

INDEX.

	Page
Writ of Error	1
Testimony	9
Court's Charge	167
Defendant's Requests to Charge.....	172
Extract from Testimony of William E. Johnson..	179
Bill of Exceptions	181
Assignments of Error	201
Joinder in Error	216
Causes for Reversal	217
Supplemental Causes for Reversal	228
Opinion of Supreme Court	229
Judgment of Supreme Court	233
Writ of Error	234
Assignment of Errors	235

Testimony.

Charles W. Runyon:	
Direct	16
Cross	21
George C. Otto:	
Direct	22
Miss Ethel Wachter:	
Direct	25
Roy G. Reynolds:	
Direct	31
Cross	38
Harry F. Langhans:	
Direct	40
Cross	56
Redirect	59
W. Lincoln Phillips:	
Direct	64
Cross	65
Redirect	71
Recross	72

	Page
William E. Richards:	
Direct	75
Cross	78
Redirect	78
Noah Woodruff:	
Direct	79
Cross	83
Charles Pawlik:	
Direct	91
Cross	96
Recalled—Direct	159
Cross	162
Andrew Jackson Bradstreet:	
Direct	98
Cross	99
Joseph A. McDevitt:	
Direct	100
Cross	107
Recalled	158
Charles E. Renton:	
Direct	118
Cross	122
Redirect	123
Henry Earnst:	
Direct	123
Harwood Fish:	
Direct	134
Cross	152
Frank V. Lowden:	
Direct	154
Lewis V. Hobbs:	
Direct	163
William D. Finkle:	
Direct	166

Exhibits.

In Typewritten Form, Exhibit P-2—In Printed Form, Exhibit P-3	177
--	-----

Writ of Error.

NEW JERSEY, SS.

The State of New Jersey to Honorable
James C. Connolly, Judge of the
[SEAL] Court of Quarter Sessions of the
Peace in and for the County of
Union.

10

Greeting: Forasmuch as in the record and proceeding and also in the giving of judgment upon a certain indictment against Harwood Fish, for libel, which was before you in our said Court of Quarter Sessions of the Peace in and for the County of Union, whereof before you said Harwood Fish hath been convicted by a certain jury of the County, taken between the State of New Jersey and the said Harwood Fish, manifest error hath intervened to the great damage of the said Harwood Fish, as by his complaint we are informed; we being willing, in his behalf, to correct the error in due manner if any there shall be, and that speedy justice be done to him, the said Harwood Fish, do command you that if judgment be thereupon given then that you do distinctly and openly send, under your seal, the record and proceedings aforesaid, including the entire record of proceedings had upon the trial of said cause, with all things touching the same, to our Supreme Court of the State of New Jersey, to be held at Trenton on the twenty-third day of March inst., and this writ, that the entire record of proceedings aforesaid being inspected, we may further cause to be done thereupon, for correcting that error, what of right and according to the laws and constitution of New Jersey ought to be done.

20

30

WITNESS the Honorable William S. Gummere,
Chief Justice of the Supreme Court of the State of

40

Writ of Error

New Jersey, at Trenton, this third day of March,
1916.

WM. C. GEBHARDT,
Clerk.

10 CODDING AND OLIVER,
Attorneys.

The answer of James C. Connolly, Esquire,
Judge of the Court of Quarter Sessions of the
County of Union, within named:

20 In obedience to the command of this writ, and
pursuant to Sections 136 and 137 of an act en-
titled "An act relating to Courts having Criminal
Jurisdiction and regulating proceedings in Crimi-
nal cases (Revision of 1898)" I herewith return
the Indictment against Harwood Fish, the entire
record of the proceedings had upon the trial of,
said cause, the bill of exceptions as signed and
sealed by me in said cause, whereof mention is
made within, and all things touching and concern-
ing the same, to our Supreme Court, within speci-
fied, at the time and place within mentioned I,
30 the Judge of the Court of Quarter Sessions, within
mentioned, under my seal and hereunto annexed,
send, as within I am commanded, as appears by
the schedule hereto annexed.

JAMES C. CONNOLLY [SEAL]
Judge of the Court of Quarter
Sessions of the County of Union.

The execution of this writ appears by the sched-
ule hereto annexed.

40

Writ of Error

IN TESTIMONY WHEREOF, I ABRAM P. MORRIS, Clerk of the County of Union and of the Court of Quarter Sessions in and for said County, have hereunto subscribed my name and affixed the seal of said Court, this Seventeenth day of March, A. D., 1916. 10

ABRAM P. MORRIS,
Clerk.

STATE OF NEW JERSEY }
COUNTY OF UNION } ss.:

BE IT REMEMBERED that at the Court of Oyer and Terminer, holden at the City of Elizabeth, in and for the County of Union, on the first Tuesday of January in the year of our Lord, One Thousand Nine Hundred and Sixteen, before the Honorable James J. Bergen, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and the Honorable James C. Connolly, Judge of the Court of Common Pleas in and for the County of Union, upon the oaths of Ernest R. Ackerman, Frederick C. Mooney, Herman Hersh, John J. Devine, Robert W. Moore, William C. Stephens, John Leyser, William H. Hoover, Jr., Harry M. Bedford, James B. Wilson, DeWitt C. Townley, F. Otto Walters, Jacob Bruecklacher, Victor Mravlag, Frank J. Hubbard, George W. Horre, George W. Littell, Leslie R. Fort, Otto E. Kitzler, Joseph Morgan, Joshua P. Benedict, Robert Morrison, George J. Tobin, good and lawful men of said County of Union, then and there sworn and charged to inquire on behalf of the State of New Jersey, in and for said County of Union, it is pre- 20 30 40

Writ of Error

sented by at least twelve of said jurors in the manner and form following, to wit:

UNION OYER AND TERMINER

10 January Term, A. D., Nineteen Hundred and Sixteen. Union County, to wit:

THE GRAND INQUEST for the State of New Jersey, and for the body of the County of Union, upon their oath

PRESENT, that William E. Johnson, of the Borough of Roselle Park, in the County of Union and State of New Jersey, was, on the second day of May, A. D., Nineteen Hundred and Eleven, duly
 20 summoned, empaneled, sworn and qualified, according to law, as one of the requisite number of members of a Grand Inquest for the State of New Jersey and for the body of the County of Union aforesaid: for the May Term, A. D., Nineteen Hundred and Eleven, of the Court of Oyer and Terminer, holden at Elizabeth, in and for the County of Union aforesaid, and he, the said William E. Johnson, being so summoned, empaneled, sworn and qualified, as one of the members of the Grand
 30 Inquest aforesaid thereupon, to wit: on the day and year last aforesaid, in the County of Union aforesaid, with his co-members, constituted the Grand Inquest aforesaid, for the May Term, A. D., Nineteen Hundred and Eleven, of the Court of Oyer and Terminer aforesaid, entered upon the performance and discharge of his legal duties of his office as one of such members of said Grand Inquest, and as such member thereof acted in a fair and honorable manner in the exercise of his said office, as such
 40 Grand Juror.

And the Grand Inquest aforesaid, upon their oath

Writ of Error

aforesaid, do further present that Harwood Fish, late of the Borough of Roselle Park, in the County of Union aforesaid, well knowing the premises, but contriving and wickedly, maliciously and unlawfully intending to hurt, aggrieve and vilify the said William W. Johnson and to injure him in his good name, fame and reputation and to bring him into great contempt, public scandal, infamy and disgrace, with and amongst his neighbors and other good and worthy citizens of the State, and also to injure the said William E. Johnson, as one of the members of the Grand Inquest aforesaid, and cause him to be taken to be dishonest and a person in whom public trust and confidence ought not to be reposed and to be a person not to be entrusted with public office, afterwards, to wit: on the Twentysixth day of October, in the year of our Lord One Thousand Nine Hundred and Fifteen, at the Borough of Roselle Park, in the said County of Union and within the jurisdiction of this Court, with force and arms, unlawfully, corruptly, wickedly and maliciously did write and publish and cause and procure to be written and published a certain wicked, malicious, scandalous and defamatory libel, of and concerning the said William E. Johnson, and of and concerning him as a Grand Juror, and as one of the members of the Grand Inquest aforesaid, according to the tenor and effect following, that is to say: "As a member of a Grand Jury he succeeded in protecting the biggest swindler, to my mind, that ever struck the county, and although I understand an indictment was voted against his friend, for some unexplained reason it was never handed in" (meaning thereby that he, the said William E. Johnson, while acting as a member of the Grand Inquest aforesaid, had corruptly performed his duty and had obstructed and defeated the due

10

20

30

40

Writ of Error

10 administration of law and justice of this State and that the said William E. Johnson had used his said office, as one of the members of such Grand Inquest to protect and shield from lawful prosecution a person charged with a criminal offense under the laws of the State of New Jersey, to the great scandal and reproach of the administration of justice in the County of Union and State of New Jersey; to the great scandal, infamy, disgrace and damage of the said William E. Johnson, to the evil example of all others in like case offending, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

20

ALFRED A. STEIN,

Prosecutor of the Pleas.

30 That at a Court of Quarter Sessions holden at Elizabeth, in said County of Union, on Monday, the Seventeenth day of January, in the year of our Lord One Thousand Nine Hundred and Sixteen, before Honorable James C. Connolly, Judge of the Court of Common Pleas, constituting the Court of Quarter Sessions in and for said County of Union, according to the form of the statute in such case made and provided, the Grand Jury presented the indictment aforesaid, which said indictment was thereupon ordered by the Court of Oyer and Terminer of said County, to be delivered to the Clerk of the Court of Quarter Sessions of said County, who is directed to affile the same in said Court of Quarter Sessions, according to the form of the statute in such case made and provided, and thereupon the said indictment is delivered to the Clerk of said Court of Quarter Sessions and by said Clerk

40

Writ of Error

affiled and entered in said Court of Quarter Sessions of said County.

That at the same term of the said Court of Quarter Sessions, holden at Elizabeth aforesaid, in the County aforesaid, on Wednesday the Nineteenth day of January, in the year last aforesaid, comes the said Harwood Fish in his own proper person, and now here touching the premises in the said indictment above specified and charged upon him, being asked in what manner he would acquit himself thereof, says that he is not guilty thereof and of this he puts himself upon the country, etc., and Alfred A. Stein, Esquire, who prosecutes for the State in this behalf, doth likewise the same. 10

That at the same term of the said Court of Quarter Sessions, holden at Elizabeth aforesaid, in the County aforesaid, on Thursday the tenth day of February, in the year last aforesaid, before Hon. James C. Connolly, the Judge aforesaid, the said Harwood Fish being set to the bar, Alfred A. Stein, Esquire, who prosecutes for the State, moves the trial of the indictment aforesaid, whereupon let a jury thereupon come on this day last aforesaid, before this Court of Quarter Sessions aforesaid, of good and lawful men of the County of Union, aforesaid, by whom the truth of the matter may be better known, and who are not of kin to the said Harwood Fish, to recognize upon their oath whether the said Harwood Fish, be guilty of libel in the indictment aforesaid specified, or not guilty, because as well the said Alfred A. Stein, who prosecutes for the State in this behalf, as the said Harwood Fish has put himself upon the said jury and the jurors of the said jury by George C. Otto, Esquire, Sheriff of said County of Union, for this purpose em- 20 30 40

Writ of Error

panelled and returned agreeably to the statute in such case made and provided, to wit:

- | | |
|---------------------------|------------------------|
| 1.—George A. Wolff | 7.—Frank Rogers |
| 2.—William C. Bollwage | 8.—William J. Beatty |
| 3.—Robert H. Smith | 9.—William J. Corbet |
| 10 4.—William M. Streeton | 10.—Herbert S. Cornell |
| 5.—David Lessner | 11.—Sidney R. Craig |
| 6.—Isaac B. Hill | 12.—William L. Rehill |

who being chosen tried and sworn to speak the truth of and concerning the premises on the day and year last aforesaid, returned into Court in charge of the officer sworn to attend them, and then and there upon their oathsay that the said Harwood Fish is Guilty of Libel in the form aforesaid, and as in the indictment aforesaid, as above supposed and charged against him.

That at the same term of the said Court of Quarter Sessions, holden at Elizabeth aforesaid, in the County aforesaid, on Friday the Twenty-fifth day of February, in the year of our Lord One Thousand Nine Hundred and Sixteen, before Hon. James C. Connolly, Judge of the Court of Common Pleas, constituting the Court of Quarter Sessions, in and for said County of Union, according to the form of the statute in such case made and provided, the said Harwood Fish, being set to the bar, Alfred A. Stein, Esquire, who prosecutes for the State in this behalf, moves for judgment on the said Harwood Fish.

Whereupon all and singular the premises being seen and by the Court now here fully understood—IT IS ORDERED AND ADJUDGED, that the said Harwood Fish, having been convicted of the crime of libel, pay a fine of Two hundred and fifty dollars

Testimony

(\$250) upon this conviction and stand committed until the fine is paid.

And the said Defendant in Mercy, etc.

Judgment signed February 25, 1916. James C. Connolly, Judge.

10

Testimony.

UNION COUNTY COURT OF OYER AND
TERMINER.

JANUARY TERM, 1916.

STATE	}	Indictment	20
		No. 34.	
VS.		January Term,	
		1916.	
HARWOOD FISH.		Criminal Libel.	

Transcript of stenographer's notes of evidence, taken on the tenth day of February, A. D. 1916, at 11.30 A.M. before Hon. JAMES C. CONNOLLY, Judge of the Court of Common Pleas, and a Jury, in the Union County Court House, in the City of Elizabeth, New Jersey.

30

Appearances:

ALFRED A. STEIN, ESQ., Prosecutor of the Pleas, for the State.

MESSRS. CODDING & OLIVER, for the Defendant.

A Jury were empanelled at this point, but were not sworn.

40

Testimony

10 Mr. Oliver: If your Honor please, in the exercise of the privilege which I reserved at the time of the arraignment, I move to quash the indictment, on the ground that it is alleged in the indictment—I withdraw my plea first. I think I had better, or the Prosecutor will tell me of that later. I will withdraw my plea of not guilty.

The Court: Can you do that after the jury is empanelled?

Mr. Oliver: Yes, sir, any time before the jury is sworn.

20 And I move to quash the indictment on the broad and general ground first that the offence alleged in the indictment does not constitute an indictable offence. Then on the ground that there is no averment that Johnson did not act as a member of any other grand jury in Union County, or elsewhere, and that there is no warrant for the innuendo that the words complained of reflected upon Johnson's conduct as a Grand Juror; as a member of that particular Grand Jury, or were intended to mean that he had obstructed or defeated the due administration of law and justice of this State. My
30 third ground is that with which your Honor is familiar in an informal speech—it appears to have been now—on the other day I enlarged somewhat upon that ground. The reason is to the effect, that the indictment shows that the unnamed individual, who is supposed to have been a swindler, "biggest swindler that ever struck Union County" was such a swindler only to the mind of
40 Fish. That is, in Fish's opinion. Assum-

Testimony

ing that Mr. Fish made this publication, and in the opinion of Fish only he was a swindler, and that being so, there has been no allegation that there was any competent evidence before the Grand Jury to show even prima facie that this man was a swindler. Therefore, it became the duty of Johnson as well as of any other member of that Grand Jury, upon his oath, to see that this man, whoever he was, this alleged swindler, was protected from indictment. And the publication goes on to show very plainly that if, perchance, justice was thwarted in that particular case by the failure to indict it was not owing to the conduct of Johnson, but owing to the conduct of other members of the Grand Jury constituting at least a majority of the Grand Jury, or the foreman of the Grand Jury, because the charge is: "for some reasons, for some causes, for some unexplained reason the indictment was never handed in, after it was found." If that is so, certainly it wasn't the fault of any individual member of that Grand Jury; that must have been due to the action of the majority of the Grand Jury or to the foreman, who failed to sign the bill as a true bill; or the Clerk of the Grand Jury, or the Prosecutor who pigeon-holed it. That could not have been due to the fault of any individual member of that Grand Jury. There is nothing on the face of the indictment to justify the innuendo "That by the utterance complained of, it was intended that the reader should believe that Johnson, while acting as a member of the Grand Jury

10

20

30

40

Testimony

10 had corruptly performed his duty and had obstructed and defeated the due administration of law and justice of this State, and that Johnson had used his office as one of the members of the Grand Inquest to protect and shield from lawful prosecution a person charged with criminal offence under the laws of the State of New Jersey." Nothing in the publication charged to justify any such innuendo.

I submit, too, that the indictment should allege that the publication complained of was false, which it does not allege.

20 The indictment does not allege in what manner the publication was made and that seems to be fatal. There is no case in this State that I know of in point. There is one case, but I forget whether it is State against Herr or State against Smith, where the charge was published in German language and it was claimed that the indictment should have alleged that it was published in the German language. The Court held that the publication, even if it was published in the German language where it was published, it must be signified that the reader might understand, otherwise it could not be published. But there is nothing in that case which holds that the manner of publication must not be alleged.

30
40 The case has been distinctly ruled upon by the Court of Errors of the State of New York in the case of the *People v. Stark*, 136 New York. (Reading case:) "The pleading charges, in substance, that the defendant at a time and place designated, wrongfully, un-

Testimony

lawfully and maliciously published of and concerning one Asa T. Soule, a false, scandalous and malicious libel in the words and tenor following, and comprising a verbatim state of the defamatory matter published. There is no averment of publication, whether by writing, printing, posting or otherwise than by mere speech, or of the person or persons to whom it was addressed, or by whom it was seen or read; or that the names of such persons were unknown to the Grand Jurors. Tested even by the criminal code, I do not think such an indictment contains a plain concise statement of the act constituting the crime. So far as the manner of publication is concerned it does not allege any fact but a mere conclusion of law." 10 20

"It was held by this Court in *People v. Dumar*, that the indictment must both charge the crime and state the act constituting it. And the principal reason for requiring a specific statement of the act, is the right which the accused has to be informed of the precise accusation which he is required to defend."

In commenting upon the change wrought by the new system of pleading in other respects, Judge Danforth, at page five hundred and twelve, says: "Under either system an offence consists of certain acts done or omitted under certain circumstances, and under neither is any indictment sufficient which does not accurately and clearly allege all the ingredients of which the offence is composed, so as to bring the accused within the true meaning and intent of the statute defining the offence." 30 40

Testimony

10 This indictment simply says he published an alleged libel in just the same words which, according to the decision in the New York Court of Appeals was characterized as "setting forth a conclusion of law—according to the idea of the pleader or man who drew this indictment—should be published, which he thinks necessary, stating the facts which he thinks make up the libel. Now there is another curious feature of this indictment which struck me in preparing the case. It is a rather bold proposition to advance, but I think I am bound to advance it, I cannot find any law upon the proposition. There is none. It is this: This publication complained of, relates to proceedings before a Grand Jury, so that the truth or falsity of the statements contained in that charge must depend upon the testimony of members of that Grand Jury, who are precluded by their oaths, and by the law from testifying in regard to those facts and circumstances, and the result of that is that this defendant loses the protection of the provision of the constitution of this State which guarantees to every man, upon a trial for libel—an indictment for libel, to give the truth, of the matters complained of, in evidence.

20 For those reasons I respectfully ask that this indictment be quashed.

30 Mr. Stein: Does your Honor think I ought to answer that? It has been decided four times in this State.

The Court: What is that?

40 Mr. Stein: It has been decided four times in this state that where an indictment al-

Testimony

leges the article was written and published by the defendant, as this one does, that is all that is necessary. Also your Honor is very well familiar with the practice which is if a defendant does not get all the information he seeks out of an indictment he can furnish us with a demand for a Bill of Particulars.

10

The Court: I have fully considered the argument made by the attorney for the defendant, and I am convinced now, as I was the other day, that the case is one that should go to the Jury. The additional reasons submitted to the Court today as ground for the quashing of the indictment do not impress me as good reasons for the granting of the defendant's motion.

20

I shall, under all the circumstances, refuse to quash the indictment.

Mr. Oliver: Your Honor will grant me an exception?

The Court: And I will grant an exception.

Exception allowed. Sealed accordingly.

JAMES C. CONNOLLY, [SEAL]
Judge.

30

Mr. Oliver: Then, if the Court please, the defendant renews his plea of not guilty.

The Court: The Court will direct the plea to be re-entered of not guilty. Proceed.

(At this point the jury was sworn.)

Mr. Stein opens the case to the Jury for the State.

40

CHARLES W. RUNYON, a witness produced on behalf of the State, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Stein:

10 Q. What is your name? A. Charles W. Runyon.

Q. What position do you hold? A. Clerk in the County Clerk's office.

Q. Of what county? A. Union County.

Q. Have you with you the record of the Court of Oyer and Terminer of the May Term, 1911? A. I have.

Q. Is that the record which you have there? A. Yes, sir.

20 Q. Will you please turn to that portion of it which shows the Grand Jurors for the May Term, 1911? A. I have it.

Q. Will you please read from the record who the members of the Grand Jury for 1911 were?

Mr. Oliver: I object as immaterial.

The Court: I will hear argument on that question.

30 Mr. Oliver: The point of my objection is it is absolutely immaterial who were the members of the Grand Jury. It may be material as to whether William E. Johnson was a member, certainly, but this is immaterial.

The Court: I will allow the evidence to go in for the purpose of ascertaining whether William E. Johnson was a member of the Grand Jury at this term of court.

Mr. Oliver: Prays exception.

Exception allowed. Sealed accordingly.

JAMES C. CONNOLLY, [L. s.]

Judge.

Charles W. Runyon—For State—Direct

A. William T. West, Norton L. Wilson, Rev. Joseph B. Ferguson; fourth, S. Merchant Meeker; fifth, Charles Brown; sixth, William F. Marsh; seventh, Michael M. Byrnes; eighth, William H. Ryan; ninth, Louis T. Hersh; tenth, Elwood W. Phares; eleventh, William G. Armstrong; twelfth, John J. Collins; thirteenth, George O. Stevens; fourteenth, John C. Traynor; fifteenth, Frank W. Runyon; sixteenth, Walter J. Lee; seventeenth, George V. Muchmore; eighteenth, Marcy P. Stephens; nineteenth, Charles A. Howard; twentieth, John Farrell; twenty-first, George G. Teller; twenty-second, William E. Johnson; twenty-third, Daniel H. Beach. 10

Q. Were the gentlemen whom you have read according to the record sworn as Grand Jurors? A. They were. 20

Q. And if so, when? A. On Tuesday, May 2d, 1911.

Q. In what Court? A. Court of Oyer and Terminer.

The Court: Of this county?

A. Of this county.

Q. Before whom presiding? A. Honorable James J. Bergen and Honorable Edward S. Atwater. 30

Q. Do you know William E. Johnson? A. No, sir.

Q. Does the record show whether the jurors entered upon the discharge of their duties?

Mr. Oliver: When?

Q. Whether they did enter upon the discharge of their duties?

The Court: That is, whether the record shows it. 40

A. It shows they were sworn on May second, which is the day they entered their duties.

Q. Yes.

Mr. Oliver: I object to that, you don't know whether they did.

10 The Court: No, the presumption, of course, is that is so.

Mr. Stein: You can strike that out of the record for all I care.

Q. What does your record nextly show about the Grand Jury of May, 1911?

Mr. Oliver: I object to that as immaterial.

20 The Court: They must have terminated their labors sometime and I suppose the record will show when they terminated those labors. I will allow the record to go in for that purpose.

A. The officers were sworn.

Q. What does it nextly show about the officers sworn to attend the Grand Jury?

30 Mr. Oliver: I object as immaterial; it is absolutely irrelevant to anything charged in this indictment. It is that Johnson was a member of the Grand Jury that was summoned, and empanelled and sworn and qualified and he entered upon the performance of his sworn and legal duties as one, that is the legal duties.

Mr. Stein: Will you admit those?

Mr. Oliver: Admit what?

Mr. Stein: That all those things were done?

40

Mr. Oliver: I do not admit anything. I

Charles W. Runyon—For State—Direct

said swearing the officers has not anything to do with performing the duties of a Grand Juror.

Q. Turn to the next page of the Grand Jury of May, 1911? A. Several things done on that day. Grand Jury being charged by— 10

The Court: You simply answer the question.

Q. You simply turn to the next, when the Grand Jury returned into Court. A. Tuesday, May 16th, 1911.

Mr. Oliver: If the Court please, I object as absolutely immaterial.

The Court: Objection overruled. 20

Mr. Oliver: Exception.

The Court: Exception granted.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge

A. Grand Jury, Tuesday, May 16th, 1911, present Hon. Edward S. Atwater, Judge of the Court of Common Pleas. The Grand Jury returned into Court and presented thirty-one indictments, being numbered from one to thirty-one, both inclusive; juror George V. Muchmore being excused. 30

Q. Were the Grand Jury discharged on that date? A. The Grand Jury, not having finished the business before them, again retired.

Q. Turn to where the jury nextly appeared before the Court.

Mr. Oliver: Same objection.

The Court: Same ruling. 40

Charles W. Runyon—For State—Direct

Mr. Oliver: Exception.

Exception allowed—sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

10 A. Monday, May Twenty-ninth, 1911, present Honorable Edward S. Atwater, Judge of the Court of Common Pleas. The Grand Jury again returned into the Court and presented twenty-three indictments, being numbered from thirty-two to fifty-four, both inclusive. Juror Daniel H. Beach being excused. The Grand Jury, not having finished the business before them, retired.

20 Q. Turn to the next record of the Grand Jury of May, 1911. A. June fifth, 1911. Present Hon. Edward S. Atwater, Judge of the Court of Common Pleas. The Grand Jury again returned into the Court and presented twenty-eight indictments, being numbered from fifty-five to eighty-two, both inclusive, and one presentment. All the members being present. The Grand Jury reported to the Court that they had finished the business before them, whereupon the Court thanked them for their services and excused them from further attendance during the term, subject, however, to the call of the Court, if necessary.

30 Q. Does the record of the Court of Oyer and Terminer which you have there show the oath that was administered to the members of the Grand Inquest of May, 1911? A. No, not in the minutes.

Mr. Oliver: I will admit the jury was properly sworn and entered upon the discharge of its duties.

The Court: Will you admit the form of the oath?

40 Mr. Oliver: Oh, yes. I do not think there is any doubt about it.

Charles W. Runyon—For State—Cross

Q. Will you please read the form of the oath into the record? A. "You, as members of this Grand Inquest, to sit in behalf of the State of New Jersey, in and for the body of the County of Union, shall diligently enquire and true presentment make of all such matters and things as shall be given you in charge, or in any way come to your knowledge, touching your present services; counsel of the State, your fellows and your own you shall keep secret; you shall present no one through envy, hatred, or malice, neither shall you leave anyone unrepresented through fear, favor, affection for reward, gain or hope thereof; but you shall present things truly as they shall come to your knowledge, according to the best of your skill and understanding, so help you God."

10

20

Mr. Stein: Cross examine the witness. I desire to offer the record in evidence.

Mr. Oliver: No objection.

The Court: That is, those portions which have been read into this record.

Cross examination by Mr. Oliver:

Q. You do not happen to have the minutes of that Grand Jury in your possession? A. No. I do not have the minutes of the Grand Jury.

30

Q. Who has? A. Who has the minutes of the Grand Jury? The Clerk of the Grand Jury.

The Court: Under the statute, no minutes are required to be kept, so that there are no official minutes.

(Record entered in Evidence and marked Exhibit P. 1.)

40

GEORGE C. OTTO, produced as a witness, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Stein:

Q. You are Sheriff of this county? A. Yes, sir.

10 Q. And have you in your possession the record of the May Term, 1911? A. Yes, sir.

Q. Showing who were the Grand Jurors drawn by the Sheriff? A. Yes, sir.

Q. Will you please refer to it? A. Records of the Grand Jury, 1911, May.

Q. Will you please read from the record of the Sheriff's Office, for May, 1911, who the Grand Jurors were that were drawn, and empanelled?

20 Mr. Oliver: I object to the question as immaterial on the ground that it is absolutely immaterial as to what, as to who were the Grand Jurors sworn as members of this Grand Jury, except possibly, as regards one William E. Johnson.

Mr. Stein: I understood counsel said in his argument, he couldn't tell when Johnson served as a member of the Grand Jury.

30 Mr. Oliver: I have no objection to proof made or evidence given that William E. Johnson was called on this Grand Jury; my point is it is immaterial who else made up that Grand Jury.

40 Mr. Stein: The reason is if William E. Johnson was called alone he could not do anything. He would not be a Grand Jury, and, in order to make the proof complete that he was regularly and duly constituted, empanelled and sworn as a Grand Juror, we have to show he was drawn according to law, and twenty-three men would have to be drawn.

George C. Otto—For State—Direct

Mr. Oliver: Absolutely so, that twenty-four men are called and twenty-three sworn. I have no objection to that. The names of those men are absolutely immaterial, and I object as immaterial.

The Court: I shall overrule the objection. 10

Mr. Oliver: I ask an exception.

The Court: You may have an exception.

Exception allowed—sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

(Question repeated by the stenographer.)

A. Do you want them all read?

Q. Yes. A. One, William T. West; two, N. L. Wilson; three, J. B. Ferguson; four, S. M. Meeker; five, Charles Brown; six, E. T. Marsh; seven, M. M. Byrnes; eight, W. H. Ryan; nine, L. T. Hersh; ten, E. W. Phares; eleven, William G. Armstrong; twelve, John J. Collins; thirteen, George O. Stephens; fourteen, John C. Traynor; fifteen, Frank W. Runyon; sixteen, Walter J. Lee; seventeen, George V. Muchmore; eighteen, W. P. Stephens; nineteen, Charles A. Howard; twenty, John Farrell; twenty-one, George G. Teller; twenty-two, W. E. Johnson; twenty-three, D. H. Page. 20 30

The Court: Isn't there twenty-four names?

A. Not twenty-four names; only for twenty-three on our list.

Q. The twenty-fourth does not appear anywhere. Now, does your record further show whether this Grand Jury was afterwards discharged from service by the Court? A. Yes, sir. 40

George C. Otto—For State—Direct

Q. When were they discharged from service? A. Certified they all signed the pay roll here.

Q. When was that they were paid off? A. Paid September twenty-second.

10 Q. And among the members paid off was William E. Johnson, one of them? A. William E. Johnson signed his name in the pay roll, as having received eighteen days.

By Mr. Oliver:

Q. You mean pay for eighteen days? A. Sir?

Q. You mean pay for eighteen days? A. He wouldn't be paid unless he served.

20 Mr. Oliver: He said he served eighteen days.

A. Eighteen days marked here, if he hadn't served—there is some got less.

Mr. Stein: That is one of those things that counsel objects to.

A. Reconvened in July at that time.

30 Q. They were paid what was due them and discharged, does your record show that? A. Yes, sir.

Mr. Stein: That is all.

Mr. Oliver: That is all, Sheriff.

MISS ETHEL WACHTER, produced as a witness, on behalf of the State, being duly sworn on her oath, according to law, saith:

Direct examination by Mr. Stein:

Q. Miss Wachter, where are you employed? A. Colby and McGowan, as bookkeeper. 10

Q. Will you speak a little louder, so the twelfth juror can hear you? You can talk over that way. Were you so employed in October of this year? A. I was.

Q. Know Mr. Harwood Fish? A. Not personally.

Q. You know that he is Mr. Fish? A. Yes.

Q. Have you seen him before? A. I have.

Q. And when? As near as you can remember? A. In November I think it was. 20

Q. Yes. Well, I show you a paper, a typewritten document of two pages, and ask you if you recognize that? 20

(Question repeated by the stenographer.)

A. I do.

Q. And when did you first see that paper? A. October 26th.

Q. Twenty-sixth. And how do you remember the date? A. Why, by our records in our sales-book. 30

Q. What is the business of Colby & McGowan? A. Printers.

Q. Who brought that paper in, if anybody did?

Mr. Oliver: One moment, if she knows.

A. I do not remember.

Q. What is the answer? A. I do not remember.

(Answer repeated by the stenographer.) 40

Miss Ethel Wachter.—For State—Direct

Q. Who received that paper in Colby & McGowan? A. I do not know.

Q. How did you get possession of that paper? A. I don't know.

10 Q. Well, you had possession of it? A. Yes, it was put in an envelope.

Q. When did you deliver up possession of that paper? As near as you can remember? A. What do you mean?

Q. When did you give the possession of it to someone else? A. 24th of January.

Q. And what was that paper brought to Colby & McGowan's for?

Mr. Oliver: I object——

20 Mr. Stein: If she knows. If she does not, she can say so.

A. It must have been brought there to be printed.

Mr. Oliver: I move to strike that out.

The Court: Unless you can show she knows I will have to strike out the answer. As appears at present it will be stricken from the record. You may repeat the question, however.

30

Q. Do you know whether this is the manuscript of some printing matter that was printed in your printing office of Colby & McGowan's?

Mr. Oliver: I object; it is leading question, if the Court please.

The Court: It is somewhat leading, and yet I do not see how he could intelligently convey what he wanted to unless he put the

40

Miss Ethel Wachter—For State—Direct

question in that way. I will allow it to stand.

Mr. Oliver: Prays exception.

Exception allowed. Sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge. 10

(Question repeated by the stenographer.)

A. Yes, it was.

Q. How did you get possession of the manuscript afterwards? A. I don't remember.

Q. What is your work in Colby & McGowan's? A. Bookkeeper.

Q. You do not know who handed it to you? A. I don't.

Q. But you had it in your possession until recently? A. Yes. 20

Q. Before you delivered it to—who did you deliver it to? A. Mr. Lowden.

Q. Who?

(Answer repeated by the stenographer.)

Q. Before you delivered it to Mr. Lowden, did you do anything with it? A. Yes. I was asked to sign my initials on the back of it. 30

Q. Are your initials on that paper now? A. They are.

Q. Are they your initials? A. They are.

Q. I would like to have that paper marked for identification, if your Honor please.

(Paper marked P2 for identification.)

Mr. Stein: Also I offer another paper to be marked, which is the printed circular, for identification. 40

Miss Ethel Wachter—For State—Direct

Mr. Oliver: I object to it being marked for identification.

The Court: It cannot be marked for identification until it is first identified.

10 Mr. Stein: I wanted to refer to the witness.

Q. I show you another paper, printed circular and ask you whether that bears your initial? A. It does.

Q. And I show you an envelope and ask you whether that bears your initial. A. It does.

Q. And I show you another circular and ask you whether that circular bears your initial? A. No, that does not.

20 Q. Do you recognize that circular? A. No, I do not.

Q. In this envelope which bears your initial which I show you, top of which is marked 10-5-39, was that handed by you to anybody?

Mr. Oliver: I object if the Court pleases.

Q. Handed by you to anybody?

30 Mr. Oliver: Leading question.
(Question repeated by the stenographer.)

Mr. Oliver: Handed to anybody by you.

Mr. Stein: That is answerable yes or no.

The Court: It is leading, but it is not of such a character I think as would lead the witness to falsify the facts.

