not sustained, what will take place upon the trial? The plaintiff would prove that the article was published; that it was false and that he was the person in fact referred to. He can prove nothing more and must rest. Will the court then dismiss the complaint? It would hardly seem so, for the plaintiff has proved all that he has alleged and those allegations are deemed sufficient to make out a cause of action, if a demurrer is properly overruled. Must the case then go to the jury after the defendant has put in its evidence, despite the fact that no proof has been made that readers understood the plaintiff was referred to and despite the fact that it cannot be assumed, without proof, that they did so? Must the defendant take the burden, and surely it is not in logic or in law his burden, of showing that readers did not so understand? How can a defendant show that they did not? If the case goes to the jury, what instructions must the court give, adequately to protect the defendant's rights? If the jury returns a verdict for the plaintiff, must the court set it aside? It would seem so, for it can scarcely be doubted

¹⁷111 App. Div. (N. Y.) 482 (1906).

that there must be proof not only that the article related to plaintiff, but also that other persons, beside the plaintiff and the defendant, knew that fact,—that there was in contemplation of law a “publication” and ensuing damages. If the court must set aside the verdict, it seems a palpable absurdity to subject the parties to the expenditure of time and money required by the trial of the issues of fact where it is apparent first and last that the plaintiff has no cause of action. All these questions remain for determination.

Just a word as to the importance of this matter from a journalistic point of view. These considerations bear upon the inherent merits of such a controversy. Suppose the fact to be that at the time of the transactions referred to in the article, the name of the plaintiff was mentioned, but the defendant, for the purpose of preventing injury, cannot and does not assume his guilt and takes pains to see that, in its report thereof, the good name of the plaintiff is not involved. If a complaint based on such an article is sustained, the defendant must plead and stand trial, just as if it had actually libeled the plaintiff by holding him up by name as the perpetrator of a crime. Such a result amounts to the imposition of a penalty upon a careful and conscientious publisher and a premium upon the act of a reckless and wanton one.

*Is A “Fair And True Report” of Grand Jury
Proceedings Privileged?*

Code of Civil Procedure, section 1907, adopted in 1854, but in most respects substantially declaratory of the common law. as amended, provides: “An action, civil or criminal, cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein of a *fair and true report of a any judicial, legislative, or other public and official proceedings*, without proving actual malice, in making the report.”

A newspaper publishes a fair and true report of the testimony of A before the grand jury, in the course of which he makes defamatory utterances against B. B commences a libel suit alleging that A’s testimony was false. May the defendant publisher plead and prove a defense in justification upon the ground of statutory privilege by setting forth in its answer and establishing upon the trial that A made such statements, or must it assume what may be the tremendous burden of pleading in the answer and proving upon the trial that A’s defamatory utterances regarding B were in fact true?

There is probably no doubtful question in the law of libel which is of more importance in the journalistic field. At the outset it is perhaps desirable to clear away a misconception regarding testi-

mony before, and proceedings of, a grand jury which is widely prevalent in the minds of laymen, and is quite so among members of the bar. It is the general notion that transactions which take place in the grand jury room are in all cases and under all circumstances matters of great and sacred secrecy, matters which must be discussed in awed whispers behind closed doors, and that when such matters are published, information regarding them must have been obtained by reporters in some devious, circuitous and stealthy fashion. That notion is wholly erroneous: As a matter of public policy it seems clear that grand jury matters should be preserved in inviolate secrecy where that course subserves the best interest of the public, and that they should be known to the wide world where publicity is desirable. Thus, it is true in general that, where the grand jury is investigating the commission of a particular crime and the probability that a particular person committed the same, the interests of justice require secrecy, lest the accused malefactor escape the jurisdiction of the court, destroy the evidence of the commission of the crime, or wreak vengeance upon his accusers. On the other hand, it is a widely known fact that where grand juries are investigating widespread scandals and evils, crimes of many ramifications and involving many individuals, public knowledge of discoveries leads to beneficial results in the interests of justice and of the public, because of the tendency to induce and compel persons familiar with the matters under investigation to come forward and disclose full information or confess their culpability in the hope that such conduct will secure clemency for themselves. Furthermore, such public disclosures tend strongly to cause influential and public-spirited citizens and organizations to rally to the assistance of the prosecuting officials, to enlist the support of the press and to rouse the public from stagnation or indifference to indignation and to the assertion of a demand that the law be enforced at whatever cost. Many recent and even current instances of the desirability of publicity could be given and much more could be said regarding the considerations of public policy involved, if space permitted. As regards secrecy, the legal principles involved, though somewhat obscure and not generally known, as stated above, are thoroughly established.

