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THE JUDGE AND THE GRAND JURY

ANDREW A. BRUCE

In a presidential address which was delivered by Frank J. Loesch on January 21, 1932, before the Board of Directors of the Chicago Crime Commission and which was subsequently given to the press, the following statement was made:

"Some things in my experience stand out to which I feel I must call attention. . . . I do not do it in any spirit of captious criticism but in the interest of the public welfare and of truth as I see it.

"The mandate of the Illinois Constitution that 'the terms of the Criminal Court of Cook County shall be held by one or more judges of the Circuit and Superior Courts of Cook County, as nearly as may be in alternation, as may be determined by said judges,' is ignored and has been for years past.

"The purpose of the provision cannot be misunderstood. It was to make each judge, without exception, of the Circuit and Superior Courts, take his place in the Criminal Court to give to it, to the public, and to the criminal and the unfortunate coming before him the benefit of his dignity, standing and learning and to give to the judges the experience which can only come from sitting in that court in the making of all-around experienced and learned judges and to prevent any effective working of that alliance between crime and politics which has become so disgraceful in the non-enforcement of our criminal laws against the organized or politician-aided criminal.

"If the judges themselves refuse to comply with their sworn duty and a plain command of the Constitution because the duty it commands is a disagreeable one, the layman may well be excused from questioning why he should be expected to obey the Constitution or laws where it is troublesome, inconvenient or disagreeable for him to do so.

"The low esteem in which the Criminal Court of Cook County is held is due, in my opinion, to just that refusal of each of the judges of the Circuit and Superior Courts to take his turn in sitting in that court as the Constitution requires he shall do.

"If all our able and upright judges, many of whom now avoid all contamination with the Criminal Court, will alternate with all their brethren by sitting in that court for six months at a time, it would give them at the most only two sittings in the six years' period. It

would do more to curb crime and speed justice to the criminal and give safety to the public in life and property than all the different remedies which have been proposed to secure those ends.

"The manifest result of so many of the judges refusing to do their sworn duty is to open places in the Criminal Court for long spaces of time to some inexperienced, timid, ignorant, subservient or mountebank judges whose presence on the bench would not be tolerated for a day if the public were not made helpless by the bipartisan deals between party politicians in putting up for their selfish ends only one set of judicial candidates and thereby depriving the voters of that choice among candidates which the Constitution makers tried to secure to the voters.

"The result is what may be expected. The look backward is startling in contrast to the present. Such judges as McAllister, Gary, Rogers, Grinnell, Moran and Tuley and others like them sat in the Criminal Court, with independence, dignity, learning and impartiality, and justice was administered; criminals were not bargained with and there was no pull with the court to be easy on them."

He then gave an example of the somewhat crass ignorance of an unnamed judge in dismissing a return of habeas corpus and then later of what he termed "a mountebank performance" in which a colloquy was held between a sitting judge, also unnamed, and a complaining witness who claimed to be a spiritualist and to be able to talk with the departed. He then said:

"Another judge has earned the nickname of 'Probation.' He is commonly so referred to in the criminal court. It is said he has openly boasted in court that he is the easiest judge in the criminal court. He has openly arbitrarily waived aside questions and prosecutors' objections with the remark, 'I am the Supreme Court.' His attitude and actions on the bench are discreditable. One cannot within proper terms sufficiently characterize his unjudicial conduct and lack of dignity on the bench.

"Another judge makes it a point to advise defendants that if they plead guilty he will be lenient with them but if they force a jury trial they will get the limit. He is so anxious to avoid jury trials that in two instances of record he changed the indictments from murder to assault and sentenced the defendants to terms in the House of Correction.

"In the municipal court we have a judge who has sat a number of times in the criminal branches of that court. He also has acquired

a nickname—it is 'Cash Register.' To what depths must a judge have sunk to earn such a sobriquet?

"These few instances are sufficient to illustrate the statements I have made that the administration of criminal justice does not need changes in the laws so much as a change in the attitude on the part of those charged with the administration of the laws.