Q. It is answerable yes or no.

40 The Court: I will allow the question to stand, and grant you an exception.

Miss Ethel Wachter—For State—Direct

Exception allowed—sealed accordingly.

JAMES C. CONNOLLY, [L. s.]

Judge.

Q. Do you remember the question?

(Question repeated by the stenographer.)

10

A. I handed it to Mr. Lowden.

Q. Yes, and what was in the envelope when you handed it to Mr. Lowden? A. Two original copies and one printed.

Q. Two original copies and one printed of what? A. Of the circular.

Q. When you speak of an original copy do you speak of the two-page typewritten statement which is marked P 2 for identification? A. Yes, sir.

20

Q. And when you speak of the printed circular do you speak of the printed circular you are now holding in your hands? A. Yes, I do.

Mr. Stein: I would like to have this printed circular marked P 3 for identification.

(Paper marked P 3 for Identification.)

Mr. Stein: I would like to have the envelope that has been identified, marked for identification.

30

(Paper envelope marked P 4 for Identification.)

Q. Now, Miss Wachter, do you know the handwriting of Harwood Fish? A. I don't.

Q. Did you ever see it? A. No, I didn't. May have been, I do not know. I am not sure.

Mr. Oliver: "May be" is not evidence. She says she does not know his handwriting.

40

Miss Ethel Wachter—For State—Direct

(Answer repeated by the stenographer.)

Mr. Oliver: I ask to strike that out, if the Court please.

The Court: I will strike it out, where she says: "it may have been."

10 Q. Do you know whether any circulars were printed from this manuscript marked P 2 for identification? A. Yes, this was one here.

Q. Do you know how many were printed? A. Fifteen hundred.

Q. Beside that one? A. Just fifteen hundred.

Q. Altogether. Do you know what became of those circulars? A. I don't.

Q. Do you know how much those circulars cost? A. Seven dollars.

20 Q. How many dollars? A. Seven dollars.

Q. Do you keep the books for Colby and McGowan? A. I do.

Q. Have you your books here with you? A. I have.

Q. Will you please open your books, are they out here? A. Mr. Colby has them.

Q. Who? A. Mr. Colby.

Q. Do your books show this charge of seven dollars? A. It does.

30 Q. It is a loose leaf ledger? A. Sales book.

Q. Yes? A. Sales book.

Q. Who were these fifteen hundred circulars charged to? A. Good Government League.

Mr. Oliver: What is that?

A. Good Government League.

Q. Who did you send the bill to? A. To the Good Government League.

Roy G. Reynolds—For State—Direct

Q. What is that? A. To the Good Government League.

Q. How did you address the Good Government League? A. I don't remember. Just Good Government League, Roselle Park.

Q. Be careful; if you can't remember how you addressed it, can you say you sent it to the Good Government League? A. No. 10

Q. How? A. No.

Q. Are you sure you did not send that letter or that bill to an individual? A. I am not sure.

Q. Can you say whether you mailed it to Harwood Fish? Can you say?

Mr. Oliver: I object.

Mr. Stein: It is not leading 20

A. No, I cannot.

Q. Do you know who paid for it? A. No, I don't.

Q. Does anybody in Colby and McGowan's—no, I will not ask that question.

Mr. Stein: That is all.

I want to offer the manuscript and the circular letter. No, I will not offer them in evidence just yet, Mr. Oliver is nervous about it. 30

ROY G. REYNOLDS, a witness produced on behalf of the State, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Stein:

Q. Mr. Reynolds, you reside where? A. Roselle Park. 40

Roy G. Reynolds—For State—Direct

Q. Where did you reside in October, 1915? A. Roselle Park.

Q. Do you know the defendant, Harwood Fish? A. Yes.

10 Q. Is there an organization known as the Good Government Club in Roselle Park? A. There is a group of men congregated together known as the Good Government League.

Q. League. Yes. Did you ever visit Mr. Fish's home? A. Yes.

Q. Are you a member of that league? A. Yes, I am one of the crowd.

Q. Yes. Is Mr. Fish a member of that league? A. Yes, sir.

20 Q. Who was its president in 1915? A. What part of 1915 may I ask?

Q. October. A. Well, may I ask a question? I don't get your question.

Q. That may be. A. I was given informal presidency in the latter part of October, if that is the question you have asked me.

Q. Who was the president just prior to yourself, if you recall? A. I don't know that I can positively state.

30 Mr. Oliver: Just a moment. If the Court please perhaps this organization and group of men keeps minutes.

The Court: Well—

Mr. Oliver: If they do, this testimony is not competent.

40 The Court: I imagine this is all introductory, but it seems to me it is of very little materiality at this time. It is simply to introduce matters that ought to be brought forth.

Roy G. Reynolds—For State—Direct

Mr. Oliver: If the Court please, he asked this man who was president of the club.

The Court: If it appears that the club has minutes and any other question is asked concerning the affairs of the club, its transactions—

10

Mr. Stein: Its meetings, I haven't asked about that.

The Court: I do not anticipate that anything of that kind will arise.

Mr. Oliver: I haven't any means of anticipating what the Prosecutor is driving at. I simply know he asked who the president of this club was and I said that the books of this club are the best evidence.

The Court: He is asked who preceded him in that office. Immediately preceding him, I understand. I will allow the question.

20

A. I believe that Mr. Mumford was president preceding me.

Q. Do you remember ever having visited the home of Mr. Fish with Louis V. Hobbs? A. Yes, he was there at that time. We weren't the only visitors; we were there together.

Q. How? A. We were there together at the time. One time.

30

Q. Do you know a man by the name of William E. Johnson in Roselle Park? A. I do.

Q. I want to show you a printed circular marked P 3 for Identification and ask you whether you have ever seen such a circular? A. Yes, I have.

Q. How did it come to your notice?

Mr. Oliver: One moment, if the Court please. I object to this witness being ex-

40

Roy G. Reynolds—For State—Direct

amined on this document before it is offered in evidence.

Mr. Stein: If I do not get it in evidence later on it will not hurt you.

10 Mr. Oliver: I object to it now on the ground he is referring to a document and asking the witness to testify to a document that is not in evidence. Simply marked as an Exhibit for Identification.

The Court: I think that is so, Mr. Prosecutor.

20 Q. I will go back a step further and show you P 2 for Identification, a typewritten paper with a name signed to it at the bottom and ask you if you recognize that signature? A. I have never seen Mr. Fish's signature.

Q. That was not what I asked you. I ask you if you recognize that signature? A. I don't.

Q. You don't? A. I don't.

Q. He doesn't recognize the signature. Do you remember whether or no you were at the home of Mr. Fish when there was a discussion or some talk, I don't know which, about a circular to be issued by him concerning Mr. Johnson?

30 Mr. Oliver: One moment. If the Court please, that puts the words in the witness' mouth; I object to it. It is very leading.

Mr. Stein: I will ask the question to be read.

(Question repeated by the stenographer.)

The Court: That is leading. Ask him if he was at his home any time and what the subject of discussion was.

40 Mr. Stein: He was there so often.

Roy G. Reynolds—For State—Direct

Q. Do you remember——

Mr. Oliver: I move to strike that remark out.

Mr. Stein: He has so testified.

The Court: I do not think it injures you. 10

Mr. Oliver: I would like the witness to testify.

Q. Mr. Reynolds, when you and Louis Hobbs were at Mr. Fish's home what was said in October last?

Mr. Oliver: I object; in the first place, there is no testimony he was there in October.

Mr. Stein: He said he was there. I will ask the question again. 20

Q. Were you and Louis Hobbs at Mr. Fish's home in October, 1915? A. Yes, sir.

Q. When you were at the home with Mr. Hobbs, what was said by Mr. Fish——

Mr. Oliver: Now, if the Court please, that question is entirely too general. Many things might have been said without any reference whatever to this particular case. 30

Q. (Continued)—concerning Mr. Johnson? A. Mr. Fish said there was some things he would like to put in the circular concerning Mr. Johnson.

Q. Did he mention them? A. He didn't.

Q. What was said by you or Mr. Hobbs? A. I said that anything personal would not go out on a circular over the signature of the Good Government League.

Q. And what was Mr. Fish's reply to that state- 40

Roy G. Reynolds—For State—Direct

ment of yours? A. If he had anything to say he would send it out himself, or something to that effect.

10 Q. And subsequently do you know whether or no a circular was sent out concerning Mr. Johnson, bearing the signature of Mr. Fish? A. I didn't see the circular until I received it next morning at my home.

Q. Was that a circular concerning Mr. Johnson?

20 Mr. Oliver: Well, now, if the Court please, I object; it doesn't make any difference whether it was or not. He said he doesn't know what Fish proposed to put in this circular he was talking about. His objection was he would not submit to anything personal, but he did not know what was in the circular.

Mr. Stein: He got one next day.

Mr. Oliver: I know, but he got what?

The Court: As the question is put I will have to overrule it.

(Question repeated by the stenographer.)

30 The Court: I overrule that on this account: assuming it did concern Mr. Johnson; assuming that the name Fish was printed on it, and it contained all the libelous matter charged in the indictment, yet there is nothing before the Court at this time to show that it was published by Fish, or sent out by him, and for that reason I cannot allow it in evidence, at this time at least. It may be that later on it will be proper to do so.

40 Mr. Oliver: I do not think your Honor intended to say that the matter charged in the indictment is libelous?

Roy G. Reynolds—For State—Direct

The Court: I have to discuss points as they are raised here. And I know the jury on these questions are not paying any attention to what I say. I shall charge them subsequently as to what I regard as the law in the matter.

10

Mr. Oliver: Your Honor does not intend now to say to the jury—

The Court: I do not intend now to say to the jury that the matter set forth in the indictment is libelous. That is a matter for proof.

Q. Mr. Reynolds, I am speaking to you now with particular reference to the circular marked three for identification, and I ask you whether or no you were at the home of Mr. Fish subsequent to the talk that you and Mr. Hobbs and he had when circulars like that one were being folded? A. Yes, I was.

20

The Court: Do you mean after they had been sent out?

Mr. Stein: No, they had not been sent out yet, they were being folded.

Q. Who was folding these circulars? A. Some members in Mr. Fish's family and a few of the men of the Good Government League.

30

Q. Do you know Mr. Pawlik? A. Yes, sir.

Q. Mr. Richards? A. Yes.

Q. What other gentlemen were there, as near as you can remember? A. Those were the only two gentlemen I can really swear were there. There was others, but I couldn't really swear who they were.

Q. On that occasion did Mr. Fish say anything

40

Roy G. Reynolds—For State—Cross

to you concerning the circulars of which P 3 is one, printed circulars? A. Yes, he asked me if I had read it.

Q. What did you tell him? A. I told him I hadn't.

10 Q. What did Mr. Fish say? A. He said you better, it is interesting.

Q. Then what did Mr. Fish do? A. He attempted to read it to me, but I was so busy folding circulars that I didn't catch what it was.

Q. Do you mean he attempted to read it to you, or he did, and you didn't pay any attention to it? A. I think he made an attempt, it looked that way.

20 Q. What was being done with those circulars after they were folded in Fish's home? A. Being put in envelopes with other circulars, with other circulars the Good Government League was putting out.

Q. Do you know what became of the circulars P 3 and others after they were folded up and put in envelopes? A. I do not.

Q. Did you, yourself, receive a circular like the one P 3? A. I did.

30 Q. For identification. And how did it reach you? A. That I don't know. I found it on my desk at home when I returned from business that day.

Q. You did not bring it home yourself? A. No, sir.

Mr. Stein: Cross examine.

Cross examination by Mr. Oliver:

40 Q. Mr. Reynolds, how many members has the Good Government Club? A. I can't say.

Roy G. Reynolds—For State—Cross

Q. About how many? A. Oh, I haven't the least idea.

Q. Don't know how many? A. I don't know.

Q. Is it a large club or small one? A. Pretty good size club.

Q. Can you name any of the members other than those you have named? A. Yes, there is— 10

Q. Will you name some? A. Langhans, Mr. Earnst.

Q. What is that, Earnst? A. Earnst, Mr. Renton.

Q. Yes. Who was Mr. Langhans? A. I do not know what his position is, he is an accountant. I believe he is City Collector, or City Treasurer, or Clerk, or something of that kind.

Q. Some official position? A. Yes. 20

Q. Does Mr. Renton? A. I think he is holding a city position also.

Q. Who are some of the other members of this Good Government Club? A. Having not been very well acquainted in Roselle Park, I couldn't say who they were. I know lots of them by sight, but not by name.

Q. Do you know anything about the purpose of the Good Government Club, generally? A. I have understood and assumed that it was for the better government of Roselle Park, promoting better government. 30

Q. As I understand it, when Mr. Fish spoke about sending this document out; this circular, you didn't know what was put in it, did you? A. I did not.

Q. Your only objection to such a circular was that you did not care—the association, as such, did not care to have to do with any circular which contained personal allusions? A. Absolutely so. 40

Harry F. Langhans—For State—Direct

Q. And that was your only objection to the proposed circular, is it not so? The sending it out with— A. Yes, my objection was I didn't want anything in it, any personalities of any kind.

Q. That is all. A. I wasn't in that business.

10

Mr. Stein: That is all.

HARRY F. LANGHANS, a witness produced on behalf of the State, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Stein:

20

Q. Mr. Langhans, you are the Borough Collector of Rosellé Park? A. I am.

Q. And you know Mr. Fish? A. I do.

Q. I call your attention to a circular marked Three for Identification on the part of the State and ask you whether you have ever seen that circular before? A. I have.

Q. When did you see it?

30

Mr. Oliver: I object, if the Court please, on the ground this circular is not in evidence.

Mr. Stein: Well, now, I will never get it in evidence, of course, if I cannot show these things. Counsel will understand that.

Mr. Oliver: I object, notwithstanding; there is a way of proving the case.

Mr. Stein: I am proving my case—

Mr. Oliver: I object to this method of proving, and I object to the question.

40

The Court: I think you ought to get it

Harry F. Langhans—For State—Direct

in evidence first before you examine on its contents.

Mr. Stein: I am not asking about its contents. He said he has seen it before; that is only to show publication of the circular.

Mr. Oliver: There is nothing, absolutely, to identify that with anything. They have not proven that the original was signed by the defendant. 10

The Court: That does not make any difference. At this time the objection is sustained.

Mr. Stein: Of course, I might say now, if the Court will permit me to, that even though the State never proves that a man signed his name to a circular, you can prove that he published the circular. In other words, a man can write all the libels he wants at home and throw them in the waste basket. And if I was to write a libel at home and never intended to publish it, and Your Honor came to my house and picked it up and said, that is a good thing on Oliver, or somebody else, and published it, the libel would be published by Your Honor, and not by me. In other words, in libeling a man you can do all you like at home. Now, then, this circular, even thought that never bore the signature of anybody, if we show it was sent out by Mr. Fish, it makes him guilty of libel. 20

The Court: Certainly. 30

Mr. Stein: In other words, if a newspaper, I bring an article to a newspaper—

Mr. Oliver: I ask leave to interrupt.

The Court: I will listen to counsel. 40

Harry F. Langhans—For State—Direct

Mr. Oliver: Will the stenographer read back a question or two?

The Court: The Court will deny your request.

10 Mr. Oliver: If the Court please, I except to the remark of Your Honor and your answering counsel, it is in the minutes; I simply want the stenographer to read back so Your Honor would see what it is.

The Court: Proceed.

20 Mr. Stein: Your Honor is familiar with the rule of law as in a case, for instance, of the newspaper. A man can bring all the libels he chooses. He can write them day or night, and bring them to the Times, and Journal; there is no publication of them until they put that in the paper, and then who is libel? Not the writer; the publisher. So, I am asking him, now whether he received such a circular as the one marked Three for Identification. If he did he can say so. After I have sufficiently shown that and connected Mr. Fish with it, whether it bears his signature or not, the proof is complete of the publication.

30 The Court: Is that your present question?

Mr. Stein: The question is whether he received such a circular as "3 for Identification."

The Court: Question is overruled.

Q. Mr. Langhans, do you know the handwriting of Mr. Fish? A. I ought to.

Q. Do you know? A. I do.

40 Q. You are Collector of the Borough he is Mayor of? A. I am Treasurer.

Harry F. Langhans—For State—Direct

Q. You are Treasurer; and I call your attention to P 2 on the part of the State, a printed circular with the name "Harwood Fish" signed at the bottom of it, and ask you whether that is the signature of Harwood Fish? A. It resembles it.

By the Court:

10

Q. Oh, well, cannot you answer whether it is or not? A. I couldn't say, Your Honor.

Q. Do not leave the Jury in doubt about it. If it is say so, and if it is not, say so.

By Mr. Stein:

Q. In your opinion is that the signature of Harwood Fish? A. It is.

The Court: That is his signature to the typewritten copy that was brought to the publisher's office?

20

Mr. Stein: Yes, Your Honor.

And of which he said fifteen hundred circulars were printed from.

The Court: Yes.

Mr. Oliver: There is no evidence, if the Court please, that is a true copy. I haven't seen that original.

The Court: It is not in evidence yet.

30

Mr. Oliver: He is asking about a circular she said there were fifteen hundred copies made of.

Q. Do you remember receiving an invitation to call at Mayor Fish's home, over the telephone? While you were at Dobbins, bowling? A. I do.

Q. When was that? The month and year. Day of the month if possible? A. Day I can't say, but

40

Harry F. Langhans—For State—Direct

I know it was in the latter part of October, if I remember correctly.

Q. About what time of the day, as near as you can remember? A. Somewheres around midnight?

10 Q. Did you know or did you recognize the voice of the person who was speaking to you? Over the wire? A. I did.

Q. Do you know the voice of Mr. Fish over the telephone? A. I do.

Q. Can you say whether it was he that called you on that occasion? A. I couldn't positively swear to it, but I took it for his voice.

Q. And taking it for his voice, what did you do? Did you go? A. Not that night.

Q. When did you go? A. Early next morning.

20 Q. The person, whoever it may have been called you, requested you to come next morning or that night? A. Asked me to come next morning.

Q. Speak a little louder. And on the next morning whom did you meet at Mr. Fish's home? A. I met the Mayor and I believe that was all.

Q. Met Mayor Fish? A. Yes.

Q. What time in the morning was it you went there? A. About six thirty.

30 Q. And how, on foot? Or horseback, or automobile? A. Automobile.

Q. What was the occasion for taking your automobile? A. Take some mail over to the post office.

Q. What mail? A. For the Good Government League.

Q. Was that the import of the telephone call, to bring your car with you? A. Yes, probably.

Q. Did you know what you were going over for, at six thirty in the morning? A. Why certainly.

40 Q. What for? A. To take some mail over to the post office to get it in the first mail.

Harry F. Langhans—For State—Direct

Q. Who asked you to do that? A. I believe it was the Mayor's voice.

Q. Mayor's voice. In the morning you met the Mayor, and then what happened? A. Why, I took some mail over to the post office.

Q. Alone? A. No.

Q. Who went with you? Just tell us, won't you, please, what happened? A. I don't just remember who was along, but I think the Mayor was with me.

Q. Was there much mail? A. Quite a lot of it.

Q. How did you get the mail into the car? A. I don't remember whether it was a basket or a box.

Q. You didn't carry it out in your hands, you know that don't you? A. I didn't carry the mail in my hands.

Q. You carried it in some receptacle, and you do not know whether it was a basket or box? A. Exactly.

Q. Who helped you carry the mail? A. The party who was with me.

Q. Who was it? A. I said I believe it was the Mayor.

Q. And where did you carry it to from the Mayor's house? A. To the automobile.

Q. Where did you go then? A. To the Roselle Post Office.

Q. Who went with you? A. The Mayor.

Q. When you got to the post office, what did you do with this mail?

Mr. Oliver: Well, now, if the Court please, there is nothing to identify this mail.

Mr. Stein: I am going to show that in a moment.

The Court: I will allow the question.

Harry F. Langhans—For State—Direct

Q. What did you do with the mail when you got to the post office? A. I don't just remember, whether the postoffice was opened or still closed.

By the Court:

10 Q. What did you do with it, throw it there?

A. Mailed it all in at once, perhaps, your Honor.

Q. By doing what? What did you do with it?

A. I don't remember if the post office was opened. If it was open we took it in naturally. But I don't just remember whether the postoffice was opened that morning, yet, or not. Half past six.

Q. Did you make a trip to only the one post-office or a number of them? A. It was either left in the postoffice or deposited in the box.

20 Q. You didn't bring it back from the postoffice, did you? A. No.

Q. I see. Can you say whether you left it at the postoffice?

The Court: He said he left it at the post-office.

A. Either in the box or in the postoffice.

30 The Court: Was it stamped?

Mr. Stein: Envelopes, your Honor means?

The Court: Yes.

Mr. Stein: Yes.

Q. Were they stamped? A. Yes.

By Mr. Stein:

40 Q. One or two cent stamp? A. That I couldn't tell you now.

Harry F. Langhans—For State—Direct

Q. Now, do you know what was in that mail?

The Court: Yes or no is the answer.

A. Why, I don't exactly know.

The Court: Yes or no, do you know what was in it? 10

A. I know there was circulars in it, your Honor.

The Court: Yes or no?

A. Yes.

The Court: That is the answer.

Q. Did you know what the circular was about? 20

A. No, sir.

The Court: Yes or no?

A. No.

Q. What is that? A. No, sir.

Q. At the postoffice, what did Mr. Fish say to you, if anything, about the mail and its contents?

A. I believe he told me there was a circular in there of the Good Government Club and also a personal circular. 30

Q. By whom, did he say? A. About W. E. Johnson.

Q. Did he further say anything about the circular or say anything further about W. E. Johnson? A. No.

Q. No, Mr. Langhans, in the morning did you receive a circular through the mail? A. I did.

Q. And I call your attention to P3 on the part of the State for Identification and ask you whether you received a circular like that. 40

Harry F. Langhans—For State—Direct

Mr. Oliver: I object on the ground it is not in evidence.

Mr. Stein: It is for identification still. That is the only way to identify it, is to identify the circular by the people who got it.

10

The Court: You are comparing a circular now with a circular that is not yet offered in evidence.

Mr. Stein: I am not doing that. I am asking whether he received a circular next morning in the mail like P3 for the State.

The Court: Yes.

Mr. Stein: Which is offered for identification.

20

The Court: Yes.

Mr. Stein: And I want to further identify the circular by other witnesses. It is not in evidence yet.

The Court: I will overrule the question.

Q. Were you at the home of Mr. Fish when circulars were being folded and placed in envelopes?

A. I was not.

30

Mr. Stein: If your Honor please, I want to ask this question, and I would like to argue the point before the Court rules in case objection is made.

Q. Mr. Langhans, did you meet Mr. Fish next morning, after you and he had mailed these circulars that were brought from his house? A. Next morning?

Q. Or a few days later, I don't care which. A. I met him several times after that, yes.

40

Harry F. Langhans—For State—Direct

Q. And did Mr. Fish talk with you subsequently about a circular? A. He did.

Q. Do you know what circular he talked about? A. The one I hold in my hand here I believe.

Q. That is P3 for identification? A. Yes.

Q. What did he say about that circular? A. I couldn't recall the words. 10

Q. I don't ask you to do that. A. I don't recall the conversation.

Q. As near as you can remember what did Mr. Fish say to you about that circular P3, which you hold in your hand? A. What I thought of it.

Q. What you thought of it; how did he say that, Mr. Langhans? A. That I couldn't tell you. I couldn't tell you now.

Q. Oh, now. 20

Mr. Oliver: Well, I object to the question as not intelligible. How did he say it?

I submit this question is not intelligible.

The Court: I will allow the question to stand. I notice that the Prosecutor is having a good deal of difficulty in eliciting testimony from this witness; I will allow the question to stand. Proceed.

(Question and answer repeated by the stenographer.) 30

Q. That is the question. How did you come to talk about the circular? Who spoke first? A. I don't remember that.

(Answer repeated by the stepographer.)

A. I don't remember who spoke first about it.

Q. Where did you meet? A. I believe it was on the street. 40

Harry F. Langhans—For State—Direct

Q. In what city? A. Borough of Roselle Park.

Q. At any rate, Mr. Langhans, it was in the Borough of Roselle Park in the street? A. I said on the street in the Borough of Roselle Park.

10 Q. What time of the day was this? A. That I couldn't say. I couldn't say whether it was morning, noon or night. I couldn't say now.

Q. Did you work in Roselle Park all the time, all day long? A. No, sir.

Q. Have you business elsewhere? A. I have.

Q. And do you come home in the evening? A. I do.

Q. Your work as Borough Clerk is all performed in the evening? A. Yes, sir.

20 Q. And now was this on a week day or a Sunday? A. It was on a week day.

Q. And you were not employed in New York on that day? A. At that time I wasn't.

Q. Was it before you went to your work in the morning? A. I wasn't employed at that time.

Q. You were unemployed. Mr. Fish, Mr. Langhans, do you know anything about whether he is around Roselle Park all the time? A. Not all the time, no.

30 Q. Did this talk take place since the last general election? A. I think it was before.

Q. Before. And about how long before the general election was it you and Mr. Fish—you at his request—together with him took these circulars to the postoffice? A. Several days only.

Q. And was it between the time you took them to the postoffice and election day you met him and talked about the circular? A. I did.

40 Q. How did it come about? Did you have a circular in your possession at the time which you showed him? A. No.

Harry F. Langhans—For State—Direct

Q. Did you have one? A. No.

Q. How did you get talking about the circular? You ought to have some recollection about it, Mr. Langhans. A. Why, probably came up in the natural course, talking about the campaign in general.

Q. Why can't you recall for us here just what was said, except that you say he wanted to know what you thought about the circular? A. I couldn't just exactly say, your Honor, how he put those words, or asked me; just exactly what he said.

Q. Will you please tell me now what you said in reply to his question what you thought about the circular, in the language you then used?

Mr. Oliver: I submit that no comment that this man may have had upon the circular can bind the defendant in any way. 20

The Court: There was not any comment that the witness made.

Mr. Stein: Yes. I am asking the testimony so far as he asked the witness what he thought about circular for identification number three on the part of the State. I have a right to show the entire conversation, and what was said in reply.

The Court: I will allow the question to stand. 30

Q. What was your reply? A. Is that permissible?

Q. Yes, I am sure the Court will pardon it. If it don't I will beseech the Court to do it for you. A. I said, "It was damn rotten record."

(Answer repeated by the stenographer.)

Q. Now, Mr. Langhans, you and the defendant are very friendly, are you not? A. We are. 40

Harry F. Langhans—For State—Direct

Q. And you are the Borough Collector of the Municipality of which he is Mayor? A. I am the Borough Treasurer.

10 Mr. Oliver: I object, if the Court please, it is not material.

The Court: I will allow the question to stand.

Mr. Oliver: I object to the testimony, to the State discrediting its own witness.

The Court: I do not understand the State is trying to do that.

Mr. Oliver: On what other theory is it admissible?

20 The Court: He wants to show that a feeling of friendship exists between those two men.

Mr. Oliver: And I submit it is absolutely immaterial except to show this witness—

The Court: I will allow it to stand.

Mr. Oliver: I ask an exception.

The Court: Exception granted.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. s.]

Judge.

30 Q. Did you on the twenty-fifth day of January of this year, make a statement which I herewith show you, and sign it?

(Hands statement to witness.)

Q. For the purposes of this prosecution? Is that your signature? A. My signature; yes, sir.

Q. Was that statement written in your presence?

The Court: Read it over first.

40 A. Everything is there all right.

Harry F. Langhans—For State—Direct

Q. What? A. Everything is there all right.

(Answer repeated by the stenographer.)

Q. That you said? A. But one word.

Q. But one word. What is it? A. The word
"Record." 10

Q. You made a statement then, Mr. Langhans,
on the sixteenth day of January—twenty-fifth day
of January, 1916. A. there is no period there and
I asked that it be put in there. "I told him——"

Mr. Oliver: One moment, if the Court
please, I object. By what right has the State
got to discredit this witness, attempting to
discredit the witness? 20

The Court: The paper is not introduced
for the purpose of discrediting him.

Mr. Oliver: Then why is the Prosecutor
permitted to ask such questions?

The Court: Very frequently witnesses
are called who forget transactions that have
passed and where a written document is
presented to them showing what they have
said on some previous occasion that, perhaps
refreshes their memory if they have made a
statement either qualifying the document
presented or, perhaps, denying they wrote
it or that it contains the facts as they ought
to appear. Now, before the Prosecutor
may cross-examine on the paper you are at
liberty to take it and cross-examine the wit-
ness to ascertain under what circumstances
it was signed by him. 30

Mr. Oliver: I object to the question if the
Court please. 40

Harry F. Langhans—For State—Direct

The Court: If that is the only thing I shall allow the question to stand, but it may be that after the cross-examination of the witness on the paper that the Court will not allow it in evidence. I do not know.

10 Mr. Stein: May I suggest that this witness has already testified on the record that he asked that the word "rotten" be added to the—the word "Record" be added. He said he asked when this was made—he varies it only now "I told him I thought it was damn rotten," that he asked that the word "record" be added, and it was not added.

Mr. Oliver: I see.

20 The Court: Do you desire to cross-examine on the paper?

Mr. Oliver: I will cross-examine later.

Q. Then, Mr. Langhans, you do not deny that that is your signature on this statement?

Mr. Oliver: I object to the question.

The Court: Question allowed.

Mr. Oliver: Exception.

Exception allowed—sealed accordingly.

30 JAMES C. CONNOLLY, [L. s.]
Judge.

Q. Do you? A. No, that is my signature.

Q. Except that you say that when the statement was written out—and you read it, did you? A. I did.

Q. You wanted the word "record" added to the language which is there contained. "I told him I thought it was damn rotten?" A. I did.

40 Q. It was not added? A. No.

Q. Is that so? A. It wasn't added while I was

Harry F. Langhans—For State—Direct

signing. It was handed to me. I signed it and he said he would add it to it.

Q. You wanted it added after you signed it? A. No, it was supposed to be added right then, and it was promised to be added and I signed it.

Q. Why didn't you have it added before you signed it? A. That is my carelessness. 10

Q. That is through carelessness: your statement now is that statement you signed, should have contained the language—when you were asked by Mr. Fish what you thought of the circular—"I told him I thought it was damn rotten record?" A. Yes.

Q. "Damn rotten record?" A. Yes.

Q. And not that you told him it was "Damn rotten"? That straightens it out. Mr. Langhans, you were employed where last October? A. Last October? At that time I wasn't employed. 20

Q. What say?

(Answer repeated by the stenographer.)

A. In October.

Q. Where had you been employed just previous to that?

Mr. Oliver: I object as immaterial.

The Court: How is that material, Mr. Prosecutor, if it is material? 30

Mr. Stein: I do not want to state. I cannot very well state.

The Court: I will allow your question presuming you are going to show its materiality.

Mr. Stein: I hope to show it.

The Court: I will allow it.

Q. Where were you employed previous to October? A. Dodge Process, Incorporated. 40

(Answer repeated by the stenographer.)

Harry F. Langhans—For State—Cross

Q. Had you——

Mr. Stein: Cross examine.

Cross examination by Mr. Oliver:

10

Q. Under what circumstances did you sign that paper? Where did you sign it? A. In the Prosecutor's office.

Q. When? A. On that day.

Q. What time of the day? A. Around twelve o'clock.

Q. How did you come to be in the Prosecutor's office? A. They asked me up there.

Q. Who asked you up there? A. Mr. Lowden.

20

Q. Where were you when he asked you? A. Downstairs in the corridor.

Q. What were you doing down there? A. I was subpoenaed to appear in the Court of Quarter Sessions.

Q. At what time? A. 9.30.

Q. What time did Court open that day? Do you know? A. I don't know, because I wasn't in the Court Room.

30

Q. You were subpoenaed to appear in this Court at 9.30, and you came to Elizabeth, and where did you go? A. To the Court House.

Q. What part of the Court House? A. Downstairs in the corridor.

Q. You saw Mr. Lowden? A. That morning.

Q. What time? A. It was about ten o'clock.

Q. Who is Mr. Lowden, do you know? A. Yes.

Q. Do you know what official position he holds?

A. Yes.

Q. What? A. Assistant County Detective.

40

Q. Assistant County Detective; where does he live? A. Mr. Lowden?

Harry F. Langhans—For State—Cross

Q. Yes? A. Roselle Park.

Q. What did he say to you when you met him here at ten o'clock that morning in the corridor?

A. He said we were half an hour late, and we were wanted in the Prosecutor's office.

Q. He said you were half an hour late and you were wanted in the Prosecutor's office? A. Yes. 10

Q. What else did he say to you? A. Come right upstairs.

Q. Did you go there then? A. Yes.

Q. How long were you there? A. Until after twelve.

Q. Well, what happened when you got there? To the Prosecutor's office? A. I was asked to sit in the ante-room.

Q. How long did you sit in the ante-room? A. About an hour, I should judge. 20

Q. How long were you in the Prosecutor's office? A. About three-quarters of an hour.

Q. How did you come to sign the statement? How did you come to sign the statement? A. Well, I was told I was there to tell everything I knew, and that I had to sign it.

Q. Were you threatened in any way? A. I was; yes.

Q. How? A. I was told that the Federal authorities would take this matter up and they would get after me for taking it to the postoffice. 30

Q. Who told you that? A. I don't just remember it was the county detective or the assistant county detective.

Q. Was the county detective there too? A. Yes, sir.

Q. Mr. Galatian? A. Yes, sir.

Q. Up to that time you refused to make a state-

Harry F. Langhans—For State—Cross

ment, had you? A. Yes. That paper hadn't been drawn or anything up to that time.

(Answer repeated by the stenographer.)

10 Q. Who wrote the paper? Wrote this writing on the paper? A. Mr. Lowden.

Q. Mr. Lowden wrote it. Which is correct, Mr. Langhans, the statement you made here that you thought the circular was rotten, or the testimony given here today that it was a rotten record? A. Testimony given today.

Q. You have not seen this paper after you left the Prosecutor's office that day until it was shown to you just now, on the stand, had you? A. No, sir.

20 Q. To what did you refer when you said it is a "damn rotten record"? A. To the bottom end of that circular.

Q. What? A. Bottom of this circular.

Mr. Stein: Wait a minute now, don't answer until I object.

30 Q. When was that conversation with Mr. Fish with reference to the time when the circular was mailed? Next morning? A. That I couldn't exactly say, do you mean—

(Question repeated by the stenographer.)

A. Yes.

Q. Next morning. You testified that you are Collector of the Borough of Roselle Park. Are you appointed or elected? A. Elected.

Harry F. Langhans—For State—Redirect

Q. Mayor Fish did not appoint you then? A. No, sir.

Mr. Oliver: I think that is all.

Redirect examination by Mr. Stein:

Q. Now, Mr. Langhans, you say in this statement, which has been shown you, "I know Harwood Fish, Mayor of Roselle Park; I was bowling—

10

Mr. Oliver: I object to that if the Court please, that statement is not in evidence.