Except as forbidden by law, testimony taken in the grand jury room may be disclosed and made public as soon as it is given.¹⁸

¹⁸Matter of Osborne, 62 Misc. (N. Y.) 575 (1909); *People v. Naughton*, 7 Abbott's Pr. (N. S.) (N. Y.) 421 (1870), where the court said (page 428): "The only secrecy that has been strictly enforced in this country or in England in the grand jury system, is that contained in the oath (taken by the grand jurors) and

Whatever the situation may be in other jurisdictions by decisions or statute, the only legal prohibitions of such disclosures and publicity in New York seem to be as follows:

(1) A grand juror "must keep secret whatever he himself, or any other grand juror, may have said, or in what manner he, or any other grand juror, may have voted on a matter before them."¹⁹

(2) A stenographer before a grand jury is required by law "to furnish to the district attorney of such county, a full copy of all such testimony as such district attorney shall require but he shall not permit any other person to take a copy of the same or of any portion thereof, nor to read the same or any portion thereof, except upon the written order of the Court, duly made after hearing the said district attorney."²⁰

(3) The minutes are required by law to be kept in the custody of the district attorney and "neither the same nor a copy of the same, nor any portion of the same, shall be taken from the office of said district attorney, excepting as above provided."²¹

It is to be noted that a district attorney is not required to keep secret the contents of the minutes, but only to retain possession of the written documents themselves. Except as above stated, it seemed no legal obligations of secrecy attach to grand jury testimony or proceedings in the State of New York. Thus, "a person subpoenaed to attend as a witness before the grand jury may, upon leaving the grand jury room, state to anybody and everybody what he testified to."²² So, "an attorney attending under circumstances where he is authorized to attend before a grand jury may, upon leaving the grand jury room, lawfully state to anyone and everyone what testimony was given in the grand jury room while he was there."²³ So, where the Attorney General through his deputy is in charge of criminal investigations, that deputy has a perfect legal right to make public

statutes. * * * There is no secrecy imposed upon a witness before a grand jury, either as to the fact of his being called before them or as to what he testifies to. The minutes of the evidence taken are given to the district attorney. This seems conclusive that the names of the witnesses and their testimony before a grand jury are not matters required by law to be kept secret. * * * That there was never any secrecy in this country in regard to who testified before a grand jury, is shown by the fact that until recent statutes were passed giving the foreman power to administer oaths, the witnesses were sworn in open court and such is the custom now in many of the States, and in some of the circuit courts of the United States; and in some of the States the accused may be present at the examination of the witnesses."

¹⁹Code of Criminal Procedure, sec. 265.

²⁰Laws of 1907, chap. 587.

²¹*Supra*, note 20.

²²Mr. Justice Crain in *Matter of Osborne*, *supra*, note 18.

²³Mr. Justice Crain in *Matter of Osborne*, *supra*, note 18.

grand jury proceedings and testimony.²⁴ A district attorney himself has a perfect legal right to disclose such matters. That there is nothing inherently secret in grand jury proceedings and testimony is also evidenced by the fact that the court has power to permit the indicted person to inspect the same and by the fact that a member of the grand jury may be compelled by the court to disclose the testimony of a witness for the purpose of ascertaining whether it is consistent with that given by the witness before the court.²⁵

It is well known to those familiar with such circumstances that prosecuting officials frequently make such accounts public. In general, such officials in doing so strongly serve and benefit public interests. In doing so in a proper case they should receive unanimous support. Having in mind that grand jury matters are not inherently secret and that there is, therefore, no insurmountable obstacle at the threshold of the inquiry stated above, it is apparent that the answer to that inquiry must depend upon two considerations:

- (1) Are grand jury proceedings "judicial"?
- (2) If not, are they "public and official"?