"It is hardly necessary for me to say that I make no general charge against all judges for I have a high respect for many of them and we have many judges who must feel as strongly as I do concerning the conduct of the judges whose actions I have criticized."

To this utterance exception was taken by the Chief Justice of the Cook County Criminal Court, who called in the members of the grand jury then in session, made a defense to them of the practice of ignoring the constitutional provision for the sitting of judges in rotation and the assigning of certain members of the Circuit and Supreme Benches to sit in the Criminal Branch or Criminal Court and stated that:

"There may be inexperienced, timid, and maybe even ignorant, judges, but if there are subservient or mountebank judges serving on this Bench it is another matter which must be investigated. If these charges are true, these men should be driven from the Bench and should be prevented from holding office in this community."

He then read Mr. Loesch's statement in regard to the so-called "cash register" judge in the Municipal Court and then said: "If there is a judge who earned that nick-name because of what he actually does, then it is cowardly not to name him. It is not right to leave the public to guess who might be so low. If there is such a judge it is your duty to find out, and if there is enough proof so that he can be named publicly, then there ought to be enough proof to indict him and then to delve immediately into all the proof available without regard to who may be hit and if the evidence justifies an indictment it is your duty to bring one in. Your inquiry is not to be limited to this one judge. If you find evidence of corruption in any court, no matter who is affected, I want you to act on it. There can be no graver charge than corruption on the part of a judge. On the other hand, if no evidence exists there is no graver charge than the maligning of judges to the extent that a large part of the public might believe such charges. If this (the Loesch statement) goes unchallenged, the respect for the law will disappear. . . . If the charges are not true, it is a conspiracy to slander and libel the judges as a group. It is a conspiracy to interfere with the due administration

of justice. Under our law the libeling of a group, whether it be judges, bankers, preachers, or carpenters, is a crime."

In response to these instructions the grand jury issued a subpoena to Mr. Loesch to appear before them. On his appearance, he was asked by Mr. Thomas Marshall, who had been appointed as a special attorney in the case by the Chief Justice Fisher, to sign the so-called immunity waiver before testifying before the jury. This Mr. Loesch refused to do; his statement being that he was not a criminal, did not stand accused of any crime, was present merely to answer a grand jury subpoena, and stood ready to answer any questions propounded; that he understood, however, that the general purpose of the inquiry was to indict some one or more judges if he, Mr. Loesch, could produce sufficient evidence to that, or failing to do that, then it was the purpose to indict some one or more officers of the Crime Commission or to lay a foundation for a libel suit. He stated that he had not libeled anyone, that he had nothing to hide, and that his motives and the records of the Crime Commission were open to critical inspection.

Upon his thus refusing to sign the waiver the grand jury dismissed Mr. Loesch from the jury room. Later, however, the members of the grand jury concluded that they would like to hear from him without the signing of the waiver, and the foreman of the grand jury followed Mr. Loesch into the hall and asked him if he would so testify. Mr. Loesch replied that he would, and went back into the room where an examination was begun.

On this examination, however, the special prosecuting attorney was excluded from the jury room. On learning of these facts the Chief Justice summoned the jury before him, but was informed that they were engaged in investigation and could not or would not come at that time. The judge then summoned a number of bailiffs and instructed them, if necessary, to break into the jury room and to escort the jury before him. It does not seem to have been necessary to break down the doors as the officers were allowed to enter but the members of the grand jury were nevertheless escorted before the judge by the bailiffs, two of them being entrusted to the arduous duty of escorting Mr. Loesch who, we might incidentally state, is a lawyer of national reputation and a veteran of eighty-one years of age. On the jury thus appearing, the foreman, Mr. Henry S. Henschen, the President of the Chicago Bank of Commerce and also a well-known and reputed citizen, was severely criticized by the judge for talking to Mr. Loesch in the ante-room, for excluding the special prosecuting

attorney, and for refusing to appear before the court when first summoned. An attempt was also made, but afterwards abandoned by the Judge, to withdraw the consideration of the case from the grand jury and to leave it for the consideration of the next body which was to convene a few days afterwards.