The Court: Do you offer it?

Mr. Stein: He said he signed that statement out of fear.

The Court: Do you offer it, in evidence?

20

Mr. Stein: No, I want to cross-examine him on the statement he signed through fear and through threats.

The Court: I will allow you to do that.

(Question repeated by the stenographer.)

Q. (Continued) —in Frank Dobbins' place on the night before this circular signed by Fish, and attacking William E. Johnson, was mailed." Did you say that, Mr. Langhans; is that right? A. Yes.

30

Q. You say: "That night Mr. Fish called me up on the telephone, and told me he had some mail that had to get into the postoffice at six-thirty the following morning." Is that right? A. That is right.

Q. Is that all true? A. That is correct.

Q. "He asked me if I would take the mail over in my car." A. That is correct.

Q. "I went to Fish's house at six-thirty next

40

Harry F. Langhans—For State—Redirect

morning. We took the mail, Fish and I, in my car to the postoffice." Is that right? A. We did.

The Court: Is that right?

A. Yes.

Q. That is true? A. Yes, that is right.

10 Q. "Fish told me that in the mail was a circular about Johnson." Is that true? Did he tell you that? A. Yes.

Q. "That day I got one of the circulars in the mail." Is that right? A. Yes.

Q. "I later met Fish and he asked me what I thought about the circular." Is that right? A. Yes.

Q. "And I told him I thought it was damn rotten." And that it wrong? A. That is wrong.

20 Q. And that is the only thing that is wrong? A. Exactly.

Q. That should have read? A. "Record."

Q. "I told him I thought it was damn rotten record? A. Yes.

Q. Word "record"? A. Yes.

Q. Otherwise what you said to the Prosecutor's detective Mr. Lowden was true? A. Yes.

30 Q. Do you want the Jury and the Court to believe now that you were scared into telling the truth? A. No, but there was other things that was said there that don't appear on that paper.

Q. But you did not sign anything but the truth, did you? A. Exactly.

Q. And so you were not scared into telling a lie, were you? A. No.

Q. Except that the word "record" is left off this statement? A. Exactly.

Mr. Stein: That is all.

Mr. Oliver: That is all.

40

Mr. Stein: I am going to offer the circular

Harry F. Langhans—For State—Redirect

taken to Colby and McGowan, marked for identification P 2 in evidence at this time, together with circular printed therefrom marked P 3 for identification. It is a copy, an exact copy. I am going to offer the manuscript, and exact copy of it. These two marked P 2 for Identification and P 3.

10

Mr. Oliver: I object to the offer, if the Court please, for these reasons: assuming that is a copy, on the ground of the variance between the circular and the indictment. The indictment charges one paragraph of this circular as having been libelously published and the rule, as I understand it, and, in fact, it is given in Wharton's Criminal Law. I quote from that work (volume three, page 2162, section 1982); I will read the paragraph. "The alleged libelous matter must be set out, accurately, any variance being fatal" (reading). For that reason I submit there is such a variance between the circular now offered in evidence and the indictment as to make the offer of the circular immaterial, because it should not be offered in evidence.

20

The Court: Desire to say anything?

30

Mr. Stein: I do not think it is really necessary only just to remind Your Honor again of the fact that if a man is libelled in a newspaper, why, the whole newspaper has got to be offered in evidence. While the libel set forth in the indictment is only that part of the whole publication which the State alleges to be libelous and there is not a great deal of difference between a circular and a newspaper in that regard.

40

Harry F. Langhans—For State—Redirect

I understand Counsel's motion to be that we have to say in an indictment that a part of a newspaper publication was libelous in that it said certain things. The fact is that the indictment in the case of Drake—

10

The Court: The State against Drake.

Mr. Stein: The State against Drake, on file in this very Court was based upon a newspaper publication, and in that indictment was simply set forth such portions of the publication as were said to be libelous, without prefixing the language in the part wherever such things were said. The indictment follows that case which has been adjudicated upon, and there is not any question about the formality of the indictment.

20

Mr. Oliver: There was no question about the legality of the Drake indictment. I don't know what that said, and there is nothing in the case to show. As a matter of fact, that was published in a newspaper; this is not a newspaper and this does not apply to a newspaper. Here is a circular sent out—

30

The Court: The only objection raised against the two papers which have been already offered for identification, and that are offered in evidence, is the fact that it does not set forth—is the fact that the indictment does not set forth all of the written matter contained in those circulars.

Mr. Oliver: No, sir.

The Court: Therefore, they should not be admitted in evidence?

40

Mr. Oliver: That is not the point. It appears from this circular that the matter

Harry F. Langhans—For State—Redirect

charged is only a part of the circular, and that under the rule laid down by Wharton, the indictment must show—and that rule is very plain; there is no question—what is going into the construction of it. Unless counsel has something to contradict this authority. I believe this is the authority. 10

(Handing Wharton to the Court.) There is the point.

The Court: If I understand your objection, it is this: that since a part of the alleged libelous matter has been selected for the indictment it has not been introduced with proper introductory words.

Mr. Oliver: Absolutely; yes, sir.

The Court: That is all? 20

Mr. Oliver: Yes, sir.

The Court: Does not go to the essence of the offense, if there be any offense?

Mr. Oliver: It goes to the validity of the indictment, if the Court please.

The Court: The Court will overrule the objections.

Mr. Oliver: I pray an exception.

The Court: You may have an exception.

(Circulars marked in evidence P 2 and P 3 respectively.) 30

Exception allowed—sealed accordingly.

JAMES C. CONNOLLY, (L. S.)

Judge.

(The Prosecutor reads Exhibit No. 2, the circular, into the record.)

The Court: I am of the opinion that the whole publication in which the alleged libel appears should be admitted in evidence. Malice is an ingredient of the offense charged against the defendant and the whole 40

W. Lincoln Phillips—For State—Direct

10 publication will therefore be submitted to the jury in order that they may determine whether there is anything in the publication which would give a different coloring to the language charged to be libelous, but I may say, and I will say now that I cannot, at this time, see how testimony can be given in support of charges which the publication may contain, and which are independent of the language charged to be libelous. Such a course would lead us into considering facts which have no relation in the case, and would only obstruct the real question at issue.

20 Mr. Oliver: Your Honor is just announcing his opinion?

The Court: I am announcing my position on it now.

Mr. Oliver: I must take exception to the announcement of the Court.

Exception allowed—sealed accordingly .

JAMES C. CONNOLLY, (L. S.)

Judge.

30 W. LINCOLN PHILLIPS, produced as a witness, on behalf of the State, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Stein:

Q. You are a resident of Roselle Borough? A. Yes sir.

Q. And were you such in 1914? A. Yes, sir.

Q. And do you know Mayor Fish? A. Yes, sir.

40 Q. Of the Borough? How long have you known

W. Lincoln Phillips—For State—Cross

him? A. Oh, possibly, about four years, maybe a little more; around four years.

The Court: You know Mayor Fish, you say that long?

A. Yes, sir. 10

Q. Did you have a conversation with Mayor Fish in August, 1914? A. Yes, sir.

Q. Concerning what? A. I went to his house that evening to discuss or talk with him about a proper political organization in the town. We wanted a real organization; and I wanted to form a well organized organization and I went there to talk to him about that thing. I had been to see him on a number of different occasions and that is the reason I am able to fasten the date this other item came up. And during the conversation he told me that Mr. Johnson, when a member of the Union County Grand Jury, after an indictment had been returned against Dr. Albert Snowden, secured by some means, to keep that indictment from being turned in. 20

Q. Yes? A. And at the proper time he would throw it into Johnson.

Mr. Stein: Cross-examine him. 30

Cross examination by Mr. Oliver:

Q. How long have you known Mr. Fish? A. About four years as near as I can remember, sir.

Q. Are you anything of a politician?

Mr. Stein: Wait, I object to that.

(Question repeated by the stenographer.)

The Court: I cannot see how that will 40

W. Lincoln Phillips—For State—Cross

have any bearing on this question, Mr. Oliver.

Mr. Oliver: I withdraw this question.

10 Q. Did you ask Mr. Fish to appoint you Borough Clerk?

Mr. Stein: One moment. I object on the ground that is not cross examination.

The Court: I will allow that.

Mr. Stein: I have simply asked about the conversation between him and Fish.

The Court: This may be going to impeach his—

Mr. Stein: All right.

(Question repeated by the stenographer.)

20

A. I wrote a letter laying up my name before him for consideration for that office.

Q. Answer my question. A. That is the only way I can answer that. This was the first step in the proceeding.

The Court: If the attorney asking the question insists upon it, you must answer by saying yes or no, and he may, under the rules, apply to have all the rest of your answer stricken out. Answer yes or no.

30

A. Relative to the way his question is I answered, he said if I wrote or spoke it.

The Court: The State's attorney will elicit that whole subject subsequently maybe.

(Question repeated by the stenographer.)

40

A. I wrote him a letter first and then had a conversation with him personally afterwards.

W. Lincoln Phillips—For State—Cross

Mr. Oliver: Well, the question is not answered Your Honor.

The Court: It is not answered yet.

A. Yes.

Q. Did he refuse you? A. Yes, sir.

10

Q. Did you threaten to get even with him for his refusal? A. Do you want the statement I made to him?

Mr. Stein: Yes, yes.

Mr. Oliver: The question is answerable yes or no, if the Court please.

The Court: Yes or no.

(Question repeated by the stenographer.)

The Court: Yes or no?

A. Yes, sir.

20

Q. Have you approached any prospective witness in this case with regard to the testimony to be given by them in this case? A. I only had a conversation with one man.

Q. You did then? A. One man.

Q. Who was it? A. Mr. Bradstreet came out in the train one night; we talked over the case.

Q. Do you know Mr. Shide? A. I know Mr. Shide; yes, sir.

Q. Did you have a talk with him about the testimony he was to give here? A. No, sir.

30

Q. Sure about that? A. Absolutely sure.

Q. Do you know Mr. Pawlik? A. Yes, sir.

Q. Did you have a talk with him about the testimony to be given here? A. No, sir; no consideration.

Q. Not a word. A. Testimony to be given here.

Q. Maybe we are quibbling; did you have a talk with him about this case? A. Yes, sir.

40

W. Lincoln Phillips—For State—Cross

Q. When? A. A day or two following the last time this case was up.

Q. What was the nature of your talk? A. With who?

10 Q. With Pawlik? A. I asked him if he had—knew that his name was going to be used in this circular.

Q. With what? A. If he knew that his name was going to be used in this circular as campaign treasurer; was going to appear on that as treasurer.

Q. Going to appear on what circular? A. The circular that I was shown around that time, bearing on this case.

Q. Around what time. A. Along in October.

20 Q. Last October? A. October when this was issued, 1915; last year.

Q. Did you see the circular then? A. I did; yes, sir.

Q. I am asking about a talk you had with Pawlik since the last day in Court here? A. I told you about two days afterwards.

Q. What did you say that day? A. I talked to him about—I asked the question whether he knew what was in this circular before his name went on as Campaign Treasurer, at the bottom.

30 Q. What else did you say as to that? A. That was the specific thing I went to him for.

Q. Specific or not, what did you say to him? A. I can't remember anything else at the present time I talked to him about.

Q. Did you say you came to him to talk about the case? A. This particular item of the case.

Q. About this case? A. No, sir.

40 Q. Did you tell him you came from Johnson?
A. No, sir.

W. Lincoln Phillips—For State—Cross

Q. Deny that? A. No, sir.

Q. How did you come to talk to him about how he was going to testify in this case? A. I was interested—he has been a friend of mine and I am interested in his welfare.

Q. Interested in whom? A. Mr. Pawlik; he was formerly a friend of mine; an associate. 10

Q. You went to his home on purpose to see him? A. Yes, I made that a specific reason to see him.

Q. Because you thought Pawlik might get into trouble because his name was signed on it? A. I asked a question point blank if he knew it was put in that circular or whether he put his name on it.

Q. But the question is put to you point blank to say whether you went to see him about anything else? A. I went to see him about that one particular item in that one. 20

Q. Did you talk to him about the testimony he was to give in Court here? A. No, sir: absolutely not.

Q. Did you say these words, or words to this effect: "They are going to get Fish; there are twenty-three against him, and you better come over to our side?"

(Question repeated by the stenographer.) 30

A. I didn't.

Q. Nothing of that kind. A. Yes, sir; something of that kind.

Q. What was it? A. I said the seriousness of this thing was that the whole Grand Jury's integrity was impugned by a document of this character, in my estimation.

Q. You were referring to the twenty-three men on the May Grand Jury, May, 1911? That is what 40

W. Lincoln Phillips—For State—Cross

you referred to? A. The Grand Jury involved in this case.

Q. How involved in this case; the one involved in this indictment; or the one mentioned in the circular? A. The one that the indictment refused to return against this person.

10

Q. Your anxiety was this document referred to the twenty-three men? A. Exactly.

Q. That had served on the May, 1911, Grand Jury, is that true? A. That is true.

Q. Who told you that that was the bad part of this case? A. Nobody told me.

Q. Well, how did that occur to you?

Mr. Stein: I cannot see the object of this examination.

20

The Court: He may impeach his testimony; that is what it is allowed for.

(Question repeated by the stenographer.)

A. It occurred according to a process of reasoning on my part.

The Court: The Court will now take a recess until two o'clock.

Adjourned until 2 P. M.

30

Afternoon Session, 2 P. M.

W. LINCOLN PHILLIPS (resumed).

Cross-examination by Mr. Oliver (continued):

Q. Before the adjournment we were referring to a conversation you had with Mr. Pawlik. On that
40 occasion did you say to Mr. Pawlik that they had

W. Lincoln Phillips—For State—Redirect

a halter around Fish's neck and they were going to hang him? A. Used no such language.

Q. Anything of that sort? A. No, sir.

Mr. Oliver: That is all.

Redirect examination by Mr. Stein:

10

Q. Now, Mr. Phillips, you were asked the question whether you had threatened the defendant, Mr. Fish, at any time, or at one time, and I think you wanted to explain that further than an answer of yes, did you? A. Yes, sir.

Q. Well, now, what was said that brought forth the answer yes, between you and Mr. Fish? Concerning the threat? A. The point of argument, the point of controversy which came, was the Mayor naming McNaughton as Chairman of the Police Bureau. I threatened if they ever approved McNaughton to the Police Board I would start an anti-saloon war in the town.

20

Q. Now, Mr. Phillips, about how long ago? A. Well, that was in the month of December, 1914.

Q. 1914, Mr. Phillips, did you threaten Mr. Fish at any time with coming forth and giving testimony—

30

Mr. Oliver: I object if the Court please.

Mr. Stein: I haven't finished my question. Don't answer.

Q. (Continued) —with coming forth and giving testimony to the effect that he told you that at the proper time he would throw it into Johnson? A. No, sir.

40

W. Lincoln Phillips—For State—Recross

Q. This so-called threat had no bearing whatever, did it, upon the——

The Court: That is leading.

10 Q. Had this so-called threat any bearing whatever upon this prosecution? In 1914, when you made it in 1914? A. No, sir.

Q. Did you know at that time that there was any prosecution about to be commenced in 1916? A. Absolutely not.

Q. Did you know? A. Absolutely not.

Q. At that time had Mr. Fish issued any circular concerning Mr. Johnson? A. Not to my knowledge.

20 Q. No. The only circular that you have knowledge of that was issued, is what circular? A. The circular that was handed to me one day in the Borough of Roselle Park.

Q. I call—I show you Exhibit P3, and ask you if that is the circular that was handed you in the Borough of Roselle Park? A. Yes, sir.

Q. To which you refer? A. Yes, sir.

Mr. Stein: That is all.

30 *Recross-examination by Mr. Oliver:*

Q. And it was before you received this circular that Mr. Fish said that, something about Johnson having protected somebody before the Grand Jury? A. In August, 1914.

Q. In August, 1914, he told you that? A. He told me that Dr. Albert Snowden—an indictment was returned against Dr. Albert Snowden through the Grand Jury, but that through Johnson's efforts
40 it wasn't turned in against him.

W. Lincoln Phillips—For State—Recross

Q. Did he say how he found that out? A. He said that a party had told him about it confidentially.

Q. Did he say what party? A. I don't remember that he used the man's name. Only a party told him confidentially.

Q. Think carefully, went you? A. I have been thinking carefully on that point and I find nothing defined in my memory except that general statement that somebody told him that confidentially.

10

Q. That is the way he claimed to know it? A. Yes, sir.

Q. And that was in August? A. 1914.

Q. 1914. And when was that you asked to be appointed Borough Clerk? A. In December.

20

Q. 1914? A. Yes, sir.

Q. And when was it you threatened to form an anti-saloon league? A. During the—at the same time.

Q. Before or after? A. At the close of our little conference and argument and discussion at that time.

Q. When was it you threatened to get even with him? A. Same time, politically.

Q. Beg pardon? A. Same time, politically.

Q. Politically. What do you mean by that? A. Just what the word implies.

30

Q. What does it imply as you use it? A. As I use it, it meant that I would throw what little political power or influence I had against him and his crowd.

Q. And his crowd? A. Yes, sir.

Q. What crowd do you refer to? A. So-called Good Government League. Q. That is the way you describe it; so-called Good Government League. A. There was no league to my knowledge.

40

W. Lincoln Phillips—For State—Recross

Q. Your threat was as against the efforts of the Good Government Club you would found an anti-saloon league, is that it? A. Contingent upon his placing this gentleman at the head of the police committee.

10 Q. I am not speaking about placing Norton McNaughton on the police committee. I am talking about your threat to him when he would not appoint you Borough Clerk? A. That wasn't the motive of my threat.

Q. You were more interested in McNaughton's not getting the job than you were in getting one yourself? A. No, sir.

20 Q. You didn't threaten him when he refused to give you a job, did you? A. That wasn't the motive of my threat.

Q. What was the motive of your threat? A. The motive of the threat was placing McNaughton as Chairman of the Police Committee.

Q. That is the only time you ever threatened him? A. To my knowledge that is the only time I ever threatened him.

Q. Don't you know whether you ever threatened him or not? A. To my knowledge, that is the only time.

30 Q. Who was appointed Borough Clerk? A. Mr. Renton.

Q. Mr. Charles E. Renton. Did you threaten Fish with any dire results if he appointed him? A. No, sir.

Q. Do you know who made up the Good Government Club?

Mr. Stein: Well, I am going to object now, because this is not re-cross at all.

40 Mr. Oliver: I will withdraw the question.

Mr. Stein: That is all.

WILLIAM E. RICHARDS, produced as a witness on behalf of the State, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Stein:

Q. Mr. Richards, you are a resident of Roselle Park? A. Yes, sir. 10

Q. And you know the defendant, Mr. Fish? A. Yes, sir.

Q. And you are a member of the Good Government League? A. Yes, sir.

Q. And hold any office in it? A. I hold the office of Secretary.

Q. I show you a circular, marked P 3 on behalf of the State, and ask you if that circular was issued by the Good Government League? A. No, sir. 20

Q. It says at the bottom it was paid for by the Good Government League. A. I see it is paid for by Charles Pawlik.

Q. What else? A. Treasurer of the Campaign Committee.

Q. Who is Charles Pawlik, Treasurer of the Campaign Committee, if you know? A. Mr. Pawlik as I know him is a man that lives in Roselle Park, employed by the Singer Manufacturing Company. 30

Q. What is he treasurer of, if you know?

Mr. Oliver: I object—I withdraw the objection.

Q. Is he a member of the Good Government League? A. Yes, sir.

Q. Was the Good Government League conducting a campaign in Roselle in October, 1915? A. Yes, sir. 40

William E. Richards—For State—Direct

Q. Roselle Park. Was he Treasurer of the Campaign Committee of that League? A. He was Treasurer of the Good Government League.

Q. Did the Good Government League issue that circular marked P 3 on the part of the State?

10 A. Not to my knowledge.

Q. And you were Secretary at that time, were you? A. Yes, sir.

Q. Were you in the home of Mr. Fish during the campaign of 1915? In the fall? A. Yes, sir.

Q. I call your attention again to the circular there marked P 3 on the part of the State, and ask you whether you saw any circulars of that kind in his house? A. I didn't.

Q. At that time? A. I didn't.

20 Q. Were any circulars issued like that, or rather folded at that time, in Mr. Fish's house? A. I believe they were to the best of my knowledge.

Q. What do you base your belief on? A. I was there and folded some circulars, but I didn't know what the circular was at that time.

Q. Well, you mean you didn't read the circular? A. No, sir, I hadn't seen the circular. I got to that house about half-past nine and I started right in folding the circulars and that was the only time

30 I ever seen the circular.

Q. Who was folding the circulars beside yourself? A. Mr. Reynolds was there and Mr. Fish.

Q. Who else? A. I believe Mr. Pawlik.

Q. Who else? A. I believe Mr. Earnst and Mr. Monford.

Q. Take a look at that circular before you in exhibit, marked Exhibit three on the part of the State, and tell me now whether you didn't fold circulars like that one and put them into envelopes

40 at Mr. Fish's home that night? A. I couldn't say

William E. Richards—For State—Direct

it was that circular; I folded some circulars; I couldn't say it was that one.

Q. Did you take from the home of Mr. Fish, on that night, two circulars the same as Exhibit three?

A. I don't know that I took two. I know I had one I looked at after.

Q. Like that? A. Like that; yes, sir. 10

Q. When did you get it? A. At the home of Mr. Fish.

Q. How many circulars were being put in envelopes that night? A. I couldn't tell you.

Q. You were folding some? A. I know, but I couldn't tell you.

Q. Was there more than one? A. Oh, yes.

Q. What sort of envelopes did you put them in?

A. I didn't notice the envelopes; I was folding the circulars. 20

Q. You didn't see any of the envelopes at all?

A. I saw envelopes there, but I didn't notice what they were like.

Q. Were they one-cent stamped envelopes or two-cent stamped envelopes? A. I didn't notice it.

Q. Did you receive a circular through the mail?

A. Yes, sir.

Q. Like Exhibit three on the part of the State?

A. Yes, sir.

Q. How many days after you were folding the circulars in Mr. Fish's home? A. Next morning, I believe. 30

Q. The circular which you took home like P 3 was brought by you from Mr. Fish's home? A. Yes, sir.

Q. And where did you get it in his home, and from whom? A. Off the table.

Q. What table? A. Table there in the dining room. 40

William E. Richards—For State—Cross
William E. Richards—For State—Redirect

Q. Was Mr. Fish there? A. He was there, yes.

Mr. Stein: Cross-examine.

Cross-examination by Mr. Oliver:

10

Q. Can you state who are the members of the Good Government League of which you are Secretary? A. Why some of them.

Q. Will you name some? A. Mr. Reynolds, Mr. Monford, Mr. Earnst, Mr. Pawlik, Mr. Hobbs, Mr. Shide, Mr. Knapp.

Q. Mr. Who? A. Mr. Knapp.

Q. Mr. Knapp? A. Yes. That is all I can think of now.

20 Q. How many members have you got? A. I don't know.

Q. You haven't records of the club with you, have you? A. No, sir; I haven't.

Q. Where are they? A. I left them at the office of the County Detective.

Mr. Oliver: All right.

Re-direct examination by Mr. Stein:

30 Q. You attended these meetings regularly of the Good Government Club? A. Some of them; yes, sir.

Q. Have any money in the treasury of the Good Government Club? A. There was some money given over to one of the men one night, I was there.

Q. Who gave it?

Mr. Oliver: I object.

The Court: What bearing has it on the subject?

40

NOAH WOODRUFF, produced as a witness, on behalf of the State, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Stein:

Q. Mr. Woodruff, you are member of the Union County Board of Freeholders? A. Yes, sir. 10

Q. And when were you elected or re-elected? A. November 2nd, 1915.

Q. And who was your opponent at that election? A. William E. Johnson.

Mr. Stein: Mr. Johnson, stand up.
(Mr. Johnson stands up in the Court Room.)

Q. Is that the gentleman who is now standing up in the Court Room? A. Yes, sir. 20

Q. How long do you know Mr. Johnson? A. Oh, perhaps four or five years.

Q. Do you also know whether he was a member of the Grand Jury of this county? A. No, sir; I don't know only from hearsay.

Q. Yes. And you were the successful candidate for the recent election? A. Yes, sir.

Q. On the Democratic ticket? A. Yes, sir.

Q. Do you know Mayor Fish, the Mayor of Roselle Borough? A. I have a slight acquaintance with him. 30

Q. You don't mean that, do you? A. Most assuredly. I never had any great acquaintance with him. Only as a matter of business. That is all. Known him for seven or eight years, I guess.

Q. You see him most every day, do you not? A. No, sometimes I don't see him in a month.

Q. You are living right there in the Borough of Roselle Park together? A. Yes. 40

Q. You are the Police Judge up there, are you not? A. Yes.

Noah Woodruff—For State—Direct

Q. And he is the Mayor of your town? A. Yes, sir.

Q. And you have been a resident of Roselle Park how many years? A. Why I have lived where I am now for the last, over about fifty years.

10 Q. Now Judge, when you ran for Freeholder recently in the Borough, did Mayor Fish take any interest in your candidacy? A. I don't think I spoke to Mayor Fish over three or four times all during the whole campaign.

Q. That is not what I asked you. I asked you if he took any interest in your candidacy? A. How can I tell unless I spoke to him about it?

Q. You might tell from one conversation. Can you say whether he did or not? A. Why, I think he was on my side.

20 Q. Yes. Did you know that Mr. Fish was going to issue a circular against your opponent in the campaign? A. Only from hearsay.

Q. Who told you? A. I can't tell you who told me. Two or three different ones spoke to me about it.

Q. Among the two or three, was Mr. Fish one of them? A. I don't think he was.

30 Q. Well, do you know? If you know, why don't you say so? If you do not, Judge, please say you do not. A. I couldn't swear positively that he did tell me so. But two or three different ones spoke about it, and I said I would rather——

Q. Not what you said; who were they that told you about it?

The Court: Don't you think that is going rather far if the defendant himself did not tell him? What other people——

40 Mr. Stein: If the Court please, it is going to affect the defendant, of course.

Noah Woodruff—For State—Direct

The Court: I think you better withdraw your question.

A. I can't tell; I can't say something that ain't so.

Q. Take a look at that circular there before you, marked Exhibit three; did you ever see that before? 10

A. I don't know whether I saw that. I seen one like it.

Q. I don't mean the identical one. You saw a circular like that? A. Yes.

Q. As a matter of fact how many did you see?
A. Oh, I don't think I saw over three or four.

Q. Isn't it true—— A. To look at them.

Q. Isn't it true, Judge, that there was three or four hundred sent over to your store by Mr. Fish? 20

A. Yes, but I didn't look at them.

Q. What do you mean you didn't—— A. I didn't look at them; I had no use for them.

Q. No use for what? A. Those circulars.

Q. What circulars? A. That he sent over; I didn't look at them at all.

Q. He sent them over? A. Yes. I don't know whether they were or not, I never looked at the bundle.

Q. When you say you had no use for the circulars you looked at them? A. I don't know whether Fish sent them there. 30

Q. When you say you had no use for the circulars, you looked at them? A. Because a fellow who brought them, whoever it was now I don't remember.

Q. Another lapse of memory. You don't remember who brought them? A. No, I don't.

Q. Answer that? A. I don't know who brought them. He said here is something Mr. Fish sent— 40

Noah Woodruff—For State—Direct

Mr. Oliver: I object to that, and ask it be stricken out.

The Court: I will strike that out, what somebody else said to him in the absence of the defendant, cannot be taken into consideration by the jury.

10

Q. Wasn't it Mr. Fish's son?

Mr. Oliver: I object, leading question.

A. No.

The Court: Even though it was Mr. Fish's son.

Mr. Stein: It is competent to offer that Mr. Fish gave them to his son; and also to show his son brought them there.

20

Q. Did his son bring them to you? A. I think not; at least, I couldn't tell you.

Q. Why, because you cannot remember, or do not know? Which? A. I don't know. I do not think I was there when they came.

Q. Didn't you have a telephone talk with Mr. Fish over the wire about these circulars? A. I did.

30

Q. What was said by Mr. Fish? A. I told Mr. Fish I was sorry he sent them out.

Q. Why? A. Because I thought it was going to beat me.

Q. Why did you think they were going to beat you, did you believe— A. Because I had friends that were anti-Fish men that would not vote for me—

Mr. Oliver: I object to that, it can only be hearsay.

The Court: That is hearsay.

40

Noah Woodruff—For State—Direct

Q. You had a talk, Judge, with Mr. Fish, over the wire about these circulars, didn't you? A. Nothing more than——

The Court: Allow me to say to the witness that if the conversation, or if the matters he was going to testify about were something that he said to Mr. Fish, he might tell it all. If it was something he said to Mr. Fish.

10

A. That was what I was telling you, what I said to Mr. Fish.

Mr. Oliver: I object to it unless it was prior to the time the circular was sent out.

20

A. No, it wasn't.

The Court: If it was contemporaneous with the sending out.

Q. It was prior to the time of sending it out?

A. Who said so? I want it straight.

Q. When was it you had the talk with Mr. Fish, about the circular? A. After I got one.

Q. Then you did get a circular like number three for the State? A. I don't know whether I got one from Fish or not.

30

Q. I asked you if you got a circular like number three for the State? A. I got four of them.

Q. Were they like that? A. I didn't look at any of them.

Q. Look at that one. A. I have looked at this.

Q. You never read the circulars? A. Yes, I did. One of them.

40

Noah Woodruff—For State—Direct

Q. Read that one, please, and then I will ask you a question.

Mr. Oliver: I object to that.

The Court: I will allow him to examine it sufficiently to testify.

10

A. Yes, I read one just like it.

Q. One just like it. Only one, Judge? A. That's all, I read. And that was enough.

Q. Now, when was it you got that one? About?

A. Well, now, I couldn't tell you, Mr. Stein. Within a week.

Q. Within a week of what? A. Within a week of that time I got it.

20

Q. That will be all right—— A. In fact I didn't get it myself at all.

Q. Who got it? A. It laid on the floor—envelope laid on the counter.

Q. Envelope? A. Yes, inside the envelope and George Briggs came there and opened one and I was busy and read it to me.

Q. George Briggs? A. Yes, he read it to me, first one I seen or heard of.

Q. Now, then, what did you do about that? A. Why I told George, that is going to beat me.

30

Q. What did you do about it so far as the defendant, Mr. Fish, was concerned, did you talk to him about it? A. Talk to who?

Q. Mr. Fish. A. I called him up that night and I told him I thought it was going to beat me. That is all I said about it.

Q. What did he say? A. He said, it is going to do you good.

40

Q. What say? A. He said: it is going to do you some good.

Noah Woodruff—For State—Direct

Q. What else was said, now? A. I don't know whether there was anything else.

Q. Were you asked by Mr. Fish to furnish him with a list of the voters up through Union? A. Yes.

Q. Did he say what he wanted them for? A. Yes.

Q. What did he say? A. He said he wanted to send each one of them a circular. 10

Q. Yes. And was that at the same time you were talking with him about having received one? A. No, it was next day.

Q. What? A. No, it was next day.

Q. Where did you meet him? A. I think it was over the phone; he called me up and wanted to know if I got the list of names.

Q. Yes.

Mr. Oliver: I do not want to waste time, but I take it that this conversation occurred after the circular had gone out. 20

Mr. Stein: After he had gotten one. Then the evidence is that Mr. Fish asked him for a list of names of the voters of Union Township.

Q. Now, then, next day after you had one, as I understand you, Mr. Fish wanted a list of voters of Union Township? A. Yes. 30

Q. Did you furnish him with a list? A. No, sir.

Q. Why? A. Well, I took one of those up and asked Howard Klein, and Walter Miller and another man what they thought about it.

Q. Don't tell us what you thought about it; that is your cabinet? A. They said it would do me more hurt than good.

Q. Now then, did you have any further talk with Mr. Fish over the wire about that, or see him personally? A. I don't think I saw Mr. Fish but once 40

Noah Woodruff—For State—Direct

after that election, and I was—told him I was afraid it was going to hurt me.

Q. And what did Mr. Fish say? A. He thought it would do me some good. That is all, it was difference of opinion.

10 Q. Were any of these circulars sent to you, Judge? Sent to your store? A. What is that?

Q. Were any of those circulars sent to your store; a large number of them? A. I didn't receive them; they were sent there.

Q. You didn't receive them? A. No.

Q. Who did? A. I wasn't there.

20 Q. Tell us about that. How many days after your talk with Mr. Fish was it that a large number of those circulars came to your store? Somehow, by some means? A. Why, I had told him to send them down and I would take care of them.

Q. What? A. I had told Mr. Fish to send the circulars down and I would take care of them; that he would not get the full list.

Q. After that the circulars came to your store—you don't know how—but they came there? A. Yes.

Q. What did you do with them? A. I didn't do anything with them.

30 Q. What do you mean you didn't do anything with them? A. I didn't do anything with them. I stood them there aside the register and left them there.

Q. Are they still there? A. No.

Q. What did you do with them? A. I didn't do anything with them. I left them lay there on the register in a pile.

Q. Didn't they ever get out? A. Yes.

Q. What? A. Yes.

Q. Did you hand them out? A. No.

40 Q. Do you know who did? A. Well, I think I know what became of them.

Noah Woodruff—For State—Direct

Q. Do you know, don't think, Judge? A. I don't know. But I think I know. I come pretty near knowing where they went to.

Q. You either know or you do not know what became of those circulars? A. I do not know then. When you come to that, personally.

Q. Did you receive a circular like that one number three for the State, through the mail? A. I don't know whether they came through the mail or not. There was three or four, but I couldn't say whether the mail man left them there or not, I was busy.

10

Q. Was there an envelope in your home or store addressed to Noah Woodruff containing one of these circulars which bore a one-cent stamp or any other kind of a stamp? A. I don't know.

20

Q. The circulars which you found in your place in an envelope, was there any writing on the envelope? A. I don't think I saw the envelope.

Q. Then you don't know whether they were in envelopes or not? A. I told you before George Briggs opened them—

Q. Just wait a moment. A. Well, I certainly know, because George said: There is a lot of mail; I am going to open it.

Q. Exactly. You opened up your own mail? A. No, George opened it.

30

Q. Were you looking at George when George did it? A. Yes, I was busy at that time cutting meat and he was looking over the mail.

Q. After George opened the mail did he hand it to you? A. He read it.

Q. And didn't you see the envelope at all? A. No, I didn't.

Q. Then all you know is that the circulars you had in your store there that you got and the others

40

Noah Woodruff—For State—Cross

came by mail, but you don't know to whom they were addressed? A. I think the postman left them there.