If the answer to both of these interrogations is in the negative, the newspaper publishing A's grand jury testimony regarding B, must plead and prove that A's utterances were in fact true.

(1) Are grand jury proceedings judicial? There seems to be only one case in the State of New York directly in point.²⁶ In the *McCabe* case it was held in substance that a fair and true report of grand jury proceedings is not privileged under the statute because those proceedings are not "judicial." That was a decision made by a single justice at a trial term of the New York Superior Court in 1865. The case seems not to have been seriously presented or well considered. The reasoning of the opinion is not satisfactory and the fallacy thereof appears when read in connection with what has been said above regarding secrecy. The decision was made upon two grounds:

(1) that the Act of 1854 (Code of Civil Procedure, section 1907) did not contemplate proceedings before a grand jury "because it begins by speaking of reporters, editors or proprietors of newspapers, a class who are never admitted before the grand jury";

(2) that the law imposes secrecy on the grand jurors and that, if the law did not contemplate that, an editor or reporter of a newspaper could divulge what transpires.

²⁴Matter of Osborne, *supra*, note 18.

²⁵Code of Criminal Procedure, section 266.

²⁶*McCabe v. Cauldwell*, 18 Abb. Pr. (N. Y.) 377 (1865).

Curiously enough, in that case Mr. Justice McCunn expressed his disapproval of the grand jury system because, "Great wrongs are frequently inflicted upon innocent persons arising absolutely from" the "exclusive practice" of grand juries. He also said, "If, however, we are to keep up this semblance of ancient times, the last remnant of a system that has long since passed away, then I say their proceedings should be open to the public."

Space does not permit an elaborate discussion of the nature, characteristics, functions and powers of a grand jury at common law. The grand jury was an established institution of English law long before the Norman Conquest.²⁷

Perhaps the best judicial description of a general character of the functions of a grand jury in American jurisprudence is that contained in *Matter of Bain*,²⁸ where Mr. Justice Field is quoted as saying: "The institution of the grand jury is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem, from the accounts of the commentators on the laws of that country, *that it was at first a body which not only accused, but which also tried, public offenders.* However this may have been in its origin, it was at the time of the settlement of this country an *informing and accusing tribunal* only, without whose previous action no person charged with a felony could, except in special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. *Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designated as a means not only of bringing to trial persons accused of public offenses upon just grounds, but also of protecting the citizen against unfounded accusation, whether it comes from the government, or be prompted by partisan passion or private enmity.* No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body,

²⁷Black's Constitutional Law (3d ed.), p. 681.

²⁸121 U. S. 1 (1886).

consisting of not less than sixteen, nor more than twenty-three good and lawful men, selected from the body of the district, shall declare upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial."

In New York it has been said: "The grand jury is an institution that we inherited with the common law. It is for many legal purposes rather difficult of classification. It is neither a regularly organized tribunal, nor yet an entirely informal body. While in a certain sense a part of the court in connection with which it conducts its deliberations, it is, for many purposes, free from any restraint by that court."²⁹

The grand jury "is the grand inquest between the government and the citizen. It is of the highest importance that this institution be preserved in its purity and that no citizen be tried until he has been regularly accused by the proper tribunal."³⁰

In New York a grand jury has statutory power to inquire of crimes committed or triable in the county; and to inquire into the case of every person imprisoned in jail and not indicted; into the condition and management of public prisons and into the willful and corrupt misconduct in office of public officers of every description.³¹

It has power to "make full investigation to see whether a crime has been committed and if so who committed it. They (grand jurors) may investigate on their own knowledge or upon information of any crime derived from any source deemed reliable; may swear witnesses generally and may originate charges against those believed to have violated the criminal laws."