The result of the whole matter was a more or less change of front on the part of the Chief Justice, a withdrawal of some of his criticisms and the return of the grand jury to the jury room and a very short examination of Mr. Loesch and of Colonel Henry Barrett Chamberlin, the Director of the Crime Commission, without the presence of the prosecuting attorney and the waiver of immunity; and, no positive evidence of corruption being produced and which appeared to the jury to be sufficient on which to base an indictment, the return of no such bills of indictment, either against any judge or against Mr. Loesch and his associates, for conspiracy.

These proceedings, though perhaps to some seemingly unnecessary and perhaps not the right method by which to meet the accusation, like many other similar legal proceedings are full of interest and of significance. What is the province and the prerogative of the grand jury? Must it allow the state's attorney, or other prosecuting officer, to be present during its deliberations? Have the members of a grand jury the right to ask questions, to obtain clues, or to investigate personally outside of the jury room, or are they concerned only with the testimony that is brought before them by the prosecuting attorney or other witnesses whom they may have formally summoned? Is it a contempt of the Bench to make a statement of a more or less public rumor or of a well known state of facts, which, if true, may be discreditable to that body? May a citizen comment on the existence of a public rumor and then regret the existence of that rumor?

As far as the last point is concerned we hardly think that there is any such limitation on public criticism, that is to say, if indulged in, as was undoubtedly the case in the present instance, not from malicious motives but as the utterance of a public-spirited citizen. Mr. Loesch's statement, indeed, was a statement of facts as he saw them with a regret attached. In the Municipal Court he said, "We have a Judge who has sat a number of times in the criminal branches of the court. He also had a nickname—It is 'Cash Register.' To what depths must a Judge have sunk to have earned such a sobriquet?" This was perhaps strong language, especially the comment, but if the facts were true the comment was inevitable. There can be no doubt of the right and duty of Chief Justice Fisher to inquire into the matter.

There was, however, hardly ground to believe that the statement was made as a part of a conspiracy.

Parallel instances have occurred in both legal and academic circles. Not long since there was a popular professor in one of our State universities. He specialized in bacteriology and entomology and knew everything of the insect world. On account of this fact the students gave him the nickname of "Old Bugs." At first this appellation, being, as it was, a term of endearment, did no particular harm. Later, however, the Professor was elected President of the University. He then was called "Prexy Bugs." This was unfortunate. The bug kingdom is a large one and includes the cootie as well as bugs of a nobler ancestry and who pursue a more useful method of obtaining a living. The term "Prexy Bugs" certainly did not add to the dignity of the new President or of the Presidential office. It might have been misunderstood by strangers and by the public at large. Yet one could hardly have prosecuted these students for criminal libel and much less have prosecuted one who happened to learn of the general use of the appellation and expressed his regret concerning the fact.

Mr. Loesch was not engaged in uttering a libel but in stating facts and regretting their existence. Judge Fisher was certainly justified and should have the support of the whole community in his attempt to probe into the matter. He was certainly justified in his first charge to the jury in which he told them to investigate the matter and to bring in indictments against recalcitrant judges, if any there were, and if legal evidence was presented to them which would justify any such action. He was in error, however, in later charging them that if Mr. Loesch failed to produce evidence sufficient to warrant an indictment that he himself should be indicted for criminal libel.

The criticism too that was made by the judge on the refusal of the grand jury to allow the special prosecuting officer to remain in the jury room and also his action in summoning the jury before him in the peremptory manner in which he did were without warrant, and it was only fair to the judge to state that he acted hurriedly and afterwards realized and admitted the error committed. A state's attorney, and much less a specially appointed prosecuting officer, is certainly no part of, and certainly is not necessary to, the composition of a grand jury. The grand jury in Illinois is essentially the grand jury of the common law. Though nothing was said concerning it in the Constitutions of 1818, 1848, and 1870, the Supreme Court, and on account of section 10 of article 8 of the Constitution of 1848, which provides that "no person shall for any indictable offense be