Q. You were not there when the postman came, were you? A. Yes.

10 Q. Were you? A. I think I was. He dropped mail on the counter and left as he always did.

Q. And George took the mail from the postman? A. He took them up and opened them and read them.

Q. And then George read you this circular letter number three? A. Yes.

20 Q. Now, Judge, those circulars were brought, or left or got to your store in some way or other in bulk, that you were to send out to the voters up in Union Township; was any talk had between you and Fish as to who was going to pay the postage for this? A. Yes, I think there was.

Q. What was said about the postage between you and Mr. Fish? A. Well, he said I will send them out if you will pay the postage, and I said, no, you send them to me, and I will take care of them.

Q. Did you pay the postage? A. They didn't get any.

30 Q. They didn't go out, those that were sent to you, did they? A. No, they didn't get any postage.

Mr. Stein: All right, that is all.

Cross examination by Mr. Oliver:

Q. How many talks did you have with Mr. Fish about this circular, Judge? A. This circular.

40 Q. Yes? A. I don't think I had but one or two. That night he called me on the phone, and once after that; that is all.

Noah Woodruff—For State—Cross

Q. Have you stated all you can remember of those conversations? A. I think so.

Q. Was anything said by Mr. Fish on any one of those occasions as to his purpose in sending out this circular? A. Why he said he thought it was going to help my campaign, and I thought it was going to injure it, and that is where we disagreed.

10

Q. Didn't he say to you that he had nothing against Johnson, but that he thought that the voters ought to know about it? A. That is what he said.

Q. When did he say that? A. He said that he was a good neighbor and personally he had nothing against him.

Q. He said that he was a good neighbor and personally he had nothing against him? A. Yes, sir.

20

Q. But he thought the voters ought to know about it? A. Yes, ought to know about what kind of a man they were voting for. That is the way it was put to me.

Q. When did he say that? Before the circular went out, or afterwards? A. I think it was after.

Mr. Stein: After they went out?

A. I think so; I wouldn't say positively whether it was before or after.

30

Q. There is no question that conversation occurred, is there? A. No, there is no question at all about it.

Q. You say you were elected Freeholder over Mr. Johnson? A. Yes.

Q. By what majority? A. About one hundred and sixty—

Mr. Stein: I object.

The Court: I will rule it out.

40

Noah Woodruff—For State—Cross

Q. Mr. Johnson was running on what ticket?
A. Republican ticket.

Q. And you ran on the Democratic ticket? A. Yes, sir.

10 Q. And who was running on the Good Government ticket? A. On what?

Q. On the Good Government ticket? A. I was endorsed by the Progressives.

Q. You were endorsed by the Progressives? A. Yes, sir.

Q. Is that word synonymous with Good Government Club? A. I think so; I don't know.

Q. You consider it so in Roselle Park? A. Yes.

Q. Any other Democrat elected?

20 Mr. Stein: I object to that.

The Court: It is answered now.

Q. How many voters are there in the Borough of Roselle Park, and Union Township combined?

Mr. Stein: I object to that. What possible bearing has that?

30 The Court: That there were fifteen hundred of those things printed and Mr. Johnson was a candidate, not only in the Borough of Roselle Park, but also in the Township; his election district embraces the whole township, as I understand it.

Mr. Oliver: The Borough and the Township.

The Court: And the Township.

Mr. Oliver: Yes.

40 The Court: I think it is proper to have this witness show, if he can, how many voters there are in the town, and it may

Charles Pawlik—For State—Direct

have some—may throw some light upon the number of circulars that were printed.

Mr. Stein: We have already proven there was fifteen hundred printed.

The Court: I will allow the question.

(Question repeated by the stenographer.) 10

A. I think the register calls for in the neighborhood of seventeen hundred in the two municipalities.

Mr. Oliver: That is all.

Mr. Stein: That is all.

CHARLES PAWLIK, produced as a witness on behalf of the State, being duly sworn on his oath, according to law, saith: 20

Direct examination by Mr. Stein:

Q. Mr. Pawlik, will you please look at the circular in evidence, marked Exhibit 3 on the part of the State, right there before you? That is it. And tell me whether you are the gentleman named there as Charles Pawlik at the bottom of the circular? 30

(Question repeated by the stenographer.)

A. Yes, sir.

(Answer repeated by the stenographer.)

Q. Have you seen this circular before? A. Well, that depends on when before.

Charles Pawlik—For State—Direct

Q. Before today? A. Yes, I have seen it before today.

Q. When did you see the circular or circulars before today, like that one? Was it around election time last year; that is near enough? A. Yes, about that. I can't tell you the date.

10 Q. This circular says at the bottom it is paid by Charles Pawlik, Treasurer of the Campaign Committee. Did you, as a matter of fact, pay for any such circulars as that? Yes or no? A. No, sir, I did not.

Q. As Treasurer of the—strike that out—the reference to you as Treasurer of the Campaign Committee, at the bottom of that circular has reference to what campaign committee, if any? If any at all? A. Why it is simply the campaign for the fall
20 of 1915.

Q. What campaign committee were you supposed to represent as Treasurer? A. Well, the general election at that time.

Q. But what campaign committee; any part, or club, or society, or organization of any kind? A. Good Government Club as we called ourselves.

Q. As Treasurer of the Good Government Club? As Treasurer of the Campaign Committee of that club in 1915, campaign, did you pay for that circular marked Exhibit No. 3? A. I did not.
30

Q. Do you remember during the campaign of 1915, month of October or thereabouts, being at the home of Mr. Fish, the Mayor of Roselle Borough, for the purpose of folding circulars? A. I arrived there late one evening.

(Answer repeated by the stenographer.)

40 Q. Was it during the campaign of 1915? In

Charles Pawlik—For State—Direct

the month of October, or was it in November? A. Well, that I couldn't state positively.

Q. It was during that campaign, was it? A. Yes, sir.

Q. And when did you arrive there in the evening, who was there? A. Well, I don't know all.

10

Q. Those you remember. A. Mr. Monford.

Q. Who? A. Mr. Monford, Reynolds; I think Mr. Richards was there, but as to who else, I couldn't positively state.

Q. Was Mr. Fish there? A. Mr. Fish was there.

Q. What was Mr. Fish doing there that evening? What did you see him do? A. Folding circulars.

Q. Look at exhibit number three on the part of the State, and tell us whether that was the circular that was being folded by Mr. Fish? A. That I don't know, as there was two circulars being folded.

20

Q. Can you remember the two circulars when you see them? A. Sir?

Q. Do you know the two circulars when you see them? A. I don't know as I do. I don't make it a rule to pay much attention to circulars when I see them, or receive them, as a matter of fact. In other words, I discard circulars as a rule.

Q. Yes, but, Mr. Pawlik, here was a circular which had your name appended to it, as Treasurer of the Campaign Committee—exhibit number three in this case—didn't you have any knowledge of that circular? Never heard tell anything about it at all? A. No, sir, I didn't.

30

Q. Didn't see it there at Fish's house at all? A. If I did, I didn't know it. I was folding circulars, but I didn't pay any attention to what was being folded. As I said, I arrived late and the work was pressing, and we folded them up and put them away.

40

Charles Pawlik—For State—Direct

Q. Do you know whether that circular Exhibit number three on the part of the State went out through the mails? A. I didn't—I beg pardon. Repeat the question.

10

(Question repeated by the stenographer.)

A. Yes, sir.

Q. How do you know that? A. I received one at the house.

Q. Who was it addressed to? A. To myself.

Q. Beside that circular was there any other circular in that envelope? A. There were two.

Q. There was another one, is that right? A. That is right.

20

Q. Well, was the other one issued by the Good Government League? A. They were both supposed to be issued by the league.

Q. What is that?

(Answer repeated by the stenographer.)

Q. Then this circular number three was supposed to be issued by the league?

30

Mr. Oliver: I object to the question as to whether it was supposed. What was supposed—

The Court: I do not think the question is proper.

Mr. Stein: All right.

40

Q. Did you ever see or talk with Mr. Fish after you had received Circular number three, Exhibit number three, on the part of the State? A. Not in regard to the circular particularly. I have talked with him after that, though.

Charles Pawlik—For State—Direct

Q. How much money did you have for campaign expenses, Mr. Treasurer?

Mr. Oliver: I object as immaterial.

Mr. Stein: It will be material if your Honor will allow the question.

10

The Court: I will allow the question.

A. I don't positively remember, somewhere in the neighborhood of eighty dollars.

Q. From whom did you receive these various amounts?

Mr. Oliver: I object as immaterial.

The Court: That is immaterial.

Mr. Stein: I mean to follow up the rest of it.

20

The Court: He didn't pay for those circulars, and the records of the McGowan-Colby Company do not show that Mr. Pawlik paid for the circulars.

Mr. Stein: I know, but we are getting just a little bit ahead of the proof of the State; I am coming to that in a minute who paid for them, or who said he did.

(Question repeated by the stenographer.)

Q. Mr. Fish never talked with you at any time about these circulars or their cost? A. No, sir.

30

O. Sure about that? A. Yes, sir.

O. And you never did know what the circulars cost?

Mr. Oliver: I object as immaterial, if the Court please.

The Court: I think it is immaterial

Mr. Stein: Except that at the bottom of the circular it says that he is campaign

40

Charles Pawlik—For State—Cross

Treasurer of the committee that paid the expenses.

Mr. Oliver: This man is not on trial for anything.

Mr. Stein: Mr. Fish is.

Mr. Oliver: Not for this. He is——

10

The Court: I do not think it is material.

Mr. Stein: If your Honor so rules; cross-examination.

Cross-examination by Mr. Oliver:

Q. Have you been approached by any person as to the testimony you should give on this trial? A. Mr. Lincoln Phillips came down to see me one evening, night before the trial was set for. First time set for.

20

Q. Lincoln Phillips, who was on the stand a while ago? A. Yes, sir.

Q. What did he say to you? A. He came down and said——

Mr. Stein: Wait a minute. This testimony, if introduced at all, if your Honor please, is not cross-examination and should be saved by the defense until the rebuttal comes in. They have laid foundation for rebuttal, and that is the proper time for it.

30

The Court: This is not cross-examination of this witness, it is true, and I think it is better to reserve the examination of the witness as to whether he was approached by Mr. Lincoln Phillips or not until a later period in the case.

Mr. Oliver: If the Court please, here is a witness called by the State. Now the testimony may not be very material for the

40

Charles Pawlik—For State—Cross

State. Now at the same time he is a State's witness and I have a right on cross-examination, I submit, to ask any question which would tend to throw any light upon his testimony; upon the circumstances under which he was asked to testify or brought here to testify. 10

The Court: The object of the question now is to throw doubts upon the character, and upon the testimony of Lincoln Phillips; that is the object of this present question.

Mr. Oliver: Very well, if the Court sees through my purpose—but I am stating it as a legal proposition. I submit that the question is proper cross-examination; if he should deny that this might not be on a material point and I couldn't contradict him. 20

The Court: I will allow you to call this witness as your own witness, but on cross-examination I cannot allow you to go into matters such as you are now attempting to go into.

Mr. Oliver: May I ask an exception?

The Court: Yes, you may.

Exception allowed; sealed accordingly.

JAMES C. CONNOLLY, [L. s.] 30
Judge.

Mr. Oliver: And may I make this man my witness now?

The Court: No, I will not allow you to do so now.

Mr. Oliver: I ask an exception to that ruling.

The Court: Yes, sir.

Exception allowed; sealed accordingly.

JAMES C. CONNOLLY, [L. s.] 10
Judge.

Andrew Jackson Bradstreet—For State—Direct

Mr. Oliver: I want your Honor to understand—

The Court: I understand you very clearly.

Mr. Oliver: If I am to have the advantage of this testimony afterwards, very well.

19 The Court: I told you I will allow you to call him as your own witness.

Mr. Oliver: And testify on that matter?

The Court: Yes, sir, that point.

Mr. Oliver: I thank you; I withdraw my exceptions.

ANDREW JACKSON BRADSTREET, produced as a witness, on behalf of the State, being duly sworn on his oath, according to law, saith:

20 *Direct examination by Mr. Stein:*

Q. Mr. Bradstreet, do you know Mr. Fish? A. I do.

Q. How long have you known him? A. Oh, possibly eighteen months.

Q. Do you live at Roselle Borough? A. I do.

Q. Roselle Park and Borough. And do you remember the last campaign up there? A. I do.

30 Q. I ask you to look at the circular marked Exhibit three on the part of the State and say whether you received such a circular through the mails or otherwise? A. No, sir.

Q. Ever have a talk with Mr. Fish about that circular marked Exhibit three on the part of the State? A. No, sir.

Q. Did Mr. Fish ever say anything to you about it at all? A. Regarding the circular?

Q. Yes, sir. A. No, sir.

40 Q. Did you ever speak to him about it? A. No, sir.

Andrew Jackson Bradstreet—For State—Cross

Q. Before the circular was issued, Exhibit three on the part of the State, did Mr. Fish say anything to you about his going to issue such a circular? A. No, sir.

Q. Did he say anything to you about Mr. Johnson? A. Well, that is—

Q. Previous to his issuing the circular? A. That is a pretty broad question. 10

Q. I would like to have a broad answer. Does not make any difference. A. In what relation, to the circular? No, sir, he said nothing to me about this circular.

Q. About his candidacy for Freeholder and the possibility of his issuing a circular against him? A. No, sir.

Mr. Stein: That is all. 20

Cross-examination by Mr. Oliver:

O. Have you been approached by Mr. Lincoln Phillips as to the testimony you would give here today? A. I have talked with Mr. Lincoln Phillips, I haven't been approached regarding the testimony.

Q. When was that, Mr. Bradstreet? A. On the train one night coming from New York. 30

(Answer repeated by the stenographer.)

The Court: Is there any foundation laid?

Mr. Oliver: About this case.

Mr. Stein: About the case is too broad.

The Court: I will allow the answer.

Mr. Stein: Your previous answer is were you not approached by him concerning your testimony? 40

Joseph A. McDevitt—For State—Direct

A. I wasn't subpoenaed, I had no testimony at that time.

(Question and answer repeated by the stenographer.)

10 *By the Court:*

Q. You said you had no testimony at that time.

A. I meant to give.

Q. Have you any to give? A. I haven't given any.

Q. Have you any to give? A. I don't know any.

The Court: You may, Mr. Oliver, proceed.

By Mr. Oliver:

20 Q. I mean did Phillips talk to you about the possibility of your testifying and being called as a witness in this case?

The Court: Yes or no.

A. No.

Mr. Oliver: All right.

30 JOSEPH A. McDEVITT, produced as a witness, on behalf of the State, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Stein:

Q. Mr. McDevitt, where do you live? A. Westfield Avenue, Roselle Park.

Q. Do you know Mr. Fish, the defendant? A. I do, sir.

40 Q. What is your business? A. I conduct a printing establishment and newspaper correspondent.

Joseph A. McDevitt—For State—Direct

Q. And how long have you known Mr. Fish? A. For five years.

Q. I ask you to look at circular there before you marked Exhibit number three on the part of the State and say whether you have seen circulars like that before? A. Yes, sir.

10

Q. Where? A. I am not positive whether it was received by mail, or was left for me in conjunction with the newspaper work.

Q. Where did you see it? At your home, office, or where? A. If my recollection serves me right, it was left for me at Pitt's Confectionery Store.

Q. About when was that? A. That was about one week prior to the general election.

Q. Of 1915? A. Of 1915, yes, sir.

Q. Have you ever had any talk thereafter with Mr. Fish about this circular? A. Yes, sir.

20

Q. To which his name is appended. And where did that take place? A. Took place on the corner of Chestnut Street and Charles; Charles and Chestnut Street, Roselle Park.

Q. Just tell us what Mr. Fish said and what you said about the circular. A. It was the afternoon following the receipt of the circular in the afternoon and as I was coming up the street I saw Mayor Fish and I wanted, if possible, to find out more concerning the circular.

30

Q. As a newspaper man? A. As a newspaper man; yes, sir. And he asked me what I thought of it. And I said I thought it was pretty raw. Well, he said, it is true, isn't it? And I said, I don't know. I said there is only one statement that I think is dangerous one to make.

Mr. Oliver: Who said that?

A. I did. And he said, What statement is that,

40

Joseph A. McDevitt—For State—Direct

and I said, That one regarding the Grand Jury, and Mr. Fish replied: Well, you were before that Grand Jury in this same case, and you know yourself it is true, don't you? And I said: No, sir, I don't know it is true. I haven't any means of finding out.

10

Q. Now, what else was said at that time? A. Well, he—Mayor Fish recalled the Grand Jury case of Dr. A. Snowden.

Q. Yes? A. And asked me concerning the testimony which I gave and the conduct of Mr. Johnson, who was one of the Grand Jurors.

Q. Yes? A. And I told him that as I was—when I was giving my testimony Mr. Johnson questioned me as to whether I thought—

20

Mr. Stein: Do not tell what transpired in the Grand Jury room.

Mr. Oliver: If the Court please—

Mr. Stein: Just wait one minute.

Mr. Oliver: All right.

Mr. Stein: This witness is mine and I am Prosecutor of the Pleas.

Mr. Oliver: I know you are, you stand here as any other lawyer.

30

Mr. Stein: No, I do not. I have a further duty to perform. I may say to the witness not to say what a member of the Grand Jury said in the Grand Jury room. He can tell what he said, although it is not the rule of law, I will not object to that.

Mr. Oliver: I submit this man has got a right to tell what any Grand Juror said. It is true Grand Jurors are hedged about by an oath that prevents them from telling what goes on in the Grand Jury Room, but

40

Joseph A. McDevitt—For State—Direct

he is not. And I know of no rule, established in a case like this where this man has a constitutional right to have the truth go to the jury. We cannot—the Prosecutor would have you believe in this case—show as to what occurred in that Grand Jury Room. And the Constitution gives us the right to give evidence of what occurred in that Grand Jury Room before this jury. We cannot bring the Grand Jurors here to give testimony, but certainly we can ask a man who appeared before the Grand Jury and testified, as to what he testified to and what went on in the room. I ask this witness to be allowed to complete his answer. 10

Mr. Stein: If your Honor please, Mr. Oliver very well said this morning, when he was arguing the motion to quash, and that is the very point that the State made in opening, too, that his client now finds himself in the position where he has assailed a Grand Juror without being able to prove that he was telling the truth. Because he recognized in making his motion this morning before your Honor that he could not prove what any Grand Juror said in a Grand Jury Room, thereby admitting the contention which will be the State's contention, that a man, when he libels a Grand Juror, commits a libel of libels, and puts himself away outside of the pale of that provision because of the necessity of the Grand Jury proceedings to be conducted in secret, in order that the truth might come out in there without anyone being fearful who appears in a Grand Jury; without any citizen hav- 20
30
40

Joseph A. McDevitt—For State—Direct

ing the slightest fear that his actions will be reported, so that he can act openly in there without fear and without favor as his oath calls.

10 The Court: Counsel on both sides are anticipating that this witness is going to tell about proceedings that occurred before the Grand Jury.

Mr. Oliver: And I am perfectly willing to have him tell.

By the Court:

Q. Were you about to testify about what happened before the Grand Jury? A. I was, your Honor.

20 The Court: Then, of course, the Court will make a ruling at this time. I have already announced that a Grand Juror—if I have not, I will do it now—that a Grand Juror has no right to divulge secrets of the jury. That has been laid down as the law of this State at a very early period in our legal history, and there is judicial authority, while not in this State, yet in other jurisdictions, that a witness or an employee in the service of the Grand Jury may not come into court and detail what took place there. It would be an anomaly to say that Grand Jurors cannot tell what took place in the Grand Jury Room, yet allow other persons to do that which they (Grand Jurors) are forbidden to do. I shall therefore direct this witness that he must not tell anything that transpired in the Grand Jury Room, whether it concerns Mr. William E. Johnson, the Grand Juror, who is set forth as the com-

30

40

Joseph A. McDevitt—For State—Direct

plaining witness in the indictment, or whether it concerns any other person.

That is my ruling now. And if his testimony is about to infringe upon that ruling, then I tell him that he must not testify further.

Mr. Oliver: I pray an exception. 10

The Court: I will give you an exception.

Exception allowed—sealed accordingly.

JAMES C. CONNOLLY, [L. s.]
Judge.

By Mr. Stein:

Q. Now then, Mr. McDevitt, what you have related by way of conversation with Mr. Fish took place after the circular had reached you? A. Yes, sir. 20

Q. You say he said to you—you told him it was raw? A. Yes, sir.

Q. And he replied it is true, didn't he? And your answer was what?

The Court: Do not lead the witness.

A. "I don't know."

Q. "I don't know." Now, since then did you meet Mr. Fish in the office of the Times of Elizabeth? A. I did, sir.

Q. Who was there when he came in? A. Mr. Griffen, one of the staff. 30

Q. Yes, who else? A. Mayor Fish; there were but three of us.

Q. Griffen, Mr. Fish, and yourself? A. Yes.

Q. What brought you there? A. I am one of the staff.

The Court: You are one of what?

A. I am one of the staff.

Q. Who is Mr. Griffen? A. He is also one of the staff, of the Elizabeth Evening Times. 40

Joseph A. McDevitt—For State—Direct

Q. Did you hear a conversation there or did a conversation take place between Mr. Griffen and Mr. Fish concerning this indictment? Oh, Mr. McDevitt, when was that? A. I can't recall the date, but it was the date of the publication of the indictment, that is as near as I can get.

10 Q. The day upon which Mr. Fish was arraigned to plead to the indictment? A. Yes, sir.

Q. What conversation did you hear between Mr. Griffen and Mr. Fish? Concerning the indictment? A. Well, Mr. Griffen was talking to Mr. Fish relative to obtaining the statement from him in regard to the indictment.

Q. Yes? A. And the Mayor was rather surprised that the news had leaked out so quickly. I happened to come into the front office at the same time and the Mayor asked if he could get a list of the jurors that were empanelled.

Q. What jurors? A. Petit.

Q. Petit jurors? A. And I looked up the issue for him and obtained it.

Q. Yes.

By the Court:

Q. You mean the issue of the newspaper or issue of the Times? A. Yes, issue of the Times.

Q. Yes. Anything else said? Was that for the January Term of the Court? This present term? A. This was not Grand Jury, if I recollect right, it was the second panel.

Q. That is during the present term of the Court? A. Yes, your Honor. Mr. Griffen asked Mayor Fish if he had a copy of the Circular which entered into the case and the Mayor replied that he had one with him, of it, and that he did not like it to leave his possession, and I told Mr. Griffen that—

40

*Joseph A. McDevitt—For State—Cross**By Mr. Stein:*

Q. Was Fish there when you told him? A. Yes, sir. That I had one that I thought I could put my hands on; that I had kept ever since they had been sent out, and which I did turn over to him.

10

Q. Well, anything else transpire? Did Mr. Fish do anything with that circular in your presence?

(Question repeated by the stenographer.)

A. Not that I can recall.

Mr. Stein: Cross-examine.

Cross-examination by Mr. Oliver:

20

Q. Mr. McDevitt, then you had the talk with Mayor Fish? About this circular? A. Yes.

Q. At the time you said it was raw? A. Yes, sir.

Q. You had read it, hadn't you? A. Yes, sir.

Q. And you were familiar with the very charge that was made in that circular; that is, you knew all of the parties that were stated, you had read it? A. I had read it.

Q. Yes? A. Yes, sir.

Q. And Mayor Fish asked you if the charges were not true? A. Yes, sir.

30

Q. And what was your reply? A. I replied I didn't know.

Q. You didn't know? A. And I might——

The Court: Let the witness go on.

A. And I might state that the latter part of the circular was absolutely news to me.

Q. The testimony you mean? A. The testimony, extract.

40

Joseph A. McDevitt—For State—Cross

Q. And what was the statement about its being dangerous? That is, one charge being the only dangerous one? A. My remark, as near as I can repeat it now was this: that the Grand Jury was the most Sacred Body in the State of New Jersey and it was dangerous to cast any odium on that body.

10

Q. Yes. But this article does not cast any odium on any Grand Jury, does it?

Mr. Stein: I object because it calls for an opinion of the witness.

The Court: I will allow that question. As I understand the alleged libel, there is something said about an indictment having been found and through some means that could not be accounted for, it was not handed in. And that may be or it may not be an aspersion upon the whole body of the Grand Jury. I will therefore allow the question.

20

Mr. Oliver: I have been laboring under an impression this was a charge for having libelled Mr. Johnson and not for having libelled any Grand Jury.

The Court: But that language is contained in it. The charge laid in the indictment is divisible into two parts; one part which especially refers to Johnson and the other part which refers to the action of the Grand Jury or some persons connected with it.

30

Mr. Oliver: I beg your Honor's pardon. (Reading indictment.) Now, a word reflecting on any other Grand Juror.

The Court: You are referring only to the language in the indictment but the language

40

Joseph A. McDevitt—For State—Cross

of the alleged libel reads as follows: "As a member of a Grand Jury he succeeded in protecting the biggest swindler to my mind that ever struck the County." That is charged against Johnson. And then it goes on and it says: "Although I understand an indictment was voted against his friend, for some unexplained reason it was never handed in." 10

Mr. Oliver: I understand about that. He does not attempt to explain the reason, but the indictment charges: (reading indictment). I submit by no possibility could that be construed to be a reflection on any other person but Mr. Johnson.

(Question repeated by the stenographer.) 20
The Court: What is your answer?

A. Yes, sir.

Q. That was your understanding of the circular?

A. Yes, sir.

Q. That it reflected upon the Grand Jury? A. Yes, sir.

Q. And not upon Johnson? A. Well, Johnson in particular, and to the Grand Jury in general.

Q. Johnson in particular and the Grand Jury generally. And that is the only reason you considered it dangerous, that one item? A. Yes, sir; that was the phrasing I considered libelous. 30

Q. Didn't you consider it particularly dangerous because you conceived that Mr. Fish would not have an opportunity to justify that?

Mr. Stein: You are asking him to express a legal opinion.

The Court: I will allow that question. I 40

Joseph A. McDevitt—For State—Cross

will see how far this man's legal knowledge goes.

(Question repeated by the stenographer.)

A. Yes.

10 Q. You had read in this paper that Mr. Fish charged that when Johnson was a member of the Borough Council he used the Borough team for private work, and said he had a perfect right to use the team in return for the work he did as Councilman, and that after Mr. Fish told him about what was right he paid for the team? You knew that was in there, didn't you?

20 Mr. Stein: I object to any reference to any other part of the circular, except that part upon which the indictment is founded. The indictment is not brought upon any averment except that wherein the defendant libelled Mr. Johnson as a member of the Grand Jury, and his libel of the Grand Jury of which he was a member.

(Question repeated by the stenographer.)

30 The Court: I will rule out the question I do not think it is necessary for me again to indicate to counsel the position which the Court assumes in this matter. The paper containing the alleged libel was admitted in its entirety so that the jury might have the benefit of reading the whole circular in order to determine whether the language complained of was of the serious character attributed to it by the State. It might throw light upon that alleged libelous language to have all of the circular admitted to the jury for inspection. That is the reason it is allowed in, but we cannot go into all the

40

Joseph A. McDevitt—For State—Cross

charges which that circular contains because if we did it would lead us into intricacies that would keep us here all night and, perhaps, all day tomorrow. The question for the Court to investigate at this time is: did this defendant publish the alleged libelous matter set forth in the indictment? The other matter is only incidental and I shall rule out the question.

10

Mr. Oliver: May I just say another word? I take it your Honor does not admit this whole document as a concession to the defendant in this particular case, but because the well settled rule of law provides that in the case of this kind your Honor is bound to allow the entire publication in evidence. That is the general rule. The paragraph of this circular complained of could not be offered in evidence or allowed in evidence unless the whole document went in. That being so and the document being in evidence, other charges which are contained in this circular which, unexplained, are libelous, just as truly libelous as the one mentioned in the indictment come before the eyes of this jury: come within the consideration of this jury, and in that paper, if the jury read it as they are bound to do, they are bound to find that Mr. Fish not only charged Johnson with improper conduct as a Grand Juror, but that he charged him with graft. Now, we have a right to go into that and show that he was justified in making that charge. And, furthermore, we have the right—question of malice in case of this kind—and we have a right to show Mr.

20

30

40

Joseph A. McDevitt—For State—Cross

10 Fish's good faith in making this publication, and we are unable to do that unless we can show what information he had upon every point charged in that circular. I submit it places a grave injustice upon this defendant to tie him down to one charge when your Honor has admitted a circular, not only setting forth other specific charges that are libelous per se, as I claim this particular charge is not, but setting forth some other matters which are not libelous, except as they hold this man, or would tend to hold this man, up to contempt.

20 The Court: The Court has made its ruling, and I have done so twice, at least. The Court will not reiterate what it has already said. If you can show want of malice, I will allow you to do it, but I am not going to allow you to prove some other charge to be true concerning Johnson in order to prove that he was not actuated by malice. That is not the manner or method by which to show there is a want of malice.

30 Mr. Oliver: I appreciate what your Honor's ruling was, I simply wanted to make my reasons clear to the Court.

The Court: Yes.

Mr. Oliver: And having made them clear, and the Court declined my request, I pray an exception.

The Court: You may have your exception. Exception allowed—sealed accordingly.

JAMES C. CONNOLLY, [L. S.]
Judge.

40 Q. Did you have any conversation with Mr. Fish

Joseph A. McDevitt—For State—Cross

when you came out of the Grand Jury Room as to what had transpired in the Grand Jury Room? A. Yes, sir.

(Question and answer repeated by the stenographer.)

Q. Did you tell Mr. Fish that you were furious over Mr. Johnson's attitude in the Grand Jury Room? 10

Mr. Stein: I object to the question.

The Court: I will allow that. That is not telling anything that occurred in the Grand Jury Room.

A. Well, that—

Q. Or words to that effect? A. Not quite as strong as that. If I may explain my words. I was— 20

The Court: Answer yes or no.

A. No, I wasn't furious.

Q. Did you tell him that? A. No, I don't recall saying furious.

Q. What did you say to him about it? A. I was surprised.

Q. That you were surprised at Mr. Johnson's attitude. Upon what case were you before the Grand Jury? 30

Mr. Stein: I object to the question.

The Court: I will allow him to testify on what case he was before the Grand Jury. Give the name of the case.

A. Dr. A. A. Snowden.

Q. Who was Dr. A. A. Snowden? A. The former publisher and manager of the Review Company of Roselle Park. 40

Joseph A. McDevitt—For State—Cross

Q. A paper with which you were connected, were you not, at that time? A. Yes, sir.

Q. Did you testify against Dr. Snowden?

Mr. Stein: I object to the question.

The Court: Is the question finished?

10

Mr. Oliver: Yes, sir.

Mr. Stein: I object to the question did he testify against anybody.

The Court: Simply whether he testified, I will allow that to go in. Answer whether you testified or not.

A. I testified.

Q. Without stating the testimony you gave, what was the subject matter upon which you testified before the Grand Jury on that day?

20

Mr. Stein: I object.

The Court: Objection sustained.

Mr. Oliver: Prays exception.

The Court: Exception granted.

Exception allowed—sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

30 Q. Did your testimony before the Grand Jury, on that day, relate to the sale of stock in this printing company by Snowden to your father?

Mr. Stein: I object.

The Court: Objection sustained.

Mr. Oliver: Prays exception.

The Court: Exception granted.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

40

Joseph A. McDevitt—For State—Cross

Q. Had a charge of fraud been preferred against Dr. Johnson—

Mr. Stein: Dr. Johnson?

Q. Dr. Snowden, Mr. McDevitt?

10

The Court: Where?

Q. Before a Magistrate or before the Grand Jury?

The Court: In that form the Court will refuse to allow the witness to answer.

Q. Did you prefer a charge against Dr. Snowden?

Mr. Stein: Where?

20

Q. Before a Magistrate?

Mr. Stein: I do not object to that question.

A. No, sir.

Q. Did your father? A. No, sir.

Q. Do you know if anyone had preferred a charge against Dr. Snowden?

30

The Court: Not in the Grand Jury?

Mr. Oliver: No, not now.

A. No, sir.

Q. They had not? A. Not to my knowledge.

Q. Do you know upon whose charge you were called before the Grand Jury?

The Court: Yes or no to that.

40

Joseph A. McDevitt—For State—Cross

A. Upon whose charge?

Q. Yes, who made the complaint upon which you were called to testify? A. Yes, sir.

Q. Who made the complaint? A. Harwood Fish.

10 Q. Harwood Fish. Was that made before any Magistrate?

Mr. Stein: If you know.

Q. If you know? A. I don't know.

20 Q. You don't know. Did you tell Mr. Fish after you came out of the Grand Jury room after you had been before the Grand Jury, that Johnson, sitting in that Grand Jury, had conducted himself in such a manner while you were in there that he was called to order by another member of the Grand Jury?

Mr. Stein: I object to the question.

30 The Court: The question would possibly elicit an answer that would introduce us into the presence of the Grand Jury and what they were doing and what was transpiring before them, and it would be violating the rule which I have already announced. I shall, therefore, sustain the objection.

Mr. Oliver: I pray an exception.

The Court: Exception granted.

Exception allowed—sealed accordingly.

JAMES C. CONNOLLY, (L. S.)

Judge.

40 Did you tell Mr. Fish that the question which Johnson put to you in that Grand Jury room made

Joseph A. McDevitt—For State—Cross

it appear to you as if Johnson were taking the part of this Dr. Snowden?

Mr. Stein: I——

The Court: Question is overruled.

Mr. Oliver: I ask an exception.

Exception allowed, sealed accordingly.

10

JAMES C. CONNOLLY, (L. S.)

Judge.

Mr. Stein: That is not fair.

Mr. Oliver: I have a right to put questions.

Mr. Stein: The point I am now making is this:

The Court: You think one objection is as good as fifty.

20

Mr. Stein: I think this, in addition to that, even though it be true that he came out of the Grand Jury and told me——

Mr. Oliver: There is nothing before the Court.

Mr. Stein: And my further objection——

Mr. Oliver: My objection is there is no occasion for any speech to the jury; there is no question before the Court.

The Court: I will allow the Prosecutor to proceed.

30

Mr. Oliver: Prays exception.

Exception allowed—sealed accordingly.

JAMES C. CONNOLLY, (L. S.)

Judge.

Mr. Stein: My address is to the Court. My objection is this: that if this witness came out of the Grand Jury room, and told Mr. Fish something on the outside, if he did, Mr. Fish would never in the world have

40

Charles E. Renton—For State—Direct

a right to repeat that as truth. That is the further contention of the state.

The Court: There are questions in this case, which I have not, perhaps, decided yet. But I have ruled on this particular matter.

10

Mr. Stein: I mean any man takes a big chance in repeating what somebody else told him.

The Court: Question overruled.

Mr. Oliver: I except to the last remarks that the Prosecutor made when there was no question pending. I object to any stump speeches being made before the Jury.

The Court: You may have an exception to the Prosecutor's remarks.

20

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, (L. S.)

Judge.

Mr. Oliver: That is all.