A grand jury is clearly an "adjunct of the court," a "part of the court," "an appendage of the court." Thus by the Code of Criminal Procedure, it is a "body of men returned * * * * before a court * * * * to inquire of crime committed or triable in the county";³² it "must be drawn for every term" of certain courts;³³ a list of the persons drawn as grand jurors "specifying for what court they shall have been drawn" is delivered to the sheriff.³⁴ The sheriff must return the list of persons drawn as grand jurors "to the court at the opening thereof";³⁵ when a person drawn as a grand juror

²⁹People v. Glenn, 173 N. Y. 395 (1903).

³⁰People v. Briggs, 60 How. Pr. (N. Y.) 17 (1880).

³¹Code of Criminal Procedure, secs. 223-260.

³²Code Crim. Proc., sec. 223.

³³Code Crim. Proc., sec. 225.

³⁴Code Crim. Proc., sec. 229-i.

³⁵Code Crim. Proc., sec. 229-j.

shall have attended "and performed his duty as such at any court" he shall not be required to serve again during the year";³⁶ the sheriff must summon the persons drawn "to appear in the court";³⁷ and they must serve "unless excused or discharged by the court";³⁸ they may be discharged "in the same cases in which trial jurors" may be discharged.³⁹

The decisions emphasize the fact that the grand jury is an "adjunct" or "appendage" of the court. In *Matter of Choate*⁴⁰ the court said: "It is clear from the elementary writers, and from what the Court of Appeals implied in the *Hackley* case,⁴¹ that the grand jury room is an enlargement of the court room and part of the court sitting."⁴²

Those statutes and decisions and many others which might be cited make it clear that the grand jury is an integral part of our judicial system; that it is as much a part of that system as is a trial juror or a judge. Furthermore, the grand jury is judicial in another sense. Its proceedings partake of the nature of judicial action. Thus, by the Code of Criminal Procedure, its deliberations are required to be *fair and impartial*,⁴³ *none but legal evidence can be received*,⁴⁴ it can require the district attorney to issue subpoenas for witnesses,⁴⁵ disobedience of such subpoena is punishable as a criminal contempt of court,⁴⁶ a subpoena is "process by which the attendance of a witness before a court or magistrate is required"⁴⁷; when the grand jury believes that evidence exists which may explain away a charge, it is its duty to require such evidence to be produced.⁴⁸ This aspect of the matter is strongly emphasized by the decisions. Thus, an indictment found without evidence or upon illegal or incompetent testimony is not valid.⁴⁹ The refusal of a witness to answer proper questions before a grand jury has been held punishable as a contempt of court under a statute which declared a refusal to answer a question in proceedings upon indictment to be a contempt of court. Such a refusal is a contempt "in the face of the court."⁵⁰

³⁶Code Crim. Proc., sec. 229-n.

³⁷Code Crim. Proc., sec. 232.

³⁸Code Crim. Proc., sec. 232.

³⁹Code Crim. Proc., sec. 229-l.

⁴⁰24 Abb. New Cases 430 (1890), aff'd without opinion in 121 N. Y. 678 (1890).

⁴¹24 N. Y. 78 (1861).

⁴²*People v. Naughton*, *supra*, note 18; *People ex rel. Hackley v. Kelly*, 24 N. Y. 74 (1861).

⁴³Code Crim. Proc., sec. 245.

⁴⁴Code Crim. Proc., sec. 256.

⁴⁵Code Crim. Proc., secs. 257-263.

⁴⁶Code Crim. Proc., sec. 619.

⁴⁷Code Crim. Proc., sec. 607.

⁴⁸Code Crim. Proc., sec. 257.

⁴⁹*People v. Glenn*, *supra*, note 29.