proceeded against criminally by information," presumed its existence. That Court also has expressly stated that the grand jury is the grand jury of the common law. The legislative act of February 4, 1819 [laws of 1819, page 3] expressly declared* that such law as existed prior to the fourth year of James I should be the common law of the new commonwealth. Though the common law brought with it the grand jury into Illinois it certainly did not bring with it the state's attorney. The state's attorney, indeed, was unknown to the early colonists and it is only after the American Revolution that we find traces of him. Whether he was brought to America from France or through our lawyers of Scotch descent is a mooted question. He certainly was not indigenous to the English or the American soil.

The grand jury, on the other hand, is of very ancient origin. Some claim that a similar institution existed among the Anglo Saxons, but others, and perhaps with more accuracy, insist that it was of Frankish lineage and was introduced into England after the conquest. It certainly was recognized by the Assize of Clarendon, A. D. 1166, which enacted "that inquiry be made in each county and in each 100 by 12 lawful men of the 100 and 4 lawful men of every township, who are sworn to say truly whether in their 100 or township there is any man accused of being or notorious as a robber or a murderer or a thief or anybody who is a harbinger of robbers or murderers or thieves since the king began to reign and this let the justices and the sheriffs inquire, each officer before himself." (Lesser's History of the Jury System, 138). This certainly denotes an investigatory body and, though later on the grand jury has been principally used as a shield for the defense of the suspect and as a bulwark against unjust and uncalled for prosecutions, it certainly has had both an accusing and investigatory function for a long period of time.

Though, too, custom and statutes have provided for the appearance before grand juries of state's attorneys and other prosecuting officers, these officers must generally be held to appear for the convenience of the grand jury and are not necessary to their deliberation. Though the constitutions and statutes of our various states differ and though few if any courts have been willing to set aside an indictment on the ground that such officers were present, almost every state has limited the function of the prosecuting officer to the presentation of evidence and has precluded him from arguing on it or urging an indictment. We also have yet to find a single case in which an indictment has been set aside because the prosecuting officer was not present. Some decisions have even gone to the length of excluding such

officer altogether. Lung's case, 1 Conn. 428; Lewis B. Wake, 74, N. Car. 194. All that our own Illinois courts say is that, as far as the defendant and the motion to quash the indictment is concerned, there is in this state no statute forbidding such presence and it is permissible under the common law *Regent v. People*, 96 Ill. App. 189, 197; and that "he *may* be present to give advice, to interrogate witnesses, to draw such bills as the jurors are prepared to find and to give such general instructions as they *may require*, but he is not to influence or direct them in respect to the findings, nor he to be present when they are deliberating upon the evidence or when their vote is taken. *Gitchell v. People*, 146 Ill. 178, 187 and 1 Bishop on Crim. Proc. (2d ed.) section 861. Nowhere is there any intimation that his presence is necessary unless it is desired by the jury.

There certainly, too, is no justification for the complaint of the judge that the foreman of the grand jury spoke to Mr. Loesch while in the hallway and asked him if he was willing to testify without signing the immunity waiver. As we have before stated, the grand jury is an investigatory as well as an indicting body. It is sworn to make diligent inquiry "and to present all infractions of the criminal law which may be given to the body in charge or may come to the knowledge of any of them touching the service in which they are engaged." In speaking of this power the Supreme Court of Georgia in *re Lester, Mayor*, 77 Ga. 143 says, "Anything that they can find out by their own inquiry and observation is legitimate and praiseworthy, but they have no authority to force private persons or the officers of other courts to disclose to them who have violated the laws and the names of persons by whom such infractions can be established." They are not dependent alone upon the evidence which the prosecuting attorney chooses to put before them. They have the power to investigate the controversy from all angles and to find out where they can get evidence.