Mr. Stein: That is all.

30

CHARLES E. RENTON, produced as a witness on behalf of the State, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Stein:

Q. Mr. Renton, are you Borough Clerk in the Borough of Roselle Park? A. I am.

Q. And you know the Mayor, Mr. Fish? A. I do.

40

Q. Were you at his house on the night when certain circulars were being folded? A. Half past eleven.

Charles E. Renton—For State—Direct

Q. Were you there? A. Yes.

The Court: He said half past eleven.

Q. Will you look at circular Exhibit three on the part of the State on the left of the seat right before you? A. I see it. 10

Q. Was that one of the circulars being folded?
A. I couldn't tell you.

Q. Did you fold any yourself? A. No, sir.

Q. Who did? A. I don't know who.

Q. Anything the matter with your eyesight? A. No, sir.

Q. Circulars were being folded? A. I couldn't tell you.

Q. I thought you said you were there when circulars were being folded? A. I was there half-past eleven. 20

Q. Were you there when the circulars were being folded? A. No, sir.

Q. At no time? A. No, sir, not that night.

Q. Any time? A. Couple of months before that for another election.

Q. They had one election last fall, didn't they?
A. This was the school election.

Q. Let us get down to business. 30

The Court: I think that is correct. He said he was not present when these circulars were folded. And he said he was present at the time when circulars were folded for another election.

A. Yes, sir.

Q. Mr. Renton, were you present at Mr. Fish's house when circulars were being folded such as exhibit number three there before you? A. No, sir. 40

Charles E. Renton—For State—Direct

Q. Did you get one of those circulars? A. I did.

Q. How did you get it? A. By mail.

Q. Addressed to you? A. Yes, sir.

Q. Did you meet Mr. Fish after you received it?

10 A. I did.

Q. Any talk take place between you and him concerning the circular which you had received like Exhibit Three? A. Might have passed a remark.

Q. Might have? Was any remark passed? A. Yes.

Q. What was it? A. I can't quite give the words, something about what do you think of it.

(Answer repeated by the stenographer.)

20

The Court: Did he say that or did you say that?

A. The Mayor.

Q. Did you tell him? A. I made the remark "that might hurt" that was all.

Q. What did he say? A. Nothing.

The Court: You made the remark that it might hurt him?

30

A. No, I didn't say "him." "That might hurt."

The Court: He made no reply?

A. No.

Q. Did he make any movement of his body? A. Shrugged his shoulders.

Q. This circular—are you a member of the Good Government League? A. I am.

Q. At the bottom of this circular something is said about Mr. Pawlik, Treasurer of the Campaign

40

Charles E. Renton—For State—Direct

Committee, paying for the circular; do you know Mr. Pawlik? A. I do.

Q. Was he Treasurer of the Campaign Committee of the Good Government League? A. Treasurer of the Campaign Committee of the Good Government League, yes, sir.

Q. Did the Campaign Committee pay for the circular? A. Yes, sir.

10

Mr. Stein: I will ask that answer be stricken out.

Q. Do you know whether or not it was paid for by the campaign committee?

Mr. Oliver: I object as immaterial, and irrelevant if the Court please.

20

The Court: He may benefit you with the answer.

Mr. Oliver: Possibly, if the Court please. I do not ask the rules of evidence be violated to help my case. I think it is immaterial.

The Court: I think I shall allow the question. I think the jury ought to know whether the committee paid for that or somebody else.

30

A. I could not tell you.

Q. What office do you hold in the Good Government League, Mr. Renton? A. Financial Secretary.

Q. Were you the Financial Secretary in the last campaign, in September? A. Yes.

Q. What were your duties as financial secretary?

Mr. Oliver: I object as immaterial.

The Court: That is immaterial.

40

Charles E. Renton—For State—Cross

Mr. Stein: If your Honor please he said he don't know. As Financial Secretary, if he had certain duties to perform it might appear he ought to know or did know they did not pay for it. I will follow it along those lines.

10

The Court: He does not know whether the club or society paid for the circulars or not. I am going to sit here until seven o'clock to try this case in order to complete it.

Mr. Oliver: Your Honor said six the other day.

The Court: I would like to make it six, but counsel are so oratorical in all their objections, I am going to give them an extra hour.

20

Mr. Oliver: I take exception to your Honor's remarks; I do not think—I think it is uncalled for.

The Court: You may take an exception to that Mr. Oliver. I do not like to offend you and I do not think I said anything that should offend you. You may take an exception to that.

Exception allowed, sealed accordingly.

30

JAMES C. CONNOLLY, [L. s.]

Judge.

Q. Mr. Renton, as Financial Secretary of the Good Government League you do not know whether this was paid for last fall or not? A. No, sir.

Mr. Stein: That is all.

Cross-examination by Mr. Oliver:

40

Q. What did you mean when you said "it might hurt"? A. The Good Government Club.

Charles E. Renton—For State—Redirect
Henry Earnst—For State—Direct

Q. It might hurt the Good Government Club?

A. Yes, sir.

Q. That was after the circular had been sent out, wasn't it? A. Yes.

Mr. Oliver: That is all.

10

Redirect examination by Mr. Stein:

Q. Why do you think a circular like that would hurt The Good Government Club? A. I can't answer that.

Q. You can't give a reason for your thought on that? A. No, sir.

Mr. Stein: That is all.

20

HENRY EARNST, produced as a witness on behalf of the State, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Stein:

Q. Mr. Earnst, you are Secretary of the Board of Health of Roselle Park? A. Yes, sir. 30

Q. And do you remember being at Mr. Fish's house last fall, folding circulars? A. Yes, sir.

Q. Look at circular before you, Exhibit Three, on the part of the State, and tell us whether that was the kind of circulars you were sending out there that night?

The Court: Did he say he was sending them out?

40

Henry Earnst—For State—Direct

Mr. Stein: He said they were folding circulars there.

The Court: He did not say——

10 A. I didn't say anything. I said I was at the house. That is all you asked me, whether I was there.

Q. Were you at Mr. Fish's house during the recent election, folding circulars? A. I was at the house, not folding circulars.

Q. Did you see any one there folding circulars? A. I went there late and it was practically done.

Q. Did you see anyone there folding circulars? I do not care whether you went there two in the morning? A. No.

20 Q. Did you receive a circular such as the one there before you, Exhibit Three on the part of the State? A. Similar to that, I did.

Q. How did you get it? A. By mail.

Q. Where did you get it? A. At my home.

Q. How was it addressed? A. It came in an envelope.

Q. Your name on it? A. Yes, sir.

Q. Stamped? A. Well, I didn't look if it was stamped or not. I know it was there amongst my other things.

30 Q. Did you ever talk to Mr. Fish about that circular? A. No, sir.

Q. His name is printed on it, isn't it? A. I never looked whether it was or not.

Q. How about the one you received? A. One I received I don't remember that because I don't know whether I read it through yet to this day.

Q. You don't know yet? A. No, sir.

Q. When are you going to find it out?

40

Mr. Oliver: I object to the question.

The Court: That is an improper question.

Henry Earnst—For State—Direct

Q. Take a look at that circular now from top to bottom and take a little time at it, and then tell me whether you have received a circular like that, through the mail. A. I believe I said of this I received one similar to that.

Q. Similar in what respect? What is there about that circular— A. Merely from the looks of it; not that I remember anything further about it. 10

Q. Give us some idea of what you mean by the looks of it. Do you mean the introductory part? Regarding Johnson? A. I would not know just how to explain that. I see circulars, and if there is any importance to them I put them on file where they can be taken care of; if not, I don't bother with them. I never do.

Q. Tell me this; how many circulars have you received there in Roselle Park, at your home in the last year? A. Yes. 20

Q. Have you any idea? A. More than what would cover that table.

Q. What is your business? A. In relation to Board of Health work.

Q. In relation to Board of Health work? A. Yes, sir.

Q. What are the circulars on? A. On different things, there is different circulars. I don't say but— 30

Q. You get them at your office? A. My office is home.

Q. You did not have any office then? A. Not then; we have now.

Q. Did you last November? A. Not until the first of the year.

Q. You do not pay attention to circulars sent to you when not in your official capacity? A. I just glance them over and I can see if there is anything. 40

Henry Earnst—For State—Direct

Q. When one coming to you has no connection with Board of Health nature? A. I throw that right away.

Q. You don't know whether you got this circular or not? A. I looked at it, and then discarded it.

10 Q. Did you look at it long enough to know what it was? A. Yes, sir; my answer is the way this looks. It looked to be similar to the one I had.

Q. You are still on the Board of Health? A. Yes, sir.

Q. Secretary of the Board? A. Yes, sir.

Q. How did you get your appointment?

Mr. Oliver: I object.

Mr. Stein: What is the harm?

20 The Court: Well——

Mr. Oliver: As being immaterial and irrelevant.

The Court: I suppose it is immaterial and irrelevant whether he is elected or appointed, or simply gets there through his own efforts.

Mr. Stein: Except this wise, if your Honor please, it may explain some of his previous testimony, I don't know.

30 A. It won't hurt it any.

The Court: I do not think—I think it is immaterial.

(Answer repeated by the stenographer.)

Mr. Oliver: The Court spoke about my efforts to delay this trial.

The Court: I did not say you were delaying the trial.

40 Mr. Oliver: Having been the principal offender.

Henry Earnst—For State—Direct

The Court: I said there was so many oratorical remarks made by counsel; I did not refer to you particularly, Mr. Oliver.

Mr. Oliver: At any rate, I want to suggest to the Court that the proof that is now coming out is merely accumulative, and might be omitted at the discretion of the Court. 10

The Court: Does the State close its case?

Mr. Stein: The State will rest.

The Court: The defendant may open his case and proceed.

Mr. Oliver: If the Court please, I ask Your Honor to direct a verdict of acquittal on the ground first: that there is absolutely no testimony connecting the William E. Johnson who served on the Grand Jury in May, 1911, with the William E. Johnson referred to in this indictment, so far as I recollect. The document in evidence upon which the charge is based which has been read to the jury, starts as follows: "Public record of William E. Johnson, Republican Candidate for Freeholder, which the voters are entitled to be informed of." In that connection I wish to call the attention of Your Honor to the fact that there is an entire absence of any testimony to show that any person not a voter of this political division made up of Roselle Park and Union Township received one of those circulars. That being so, that communication is privileged, and the defendant is guilty of no offense unless it be shown that he was guilty of actual malice in sending it out; unless there is some evidence to that effect. There is no evidence to that effect, whatever. In 20
30
40

Henry Edrnst—For State—Direct

10 fact, the testimony of the State's own witnesses show that Fish on other occasions declared to witnesses his purpose in sending this out, and that purpose, as so declared, corresponds with the declaration in the circular itself. You recollect that Phillips—
 20 the man who said he had threatened to get square with Fish, get even with him, and who is evidently antagonistic to Fish, and is willing to go to whatever lengths in conscientiousness he can in making the case against Fish—testified “that Fish said that he had nothing against Johnson, personally; that he was a good neighbor, but that he thought the voters ought to know of Johnson's record. There is a statement by the State's own witness; that is the State's evidence, and they are bound by it. He said he had nothing against this man Johnson personally; that he was a good neighbor and that the only purpose in sending it out was because he thought the voters ought to know about it. There is no evidence against that statement; there cannot be. The State is precluded by the testimony of their own
 30 witness from proving malice, because there is a statement of their own witness that he had no malice; that he had nothing whatever against the man; that he was a good neighbor.

40 Now as to the motive in making this charge; we have been tied down to this one particular charge, but we rely for this purpose, and we are contended with that because Phillips said that Fish told him, before any indictment was found, and it is not

Henry Earnst—For State—Direct

any self-serving declaration. Fish told him that Johnson—that someone had told him—Fish—that Johnson had protected this man before the Grand Jury. Now there is nothing to show that this is not so. It comes from the State's own witnesses that somebody told Mr. Fish that Johnson had protected Snowden before the Grand Jury. I say there is not only no evidence of malice, no evidence to show that Fish did not actually believe the facts were true, but there is positive evidence on the part of the State there was no malice and that Fish had been told this thing was true, and therefore he had a right to believe that this thing was true. I think I have got a correct statement as to the facts as they appear from the State's own case. And now I shall read from the opinion of the Court of Errors and Appeals, King against Patterson (*Reading King vs. Patterson*, 49 Law, 418). Now it seems to me that this case, as the evidence stands, comes exactly under that rule in King against Patterson, and under that a jury could not find a verdict of conviction, and, therefore, I submit we are entitled to a direction of the verdict. 10
20
30

The Court: The case you have just cited was a civil action instituted by a person named Patterson against a corporation, or against somebody who furnished information as to the financial standing of other persons. Do you desire to say anything?

Mr. Stein: We are losing some time on the motion. The constitution distinctly provides that the judges of the fact and law 40

Henry Earnst—For State—Direct

10 in this case are the jury as to whether or not we have made out libel, on the proper instructions of the Court. Outside of that, and over and above it, if I may answer it further that the law is very clearly and well settled in every jurisdiction that, if this language is libelous *per se*, standing alone by itself, malice is presumed. The State does not have to prove malice in criminal libel; the law carries that along with it. Your Honor well knows that the only time malice needs to be proven is in a civil action where the language is not libelous, *per se*, and by imputing to it a meaning you can make it malicious, by showing that the man had some
20 motive which was not honest for making the statement which he did, and that he desired to injure the person. Where, of course, it is not libelous at all, then, of course, we have to prove special damages, but we are to bear away from that in criminal proceedings. If a man is indicted, as the defendant happens to be here, for language laid in the indictment which is libelous of itself, then there is but one thing he can say, under the law, that he can show; that he can do, to escape
30 conviction, and that is to present to the jury evidence, tending not only to show that the libel he uttered was true—if indeed he can show it—but in addition to that it was published through good motives, good motives, and for justifiable ends. A motion to direct a verdict, therefore, at this time I think is not proper; I think the Court should allow the case to go to the Jury. Also, your Honor will remember the Benton case in which it
40

Henry Earnst—For State—Direct

was clearly laid down that the language of a publication, on a motion made to quash an indictment—it was alleged that the language of the charge laid down in the indictment was not libelous language, and the Court said it was perfectly proper that the Judge should deny the motion as long as the language used was such that even an inference might reasonably be drawn by a jury that the words were within the definition of libel as laid down by the Court, in instructing the jury. I do not think there is the slightest question about that being the law in this State that the jury must pass upon whether the language was libelous. And after they pass upon it, they must determine not only whether it was true, but that the man published the libel for good and pure motives and for justifiable ends. If he did not publish it for justifiable ends, even though it be true, I will ask the Court to instruct the jury that the defense is not complete.

10

20

Mr. Oliver: I do not suppose that the Prosecutor would wish to be taken seriously in his remark, that, under the constitutional provision a Court must allow the matter to go to the jury, no matter what sort of a case the State makes out. I do not think he is serious on that.

30

The Court: I do not think so either.

Mr. Oliver: We have nothing to do, whatever with the Constitutional provision, that is for a man who has no other defense. I am speaking now under the rules of Common Law which your Honor knows so well,

40

Henry Farnst—For State—Direct

10 that it is foolish to talk about the question that where a communication appears on its face to be a privileged one, and where it was made for good purposes, express malice has to be shown. And there is no malice shown; on the contrary, the testimony is that Fish declared to one of the State's own witnesses that he had nothing against this man. That he was a good neighbor, and that he thought the information should go to the voters. And there is not testimony to show that the information went to anybody but the voters and counsel declines to even dignify it by comment or that the state has failed to connect William E. Johnson who sat on May 20 term, 1911, with the Johnson named in the indictment.

Mr. Stein: I thought you knew it; you were sitting here when Mr. McDevitt testified he was before the Grand Jury with the defendant.

Mr. Oliver: That is right; I overlooked that.

Mr. Stein: And that Mr. Johnson was a member of the Grand Jury.

Mr. Oliver: That is true.

30 Mr. Stein: And that it was the same Johnson to which this circular referred.

Mr. Oliver: I admit that, now.

Mr. Stein: Do you remember that now?

Mr. Oliver: I remember he did testify to that.

The Court: I shall deny the several motions made by the attorney for the defendant, and require him to present his case to

Henry Farnst—For State—Direct

the jury. In doing so I want to say that malice, of course, must be shown, but it is not absolutely necessary that that malice should be positively shown by some act, word, or deed on the part of the defendant, if malice in law can be shown.

10

Mr. Stein: That is the point.

The Court: And the law regards a note as maliciously published when it concerns a public man in a public office and attacked his integrity and his character in the discharge of his public functions or duties. It is then upon him to take the witness stand and to prove to the jury that he was not actuated by malice. The Court said, in the case of State against Benton, or Benton against the State this—I think I cited this language the other day—"On an indictment of criminal libel, the Court should not grant a motion to quash or a motion in arrest of judgment, upon the ground that the publication was not libelous so long as the language thereof was such that an inference might reasonably be drawn therefrom by the jury that the words were within the definition of libel as laid down by the Court." You may proceed with the defense.

20

30

Mr. Oliver: I pray an exception.

The Court: Yes, sir.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

40

DEFENDANT'S CASE.

Mr. Oliver opens for defense.

HARWOOD FISH, the defendant, being duly sworn on his oath, according to law, saith:

10 *Direct examination by Mr. Oliver:*

Q. Mayor Fish, you are the defendant in this case? A. Yes, sir.

Q. Where do you live? A. Roselle Park.

Q. How long have you lived there? A. About sixteen years.

Q. Do you hold an official position there? A. Mayor of the Town.

20 Q. Have you been Mayor before your present term? A. I was re-elected after serving two years.

Q. You wrote this circular, I believe, that has been put in evidence? A. I did.

Q. What purpose did you have in publishing that circular? A. As I stated on the circular, I thought it was a matter of my public duty.

Q. Was that true? A. Absolutely.

Q. And that is the only reason you put out the circular? A. The only reason.

30 Q. What reason did you have for believing that the statement regarding Johnson's action, as a member of the Grand Jury, was true?

40 Mr. Stein: I object to the question upon the ground that the defense must be that the statement which the defendant made was true. Not what he believed to be the truth, but that, in fact, it was true, and that that must firstly be his defense. And then, after it is shown by him that it is true, then only—and not until then, and not before, can he attempt to show under the Constitutional de-

Harwood Fish—Defendant—Direct

fense that is his, the other two elements of his defense, namely, that he has published it for good motives and for justifiable ends. Now the question asked is: Did he believe it to be true.

The Court: No, the question is: What reason had he to believe that what he said was true? 10

Mr. Stein: That is just as objectionable to the mind of counsel for the reason that it would afford a man a defense which not given to him under the Constitution to make. That he had some reason to believe that it was true. The language of the Constitution is plain, it says, he must prove the truth. It says the truth may be given in evidence, and if given in evidence and it is shown that the writer or the person who published the libel did it for good motives and for justifiable ends, then his defense is complete. In other words, I take it that, under the law, a man has not a right to charge the truth unless he can show it is for good motives and for justifiable ends, and that is a question for the jury to say, whether the things he has advanced as good motives and the things he advanced as justifiable ends, whether they are, in truth, the things he claims them to be; whether the jury thinks they are. This question does not commence to show in any way and could not show that, it is for the purpose of showing that the article was true. It is only for the purpose of shewing what the defendant himself heard that led him to believe it was true. 20

Mr. Oliver: I think it is so, but we have 30 40

Harwood Fish—Defendant—Direct

nothing to do now with that Constitutional provision, we are dealing with Common Law ruling. This alleged libel, this circular shows on its face that it is issued to apprise the voters of the character and fitness for office of the candidate. The Mayor has testified that was his purpose in putting out the circular, and he had no other purpose. If that be true, then this man cannot be convicted unless it appears that he was actuated by malice in putting it out; and that he did not believe it was true, and had no reason to believe it was true. It goes to the question of malice. If this man simply put this statement out, recklessly and without any regard to its truth, then, undoubtedly, he would be guilty of putting it out maliciously; he would be guilty of malice. This goes to motive, and the question is as to motive, and, certainly, he has a right to show, in that connection that he had reason to believe it to be true and did believe it to be true. He said he believed it to be true. Now, he has a right to go further, I submit, and show why he believed it to be true. I have not the books here but the law says, it is taken from Cyc., that is the main authority; I am quoting from Cyc. This is the way that phrases it: "Rumors or other sources of information relied upon by the defendant in making the publication was held to be admissible to show absence of malice."

Mr. Stein: In civil cases.

Mr. Oliver: That happens to be taken from the Criminal libel. I will not argue the question any further, that is the ground

Harwood Fish—Defendant—Direct

for my question. I submit it is a proper one.

The Court: If the attempt is now being made to have this witness, who happens to be the defendant, give testimony going to show what transpired in the Grand Jury Room, then I would not allow him to testify to that. I would allow him to testify that he had been informed by Mr. Johnson himself of what he had done there, or that Mr. Johnson had made a statement to him, but I would not allow—that would be allowed under the decisions, as I take it—but I would not allow him to repeat the testimony of any other Grand Juror or witness who appeared before the Grand Jury or any Clerk who appeared before the Grand Jury.

10

20

Mr. Stein: Johnson was a Grand Juror.

The Court: I would allow him, if he could show that Johnson had made a self-accusing statement, I would allow him to show that. But this is foreign to the question. He cannot show that. That is not the attempt. The attempt it now to elicit testimony going to show what he learned from witnesses who were before the Grand Jury.

30

(Question repeated by the stenographer.)

Mr. Oliver: I withdraw the question.

Q. What reason, if any, did you have for believing that your statement regarding Johnson's conduct in the Grand Jury was true? A. Personal experience.

The Court: Is that objected to?

Mr. Stein: He answered it.

A. And others personal experience as a witness before the Grand Jury.

40

Harwood Fish—Defendant—Direct

Q. Anything else?

Mr. Stein: I ask that, if your Honor please—

The Court: That is all right as far as it has gone.

10

Mr. Stein (Continued)—answer be stricken out.

The Court: There is nothing divulged here that happened before the Grand Jury.

Mr. Stein: All right.

Q. Did you have any other reason? A. In what regard?

20

Q. Did you have any other reason for believing that—did you have any other reason other than your personal experience in that Grand Jury Room, for believing the statement you made regarding Johnson's conduct as a member of that Grand Jury to be true? A. I did.

Q. What was the reason? A. Statements made by Mr. Joseph McDevitt, outside of the Grand Jury Room.

Q. What was the statement?

30

The Court: I shall rule that out.

Mr. Oliver: I pray an exception.

The Court: You may have an exception.

Exception allowed; sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

Q. Had you complained against—did you complain before that Grand Jury of May, 1911, regarding Snowden? A. I did.

40

Q. And upon what facts was your complaint

Harwood Fish—Defendant—Direct

based? A. Based on my experience with Doctor Snowden and the experience of others.

Q. Will you tell us about your experience with Snowden, what was it you complained of?

Mr. Stein: Where did you complain, in the Grand Jury? 10

Mr. Oliver: Yes.

Mr. Stein: Did not complain outside.

All right, I object to the witness testifying to the subject matter, the facts that he gave before the Grand Jury on offering the subject matter of his complaint. I do not object to his stating what was the subject matter of the complaint.

(Question repeated by the stenographer.)

A. Obtaining money under false pretenses. 20

The Court: That was Snowden?

Mr. Oliver: Yes. That was the charge.

Q. What were the facts, without stating now what you testified to before the Grand Jury, what were the facts regarding the charge that you made?

Mr. Stein: I object to that because that would carry with it an attempt on the part of counsel to try before a petit jury a matter that had been submitted to a Grand Jury, and which the Grand Jury, under its oath, evidently had not taken cognizance of. 30

The Court: He is not asked for the testimony that was given to the Grand Jury, but the facts which induced him to go before the Grand Jury and make a complaint.

Mr. Stein: Yes.

The Court: It does appear to me that Snowden's case is not a proper matter for 40

Harwood Fish—Defendant—Direct

10 investigation here now. If we go in to prove the character of Snowden, and if the counsel for the defendant endeavors to show that he was a swindler that was protected by the Grand Jury it will take us far away from the issue that is before the Court. Under the circumstances I will refuse to allow testimony going to show what the facts were upon which the complaint was made to the Grand Jury, concerning Snowden.

20 Mr. Oliver: The question is directed, of course—strike out that “of course”—the question is directed to that part of the alleged libel which says that in Fish’s opinion, in effect, that this man Snowden—it appears now it was Snowden, he is unnamed there—but that this man was a swindler. Now, without regard to what transpired in the Grand Jury Room, what testimony was presented there, as to whether this man was a swindler, I want to show Fish’s own experience with this man that led him to believe he was a swindler as he said he was in the indictment.

Mr. Stein: If your Honor please—

30 The Court: I think my ruling covers the whole question. I will refuse to allow you to go into any testimony, any line of testimony showing Snowden’s character at this time in the case. There may arrive a time in this case when I would allow it, but not now.

Mr. Oliver: I pray an exception.

The Court: You may have an exception. Exception allowed, sealed accordingly.

40 JAMES C. CONNOLLY. [L. s.]
Judge.

Harwood Fish—Defendant—Direct

Q. When you wrote that article did you believe that Snowden was a swindler? A. I did.

Q. Why did you believe that?

The Court: You are going back again.

Mr. Stein: May I say this, if your Honor please. I do not know Snowden, but as Prosecutor of the County now, succeeding the man who was Prosecutor then, I think it is but right and fair and honest that I should bring to this Court's attention that in the prosecution here now of the defendant on a libel charge the defense is trying to show not only that it published a libel out of good motives, but to show that the Grand Jury at that time, who did not find a bill, according to them, let a swindler get away. Now Mr. Snowden is entitled to something, whoever he is, or wherever he lives, and if the Grand Jury or my predecessor, when he was in office did not find a bill against this Snowden I do not think it is right or honorable, and I do not think that your Honor will ever allow this man to testify on the trial of himself, that, notwithstanding what the Grand Jury did, that he is still a swindler. That is going a little too far.

The Court: I have made my ruling and it will stand.

Mr. Oliver: Question is overruled.

The Court: The question is overruled.

Mr. Oliver: I pray an exception.

The Court: Exception granted.

Q. Did you have a talk with Joseph McDevitt about what happened in the Grand Jury Room?

A. I did.

Harwood Fish—Defendant—Direct

Q. What did Mr. McDevitt tell you, if anything?

Mr. Stein: I object.

The Court: Objection sustained.

Mr. Oliver: I pray an exception.

The Court: Granted.

10

Exception allowed; sealed accordingly.

JAMES C. CONNOLLY, [L. s.]

Judge.

Q. Mr. Fish, what, if anything, led you to believe that an indictment had been found against Snowden?

20

Mr. Stein: I object on this ground; that a person who is not a Grand Juror, present in the body, cannot know one way or the other whether an indictment is found; the only way he can know of it is when an indictment is presented in the Court, and the fact is an indictment is not found in law until it is presented to the Court. So that this witness could not know. An indictment might be voted; an indictment might be reconsidered after being voted; indictments might be *nolle prosequed* by the Court on request by the Prosecuting Officer. And they are never found until they get here—

30

The Court: Question will be overruled.

Mr. Oliver: I pray an exception.

Exception allowed; sealed accordingly.

JAMES C. CONNOLLY, [L. s.]

Judge.

Q. What reason did you have, if any, to believe that Snowden was a friend of Johnson? A. By things that Mr. Johnson told me himself. By his attitude as a Grand Juror; by his attitude as a

40

Harwood Fish—Defendant—Direct

Grand Juror and by things he told me personally, and also by statements made to me by others that Mr. Johnson had ordered goods from Mr. Snowden.

The Court: Do not tell what they were.

Mr. Oliver: I submit he has a right to tell what they were. 10

The Court: He cannot tell what others told him.

Mr. Oliver: I pray an exception.

The Court: You may have an exception; you can tell what Johnson said to you.

Exception allowed; sealed accordingly.

JAMES C. CONNOLLY, [L. S.]
Judge.

Mr. Oliver: I notice the Prosecutor used the word "found" a few minutes ago in connection with this indictment. I may have made a mistake in the question I put, and to save any misunderstanding I will ask the witness again. 20

Q. What led you to believe that in that Grand Jury an indictment had been voted against Snowden?

Mr. Stein: I object to that, since no man who is not a member of a Grand Jury can know whether an indictment is voted for this reason: after the witnesses are heard in a Grand Jury Room, they retire, and there after the Grand Jury deliberates as this petit Jury does after it hears the evidence. And what the Grand Jurors do in the voting of the indictment an outsider cannot know. More particularly is that true when the record can be perused, and outsider wants to find out whether an indictment is voted. And 30 40

Harwood Fish—Defendant—Direct

10 if none is found, even though a person should hear in some way or the other that an indictment was voted, if none is found in the Court, which is a public place where he can look, he has no right to say one was voted, because the fact is in law and fact that none was voted unless it is handed in. But the principal objection is that Mayor Fish or anybody else, who is not a member of a Grand Jury cannot know whether an indictment was voted. The only persons who can know that are the Grand Jurors themselves, and they cannot tell.

20 Mr. Oliver: It sounds all right, if the Court please, and that is fine theory, but let us be honest and sensible, there is not a man within that Bar who does not know that within twenty-four hours after any Grand Jury indicts a man, he can find out in some way what action that Grand Jury took. I am not talking about what should be, I am talking about what is.

Mr. Stein: Are you talking law?

Mr. Oliver: No, sir, I am answering your statement.

30 The Court: The Court will now make a ruling.

Mr. Stein: One thing further I may make in reply to that: if any Grand Juror does that, and we find out about that, he is liable for misconduct.

The Court: I shall refuse to allow that question to stand.

Mr. Oliver: Prays exception.

The Court: You may have an exception. Exception allowed; sealed accordingly.

40

JAMES C. CONNOLLY, [L. s.]
Judge.

Harwood Fish—Defendant—Direct

A. I can easily prove the truth of that if the Prosecutor will stop raising technical objections.

Mr. Oliver: One moment, you have counsel.

Mr. Stein: I am very glad that statement was made. 10

Q. Did you have any talk with Judge Swift who was then Prosecutor as to an indictment having been prepared against Snowden? A. I did.

Q. What did—what, if anything, did Judge Swift tell you in that regard?

Mr. Stein: I object.

The Court: I will allow it because it may be something that he told him that did not transpire in the Grand Jury Room. 20

Mr. Stein: I would like to say this: I have no fear of Judge Swift, as Prosecutor, telling what happened in the Grand Jury Room.

The Court: If it appears that it is a matter pertaining to what transpired in the Grand Jury Room—

Mr. Oliver: It does not, though.

(Question repeated by the stenographer.)

(Question and answer repeated by the stenographer.) 30

Q. In regard to the indictment being prepared?

The Court: Answer the question.

A. Can I state why, from Judge Swift—

Q. If he did, tell us about it: did he or not? A. He did. 40

Harwood Fish—Defendant—Direct

Q. What did he say? A. He told me that an indictment had been prepared and he had gone to a good deal of trouble about it because it was peculiar and it was in his safe.

10 Q. Did you ever have any talk—before you wrote this document, that is Exhibit number three circular, complained of, did you have any talk with George Teller of Cranford, regarding Johnson?

Mr. Stein: Mr. Teller was a member of the Grand Jury of the May Term, 1911.

The Court: This may be something which does not tell of Grand Jury affairs. I am not going to anticipate he is going into Grand Jury affairs.

20 Q. What did Teller say to you about Johnson?
A. He told me that after his experience with him, sitting on the same Grand Jury—

Mr. Stein: I object to anything further.

The Court: I will allow that; that is not retailing Grand Jury matters.

30 A. That because of his experience as a fellow Grand Juror he didn't want to sit with him on the Board of Freeholders.

Q. Is that—was Mr. Teller a member of the Grand Jury—a member of the Board of Freeholders at the time he made that statement to you? A. He was.

Q. Is he a member now? A. He is.

Q. Did that statement of Mr. Teller's have any influence whatever upon your mind when you said—when you wrote rather, that a man of Johnson's

40

Harwood Fish—Defendant—Direct

history, political morality, style and general character—

Mr. Stein: Just wait—

Q. (Continued)—would be so obnoxious to the other Freeholders that he would be absolutely helpless to secure for the district the important improvements we now need—that is, Roselle Park? 10

Mr. Stein: I object.

The Court: That takes us into an issue that is not before the Jury. The Jury has the circular before it, for the purpose of reading the whole article in which the alleged libel occurs, but I do not think that we are allowed to go into an investigation of matters independent of the charge complained of. I think that I am justified, therefore, in overruling the question. 20

Mr. Oliver: The question, your Honor appreciates, is directed to the question of this man's malice in writing this circular?

The Court: Yes.

Mr. Oliver: I except to your Honor's ruling.

(Question repeated by the stenographer.)

The Court: I will allow him to answer that by saying yes or no. 30

A. Yes.

The Court: That does away with your objection.

Mr. Oliver: And the exception.

The Court: And your exception.

Q. How did you know that Johnson was treasurer of a bankrupt dentist's corporation? 40

Harwood Fish—Defendant—Direct

Mr. Stein: I object to that.

The Court: That does not come within the same category as the other question which I have just allowed to be answered. I will rule it out.

10 Mr. Oliver: Prays exception.

The Court: Grant you an exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L.S.]
Judge.

Q. How did you know he was an ex-hotel keeper in the west?

Mr. Stein: I object.

20 The Court: It is the same as your last question, and I shall rule it out, and grant you an exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]
Judge.

30 Q. What led you to say "As a councilman in Roselle Park Johnson was so dictatorial and abusive and he so disgusted the decent people in the borough that he did not have the presumption to run for re-election."

Mr. Stein: I object as immaterial, and not bearing on the issue.

The Court: I shall rule that out.

Mr. Oliver: I pray an exception.

The Court: Grant you an exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]
Judge.

Harwood Fish—Defendant—Direct

Q. What ground, if any, did you have for saying on this circular of Johnson: "He used the Borough team for private work about his residence, and when I insisted on his paying fifteen dollars for the use of it, he violently abused me at a Council meeting and said he had a perfect right to use the team in return for the work he did as a councilman. I told him his idea of honesty in public life was very different from mine, and that having taken the office of councilman without salary he must pay for the team, which he did." 10

Mr. Stein: I object.

The Court: I think that is self-explanatory. I shall overrule the question.

Mr. Oliver: I pray an exception. 20

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

Q. Do you know whether that charge, so made against Johnson, is proper?

Mr. Stein: I object, the indictment is not founded on any charge but one in the circular.

The Court: What charge do you refer to? 30

Mr. Oliver: The charge I have just read.

Mr. Stein: That he used the team for private purposes, and then paid the borough for the use of it.

The Court: Overruled.

Mr. Oliver: Prays exception.

The Court: Granted.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge. 40

Harwood Fish—Defendant—Direct

Q. Did you have a discussion with Johnson in Council meeting at Roselle Park, relative to his using the town team, the borough team for his private work? A. I did.