⁵⁰*People ex rel. Hackley v. Kelly*, 24 N. Y. 74 (1861), affirming the decision of Mr. Justice Leonard in the same case at the General Term of the Supreme Court, reported in 21 Howard's Practice (N. Y.) 54. There Mr. Justice Leonard said: "When summoned, sworn, and organized the grand jury are a constituent part of the

"A grand jury is clothed with power to determine both the facts and the law."⁵¹ "The grand jury is merely an appendage of the court, of which the judge is the head or controlling power."⁵²

Proceedings before the grand jury constitute a "criminal case" within the meaning of the provisions of the federal and state constitutions relating to the privileges of a witness against self-incrimination.⁵³

It is submitted that the proceedings of a body such as a grand jury—a tribunal which has power to make "full investigation to see whether a crime has been committed and if so, who committed it"; which is an adjunct, a part, an appendage of the court; which is a "part of the Court sitting", which can receive none but legal evidence; which is a "judicial tribunal"; a contempt of which is a contempt committed "in the face of the Court"; which may swear witnesses and originate charges—are "judicial" proceedings within the meaning of the code.

There seems to be no unanswerable objection to the proposition that a fair and true report of grand jury proceedings should be privileged because those proceedings are judicial. In opposition to that view, it has been contended that a fair and true report is not privileged because the proceedings of a grand jury (1) are designed to be kept secret; (2) do not take place in public.

As to the first objection, the answer is that there is nothing inherently secret about grand jury proceedings, as pointed out above. When they are in fact kept secret, of course, an account thereof is not published. When they are not kept secret, the contention is of no avail because inapplicable and contrary to fact. The same reasoning applies in general to contention number two. Many court proceedings do not take place in public. This is true in numerous instances with respect to references. It is also true in divorce cases where records

court for the performance of the functions and duties devolved upon the court, as much as a body of twelve petit jurors impaneled for the trial of a person charged with crime.
* * * When the witness has been brought before the grand jury to testify he is for the time in the custody or under the control of the court and the grand jury. He stands in the same relation to the court as a witness on the stand before the court and a petit jury." *People v. Naughton, supra*, note 18, where the court said: "The grand jury is a constituent part of the Court of Oyer and Terminer and its proceedings are a part of the proceedings of the court of Oyer and Terminer. The court 'inquires' by the grand jury and 'tries and determines' with the petit jury." (p. 423.) Every member of the community is interested in preserving the grand jury system in its purity and usefulness. It must retain the confidence of the people, and stand upon the ground of vindicating the public law; to do this it must be a judicial tribunal, acting strictly within the principles upon which it was originally based."

⁵¹*People v. Glen, supra*, note 29.

⁵²Thompson's Trials, sec. 168.

⁵³Counselman v. Hitchcock, 142 U.S. 547; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219.

are frequently sealed. It would scarcely be logical to say, and the proposition certainly is not supported by the decisions, that if some person should make public what occurred on a reference or in a divorce case, a fair and true report would not be privileged.

(2) Are grand jury proceedings "public and official?"

Obviously, the answer to this inquiry must turn upon the meaning of the word "public". It can scarcely be questioned that grand jury proceedings are official. To establish a privileged occasion, however, it must appear that they are both public *and* official. The word "public" would appear to be susceptible of two constructions. It may mean to confine the application of the code section to proceedings which take place in the presence of the people, or some part thereof; to proceedings which are not privately heard or conducted. On the other hand, it may mean that the privilege extends to reports of proceedings which are public in the sense of being designed for the public benefit and for the protection of the public interest. If the word "public", as used in this connection, means that the privilege extends only to those affairs which do in fact take place or which may of right take place in the presence of many persons, grand jury proceedings would, of course, not be included. This hardly seems a logical view to take of the intent of the statute, because our institutions and our ideals of government are such that the searching light of publicity should be welcomed where one or more are gathered together to discuss matters and take actions which are burdened with a common interest. It is submitted that the word "public", as used in this connection, is intended to mean proceedings which have a relation to the rights, protection and welfare of the public generally. If that be so, it inevitably follows that the proceedings of a grand jury are "public and official".