In the case of *Ward v. State* (1829) 2 Mo. 120, where without any particular accusation first having been made, the foreman of the jury summoned a witness and asked him if he knew of any person or persons having been at a Faro table in the county within the last twelve months, the Supreme Court of Missouri said, "I take this to be an ordinary case where perhaps the jury had probable cause to believe that some offenses had been committed against law; and that so believing they desired in the discharge of their oaths, and of their duties to the county to inquire; and how should they inquire? Not by going into the secret recesses of gamblers and gambling devices

to ask and seek information, but to send for persons who might in their opinion be most likely to possess evidence relating to these matters. It is a solemn and important duty that every citizen owes to his country to give evidence in the courts of justice against offenders against the peace and good order of the community. A grand jury should be considered trustworthy in this matter. They stand as a rampart between a malicious or incensed prosecution in case of life and death; no man can be brought to trial on the lowest or the highest offenses known to the law unless the grand jury shall say so, yet they are not to be trusted with the power to send for witnesses, till some malignant prosecutor or some injured person shall cause an indictment to be sent up to them! This would strip them of their greatest utility, would convert them into a mere engine, to be acted upon by Circuit Attorneys or those who might choose to use them. This point is untenable."

All that the foreman asked of Mr. Loesch in the hallway was whether he was willing to testify without signing the immunity waiver. Even if the foreman had asked him if he had any knowledge of the cases and the nature of that knowledge, though perhaps the witness would not have been required to answer, the jurymen had a perfect right to ask the question. Grand Juries are not dependent on the state's attorney for the obtaining of their witnesses. Though they are not required to visit the gambling joint for the obtaining of evidence, it is within their power to do so. It is true that the evidence on which an indictment is voted should be presented to the whole jury, but preliminary investigations may be made anywhere.

Certainly, also, Mr. Loesch was justified in refusing to sign the so-called immunity waiver. As he himself stated, he was not a criminal nor had he been accused of a crime. He had been summoned as a witness merely. He was perfectly willing to tell the jury all that he knew. It is, indeed, difficult to see how anyone could have believed that it was improper for the jury to consider his evidence without any such waiver being signed. The Federal Statute expressly makes such witnesses immune and we have yet to learn that, even in the Federal courts, the grand jurors refuse to examine the cases and organize strikes because of the existence of the statute.

We believe, also, that the Chief Justice was unwarranted in summoning the jury before him in the way in which he did. They constituted an independent body. They had the power even to indict the judge who presided over the court. They could indict the state's attorney or any other persons. While deliberating they should

have been immune from all unnecessary interruption. Cases in this line are of ancient origin. In the Earl of Shaftesbury's Trial, 1681, 8 How. St. Tr. 759, 771, we find a case in which a motion was made that the evidence be heard in court and in which the jury stated to the chief justice that "It is the opinion of the jury that they ought to examine the witnesses in private and it has been the constant practice of our ancestors and predecessors to do it; and they insist upon it as their right to examine them in private as they are bound to keep the king's secrets which they can not do if it be done in court; then, besides, the jury do apprehend that in private they are more free to examine things in particular for the satisfying of their own consciences, and that without fear or affection; and we hope we shall do our duty." It is true that in this particular case the jury afterwards yielded, but in yielding the foreman stated, "My Lord, the gentlemen of the jury desire that it may be recorded that we insisted upon it as our right, but if the court overrule we must submit to it."

These were brave words at the time of James II, when the judges even were appointed by the king and in the age of judges like Judge Jeffreys. As we have before stated, however, Judge Fisher was undoubtedly justified in his desire to probe the accusations to the bottom and if any judges were recreant to their oaths of office to drive them from the bench. He was certainly right in trying to maintain the dignity of the courts against unjust accusations. The writer, too, is one of those who believe that though courageous and high-minded as the words and deeds of Mr. Loesch were and always are, there was a measure of injustice in speaking of cash register and harlequin judges without specifying their names. It is hardly fair to a court composed of several judges to state that one of them is known as a harlequin or a cash register expert. Since the charge is general, the public may fit it to anyone whom they please. The accuser, in short, knows of whom he speaks; the public does not; and the cloud rests over all.