Q. What was that conversation.

10

Mr. Stein: I object.

The Court: Objection sustained.

Mr. Oliver: I pray an exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

Q. As a result of that conversation or after that conversation at the same meeting, did Johnson pay anything for the use of the Borough team?

20

Mr. Stein: I object.

The Court: Objection sustained.

Mr. Oliver: Prays exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

Q. Who was present at the council meeting if you can remember, at which the instance I have just referred to occurred?

30

Mr. Stein: I object.

The Court: I sustain the objection.

Mr. Oliver: Prays exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

Q. To what circumstances, or incident had you reference when you wrote: He pledged seventy-five

40

Harwood Fish—Defendant—Direct

dollars toward the construction of a local church and then when, because of the war, the church was embarrassed in paying its contractor, he refused to pay a balance of forty-eight dollars and wrote a letter reneging on the subscription and refused to pay it.

Mr. Stein: I object to that.

10

(Question repeated by the stenographer.)

The Court: I cannot see how that would go to justify the use of the language complained of in the indictment, and I overrule the question.

Mr. Oliver: I pray an exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. s.]

Judge.

20

Q. Had you personal knowledge of any such fact

as is referred to in that last?

Mr. Stein: I object.

The Court: Question objected to is overruled.

Mr. Oliver: I pray an exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. s.]

Judge.

30

Q. What warrant, if any, did you have for saying in this circular, of Johnson, "He side-stepped the payment of a debt, as shown by a copy of Court proceeding, as given below, and judge for yourself whether he perjured himself or not."

Mr. Stein: I object.

The Court: Objection sustained.

Mr. Oliver: I pray an exception.

40

Harwood Fish—Defendant—Cross

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. s.]
Judge.

10 Q. From what source did you obtain the extract
from the public records as recited in this circular?

Mr. Stein: I object.

The Court: I will allow that; it is immaterial, it seems to me.

A. William F. Groves as Master, who tried the case.

The Court: This is a printed extract in the case of somebody against somebody, I do not know who it is.

20

Q. Where did you see that testimony?

Mr. Stein: I object.

A. Mr. Grove's office.

The Court: It is answered.

Mr. Oliver: Cross-examine.

30 *Cross-examination by Mr. Stein:*

Q. Mr. Fish, Mr. Johnson held a public office up in the Borough of Roselle Park, did he not? A. He did.

Q. What office did he hold? A. Councilman.

Q. They are elected by the people up there, are they? A. They are.

Q. And you and he were in the same government together? A. We were.

40 Q. You were Mayor and he was member of coun-

Harwood Fish—Defendant—Cross

cil, how long? A. He was member of council before I was Mayor.

Q. Wasn't he member of council while you were Mayor? A. He was part of the time.

Q. How? A. He was part of the time.

(Answer repeated by the stenographer.)

10

Q. Now he served how long in the City Council?

A. Three years I believe. That is the regular term.

Q. Did they elect him each year? A. No, elected once for three-year term.

Q. I see. When was he first elected, if you remember? A. A year or two after he moved to the town.

Q. You lived in the town before him? A. Yes.

Q. Sixteen years I think you said? A. About that.

20

Q. You and he have not been getting along very well up there in the government, have you? There has been some feeling between you? A. Only because he tried to be Mayor.

Q. I see. Well, you were the Mayor? A. He insisted on being. I was elected for that purpose.

Q. That's right. And the insistment was rather hard, was it? A. No, he offered to make the most popular man in Union County, if I would take his advice, and appoint people that I was elected to put out of office. And I refused to become the most popular man in Union County at his hands.

30

Mr. Stein: I think that is all.

Q. Do you know Mr. Griffen of the—you heard the testimony of Mr. McDevitt of your meeting Mr. Griffen and himself at the Times' office? A. I did.

40

Frank V. Lowden—For Defendant—Direct

Q. Did you meet him there? A. I believe so. Can I state what I said at the Grand Jury hearing, Judge?

10 The Court: No, witnesses are not allowed under the ruling of the Court, and I cannot allow you to tell what you said before the Grand Jury.

FRANK V. LOWDEN, produced as a witness, on behalf of the defendant, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Oliver:

20 Q. Mr. Lowden, you reside in Roselle Park, don't you? A. I do; yes, sir.

Q. What position do you hold in Union County? A. Clerk of the Grand Jury, and County Detective.

Q. Both positions? A. Both positions; yes, sir. Hold some more too.

Q. I beg your pardon? A. Hold some more too.

30 Q. What are they? A. I am member of the National Guard, hold a commission in the National Guard; elected Justice of the Peace; and several other things.

Q. Won't you specify, can't you specify the others? A. Yes.

Q. Let us have them? A. Once in a while I do a little newspaper corresponding.

Q. Yes? A. Finger print business.

The Court: What else?

(Answer repeated by the stenographer.)

40 A. Want some more?

Frank V. Lowden—For Defendant—Direct

Q. If there are any more? Have you any more occupations? A. I think that is all.

Q. As Clerk of the Grand Jury have you in your custody or in your control the minutes of the Grand Jury of the May Term, 1911?

Mr. Stein: If your Honor pleases—I will allow him to answer that. 10

Mr. Oliver: You will allow him to answer?

Mr. Stein: Yes, I mean without an objection. Then I am going to make an objection as Prosecutor.

Mr. Oliver: I see, all right.

A. They are in the Prosecutor's office, sir.

Q. Subject to your control, aren't they? A. I don't know how to answer that. 20

Mr. Stein: If your Honor please, the minutes of a Grand Jury are never official minutes, as I am prepared to show, except when there is a statute which says that there shall be minutes. In New Jersey we have no statute which requires the keeping of any minutes of the Grand Jury proceedings by the Clerk. I am, therefore, going to object to this line of testimony since there would be no minutes of the 1911 Grand Jury. And further because where there are minutes they are constructively in the custody of the District Attorney, or prosecuting officer, who has them for the purposes of prosecutions, and nothing else; I think your Honor is familiar with that. 30

(Question and answer repeated by the stenographer.) 40

Frank V. Lowden—For Defendant—Direct

A. I don't know, your Honor, there is nothing to guide me.

The Court: In New York they have a law governing the Grand Jury, but the question is answered.

19

(Answer repeated by the stenographer.)

Q. Why don't you know how to answer that? A. There is no rules governing whether I control the minutes of the Grand Jury or not.

Q. Are they where you can go and get them whenever you want? A. There are books of the Grand Jury I can go and get any time I want them.

Q. You said you had the minutes of that Grand Jury. I ask whether they are where you could go and get them? A. Yes, sir.

20

The Court: Why proceed with those questions? I would not allow the minutes that he has kept to be offered here in evidence; if they were official minutes they might be allowed in evidence. I know they have in some other States, but if they were official minutes in this Court, I doubt whether I would allow them, even then, to go in evidence. But there is no use pursuing this course any further, because I cannot allow what he calls minutes of the Grand Jury to be introduced in this case.

30

Mr. Oliver: Very well, I was leading up to this question, but since your Honor has anticipated me, and will not allow them to go in—

The Court: No, I will not.

40

Mr. Oliver (continued)—I pray an exception.

Joseph McDevitt—Recalled—Direct

The Court: All right.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]
Judge.

The Court: Of course, you understand there is no statute in our state requiring minutes to be kept. 10

Mr. Oliver: I also understand this witness said he had the minutes.

The Court: Those are kept for the officers' own purposes.

Mr. Stein: Were you clerk of the Grand Jury in 1911?

A. I was not, sir.

Mr. Stein: When were you made Clerk of the Grand Jury? 20

A. June, last year, 1915.

Q. And as Clerk you took over the books and records relating to the office from your predecessor in office, whatever they were? A. I didn't, sir.

Q. You didn't? A. No, sir.

Mr. Oliver: That is all.

The Court: Step down. 30

JOSEPH McDEVITT, recalled on the part of the defendant.

Direct examination by Mr. Oliver:

Q. I think you testified you were a witness before the Grand Jury in May, 1911? A. Yes, sir. 40

Joseph McDevitt—Recalled—Direct

Q. And it was in a case relating to one Snowden of Roselle Park, wasn't it? A. Yes, sir.

Q. And what was the nature of the complaint against him? A. Obtaining money under false pretenses.

10 Q. Whose money? A. Stockholders of the Review Company.

Q. That is a corporation? A. Yes, sir.

Q. You had knowledge of that transaction, didn't you, whereby he obtained the money? Did you have knowledge? A. No, sir. I might supplement that by saying I was only with him five weeks.

Q. You were only with him five weeks? A. Yes, sir, before it went into the hands of the receiver.

20 Q. You do not know whether he obtained any money under false pretenses or not, then? A. No, sir; I do not.

Q. Do you know whether or not he obtained any from you?

Mr. Stein: There we go, trying to convict poor old Snowden again.

(Question repeated by the stenographer.)

The Court: I will rule it out.

Mr. Oliver: I pray an exception.

The Court: Exception granted.

30 Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

Q. Did you or did you not tell Mayor Fish that while you were in the Grand Jury room a member of the Grand Jury called Johnson to order?

Mr. Stein: I object.

The Court: Objection sustained.

40 Mr. Oliver: I pray an exception.

Charles Pawlik—Recalled—Direct

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

Mr. Oliver: That is all.

10

CHARLES PAWLIK, recalled as a witness for the defendant.

Direct examination by Mr. Oliver:

Q. Mr. Pawlik, on this occasion—early in the day you were talking of a conversation you had with Mr. Phillips, about this case. Will you now tell us what that conversation was?

20

Mr. Stein: I object to that as not being rebuttal in the way in which it is put.

The Court: That is not rebuttal. You must repeat the language of the witness that it is intended this witness shall rebut.

Mr. Oliver: It is not in rebuttal, if the Court please.

The Court: He is not called in rebuttal?

Mr. Oliver: No, he is called in pursuance of your Honor's agreement, that upon my case I could call this man to testify to the conversation.

30

The Court: I think I said you might call him on the defense for the purpose of showing that what was said about this man was not true, that is about this witness.

Mr. Phillips, as I understand it, said about Pawlik whether he had put his name to the circular and that he did not say that they had a rope around Fish's neck by which they

40

Charles Pawlik—Recalled—Direct

would hang him, or words to that effect. There may be some other testimony that escaped my attention.

10 Q. Did Phillips say to you that they had a rope around Fish's neck and would hang him, or words to that effect? A. Yes, sir.

Q. What else did he say in that regard?

(Question repeated by the stenographer.)

A. He made reference that it was the County Prosecutor's—

(Answer repeated by the stenographer.)

20 A. (Continued)—office prosecuting this case, and not Mr. Johnson, and that Mr. Fish was bucking 23 grand jurors and that those 23 grand jurors had friends that would use influence or that would be backed by those friends and that no man could very well buck twenty-three men of that calibre because they are very prominent, influential men.

Q. Did he say what he wanted you to do, if anything? A. Sir?

30 Q. Why did he tell you that? A. May I start from the beginning?

The Court: Yes, tell us all about it.

A. Mr. Phillips came down to the house and wanted to know if I had anything against Mr. Johnson. He said he was talking to Mr. Johnson about it and Mr. Johnson asked him who this man Pawlik was.

40 Mr. Stein: In a conversation between one and two weeks, is that all that is—

Charles Pawlik—Recalled—Direct

The Court: You understand, only tell what Mr. Phillips said to you. But if it appears that Mr. Phillips had a conversation with some other person that he brought in, leave that out. Just tell what he said to you and your answer. And not detailing any other conversation between any other parties when you were not present. 10

A. Well, I took Mr. Phillip's attitude he was practically an emissary of Mr. Johnson's.

The Court: Just tell what he said and did.

A. That is just what I was doing.

The Court: Go ahead. 20

A. He stated he was talking to Mr. Johnson.

The Court: Do not tell what Mr. Johnson said to him, you were not there.

A. I am not going to. And Mr. Phillips said I don't think that Pawlik had any spite against you, meaning Mr. Johnson. I assured him I had not, neither have I. The conversation drifted on and he said did you have anything to do with that circular? I assured him I had not. Well, he says, did you allow your name to be used on that? Well, I said, my name is on there and it was only on there as Treasurer of the Campaign Fund. And then the statement was made that it was not Mr. Johnson that was prosecuting the case, but the County officials, and I was also told that— 30

Q. Do not say I was also told, tell who told you.

The Court: Tell what Phillips said. 40

Charles Pawlick—Recalled—Cross

10 A. Mr. Phillips said that the integrity of the Grand Jury was at stake, and that there is twenty-three men, and they all objected to being—well, I don't know what to say—to being used in that way. To being deframed, if you can use that expression. And that they had Mr. Fish this time; they believe he couldn't escape. They had a rope around his neck and they believed they were going to hang him, too. Because of the influence of the Grand Jurors and their friends back of them pushing it. And advised me to clean my hands if I had anything to do with it.

(Answer repeated by the stenographer.)

20 Q. Clean your hands if you had anything to do with this circular? A. Yes.

Q. How could you clean your hands, did he say? A. No, he didn't make any suggestion as how I should do it.

Q. Did not say anything about what he wanted you to do? A. No.

Q. Did he or did he not say anything—I will not press that, that is all. Cross-examine.

30 *Cross-examination by Mr. Stein:*

Q. Mr. Pawlik, let me see now if I understand you right. Mr. Phillips told you that this was not Johnson's prosecution here, but it was the County Prosecutor was prosecuting it? A. Yes, sir.

Q. And he told you also that twenty-three men on that Grand Jury, their integrity had been assailed—use the word integrity? A. To that effect.

40 Q. Which Grand Jury did he say? The one indicted Mr. Fish or the one Mr. Johnson was on which was libelled? A. He made no reference as

Lewis V. Hobbs—For Defendant—Direct

to the Grand Jury it was. I inferred it was the Grand Jury that this circular was written about.

Mr. Stein: Yes; that is all.

10

LEWIS V. HOBBS, produced as a witness on behalf of the defendant, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Oliver:

Q. Mr. Hobbs, you live in Roselle Park? A. Yes, sir.

Q. And have you recently held any official position in the Borough? A. Yes, sir.

20

Q. What? A. Councilman.

Q. Were you ever a member of that council when Will E. Johnson was? A. Yes, sir.

Q. And who was Mayor at that time? A. When I first became councilman, Mr. Horning was in office.

Q. And then who? A. Then Harwood Fish became Mayor.

Q. Upon a certain occasion after Mr. Fish became Mayor, and while you and William Johnson were both members of the borough council, did any discussion occur at a council meeting to your recollection about certain—

30

Mr. Stein: I am going to object to the question as far as it has gone, and incomplete.

The Court: On what ground?

Mr. Stein: On the ground it is not relevant, and does not bear at all on the issue,

40

Lewis V. Hobbs—For Defendant—Direct

what discussion the councilmen had up in the Borough of Roselle Park between themselves, and whether Johnson was one of them or not.

(Question repeated by the stenographer.)

10

Mr. Oliver: Strike out that word "certain."

Q. (Continued) About Johnson having used the borough team for private work?

Mr. Stein: I object to that question.

The Court: That raises that same question again that I have disposed of before. Going into other matters than that complained of in the indictment. I shall have to rule it out.

20

Mr. Oliver: I pray an exception.

The Court: Exception granted.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. S.]

Judge.

Q. At the meeting referred to did you see—did you or did you not see Johnson pay any money for the use of the Borough of Roselle Park?

30

Mr. Stein: I object to the question.

The Court: See Johnson pay any money—

Q. For the use of the Borough of Roselle Park?

The Court (continued)—for the use of this team.

Mr. Stein: How does the question of that justify—

The Court: I shall rule it out.

40

Mr. Oliver: I pray an exception.

Lewis V. Hobbs—For Defendant—Direct

The Court: Grant an exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. s.]
Judge.

Q. Do you know, Mr. Hobbs, whether there was any relationship—I don't mean—acquaintanceship between William E. Johnson and Dr. Snowden as they call him? 10

Mr. Stein: I object.

The Court: Overruled.

Mr. Oliver: Prays exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. s.]
Judge. 20

Mr. Oliver: That is all. If the Court please, I offer to produce Mr. William Finkle of the Borough of Roselle Park, to testify he was councilman at the time of the indictment I have just mentioned, and proof that—

Mr. Stein: I object to counsel stating— if your Honor will permit the State at this time to object—

Mr. Oliver: I will call Mr. Finkle; I was trying to save time. 30

Mr. Stein (continued)—when the Court has ruled a half dozen times on that same thing.

WILLIAM D. FINKLE, produced as a witness, on behalf of the defendant, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Oliver:

10 Q. Mr. Finkle, were you a member of the Roselle Park Council in 1914? A. Yes.

Q. Together with Mr. Hobbs, the last witness? And William E. Johnson, when Mayor Fish was Mayor, or when Mr. Fish was Mayor? A. I was.

Q. Do you remember whether or not at a certain meeting of the borough council there arose a discussion between Mr. Fish and Mr. Johnson regarding Johnson's having the use of the borough team for private work and not having paid for it? A. Yes.

20 Q. Will you state the substance of that conversation?

Mr. Stein: I object.

The Court: Objection sustained.

Mr. Oliver: I pray an exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. s.]

Judge.

30 Q. On that occasion, did you, as a result of that conversation or otherwise, see Johnson pay any money to any one for the use of the Borough of Roselle on account of using that borough team?

Mr. Stein: I object.

The Court: Objection sustained.

Mr. Oliver: Prays exception.

Exception allowed, sealed accordingly.

JAMES C. CONNOLLY, [L. s.]

Judge.

40 Mr. Oliver: That is all.

The Court: Anything further?

Court's Charge

Mr. Oliver: We rest.

The Court: State any rebuttal?

Mr. Stein: None, sir.

Defense rests.

The Court: Counsel may sum up. Take
as long as you want, Mr. Oliver.

Mr. Oliver sums up for the Defense.

Mr. Stein sums up for the State.

10

Court's Charge.

UNION COUNTY COURT OF OYER AND
TERMINER.

JANUARY TERM, 1916.

20

STATE	}	Indictment
VS.		No. 34.
HARWOOD FISH.		January Term. Criminal Libel.

Court's charge to the Jury, by HON. JAMES C.
CONNOLLY, Judge of the Court of Common Pleas.

30

Gentlemen of the Jury:

The defendant is charged with the publication of
a libel concerning William E. Johnson, in his office
as a member of the Grand Jury in this county.
The indictment charges that the alleged libel was
published on or about the twenty-sixth day of Octo-
ber, 1915, and consisted of the following language:
"As a member of the Grand Jury he succeeded in

40

Court's Charge

protecting the biggest swindler, to my mind, that ever struck the county. And, although I understand an indictment was voted against his friend, for some unexplained reason it was never handed in."

10 You are to determine by your verdict whether this language constitutes a libel, and under the constitution of this State you are the judges of the law and of the fact. But it is proper for the Court to instruct you as to law governing the case, leaving you to exercise your constitutional duties. It seems to me that it will be proper to read to you, at this time, that portion of the constitution which relates to the offense charged against the defendant. It reads as follows: "Every person may freely

20 speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the

30 law and the fact."

You will notice that defamatory words published by one person concerning another will not at all times support an indictment, for, if the language used was true, and was published with good motives and for justifiable ends the defendant shall be acquitted. But if a person is actuated by malice, and malice is a necessary ingredient of the crime, and published the libel for the object and purpose of injuring and ruining the character and reputation

40 of another, he is responsible for his conduct.

Court's Charge

Of course, a man who holds a public office or position is, at all times, amenable to criticism. It is the right which the public or a citizen may exercise to criticize those who seek public office, or who are in authority, for their official acts. If such were not the case, the worst consequences might result; but the criticism must be just and the belief that it is true, must actuate the person who makes the publication, and no man ought to make a charge which will injure another, where it affects his honesty and integrity, unless he has grounds for his accusation, and when he is called to account for the language which he uses he should make known to the jury the grounds upon which he bases his charge. Otherwise every man in the community would be at the mercy of the individual who felt disposed to injure him.

The facts in the case show that William E. Johnson was a member of the Grand Jury of this county at the May Term, 1911, of the Court. And that, subsequently, in the fall of 1915 he was a candidate for the office of Chosen Freeholder at the Borough of Roselle Park in this county. And that the alleged libel was published of him while he was such a candidate. Now, having become a candidate for office, Johnson necessarily submitted himself to the criticism of his fellow citizens, and the defendant or any other citizen had a right to show his want of qualification for the office he sought. His inexperience, his failure to have properly discharged the duties of other offices which he filled, but, as I have said, when the criticism attacks one's honesty and integrity, it must be true, and be published with good motives and for justifiable ends.

You are to take the whole paper admitted in

Court's Charge

evidence, containing the alleged libelous matter, and the testimony in the case and say whether the defendant told the truth of Johnson, and, in so doing, was prompted by good motives and for justifiable ends.

10 The language of the alleged libel charges Johnson with improper conduct as a grand juror. It states that, "As a member of the Grand Jury he succeeded in protecting the biggest swindler, to my mind"—that is, to the mind of the defendant—"that ever struck the county." Was the defendant guided by malice in making the publication? You are to determine that question. Was this language such as one man ought to have used of another if it were not true? Did it impute that Johnson used

20 his office to protect a criminal from justice? The law does not require actual malice to be proved if the libel is one that imputes to another the perversion of public justice in his office of judge or juror. In that case the law will presume malice, and the burden is on the defendant to show that he was not actuated by malice. I therefore repeat if the defendant has shown that what he published was true and that it was published with good motives and for justifiable ends then the jury should

30 acquit.

The defendant insists that the publication was a privileged one. And that, under the circumstances he cannot be held to answer for it. A person is conditionally privileged to communicate to his fellow citizens what is of public interest, and conducive to public good, even when the publication proves injurious to another, but then he must not be swayed by malice, and the publication must be true. Therefore, the jury, under the law, are required to determine whether the language attributed

40 to the defendant and set forth in the indictment

Court's Charge

is libelous; whether the defendant has shown its truth, and whether it was published by the defendant with good motives and for justifiable ends. You must solve those questions. You must determine those questions, because you are the judges of the law, and the fact.

In conclusion, let me say to you that the defendant comes before you with a presumption of innocence in his favor and this presumption accompanies him through the trial and until you find and deliver your verdict. And, in considering the entire testimony and evidence laid before you, you must give the defendant the benefit of any reasonable doubt that may arise in your minds as to his guilt. And, if you entertain such a doubt your verdict should be in his favor. 10

I have been requested by the attorneys for the defendant to charge the jury specially on several points which have been prepared by them, but I think that I have fully covered all the law governing the case, and that my instructions are sufficiently comprehensive for the jury to act intelligently in determining the case. There is one request, however, that I shall read and comment on, and in accordance with which I shall charge you as I am requested to do. That is, as to part of it, at least. 20

The ninth request which they make is as follows: 30
"Before you can convict you must be satisfied beyond a reasonable doubt as to the guilt of the defendant." I so charge you. "If you believe that Fish believed the charge to be true and that he published it for justifiable ends, then you must acquit, and upon either point the defendant is entitled to the benefit of every reasonable doubt." I refuse to charge you any further than I have charged you with respect to the law governing the 40

Defendant's Requests to Charge

alleged libel. But this request continues: "A reasonable doubt exists where, upon the consideration of all the evidence, the mind is left in that condition where one cannot say that he feels an abiding conviction to a moral certainty of the truth of the charge against the defendant." As to that part of the request, I charge you that is the law.

With that, gentlemen, you may retire to the jury room and consider your verdict.

Mr. Oliver: I except to your Honor's charge in general, and to your Honor's refusal to charge as requested.

The Court: All right.

JAMES C. CONNOLLY, [L. S.]
Judge.

20

Defendant's Requests to Charge.

(1)

"If you are satisfied that defendant believes the charge complained of to be true, then I charge you that the publication was one of qualified privilege, and unless the State has proved beyond a reasonable doubt that the defendant was actuated by express malice against Johnson you must acquit."

30

(2)

"The selection of suitable persons for the performance of official service is essential to the interests of both the government and the citizen. These interests can be protected only by the communication of information and by free discussion concerning the fitness of applicants. It would tend

40

Defendant's Requests to Charge

to repress this necessary freedom, and would be a manifest injustice to the citizen, if communications of this character subjected the person making them to punishment in the event of an honest mistake. But these considerations disclose no necessity for a privilege broad enough to cover charges which are unfounded and malicious. A just distinction is established, and reasonable protection afforded to every interest, by holding communications of this nature to be prima facie privileged. By virtue of this privilege, a defendant who has made a statement which cannot be substantiated is relieved from the effect of a legal presumption of malice, and is made liable only by proof of actual malice. The occasion in question was not one of absolute privilege, but was so far privileged as to protect a communication made in good faith and from an honest motive."

(3)

"When a man becomes a candidate for public office his character for honesty and integrity and his fitness for the position are put before the public and are thereby made proper subjects for comment."

(4)

"If in commenting upon the qualifications for public office of a man who is a candidate for that office, a person publishes a statement which he believes to be true and in making such publication is not moved by actual malice against such candidate, he is guilty of no criminal offense."

(5)

"The people have a right to know how their public affairs are being conducted, and how the duties

Defendant's Requests to Charge

10 of their officers are being performed, and it is one of the privileges of citizens to give the people this information, and that, if the information so given is true, *or if the publishers believe it to be true* and have reasonable and probable cause for so believing, the law protects them in that the truth must not be concealed; that the public good requires that it be allowed to be known; and that all which the law requires of publishers is good faith and an honest belief that their statements are true, *and that such belief be founded on reasonable and probable grounds.*"

(6)

20 "Defamatory words uttered in a privileged communication are not indictible unless there be proof of actual malice. If such words are uttered in good faith on a privileged occasion, in an honest belief that they are true, the party injured is without remedy."

30 "The occasions which give rise to the privilege of speaking or publishing words which otherwise would be defamatory and indictible are various, but among them are comments by electors upon the character of candidates for office and a criticism of the public acts of a candidate for office may be inserted in a public newspaper or be proclaimed by a circular."

(7)

"Malice is manifested by the intentional doing of a wrongful act to the injury of another, without just cause or excuse."

(8)

40 "If you find that the defendant honestly believed from his own experience in the Grand Jury room

Defendant's Requests to Charge

and from what he had been told by other persons who had been before the Grand Jury in the same matter and were in a position to form an opinion as to Johnson's attitude, that Johnson had protected Snowden from indictment, then you must acquit unless you are satisfied beyond a reasonable doubt that the circular was published from some other motive than that expressed in the circular." 10

(9)

"Before you can convict you must be satisfied beyond a reasonable doubt as to the guilt of the defendant.

"If you believe that Fish believed the charge to be true and that he published it for justifiable ends, then you must acquit, and upon either point the defendant is entitled to the benefit of every reasonable doubt. A *reasonable* doubt exists where upon the consideration of all the evidence the mind is left in that condition where one cannot say that he feels an abiding conviction to a moral certainty of the truth of the charge against the defendant." 20

(10)

"The circular itself states that it sets forth the public record of William E. Johnson, a candidate for office, as to which the voters are entitled to be informed. There is no evidence that the circular was published outside of Roselle Park Borough and Union Township, the political division in which Johnson was an candidate." 30

"In these circumstances the state must prove beyond a reasonable doubt :

40

Defendant's Requests to Charge

That Fish knew the charge against Johnson to be false, and that he was actuated by malice and ill-will against Johnson in making the charge."

(11)

10 "If it is true, as stated in the circular, that its purpose was to inform the voters of Johnson's public record, and if Fish believed the charge complained of to be true, then Fish must be acquitted unless you believe that he was actuated by malice in publishing the circular, and by malice, in this connection, I mean some motive different from that which made the statement privileged, and which was itself contrary to good morals. Indignation
20 towards Johnson for his supposed offenses would not be, per se, contrary to good morals."

STATE VS. HARWOOD FISH.

I, James C. Connolly, Judge of the Court of Quarter Sessions in and for the County of Union, before whom the above stated indictment was tried,
30 "Act relating to courts having criminal jurisdiction and regulating proceedings in criminal cases (Revision of 1898), that the foregoing is the entire record of proceedings had upon the trial of the indictment in the above stated cause.

JAMES C. CONNOLLY, [L. S.]
Judge.

In Typewritten Form, Exhibit P-2.**In Printed Form, Exhibit P-3.**

Public record of William E. Johnson, Republican Candidate for Freeholder, which the voters are entitled to be informed of.

To the Voters of Union Township and Roselle Park— 10

A man has had the presumption to appeal to you for your votes at the November election for the important office of Freeholder of this District, whose public record so unfits him for the position that I feel I cannot honorably refrain from informing you of that record in small part, at least, in order that he may receive the rebuke on November 2nd which he so richly deserves. 20

A man of William E. Johnson's past history, political morality, style and general character would be so obnoxious to the other Freeholders that he would be absolutely helpless to secure for the District the important improvements we now need. This is a very important and responsible office and should be filled by a man of some standing in the community whose business integrity is beyond question.

He has already accomplished the greatest harm 30 to the district, as it was he who got Chestnut Street returned to Roselle Park, after it was accepted as a County Road, and if this had not been done Chestnut Street from Westfield Avenue to Irvington would now have, in all probability, been permanently improved to the great and lasting benefit of Union Township and the Borough.

Being treasurer of a bankrupt Dentist Corporation and an ex-hotel-keeper in the West hardly fit him to give valuable service as your Freeholder. 10

In Typewritten Form, Exhibit P-2—In Printed Form, Exhibit P-3

As a Councilman in Roselle Park he was so dictatorial and abusive and so disgusted the decent people of the Borough that he did not have the presumption to run for re-election.

10 He used the Borough team for private work about his residence, and when I insisted on his paying \$15 for the use of it, he violently abused me at a Council meeting and said he had a perfect right to use the team in return for the work he did as a Councilman. I told him his idea of honesty in public life was very different from mine and that having taken the office of Councilman without salary he must pay for the team, which he did.

20 As a member of a Grand Jury he succeeded in protecting the biggest swindler, to my mind, that ever struck the county, and although I understand an indictment was voted against his friend, for some unexplained reason it was never handed in.

He pledged \$75 toward the construction of a local church, and then when, because of the war, the church was embarrassed in paying its contractor, he refused to pay a balance of \$48, and wrote a letter reneging on his subscription and has refused to pay it.

30 He shows his poor business judgment and animosity by calling the new Municipal Building in Roselle Park at monstrosity, when everyone else agrees it is the best public building for the money in the State.

He side-stepped the payment of a debt, as shown by a copy of Court proceedings as given below, and judge for yourself whether he perjured himself or not.

40 Do you want such a man, with such a record, as your Freeholder to represent you? I believe too much in the honor and good sense of the voters

Extract From Testimony of William E. Johnson

of this district to think for a moment that you do, and the roll of dishonor of those who vote for him should be very small.

Sincerely yours,

HARWOOD FISH,

Mayor of the Borough of Roselle Park.

October 26th, 1915.

10

Extract from public records showing sworn testimony of William E. Johnson (now candidate for Freeholder), in a legal action to collect a debt, taken September 9th, 1913:

Q. What is your business, Mr. Johnson?

A. Business, I can't say at present I have any regular business.

20

Q. What business do you do, if any?

A. Buying and selling real estate, once in a while, for clients.

Q. Have you any office? A. No.

Q. When did you make your last deal?

A. About 4 or 5 months ago I should think.

Q. Who was your client?

A. My brother-in-law was the client.

Q. Is there now any money due you on other deals?

30

A. I have not had any other deals, so no money is due me.

Q. Well then you mean to say that that is the only real estate proposition that you have had that you got any money out of?

A. That is the only one.

Q. Do you own any personal property?

A. I own none whatever.

Q. Do you own the clothes on your back? (Attorney objects because defendant is a married man

40

Extract From Testimony of William E. Johnson

and entitled to exemption of personal property to extent of \$200.)

Q. How much money have you in your pockets, if any?

A. About three or four dollars.

10 Q. To whom does it belong?

A. It belongs to me, with exception of a \$5 bill, which belongs to a man in New York.

Q. Where did you get that three or four dollars you have? A. I don't know.

Q. Have you an account with any Bank?

A. No.

Q. How do you make a livelihood, Mr. Johnson?

A. I can't say that I make a livelihood at the present time.

20 Q. Do you mean to say that you are not making any money at all?

A. Oh, I sometimes make a commission on some things I do for people, but I have no business and I don't seek for any.

Q. Commissions on things other than real estate deals?

A. Yes, whenever the opportunity presents itself.

Q. Have you made commissions on other things than real estate deals?

30 A. Certainly I did.

Q. What kind of deals were those other deals?

A. I don't know.

Q. What commissions have you made during the last six months?

A. I haven't made any.

Q. You say you are not making a livelihood now?

A. No.

Q. Then who pays the bills for household necessities?

A. My wife does.

40 Q. Do you own any stock in any corporation?

Bill of Exceptions

A. I did own some shares in U. S. Dentist Co., an insolvent corporation, which has of late been adjudicated a bankruptcy (of which company he was treasurer).

Q. Do you own any interest in any mortgage or bond?

A. No.

(Sworn testimony of Wm. E. Johnson taken September 9th, 1913.)

Paid for by Charles Pawlik, Treasurer Campaign Committee.

10

Bill of Exceptions.

UNION COUNTY COURT OF OYER AND
TERMINER.

20

JANUARY TERM, 1916.

STATE	}	Indictment
vs.		No. 34.
HARWOOD FISH.		January Term. Criminal Libel.

30

The court refused to quash the indictment on the motion of the attorney for defendant before the Jury was sworn. To which refusal the attorney for defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. S.]
Judge.

40

Bill of Exceptions

10 The court permitted the witness, Charles W. Runyon, to read from the record the names of the men who constituted the Grand Jury in and for the County of Union for the May Term, 1911. To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

20 The court permitted the witness, George C. Otto, to read from the record of the Sheriff's office the names of the men who constituted the Grand Jury in and for the County of Union for the May Term, 1911. To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

30 In response to this statement of the Prosecutor made during the trial in the presence of the Jury, to wit: "Now then, this circular, even though it never bore the signature of anybody, if we show it was sent out by Mr. Fish, it makes him guilty of libel," the court responded, "Certainly." To which statement and remark of the Court the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

40 The court allowed in evidence the circular and copy exhibits P2 and P3 for identification, notwithstanding the variance between the circular and

Bill of Exceptions

the indictment, namely: That from the circular it appeared that the words complained of in the indictment constituted but one paragraph of the circular, whereas the indictment did not aver that the words complained of were printed and published among other things, and as part of a communication. To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly. 10

JAMES C. CONNOLLY [L. S.]
Judge.

The court announced that he would not admit testimony in support of charges contained in the publication other than the particular charge set up in the indictment. To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly. 20

JAMES C. CONNOLLY [L. S.]
Judge.

