

Opinion No. 42-4151

September 7, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Honorable John E. Miles Governor State of New Mexico Santa Fe, New Mexico

{*243} This is an opinion on the following two questions which you have submitted to me:

"1. Is a grand jury under the laws of the State of New Mexico authorized to accuse a public official of acts which constitute indictable crimes, and, or corruption in office, without at the same time indicting such official and thereby giving him an opportunity to clear his name and record?"

"2. Does the law provide a remedy for a public official that is libeled but not indicted by a grand jury whereby he may clear his record and name of such infamous charges?"

In answer to your first question I submit the following: Section 78-217 of the New Mexico Statutes Annotated, 1929 Compilation, provides:

"The grand jury has power, and it is their duty to inquire into all public offenses committed or triable in the county, and to present them to the court, by indictment."

In view of this statute, it is my opinion that the power of a grand jury in this State does not extend to making accusations against public officials or citizens of this State unless such is done by way of indictment. This is also, apparently, the general rule in the other states in this country unless there is a specific statute allowing a grand jury to make accusations without indicting. We do not have such a specific statute in New Mexico. While never before in the history of this State has occasion arisen for our Supreme Court to decide a question based on the facts you outline, I firmly believe that the law of New Mexico will be found to be in accord with this opinion. In further accord with {*244} this opinion see 24 A. J., Page 859, Section 36, wherein it is stated:

"* * * * Although present-sentments 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 extra judicial, is not privileged, * * * *"

See also 22 A.L.R., 1367, which states:

"In the absence of a statute authorizing a grand jury to make reports which do not amount to indictments or presentments, reports are not privileged, because extrajudicial, and therefore may form a basis for libel."

The unquestionable soundness of the above mentioned rule of law is fully illustrated by the following pertinent quotation: Lord Mansfield stated in 1776, in the case of *Rex v. Roupell*, 98 Eng. Rep. 1185:

"* * * * Accusations without opportunity to answer in the form is a bitter hardship, if not intolerable."

In the case of *Rector v. Smith*, 11 Iowa 302, 307, the Court states:

"* * * * The grand jury have no power, nor is it their privilege or duty to present any person for a criminal offense except by indictment. If the misconduct of an officer does not amount to a crime, and is not of such magnitude as will justify the jury in filing an indictment, their powers over the offense complained of, are at an end. * * * *"

The New York Court stated in the case of *In re Healy* (1937) 293 New York Supp. 584:

"* * * * 'To single out an individual, not by reason of any acts in public office, not by reason of any acts as a public official, and to condemn him without a trial, without an opportunity to be heard, without the privilege of making a defense in a free American court of justice, to attempt to deprive him of his good name, to besmirch his character, is so unfair, so repugnant to the ideals of the administration of justice in America, as to merit the disapproval of this court."

It is noted that in the above quotation, the Court made an apparent exception of cases dealing with acts of public officials. However, this exception is based on a specific New York Statute and is not applicable under the New Mexico Laws where we have no such specific statute. Therefore, what is said in relation to the rights of a private individual, is equally applicable in this State to the rights of public officials.

In addition to the civil remedy, there is a further procedure provided by our statutes which provides as follows:

Section 35-3501, New Mexico Statutes Annotated, 1929 Compilation:

"That any person who, with intent to injure, makes, writes, prints, publishes, sells or circulates, any malicious {²⁴⁵} statement affecting the reputation of another in respect to any matter or thing pointed out in this article, shall be deemed guilty of libel."

Section 35-3507, New Mexico Statutes Annotated, 1929 Compilation:

"The written, printed or published statement to come within the definition of libel, must convey the idea, either: * * * *"

"4. That he has been guilty of some act or omission which, though not a penal offense, is disgraceful to him as a member of society and the natural consequence of which is to bring him into contempt among honorable persons; or * * * *."

"5. That any person in office or a candidate therefor, is dishonest and therefore unworthy of such office, or that while in office he has been guilty of some malfeasance rendering him unworthy of the place."

Section 35-3502, New Mexico Statutes Annotated, 1929 Compilation:

"If any person be guilty of libel, he shall be punished by fine not less than one hundred nor more than two thousand dollars, or by imprisonment in the state penitentiary not more than two years, or by both such fine and imprisonment in the discretion of the court trying the cause."

I further call your attention to Section 35-3521, New Mexico Statutes Annotated, 1929 Compilation, which provides as follows:

"No statement made in the course of a legislative or judicial proceeding, whether true or false, although made with intent to injure and for malicious purposes, comes within the definition of libel."

Assuming criticisms and accusations by a grand jury, when not followed by indictment, are shown to be extrajudicial and unauthorized, then and in that event, it is my opinion the above section 35-3521, is not applicable and no immunity could attach by reason thereof.

In view of the foregoing, it is my opinion that a civil action of libel for damages will lie under a proper statement of facts showing unauthorized criticism of a public official by a grand jury, not followed by an indictment.

It is further my opinion, in view of express statutory provisions above cited that under proper facts, a criminal prosecution could also be instituted against the individual members of a grand jury.