The court refused to permit the witness, Joseph A. McDevitt, to testify about what happened before the Grand Jury. To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly. 30

JAMES C. CONNOLLY [L. S.]
Judge.

The court refused to permit the attorney for the defendant to ask the witness, Joseph A. McDevitt, the following question: "You had read in this paper that Mr. Fish charged that when Johnson was a member of the Borough Council he used the bor- 40

Bill of Exceptions

10 ough team for private work, and said he had a perfect right to use the team in return for the work he did as Councilman, and that after Mr. Fish told him about what was right he paid for the team. You knew that was in there, didn't you?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

20 The court refused to permit Joseph A. McDevitt, a witness for the State, to answer the following question: "Without stating the testimony you gave, what was the subject matter upon which you testified before the Grand Jury on that day?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

30 The court refused to permit the witness, Joseph A. McDevitt, to answer the following question: "Did your testimony before the Grand Jury on that day relate to the sale of stock in this printing company by Snowden to your father?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

40 The court refused to permit the witness, Joseph A. McDevitt, to answer the following question: "You don't know. Did you tell Mr. Fish after you

Bill of Exceptions

came out of the Grand Jury room after you had been before the Grand Jury, that Johnson, sitting in that Grand Jury, had conducted himself in such a manner while you were in there that he was called to order by another member of the Grand Jury?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

10

JAMES C. CONNOLLY [L. s.]
Judge.

The court refused to permit the witness, Joseph A. McDevitt, to answer the following question: "Did you tell Mr. Fish that the questions that Johnson put to you in that Grand Jury room made it appear to you as if Johnson were taking the part of this Dr. Snowden?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

20

JAMES C. CONNOLLY [L. s.]
Judge.

The court made the following statement in the presence of the Jury: "I would like to make it six, but counsel are so oratorical in all their objections I am going to give them an extra hour." To which remark of the court the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

30

JAMES C. CONNOLLY [L. s.]
Judge.

After the testimony on the part of the State had been closed, the court declined to direct a verdict of acquittal on motion of the attorney for the de-

40

Bill of Exceptions

pendant. To which refusal the attorney for defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

10

The court refused to permit the defendant to testify as to the statement made to him by Joseph A. McDevitt outside of the Grand Jury room. To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

20

The court refused to permit the defendant to answer the following question: "What were the facts, without stating now what you testified to before the Grand Jury, what were the facts regarding the charge that you made?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

30

The court refused to permit the defendant to testify why he believed that Snowden was a swindler. To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

40 The court refused to permit the defendant to answer the question: "What did Mr. McDevitt tell

Bill of Exceptions

you, if anything?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

The court refused to permit the defendant to answer the following question: "Mr. Fish, what, if anything, lead you to believe that an indictment had been found against Snowden?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

The court refused to permit the defendant to testify as to statements that had been made to the defendant by others about Mr. Johnson having ordered goods from Mr. Snowden? To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

The court refused to permit the defendant to answer the following question: "What lead you to believe that in that Grand Jury an indictment had been found against Snowden?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

19

20

30

40

Bill of Exceptions

10 The court refused to permit the defendant to answer the following question: "How did you know that Johnson was Treasurer of a Bankrupt Dentist Corporation?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

20 The court refused to permit the defendant to answer the following question: "How did you know he was an ex-hotel-keeper in the West?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

30 The court refused to permit the defendant to answer the following question: "What lead you to say: 'As a Councilman in Roselle Park, Johnson was so dictatorial and abusive and so disgusted the decent people in the borough that he did not have the presumption to run for re-election?'" To which the attorney for the defendant prays an exception and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

40 The court refused to permit the defendant to answer the following question: "What ground, if any, did you have for saying on this circular of Johnson: 'He used the borough team for private work about his residence, and when I insisted upon his paying fifteen dollars for the use of it, he violently

Bill of Exceptions

abused me at a council meeting, and said that he had a perfect right to use the team in return for the work he did as a Councilman. I told him his idea of honesty in public life was very different from mine, and that having taken the office of Councilman without salary, he must pay for the team, which he did.'” To which the attorney for the defendant prays exception, and the same is allowed and signed and sealed accordingly. 10

JAMES C. CONNOLLY [L. s.]
Judge.

The court refused to permit the defendant to answer the following question: “Do you know whether that charge, so made against Johnson, is proper?” To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly. 20

JAMES C. CONNOLLY [L. s.]
Judge.

The court refused to permit the defendant to testify as to the discussion with Johnson in council meeting in Roselle Park relative to Johnson's use of the borough team for his private work. To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly. 30

JAMES C. CONNOLLY [L. s.]
Judge.

The court refused to permit the defendant to answer the following question: “As a result of that conversation or after that conversation at the same meeting, did Johnson pay anything for the use of the borough team?” To which the attorney for the 40

Bill of Exceptions

defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. S.]
Judge.

10 The court refused to permit the defendant to answer the following question: "Who was present at the council meeting, if you can remember, at which the incident I have just referred to occurred?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. S.]
Judge.

20 The court refused to permit the defendant to answer the following question: "To what circumstances or incidents had you reference when you wrote: 'He pledged seventy-five dollars towards the construction of a local church and then when because of the war, the church was embarrassed in paying its contractor, he refused to pay a balance of forty-eight dollars and wrote a letter reniging on the subscription and refused to pay it'?" To which the attorney for the defendant prays an exception and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. S.]
Judge.

40 The court refused to permit the defendant to answer the following question: "Had you personal knowledge of any such facts as is referred to in that last?" To which the attorney for the defendant

Bill of Exceptions

prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. S.]
Judge.

The court refused to permit the defendant to answer the following question: "What warrant, if any, did you have for saying in this circular of Johnson: 'He side-stepped the payment of a debt, as shown by a copy of court proceedings, as given below, and judge for yourselves whether he perjured himself or not?'" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly. 10

JAMES C. CONNOLLY [L. S.]
Judge. 20

The court declared that he would not permit the minutes of the Grand Jury of the May Term, 1911, to be put in evidence. To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. S.]
Judge.

The court refused to permit Joseph A. McDevitt, a witness on the part of the defendant, to answer the question: "Did you or did you not tell Mayor Fish that while you were in the Grand Jury room a member of the Grand Jury called Johnson to order?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly. 30

JAMES C. CONNOLLY [L. S.]
Judge. 40

Bill of Exceptions

10 The court refused to permit Louis V. Hobbs, a witness for the defendant, to answer the question: "Upon a certain occasion after Mr. Fish became Mayor, and while you and William Johnson were both members of the Borough Council, did any discussion occur at a council meeting to your recollection about Mr. Johnson having used the borough team for private work?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. S.]
Judge.

20 The court refused to permit Louis V. Hobbs, a witness for the defendant, to answer the question: "At the meeting referred to did you see—did you or did you not see Johnson pay any money for the use of the Borough of Roselle Park?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. S.]
Judge.

30 The court refused to permit Louis V. Hobbs, a witness for the defendant, to answer the question: "Do you know, Mr. Hobbs, whether there was any relationship—I don't mean—acquaintanceship between William E. Johnson and Dr. Snowden, as they call him?" To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. S.]
Judge.

Bill of Exceptions

The court refused to permit William D. Finkle, a witness for the defendant, to testify as to a conversation which occurred at a meeting of the borough council between Mr. Fish and Mr. Johnson regarding Johnson having used the borough team for private work and not having paid for it. To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly. 10

JAMES C. CONNOLLY [L. S.]
Judge.

The court refused to permit William D. Finkel, a witness for the defendant, to answer the question: On that occasion, did you, as a result of that conversation or otherwise, see Johnson pay any money to anyone for the use of the Borough of Roselle Park on account of using that borough team? To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly. 20

JAMES C. CONNOLLY [L. S.]
Judge.

At the conclusion of the court's charge, the defendant prays a general exception to the said charge, and the court's refusal to charge as requested, and the same is allowed and signed and sealed accordingly. 30

JAMES C. CONNOLLY [L. S.]
Judge.

The defendant by his counsel requested the court to charge as follows: "If you are satisfied that defendant believed the charge complained of to be true, then I charge you that the publication was 40

Bill of Exceptions

one of qualified privilege, and unless the State has proved beyond a reasonable doubt that the defendant was actuated by express *malice* against Johnson you must acquit." Which the court refused to charge and thereupon the defendant prays an exception to said refusal so to charge and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. S.]
Judge.

The defendant by his counsel requested the court to charge as follows: "The selection of suitable persons for the performance of official service is essential to the interests of both the government and the citizen. Theses interests can be protected only by the communication of information and by free discussion concerning the fitness of applicants. It would tend to repress this necessary freedom, and would be a manifest injustice to the citizen, if communications of this character subjected the person making them to punishment in the event of an honest mistake. But these considerations disclose no necessity for a privilege broad enough to cover charges which are unfounded and malicious. A just distinction is established and reasonable protection afforded to every interest, by holding communications of this nature to be *prima facie* privileged. By virtue of this privilege, a defendant who has made a statement which cannot be substantiated is relieved from the effect of a legal presumption of malice, and is made liable only by proof of actual malice. The occasion in question was not one of absolute privilege, but was so far privileged as to protect a communication made in good faith and from an honest motive." Which the court refused to charge and thereupon the defend-

Bill of Exceptions

ant prays an exception to said refusal so to charge, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

The defendant by his counsel requested the court to charge as follows: "When a man becomes a candidate for public office his character for honesty and integrity and his fitness for the position are put before the public and are thereby made proper subjects for comment." Which the court refused to charge and thereupon the defendant prays an exception to said refusal so to charge, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.] 20
Judge.

The defendant, by his counsel, requested the court to charge as follows: "If in commenting upon the qualifications for public office of a man who is a candidate for that office, a person published a statement which he believes to be true and in making such publication is not moved by actual malice against such candidate, he is guilty of no criminal offense." Which the court refused to charge and thereupon the defendant prays an exception to said refusal so to charge and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.] 30
Judge.

The defendant, by his counsel, requested the court to charge as follows: "The people have a right to know how their public affairs are being conducted, and how the duties of their officers are being

40

Bill of Exceptions

performed, and it is one of the privileges of citizens to give the people this information, and that, if the information so given is true, *or if the publishers believe it to be true* and have reasonable and probably cause for so believing, the law protects them in that the truth must not be concealed; that the public good requires that it be allowed to be known, and that all which the law requires of publishers is good faith and an honest belief that their statements are true, *and that such belief be founded on reasonable and probable grounds.*" Which the court refused to charge and thereupon the defendant prays an exception to said refusal so to charge, and the same is allowed and signed and sealed accordingly.

20

JAMES C. CONNOLLY [L. S.]
Judge.

The defendant by his counsel requested the court to charge as follows: "Defamatory words uttered in a privileged communication are not indictable unless there be proof of actual malice. If such words are uttered in good faith on a privileged occasion, in an honest belief that they are true, the party injured is without remedy."

30

"The occasions which give rise to the privilege of speaking or publishing words which otherwise would be defamatory and indictable are various, but among them are comments by electors upon the character of candidates for office and a criticism of the public acts of a candidate for office may be inserted in a public newspaper or be proclaimed by a circular." Which the court refused to charge and thereupon the defendant prays an exception to said refusal so to charge, and the same is allowed and signed and sealed accordingly.

40

JAMES C. CONNOLLY [L. S.]
Judge.

Bill of Exceptions

The defendant by his counsel requested the court to charge as follows: "Malice is manifested by the intentional doing of a wrongful act to the injury of another, without just cause or excuse." Which the court refused to charge and thereupon the defendant prays an exception to said refusal so to charge, and the same is allowed and signed and sealed accordingly. 29

JAMES C. CONNOLLY [L. S.]
Judge.

The defendant by his counsel requested the court to charge as follows: "If you find that the defendant honestly believed from his own experience in the Grand Jury room and from what he had been told by other persons who had been before the Grand Jury in the same matter and were in a position to form an opinion as to Johnson's attitude, that Johnson had protected Snowden from indictment, then you must acquit unless you are satisfied beyond a reasonable doubt that the circular was published from some other motive than that expressed in the circular." Which the court refused to charge and thereupon the defendant prays an exception to said refusal so to charge, and the same is allowed and signed and sealed accordingly. 30

JAMES C. CONNOLLY [L. S.]
Judge.

The defendant by his counsel requested the court to charge as follows: "If you believe that Fish believed the charge to be true and that he published it for justifiable ends, then you must acquit, and upon either point the defendant is entitled to the benefit of every reasonable doubt." Which the 40

Bill of Exceptions

court refused to charge and thereupon the defendant prays an exception to said refusal so to charge, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. S.]
Judge.

10

The defendant by his counsel requested the court to charge as follows: "The circular itself states that it sets forth the public record of William E. Johnson, a candidate for office, as to which the voters are entitled to be informed. There is no evidence that the circular was published outside of Roselle Park Borough and Union Township, the political division in which Johnson was a candidate."

20

In these circumstances the state must prove beyond a reasonable doubt:

"That Fish knew the charge against Johnson to be false, and that he was actuated by malice and ill-will against Johnson in making the charge." Which the court refused to charge and thereupon the defendant prays an exception to said refusal so to charge, and the same is allowed and signed and sealed accordingly.

30

JAMES C. CONNOLLY [L. S.]
Judge.

The defendant by his counsel requested the court to charge as follows: "If it is true, as stated in the circular, that its purpose was to inform the voters of Johnson's public record, and if Fish believed the charge complained of to be true, then Fish must be acquitted unless you believe that he was actuated by malice in publishing the circular, and by malice in this connection. I mean some motive dif-

40

Bill of Exceptions

ferent from that which made the statement privileged, and which was itself contrary to good morals. Indignation towards Johnson for his supposed offenses would not be, per se, contrary to good morals." Which the court refused to charge, and thereupon the defendant prays an exception to said refusal so to charge, and the same is allowed and signed and sealed accordingly. 10

JAMES C. CONNOLLY [L. S.]
Judge.

That the court charged the Jury as follows:

"Now, having become a candidate for office, Johnson necessarily submitted himself to the criticism of his fellow citizens, and the defendant or any other citizen had a right to show his want of qualification for the office he sought. His inexperience, his failure to have properly discharged the duties of other offices which he filled, but, as I have said, when the criticism attacks one's honesty and integrity, it must be true, and he published with good motives and for justifiable ends. 20

You are to take the whole paper admitted in evidence, containing the alleged libelous matter, and the testimony in the case and say whether the defendant told the truth of Johnson, and, in so doing, was prompted by good motives and for justifiable ends." To which instruction the defendant prays an exception and the same is allowed and signed and sealed accordingly. 30

JAMES C. CONNOLLY [L. S.]
Judge.

The court charged the jury as follows:

"The law does not require actual malice to be proved if the libel is one that imputes to another 10

Bill of Exceptions

the perversion of public justice in his office of judge or juror. In that case the law will presume malice, and the burden is on the defendant to show that he was not actuated by malice. I therefore repeat if the defendant has shown that what he published was true and that it was published with good motives and for justifiable ends then the jury should acquit." To which instruction the defendant prays an exception and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

The court charged the jury as follows:

"The defendant insists that the publication was a privileged one. And that, under the circumstances he cannot be held to answer for it. A person is conditionally privileged to communicate to his fellow citizens what is of public interest, and conducive to public good, even when the publication proves injurious to another, but then he must not be swayed by malice, and the publication must be true. Therefore, the jury, under the law, are required to determine whether the language attributed to the defendant and set forth in the indictment is libelous; whether the defendant has shown its truth, and whether it was published by the defendant with good motives and for justifiable ends. To which the attorney for the defendant prays an exception, and the same is allowed and signed and sealed accordingly.

JAMES C. CONNOLLY [L. s.]
Judge.

Assignments of Error.

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">THE STATE, Defendant-in-Error, against HARWOOD FISH, Plaintiff-in-Error.</p>	<p>On Error to Union County Quarter Ses- sions.</p>	<p>10</p>
---	---	-----------

Afterwards, to wit, etc., comes the plaintiff-in-error by Coddling & Oliver, his attorneys, and assigns error in the following respects for the reversal of the judgment in this cause.

1. That the judgment aforesaid was given against the said Harwood Fish, whereas by the law of the land judgment should have been given for him.

20

2. That the charge of the Court as a whole, and in each and every part thereof is illegal, and thereby defendant below suffered manifest wrong and injury.

3. That on the trial of the said plaintiff-in-error, he suffered manifest wrong and injury in the admission of evidence and the charge of the Court, which prejudiced the said plaintiff-in-error in maintaining his defense upon the merits.

30

4. That the entire evidence as a whole did not show beyond a reasonable doubt that the said plaintiff-in-error was guilty of the crime charged, and did not justify the verdict found against him.

40

Assignments of Error

5. That the evidence in the cause is of such a nature that when fully and fairly considered it will not satisfy any thoughtful mind beyond a reasonable doubt of the guilt of the accused, and that upon said evidence the said plaintiff-in-error was entitled to an acquittal.
- 10
6. That the Court refused to quash the indictment on the motion of the attorney for defendant before the jury was sworn.
7. That the Court erred to the prejudice and injury of the plaintiff-in-error by permitting the witness, Charles W. Runyon, to read from the record the names of the men who constituted the Grand Jury in and for the County of Union for the May Term, 1911, contrary to the objection of the plaintiff-in-error.
- 20
8. That the Court erred to the prejudice and injury of the plaintiff-in-error by permitting the witness, George C. Otto, to read from the records of the Sheriff's office the names of the men who constituted the Grand Jury in and for the County of Union for the May Term, 1911, contrary to the objection of the plaintiff-in-error.
- 30
9. That the Court erred to the prejudice and injury of the plaintiff-in-error in saying, in response to this statement of the Prosecutor made during the trial in the presence of the Jury, to wit: "Now, then, this circular, even though it never bore the signature of anybody, if we show it was sent out by Mr. Fish, it makes him guilty of libel," "Certainly."
- 40
10. That the Court erred to the prejudice and injury of the plaintiff-in-error by admitting in evi-

Assignments of Error

dence the circular and copy, Exhibits P2 and P3 for identification, contrary to the objection of the plaintiff-in-error that the said Exhibits should not be admitted in evidence because of the variance between the circular and the charge in the indictment.

11. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to admit testimony in support of charges contained in the publication other than the particular charge set up in the indictment, contrary to the objection of the plaintiff-in-error. 10

12. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the witness, Joseph A. McDevitt, to testify about what happened before the Grand Jury. 20

13. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the attorney for the defendant to ask the witness, Joseph A. McDevitt, the following question: "You had read in this paper that Mr. Fish charged that when Johnson was a member of the Borough Council he used the Borough team for private work, and said he had a perfect right to use the team in return for the work he did as Councilman, and that after Mr. Fish told him about what was right, he paid for the team. You knew that was in there, didn't you?" 30

14. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the attorney for the defendant to ask Joseph A. McDevitt, a witness for the State, the following question: "Without stating the testimony you 40

Assignments of Error

gave, what was the subject matter upon which you testified before the Grand Jury on that day?"

10 15. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the attorney for the defendant to ask Joseph A. McDevitt the following question: "Did your testimony before the Grand Jury on that day relate to the sale of stock in this printing company by Snowden to your father?"

20 16. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the attorney for the defendant to ask Joseph A. McDevitt the following question: "You don't know. Did you tell Mr. Fish after you came out of the Grand Jury Room after you had been before the Grand Jury, that Johnson, sitting in that Grand Jury, had conducted himself in such a manner while you were in there that he was called to order by another member of the Grand Jury?"

30 17. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the attorney for the defendant to ask Joseph A. McDevitt the following question: "Did you tell Mr. Fish that the questions that Johnson put to you in that Grand Jury Room made it appear to you as if Johnson were taking the part of this Dr. Snowden?"

40 18. That the Court erred to the prejudice and injury of the plaintiff-in-error in making the following statement in the presence of the Jury: "I would like to make it six but counsel are so oratorical in all their objections I am going to give them an extra hour."

Assignments of Error

19. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to direct a verdict of acquittal on motion of the attorney for defendant after the testimony on the part of the State had been closed.

20. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to testify as to the statement made to him by Joseph A. McDevitt outside of the Grand Jury Room. 10

21. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "What were the facts, without stating now what you testified to before the Grand Jury, what were the facts regarding the charge that you made?" 20

22. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to testify why he believed that Snowden was a swindler.

23. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "What did Mr. McDevitt tell you, if anything?" 30

24. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "Mr. Fish, what, if anything, led you to believe that an indictment had been found against Snowden?"

25. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit 40

Assignments of Error

the defendant to testify as to statements that had been made to the defendant by others about Mr. Johnson having ordered goods from Mr. Snowden.

10 26. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "What led you to believe that in that Grand Jury an indictment had been found against Snowden?"

20 27. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "How did you know that Johnson was Treasurer of a Bankrupt Dentist Corporation?"

28. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "How did you know he was an ex-hotel keeper in the West?"

30 29. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "What led you to say: 'As a Councilman in Roselle Park, Johnson was so dictatorial and abusive and so disgusted the decent people in the borough that he did not have the presumption to run for re-election'?"

40 30. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "What ground, if any, did you have for saying on this circular, of Johnson: 'He used the borough team for private work about his residence, and when

Assignments of Error

I insisted upon his paying Fifteen Dollars for the use of it, he violently abused me at a council meeting, and said that he had a perfect right to use the team in return for the work he did as a Councilman. I told him his idea of honesty in public life was very different from mine, and that having taken the office of Councilman without salary, he must pay for the team, which he did.' ” 10

31. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: “Do you know whether that charge, so made against Johnson, is proper?”

32. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to testify as to the discussion with Johnson in council meeting in Roselle Park relative to Johnson’s use of the borough team for his private work. 20

33. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: “As a result of that conversation or after that conversation at the same meeting, did Johnson pay anything for the use of the borough team?” 30

34. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: “Who was present at the council meeting, if you can remember, at which the incident I have just referred to occurred?”

35. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to per- 40

Assignments of Error

10 mit the defendant to answer the following question: "To what circumstances or incidents had you reference to when you wrote: 'He pledged seventy-five dollars towards the construction of a local church and then when because of the war, the church was embarrassed in paying its contractor, he refused to pay a balance of Forty-eight Dollars and wrote a letter reniging on the subscription and refused to pay it?'"

36. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "Had you personal knowledge of any such fact as is referred to in that last?"

20 37. That the Court erred to the prejudice and iniury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "What warrant, if any, did you have for saying in this circular of Johnson: 'He side-stepped the payment of a debt, as shown by a copy of court proceedings, as given below, and judge for yourselves whether he perjured himself or not?'"

30 38. That the Court erred to the prejudice and iniury of the plaintiff-in-error in refusing to permit the minutes of the Grand Jury of the May Term, 1911, to be put in evidence.

40 39. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit Joseph A. McDevitt, a witness on the part of the defendant, to answer the question: "Did you or did you not tell Mavor Fish that while you were in the Grand Jury Room a member of the Grand Jury called Johnson to order?"

Assignments of Error

40. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the attorney for defendant to ask Louis V. Hobbs, a witness for the defendant, the following question: "Upon a certain occasion after Mr. Fish became Mayor, and while you and William Johnson were both members of the Borough Council, did any discussion occur at a council meeting to your recollection, about Mr. Johnson having used the borough team for private work?"

10

41. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the attorney for defendant to ask Louis V. Hobbs, a witness for the defendant, the following question: "At the meeting referred to did you see—did you or did you not see Johnson pay any money for the use of the Borough of Roselle Park?"

20

42. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the attorney for the defendant to ask Louis V. Hobbs, a witness for the defendant, the following question: "Do you know, Mr. Hobbs, whether there was any relationship—I don't mean—acquaintance-ship between William E. Johnson and Dr. Snowden, as they call him?"

30

43. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit William D. Finkle, a witness for the defendant, to testify as to a conversation which occurred at a meeting of the borough council between Mr. Fish and Mr. Johnson regarding Johnson having used the borough team for private work and not having paid for it.

40

Assignments of Error

10 44. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit William D. Finkle, a witness for the defendant, to answer the following question: "On that occasion, did you, as a result of that conversation or otherwise, see Johnson pay any money to anyone for the use of the Borough of Roselle Park on account of using that borough team?"

20 46. That the defendant by his counsel requested the Court to charge as follows: "If you are satisfied that defendant believed the charge complained of to be true, then I charge you that the publication was one of qualified privilege, and unless the State has proved beyond a reasonable doubt that the defendant was actuated by express malice against Johnson you must acquit." Which the Court refused to charge.

30 47. That the defendant by his counsel requested the Court to charge as follows: "The selection of suitable persons for the performance of official service is essential to the interests of both the government and the citizen. These interests can be protected only by the communication of information and by free discussion concerning the fitness of applicants. It would tend to repress this necessary freedom, and would be a manifest injustice to the citizen, if communications of this character subjected the person making them to punishment in the event of an honest mistake. But these considerations disclose no necessity for a privilege broad enough to cover charges which are unfounded and malicious. A just distinction is established and reasonable protection afforded to every interest, by holding communications of this nature to be
40 *prima facie* privileged. By virtue of this privilege,

Assignments of Error

a defendant who has made a statement which cannot be substantiated is relieved from the effect of a legal presumption of malice, and is made libel only by proof of actual malice. The occasion in question was not one of absolute privilege, but was so far privileged as to protect a communication made in good faith and from an honest motive." Which the Court refused to charge. 10

48. That the defendant by his counsel requested the Court to charge as follows: "When a man becomes a candidate for public office his character for honesty and integrity and his fitness for the position are put before the public and are thereby made proper subjects for comment." Which the Court refused to charge. 20

49. That the defendant by his counsel requested the Court to charge as follows: "If in commenting upon the qualifications for public office of a man who is a candidate for that office, a person publishes a statement which he believes to be true and in making such publication is not moved by actual malice against such candidate, he is guilty of no criminal offense." Which the Court refused to charge. 30

50. That the defendant by his counsel requested the Court to charge as follows: "The people have a right to know how their public affairs are being conducted, and how the duties of their officers are being performed, and it is one of the privileges of citizens to give the people this information, and that, if the information so given is true, or if the publishers believe it to be true and have reasonable and probable cause for so believing, the law protects them in that the truth must not be concealed; 40

Assignments of Error

10 that the public good requires that it be allowed to be known, and that all which the law requires of publishers is good faith and an honest belief that their statements are true, and that such belief be founded on reasonable and probable grounds." Which the Court refused to charge.

51. That the defendant by his counsel requested the Court to charge as follows: "Defamatory words uttered in a privileged communication are not indictable unless there be proof of actual malice. If such words are uttered in good faith on a privileged occasion, in an honest belief that they are true, the party injured is without remedy."

20 "The occasions which give rise to the privilege of speaking or publishing words which otherwise would be defamatory and indictable are various, but among them are comments by electors upon the character of candidates for office and a criticism of the public acts of a candidate for office may be inserted in a public newspaper or be proclaimed by a circular." Which the Court refused to charge.

30 52. That the defendant by his counsel requested the Court to charge as follows: "Malice is manifested by the intentional doing of a wrongful act to the injury of another, without just cause or excuse." Which the Court refused to charge.

40 53. That the defendant by his counsel requested the Court to charge as follows: "If you find that the defendant honestly believed from his own experience in the Grand Jury Room and from what he had been told by other persons who had been before the Grand Jury in the same matter and were in a position to form an opinion as to Johnson's attitude, that Johnson had protected Snow-

Assignments of Error

den from indictment, then you must acquit unless you are satisfied beyond a reasonable doubt that the circular was published from some other motive than that expressed in the circular." Which the Court refused to charge.

54. That the defendant by his counsel requested the Court to charge as follows: "If you believe that Fish believed the charge to be true and that he published it for justifiable ends, then you must acquit, and upon either point the defendant is entitled to the benefit of every reasonable doubt." Which the Court refused to charge.

10

55. That the defendant by his counsel requested the Court to charge as follows: "The circular itself states that it sets forth the public record of William E. Johnson, a candidate for office, as to which the voters are entitled to be informed. There is no evidence that the circular was published outside of Roselle Park Borough and Union Township, the political division of which Johnson was a candidate.

20

In these circumstances the State must prove beyond a reasonable doubt: That Fish knew the charge against Johnson to be false, and that he was actuated by malice and ill-will against Johnson in making the charge." Which the Court refused to charge.

30

56. That the defendant by his counsel requested the Court to charge as follows: "If it is true, as stated in the circular, that its purpose was to inform the voters of Johnson's public record, and if Fish believed the charge complained of to be true, then Fish must be acquitted unless you believe that he was actuated by malice in publishing the cir-

40

Assignments of Error

10 ular, and by malice in this connection, I mean some motive different from that which made the statement privileged, and which was itself contrary to good morals. Indignation towards Johnson for his supposed offenses would not be, per se, contrary to good morals." Which the Court refused to charge.

57. That the Court charged as follows:

20 "Now, having become a candidate for office, Johnson necessarily submitted himself to the criticism of his fellow citizens, and the defendant or any other citizen had a right to show his want of qualification for the office he sought. His inexperience, his failure to have properly discharged the duties of other offices which he filled, but, as I have said, when the criticism attacks one's honesty and integrity, it must be true, and be published with good motives and for justifiable ends.

You are to take the whole paper admitted in evidence, containing the alleged libelous matter, and the testimony in the case and say whether the defendant told the truth of Johnson, and, in so doing, was prompted by good motives and for justifiable ends."

30

58. That the Court charged the jury as follows:

40 "The law does not require actual malice to be proved if the libel is one that imputes to another the perversion of public justice in his office of Judge or juror. In that case the law will presume malice, and the burden is on the defendant to show that he was not actuated by malice. I therefore repeat if the defendant has shown that what he published was true and that it was published with good motives and for justifiable ends, then the jury should acquit."

Assignments of Error

59. That the Court charged the jury as follows:

“The defendant insists that the publication was a privileged one. And that, under the circumstances he cannot be held to answer for it. A person is conditionally privileged to communicate to his fellow citizens what is of public interest, and conducive to public good, even when the publication proves injurious to another, but then he must not be swayed by malice, and the publication must be true. Therefore, the jury, under the law, are required to determine whether the language attributed to the defendant and set forth in the indictment is libelous; whether the defendant has shown its truth, and whether it was published by the defendant with good motives and for justifiable ends.”

And the said plaintiff-in-error prays that the judgment aforesaid, for the errors aforesaid, and for the errors therein be reversed, annulled and altogether holden for nothing, and that he may be restored in all things, in which he has lost by reason of said judgment.

CODDING & OLIVER,

Attorneys for and of Counsel with Plaintiff-in-Error.

30

20

30

40

Joinder in Error.

NEW JERSEY SUPREME COURT.

10	THE STATE, Defendant-in-Error, against HARWOOD FISH, Plaintiff-in-Error.	} On Error to } Union County } Quarter Ses- } sions.
----	--	---

And hereupon, afterwards, to wit; on the day of May A. D., nineteen hundred and sixteen, the State of New Jersey by Alfred A. Stein, Prosecutor of the Pleas of the County of Union, comes into court and says, that there is no error, either in the record and proceedings aforesaid, or in giving judgment aforesaid, and it prays here that the Court here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error and that the judgment aforesaid, in manner aforesaid given, may, in all things be affirmed, etc.

30

ALFRED A. STEIN,

Prosecutor of the Pleas
 of the County of Union
 in the State of New Jersey,
 for the defendant-
 in-Error.

40

Causes for Reversal.

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">THE STATE, Defendant-in-Error, against HARWOOD FISH, Plaintiff-in-Error.</p>	}	<p>On Error to Union County Quarter Ses- sions.</p>
---	---	---

Afterwards, to wit, &c., comes the plaintiff-in-error by Coddling and Oliver, his attorneys, and specifies the following errors and causes in the record and proceedings therein relied upon for the reversal of the judgment in this cause.

20

1. That the judgment aforesaid was given against the said Harwood Fish, whereas by the law of the land judgment should have been given for him; which is a cause for reversal.

2. That the charge of the Court as a whole, and in each and every part thereof is illegal, and thereby defendant below suffered manifest wrong and injury; which is a cause for reversal.

30

3. Because the case was tried by the State, under sanction of the Court, upon the theory that paragraph 5 of Article 1 of the Constitution of the State has abrogated the common law rule under which it is permitted to comment upon the public record of a man who is a candidate for public office if the communication is made without malice and in the belief that it is true; and that said provision of the Constitution tends to limit rather than to enlarge the liberty of speech and of the press.

40

Causes for Reversal

10 4. That on the trial of the said plaintiff-in-error, he suffered manifest wrong and injury in the admission of evidence and the charge of the Court, which prejudiced the said plaintiff-in-error in maintaining his defense upon the merits; which is a cause for reversal.

5. That the entire evidence as a whole did not show beyond a reasonable doubt that the said plaintiff-in-error was guilty of the crime charged, and did not justify the verdict found against him; which is a cause for reversal.

20 6. That the evidence in the cause is of such a nature that when fully and fairly considered it will not satisfy any thoughtful mind beyond a reasonable doubt of the guilt of the accused, and that upon said evidence the said plaintiff-in-error was entitled to an acquittal; which is a cause for reversal.

7. That the Court refused to quash the indictment on the motion of the attorney for defendant before the Jury was sworn; which is a cause for reversal.

30 8. That the Court erred to the prejudice and injury of the plaintiff-in-error by permitting the witness, Charles W. Runyon, to read from the record the names of the men who constituted the Grand Jury in and for the County of Union for the May Term, 1911, contrary to the objection of the plaintiff-in-error.

40 9. That the Court erred to the prejudice and injury of the plaintiff-in-error by permitting the witness, George C. Otto, to read from the records of

Causes for Reversal

the Sheriff's office the names of the men who constituted the Grand Jury in and for the County of Union for the May Term, 1911, contrary to the objection of the plaintiff-in-error.

10. That the Court erred to the prejudice and injury of the plaintiff-in-error in saying, in response to this statement of the Prosecutor made during the trial in the presence of the Jury, to wit: "Now, then, this circular, even though it never bore the signature of anybody, if we show it was sent out by Mr. Fish, it makes him guilty of libel," "Certainly."

11. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to admit testimony in support of charges contained in the publication other than the particular charge set up in the indictment.

12. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the witness, Joseph A. McDevitt, to testify about what happened before the Grand Jury.

13. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the attorney for the defendant to ask Joseph A. McDevitt, a witness for the State, the following question: "Without stating the testimony you gave, what was the subject matter upon which you testified before the Grand Jury on that day?"

14. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the attorney for the defendant to ask Joseph A. McDevitt the following question: "You don't

Causes for Reversal

10 know. Did you tell Mr. Fish after you came out of the Grand Jury Room after you had been before the Grand Jury, that Johnson, sitting in that Grand Jury, had conducted himself in such a manner while you were in there that he was called to order by another member of the Grand Jury?"

15. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the attorney for the defendant to ask Joseph A. McDevitt the following question: "Did you tell Mr. Fish that the questions that Johnson put to you in that Grand Jury Room made it appear to you as if Johnson were taking the part of this Dr. Snowden?"

20 16. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to direct a verdict of acquittal on motion of the attorney for defendant after the testimony on the part of the State had been closed.

30 17. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to testify as to the statements made to him by Joseph A. McDevitt outside of the Grand Jury Room.

18. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "What were the facts, without stating now what you testified to before the Grand Jury, what were the facts regarding the charge that you made?"

40 19. That the Court erred to the prejudice and

Causes for Reversal

- injury of the plaintiff-in-error in refusing to permit the defendant to testify why he believed that Snowden was a swindler.

20. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "What did Mr. McDevitt tell you, if anything?" 10

21. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "Mr. Fish, what, if anything, led you to believe that an indictment had been found against Snowden?"

22. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to answer the following question: "What led you to believe that in that Grand Jury an indictment had been voted against Snowden?" 20

23. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to permit the defendant to testify as to the discussion with Johnson in council meeting in Roselle Park relative to Johnson's use of the borough team for his private work. 30

24. That the Court erred to the prejudice and injury of the plaintiff in error in refusing to permit the minutes of the Grand Jury of the May Term, 1911, to be put in evidence.

25. That the Court erred to the prejudice and injury of the plaintiff-in-error in refusing to per- 10

Causes for Reversal

mit Joseph A. McDevitt, a witness on the part of the defendant, to answer the question: "Did you or did you not tell Mayor Fish that while you were in the Grand Jury Room a member of the Grand Jury called Johnson to order?"

10

26. That the defendant by his counsel requested the Court to charge as follows: "If you are satisfied that defendant believed the charge complained of to be true, then I charge you that the publication was one of qualified privilege, and unless the State has proved beyond a reasonable doubt that the defendant was actuated by express malice against Johnson you must acquit." Which the Court refused to charge.

20

27. That the defendant by his counsel requested the Court to charge as follows: "The selection of suitable persons for the performance of official service is essential to the interests of both the government and the citizen. These interests can be protected only by the communication of information and by free discussion concerning the fitness of applicants. It would tend to repress this necessary freedom, and would be a manifest injustice to the citizen, if communications of this character subjected the person making them to punishment in the event of an honest mistake. But these considerations disclose no necessity for a privilege broad enough to cover charges which are unfounded and malicious. A just distinction is established and reasonable protection afforded to every interest, by holding communications of this nature to be *prima facie* privileged. By virtue of this privilege, a defendant who has made a statement which cannot be substantiated is relieved from the effect of a legal

20

40

Causes for Reversal

presumption of malice, and is made liable only by proof of actual malice. The occasion in question was not one of absolute privilege, but was so far privileged as to protect a communication made in good faith and from an honest motive." Which the Court refused to charge.

10

28. That the defendant by his counsel requested the Court to charge as follows: "When a man becomes a candidate for public office his character for honesty and integrity and his fitness for the position are put before the public and are thereby made proper subjects for comment." Which the Court refused to charge.

29. That the defendant by his counsel requested the Court to charge as follows: "If in commenting upon the qualifications for public office of a man who is a candidate for that office, a person publishes a statement which he believes to be true and in making such publication is not moved by actual malice against such candidate he is guilty of no criminal offense." Which the Court refused to charge.

20

30. That the defendant by his counsel requested the Court to charge as follows: "The people have a right to know how their public affairs are being conducted, and how the duties of their officers are being performed, and it is one of the privileges of citizens to give the people this information, and that, if the information so given is true, or if the publishers believe it to be true and have reasonable and probable cause for so believing, the law protects them in that the truth must not be concealed; that the public good requires that it be allowed to be known, and that all which the law requires of

30

40

Causes for Reversal

publishers is good faith and an honest belief that their statements are true, and that such belief be founded on reasonable and probable grounds." Which the Court refused to charge.

10 31. That the defendant by his counsel requested the Court to charge as follows: "Defamatory words uttered in a privileged communication are not indictable unless there be proof of actual malice. If such words are uttered in good faith on a privileged occasion, in an honest belief that they are true, the party injured is without remedy."

20 "The occasions which give rise to the privilege of speaking or publishing words which otherwise would be defamatory and indictable are various, but among them are comments by electors upon the character of candidates for office and a criticism of the public acts of a candidate for office may be inserted in a public newspaper or be proclaimed by a circular." Which the Court refused to charge.

30 32. That the defendant by his counsel requested the Court to charge as follows: "Malice is manifested by the intentional doing of a wrongful act to the injury of another, without just cause or excuse." Which the Court refused to charge.

40 33. That the defendant by his counsel requested the Court to charge as follows: "If you find that the defendant honestly believed from his own experience in the Grand Jury Room and from what he had been told by other persons who had been before the Grand Jury in the same matter and were in a position to form an opinion as to Johnson's attitude, that Johnson had protected Snowden from indictment, then you must acquit unless you are satisfied beyond a reasonable doubt that the circular

Causes for Reversal

was published from some other motive than that expressed in the circular." Which the Court refused to charge.

34. That the defendant by his counsel requested the Court to charge as follows: "If you believe that Fish believed the charge to be true and that he published it for justifiable ends, then you must acquit, and upon either point the defendant is entitled to the benefit of every reasonable doubt." Which the Court refused to charge. 10

35. That the defendant by his counsel requested the Court to charge as follows: "The circular itself states that it sets forth the public record of William E. Johnson, a candidate for office, as to which the voters are entitled to be informed. There is no evidence that the circular was published outside of Roselle Park Borough and Union Township, the political division in which Johnson was a candidate. 20

In these circumstances the State must prove beyond a reasonable doubt: That Fish knew the charge against Johnson to be false, and that he was actuated by malice and ill-will against Johnson in making the charge." Which the Court refused to charge. 30

36. That the defendant by his counsel requested the Court to charge as follows: "If it is true, as stated in the circular, that its purpose was to inform the voters of Johnson's public record, and if Fish believed the charge complained of to be true, then Fish must be acquitted unless you believe that he was actuated by malice in publishing the circular, and by malice in this connection, I mean some motive different from that which made the 40

Causes for Reversal

statement privileged, and which was itself contrary to good morals. Indignation towards Johnson for his supposed offenses would not be, per se, contrary to good morals." Which the Court refused to charge.

10

37. That the Court charged as follows:

"Now, having become a candidate for office, Johnson necessarily submitted himself to the criticism of his fellow citizens, and the defendant or any other citizen had a right to show his want of qualification for the office he sought. His inexperience, his failure to have properly discharged the duties of other offices which he filled, but as I have said, when the criticism attacks one's honesty and integrity, it must be true, and be published with good motives and for justifiable ends.

20

"You are to take the whole paper admitted in evidence, containing the alleged libelous matter, and the testimony in the case and say whether the defendant told the truth of Johnson, and, in so doing, was prompted by good motives and for justifiable ends."

38. That the Court charged the jury as follows:

30

"The law does not require actual malice to be proved if the libel is one that imputes to another the perversion of public justice in his office of Judge or juror. In that case the law will presume malice, and the burden is on the defendant to show that he was not actuated by malice. I therefore repeat if the defendant has shown that what he published was true and that it was published with good motives and for justifiable ends, then the jury should acquit."

40

39. That the Court charged the jury as follows:

"The defendant insists that the publication was

Causes for Reversal

a privileged one. And that, under the circumstances he cannot be held to answer for it. A person is conditionally privileged to communicate to his fellow citizens what is of public interest, and conducive to public good, even when the publication proves injurious to another, but then he must not be swayed by malice, and the publication must be true. Therefore, the jury, under the law, are required to determine whether the language attributed to the defendant and set forth in the indictment is libelous; whether the defendant has shown its truth, and whether it was published by the defendant with good motives and for justifiable ends." 10

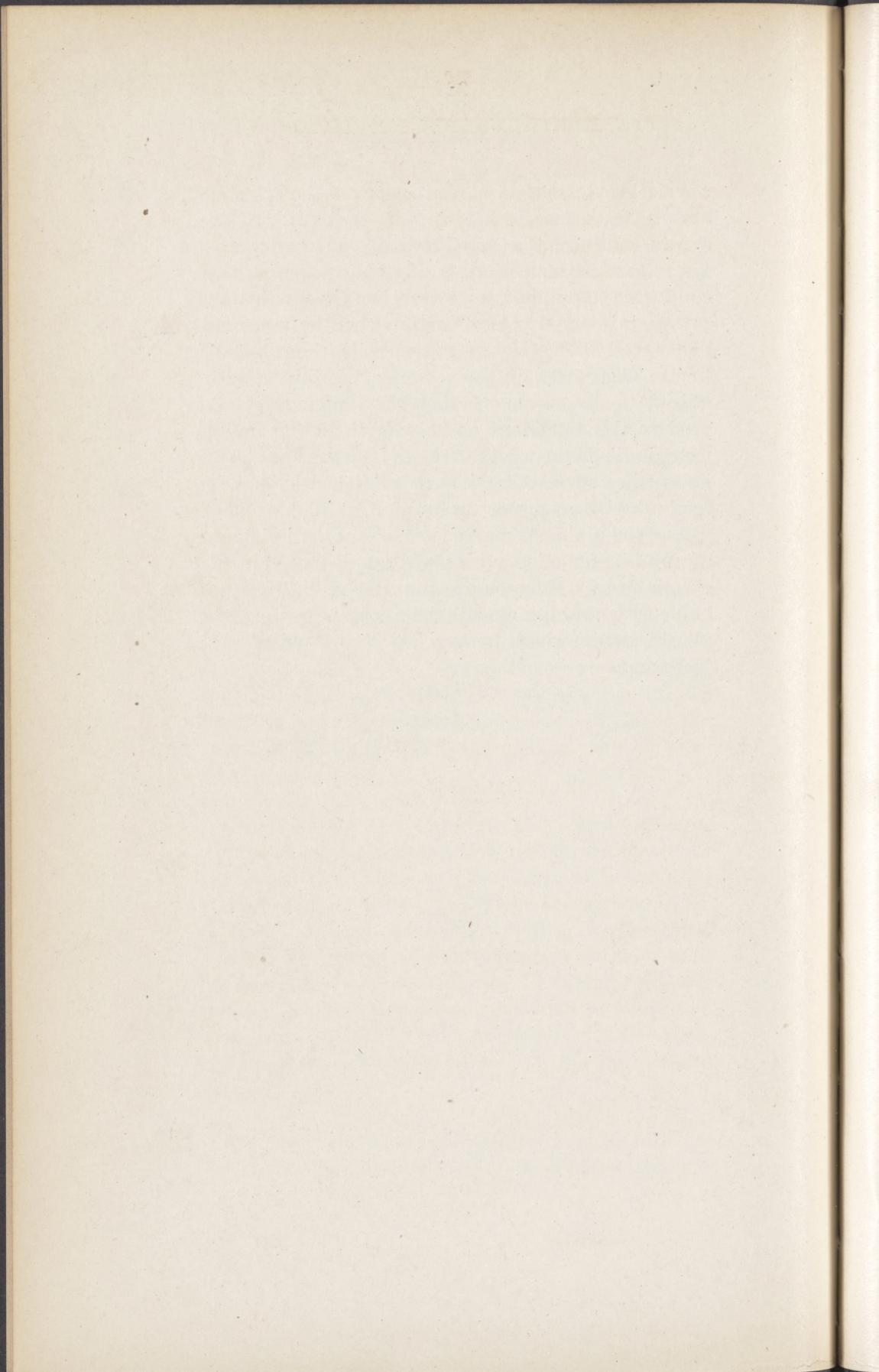
And the plaintiff-in-error prays that the judgment aforesaid, for the errors aforesaid, and for the errors therein be reversed, annulled and altogether holden for nothing, and that he may be restored in all things, in which he has lost by reason of said judgment. 20

CODDING & OLIVER,
Attorneys for and of Counsel with Plaintiff-in-Error.

30

[8053]

40



SUPPLEMENTAL CAUSES FOR REVERSAL.

Served May 24, 1916.

40. Because the Court, in his allusion to the matter of Johnson's alleged suppression of the indictment found against Snowden, gave the Jury to understand that if such insinuation were found to be an aspersion upon the whole body of the Grand Jury, the defendant might on that account be found guilty under the indictment. 10

41. Because statements and remarks were made by the Court during the progress of the trial from which the Jury might have inferred that any reflection upon the conduct and character of members of the Grand Jury of the May term, 1911, other than Johnson, or upon that Grand Jury as a body, that might be contained in the publication complained of in the indictment, would render Fish guilty under the indictment. 20

CODDING & OLIVER,
Attorneys for and of Counsel with Plaintiff-in-Error.

30

40

OPINION OF SUPREME COURT.

(Filed March 5, 1917)

NEW JERSEY SUPREME COURT.

June T., 1916.

THE STATE,

10

vs.

HARWOOD FISH.

Error to Union Quarter Sessions.

Argued before Gummere, Chief Justice, and Justices
Trenchard and Black.

For the plaintiff in error, Coddling & Oliver.

For the State, Alfred A. Stein, Prosecutor of the
20 Pleas.

The opinion of the Court was delivered by Gum-
mere, C. J.:

30 The defendant was convicted of the crime of libel.
The case made against him was that he had circulated
a printed article among certain of the voters of his
county in which he stated the following of one William
E. Johnson, who had been a member of the Union
county grand jury: "As a member of the grand jury
he succeeded in protecting the biggest swindler to my
mind that ever struck the county, and although I under-
stand an indictment was voted against his friend, for
some unexplained reason it was never handed in."

40 The first ground upon which we are asked to reverse
the conviction is that the indictment did not charge a
crime, because the words set out in it are not libelous.
This point is almost too tenuous for discussion. The
words cited charge a member of the grand jury, the
holder of a public office of great importance, with
malfeasance in his office of the gravest character. That
such a charge, if untrue, is plainly libelous was decided
by this court in **Heller vs. Duff**, 62 N. J. L. 101.

Opinion of Supreme Court.

The next contention is that it was error for the trial court to allow the deputy clerk to read from the record in the clerk's office the names of the members of the grand jury for the May term, 1911, for the purpose of showing that Johnson was a member of that body. This reading was objected to upon the ground that it was immaterial who were the members of the grand jury, except, perhaps, as to William E. Johnson. This objection having been made the Court ruled that the reading was only evidential for the purpose of ascertaining Mr. Johnson's membership. This ruling wiped out the ground of objection, and, consequently, the defendant can take nothing by this contention. We may add that we are unable to see how any harm could have come to the defendant from the reading of this grand jury list, even in the absence of the ruling just referred to. 10

Next it is urged that the Court committed error in excluding testimony offered in support of the truth of other matters contained in the alleged libelous article, but which were not referred to in the indictment, or made a ground of charge against the defendant. We think this testimony was properly excluded, for, if it be conceded that the charges at which it was directed were true in fact, that could not afford any justification for the untruthful statement which is made the subject of the indictment. 20

Next it is contended that it was erroneous to refuse to permit the defendant to prove matters which had occurred in the grand jury room during the investigation of the charges made against the person, who was designated by the defendant as "the biggest swindler that ever struck the county." The offer was to show that facts had been communicated to him by one Me-Devitt, who had been a witness before the grand jury, that justified him in writing and circulating the libelous article. This testimony was overruled upon the ground that it had a tendency to violate the secrecy of the grand jury room. We do not think this ground 30 40

Opinion of Supreme Court.

of exclusion is sound. A witness who has been examined before a grand jury is under no legal obligation to refrain from stating what was said to and by him while there. The obligation of secrecy rests only upon members of that body, and those associated with them in the administration of justice. But we consider
 10 the ruling proper for the reason that the fundamental question was, not what caused the defendant to publish this untruthful charge against Mr. Johnson, but whether it was in fact untruthful. No matter what his motives were, no matter what induced his action, if, in fact, he did circulate the paper and it contained a libelous and untruthful charge he is subject to punishment under the indictment.

The next objection is that the Court erred in refusing to direct a verdict for the defendant. It is hardly
 20 necessary to discuss this. The circular was libelous if the fact stated therein was untrue. The proof of its publication was plenary, if the jury believed the testimony. Whether the charge contained in the circular was true or not was for the jury.

Next it is argued that the Court in its charge failed to appreciate the true principle of the law of libel; but as no specific errors are pointed out we find nothing of substance to deal with in attempting to dispose of this phase of the case.

Another ground of reversal is predicated upon the
 30 following situation: The Prosecutor of the Pleas argued before the jury that the defendant might be held guilty under the indictment if the jury should conclude that he had sent out the circular, and found no other fact against him. This was, of course, an erroneous statement of the law, but the harmfulness of it was probably neutralized by the charge of the Court. But even if its injurious effect was not eradicated it cannot be now appealed to as a justification for a reversal of the conviction. It is not properly presentable on any
 40 assignment of error, for no application was made to the Court to deal with the statement; much less was

Opinion of Supreme Court.

there any exception to any ruling of the Court upon the matter. It cannot be considered under section 136 of the Criminal Procedure Act, because it does not come within any of the grounds specified in that section as a justification for a reversal. By that statutory provision the court of review is only permitted to reverse where the plaintiff in error on the trial below suffered manifest wrong or injury, either in the admission or rejection of testimony, or in the charge of the Court, or in the denial of any matter by the Court which was a matter of discretion. 10

Next it is argued that the statement just referred to was concurred in by the Court by its oral declaration in the presence of the jury, and that there should be a reversal for this reason. But no exception was signed and sealed to the statement of the Court, and so the present contention does not afford a basis for an assignment of error; and it cannot be considered under the 136th section, for the reason that it does not come within the scope thereof. 20

Lastly it is contended that the proofs showed that Johnson, the libeled party, was a candidate for office, and that, therefore, the defendant was entitled to circulate libelous articles with relation to his character, provided he acted in good faith, believing them to be true. No authority is cited for any such contention, and it is manifestly without support in law. 30

On the whole case we think there should be an affirmance. 30

JUDGMENT OF SUPREME COURT.

(Entered March 12, 1917)

NEW JERSEY SUPREME COURT.

10	The State of New Jersey, Defendant in Error, vs. Harwood Fish, Plaintiff in Error.	} In Error. Order for Affirmance of Judgment and Remittitur.
----	--	--

20 This cause having been duly argued at the November Term, A. D. 1916 of this Court, by Charles N. Codding and Paul Q. Oliver, Counsel for Plaintiff in Error, and Alfred A. Stein, Prosecutor of the Pleas for Union County, for Defendant in Error, and the Court having duly considered the same and finding no error in the record or proceedings in the Union County Court of Quarter Sessions.

30 It is thereupon, on this twelfth day of March, A. D. 1917, ordered and adjudged that the judgment of the Union County Court of Quarter Sessions, removed by the writ of error in this cause, be affirmed and that the record be remitted to the Union County Court of Quarter Sessions, to be proceeded with in accordance with the judgment and practice of said Court.
 Entered March 12, 1917.

On motion of

ALFRED A. STEIN,

Prosecutor of the Pleas for
 Union County and Counsel
 for Defendant in Error.

(Returnable March 13, 1917)

WRIT OF ERROR.

(Returned April 13, 1917)

NEW JERSEY, SS:

(Seal) THE STATE OF NEW JERSEY TO
OUR JUSTICES OF OUR SUPREME
COURT, GREETING:

Because in the record and proceedings and also in the giving of judgment upon a certain indictment in the name of the State of New Jersey against Harwood Fish, for libel, heard and determined by the said Supreme Court of the State of New Jersey on writ of error issued out of our said Supreme Court to the Court of Quarter Sessions of the Peace in and for the County of Union, manifest error hath intervened to the great damage of the said Harwood Fish as from his complaint we have received information; we being willing in this behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him the said Harwood Fish, do command you that if judgment be thereon given, then that you distinctly and openly send the record and proceedings aforesaid with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes under your seal of the said Supreme Court, together with this writ, so that we may have the same before our Judges of our Court of Errors and Appeals at Trenton, on the 31st day of March, 1917, that inspecting the record and proceedings aforesaid we may further do thereupon for correcting that error what of right and according to law ought to be done.

Witness, Edwin Robert Walker, Esq., our Chancellor and President Judge of our Court of Errors and Appeals, at Trenton, this 13th day of March, in the year nineteen hundred and seventeen.

THOMAS F. MARTIN,
Clerk

CODDING & OLIVER,
Attorneys for Plaintiff
in Error.

10

20

30

40

ASSIGNMENT OF ERRORS.

(Filed May 9, 1917)

NEW JERSEY COURT OR ERRORS AND APPEALS.

10	The State of New Jersey, Defendant in Error, vs. Harwood Fish, Plaintiff in Error.	}	In Error to New Jersey Supreme Court. Assignment of Errors.
----	--	---	---

And now comes the said Harwood Fish, plaintiff in error, by Coddling & Oliver, his attorneys, and says that in the record and proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error in this, to wit:

- 20 1. Because said Supreme Court decided that the judgment ought not to be reversed for the reason that the trial judge said, in response to this statement of the Prosecutor made during the trial in the presence of the Jury, to wit: "Now, then, this circular, even though it never bore the signature of anybody, if we show it was sent out by Mr. Fish, it makes him guilty of libel," "Certainly."
- 30 2. Because said Supreme Court decided that the Court of Quarter Sessions of Union County properly refused to admit testimony in support of charges contained in the publication other than the particular charge set up in the indictment.
3. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the witness, Joseph A. McDevitt, to testify about what happened before the Grand Jury.
- 40 4. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for the defendant to ask Joseph A. McDevitt, a witness for the State, the following question:

Assignment of Errors.

“Without stating the testimony you gave, what was the subject matter upon which you testified before the Grand Jury on that day?”

5. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for the defendant to ask Joseph A. McDevitt the following question: “Did your testimony before the Grand Jury on that day relate to the sale of stock in this printing company by Snowden to your father?” 10

6. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for the defendant to ask Joseph A. McDevitt the following question: “You don’t know. Did you tell Mr. Fish after you came out of the Grand Jury Room after you had been before the Grand Jury, that Johnson, sitting in that Grand Jury, had conducted himself in such a manner while you were in there that he was called to order by another member of the Grand Jury?” 20

7. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for the defendant to ask Joseph A. McDevitt the following question: “Did you tell Mr. Fish that the questions that Johnson put to you in that Grand Jury Room made it appear to you as if Johnson were taking the part of this Dr. Snowden?” 30

8. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to testify as to the statement made to him by Joseph A. McDevitt outside of the Grand Jury Room.

9. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: “What were the facts, without stating now what you testified to before the Grand Jury, what were the facts regarding the charge that you made?” 40

Assignment of Errors.

10. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to testify why he believed that Snowden was a swindler.

10 11. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "What did Mr. McDevitt tell you, if anything?"

12. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "Mr. Fish, what, if anything, led you to believe that an indictment had been found against Snowden?"

20 13. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to testify as to statements that had been made to the defendant by others about Mr. Johnson having ordered goods from Mr. Snowden.

14. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "What led you to believe that in that Grand Jury an indictment had been found against Snowden?"

30 15. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "How did you know he was an ex-hotel keeper in the West?"

40 16. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "What led you to say: 'As a Councilman in Roselle Park, Johnson was so dictatorial and abusive and so disgusted the decent people in the borough that he did not have the presumption to run for re-election?'"

Assignment of Errors.

17. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "What ground, if any, did you have for saying on this circular, of Johnson: 'He used the borough team for private work about his residence, and when I insisted upon his paying Fifteen Dollars for the use of it, he violently abused me at a council meeting, and said that he had a perfect right to use the team in return for the work he did as a Councilman. I told him his idea of honesty in public life was very different from mine, and that having taken the office of Councilman without salary, he must pay for the team, which he did.' "
- 10
18. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to testify as to the discussion with Johnson in council meeting in Roselle Park relative to Johnson's use of the borough team for his private work.
- 20
19. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "As a result of that conversation or after that conversation at the same meeting, did Johnson pay anything for the use of the borough team?"
20. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the minutes of the Grand Jury of the May Term, 1911, to be put in evidence.
- 30
21. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit Joseph A. McDevitt, a witness on the part of the defendant, to answer the question: "Did you or did you not tell Mayor Fish that while you were in the Grand Jury Room a member of the Grand Jury called Johnson to order?"
- 40

Assignment of Errors.

22. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for defendant to ask Louis V. Hobbs, a witness for the defendant, the following question: "Upon a certain occasion after Mr. Fish became Mayor, and while you and William Johnson were both members of the Borough Council, did any discussion occur at a council meeting to your recollection, about Mr. Johnson having used the borough team for private work?"
23. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for defendant to ask Louis V. Hobbs, a witness for the defendant, the following question: "At the meeting referred to did you see—did you or did you not see Johnson pay any money for the use of the Borough of Roselle Park?"
24. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit William D. Finkle, a witness for the defendant, to testify as to a conversation which occurred at a meeting of the borough council between Mr. Fish and Mr. Johnson regarding Johnson having used the borough team for private work and not having paid for it.
25. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit William D. Finkle, a witness for the defendant, to answer the following question: "On that occasion, did you, as a result of that conversation or otherwise, see Johnson pay any money to anyone for the use of the Borough of Roselle Park on account of using that borough team?"
26. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to direct a verdict of acquittal on motion of the attorney for defendant after the testimony on the part of the State had been closed.

Assignment of Errors.

27. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

“If you are satisfied that defendant believed the charge complained of to be true, then I charge you that the publication was one of qualified privilege, and unless the State has proved beyond a reasonable doubt that the defendant was actuated by express malice against Johnson you must acquit.” 10

28. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

“The selection of suitable persons for the performance of official service is essential to the interests of both the government and the citizen. These interests can be protected only by the communication of information and by free discussion concerning the fitness of applicants. It would tend to repress this necessary freedom, and would be a manifest injustice to the citizen, if communications of this character subjected the person making them to punishment in the event of an honest mistake. But these considerations disclose no necessity for a privilege broad enough to cover charges which are unfounded and malicious. A just distinction is established and reasonable protection afforded to every interest, by holding communications of this nature to be prima facie privileged. By virtue of this privilege, a defendant who has made a statement which cannot be substantiated is relieved from the effect of a legal presumption of malice, and is made liable only by proof of actual malice. The occasion in question was not one of absolute privilege, but was so far privileged as to protect a communication made in good faith and from an honest motive.” 20 30 40

Assignment of Errors.

29. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

10 “When a man becomes a candidate for public office his character for honesty and integrity and his fitness for the position are put before the public and are thereby made proper subjects for comment.”

30. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

20 “If in commenting upon the qualifications for public office of a man who is a candidate for that office, a person publishes a statement which he believes to be true and in making such publication is not moved by actual malice against such candidate, he is guilty of no criminal offense.”

31. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

30 “The people have a right to know how their public affairs are being conducted, and how the duties of their officers are being performed, and it is one of the privileges of citizens to give the people this information, and that, if the information so given is true, or if the publishers believe it to be true and have reasonable and probable cause for so believing, the law protects them in that the truth must not be concealed; that the public good requires that it be allowed to be known, and that all which the law requires of publishers is good faith and an honest belief that their statements are true, and that such belief be founded on reasonable
40 and probable grounds.”

Assignment of Errors.

32. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

“Defamatory words uttered in a privileged communication are not indictable unless there be proof of actual malice. If such words are uttered in good faith on a privileged occasion, in an honest belief that they are true, the party injured is without remedy.” 10

“The occasions which give rise to the privilege of speaking or publishing words which otherwise would be defamatory and, indictable are various, but among them are comments by electors upon the character of candidates for office and a criticism of the public acts of a candidate for office may be inserted in a public newspaper or be proclaimed by a circular.” 20

33. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

“Malice is manifested by the intentional doing of a wrongful act to the injury of another, without just cause or excuse.”

34. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows: 30

“If you find that the defendant honestly believed from his own experience in the Grand Jury Room and from what he had been told by other persons who had been before the Grand Jury in the same matter and were in a position to form an opinion as to Johnson’s attitude, that Johnson had protected Snowden from indictment, then you must acquit unless you are satisfied beyond a reasonable doubt that the circular was 40

Assignment of Errors.

published from some other motive than that expressed in the circular."

- 10 35. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

"The circular itself states that it sets forth the public record of William E. Johnson, a candidate for office, as to which the voters are entitled to be informed. There is no evidence that the circular was published outside of Roselle Park Borough and Union Township, the political division of which Johnson was a candidate.

- 20 "In these circumstances the State must prove beyond a reasonable doubt: That Fish knew the charge against Johnson to be false, and that he was actuated by malice and ill-will against Johnson in making the charge."

36. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

- 30 "If it is true, as stated in the circular, that its purpose was to inform the voters of Johnson's public record, and if Fish believed the charge complained of to be true, then Fish must be acquitted unless you believe that he was actuated by malice in publishing the circular, and by malice, in this connection, I mean some motive different from that which made the statement privileged, and which was itself contrary to good morals. Indignation towards Johnson for his supposed offenses would not be, per se, contrary to good morals."

- 40 37. Because said Supreme Court decided that the Court of Quarter Sessions properly charged the jury as follows:

Assignment of Errors.

“Now, having become a candidate for office, Johnson necessarily submitted himself to the criticism of his fellow citizens, and the defendant or any other citizen had a right to show his want of qualification for the office he sought. His inexperience, his failure to have properly discharged the duties of other offices which he filled, but, as I have said, when the criticism attacks one’s honesty and integrity, it must be true, and be published with good motives and for justifiable ends. 10

“You are to take the whole paper admitted in evidence, containing the alleged libelous matter, and the testimony in the case and say whether the defendant told the truth of Johnson, and in so doing, was prompted by good motives and for justifiable ends.”

38. Because said Supreme Court decided that the Court of Quarter Sessions properly charged the Jury as follows: 20

“The law does not require actual malice to be proved if the libel is one that imputes to another the perversion of public justice in his office of Judge or juror. In that case the law will presume malice, and the burden is on the defendant to show that he was not actuated by malice. I therefore repeat if the defendant has shown that what he published was true and that it was published with good motives and for justifiable ends, then the jury should acquit.” 30

39. Because said Supreme Court decided that the Court of Quarter Sessions properly charged the Jury as follows:

“The defendant insists that the publication was a privileged one. And that, under the circumstances he cannot be held to answer for it. A person is conditionally privileged to communicate to his fellow citizens what is of public interest, and conducive to public good, even when the publication proves injurious to another, but then he must not be swayed by malice, 40

Assignment of Errors.

and the publication must be true. Therefore, the jury, under the law, are required to determine whether the language attributed to the defendant and set forth in the indictment is libelous; whether the defendant has shown its truth, and whether it was published by the defendant with good motives and for justifiable ends."

10

40. Because the judgment aforesaid was given against the said Harwood Fish, whereas by the law of the land judgment should have been given for him; which is a cause for reversal.

20

41. Because the case was tried by the State, under sanction of the Court, upon the theory that paragraph 5 of Article 1 of the Constitution of the State had abrogated the common law rule under which it is permitted to comment upon the public record of a man who is a candidate for public office if the communication is made without malice and in the belief that it is true; and that said provision of the Constitution tends to limit rather than to enlarge the liberty of speech and of the press.

30

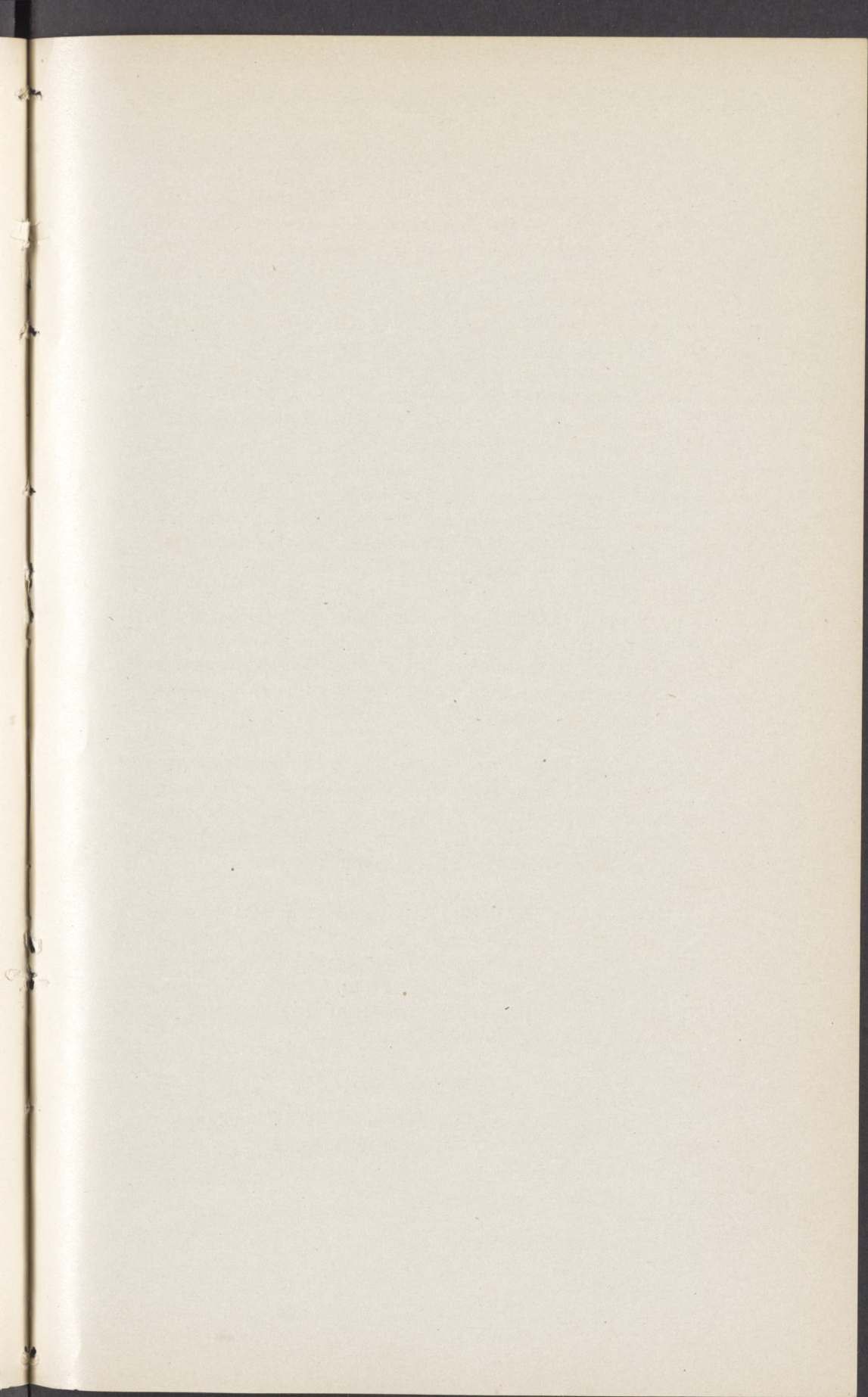
42. Because there is no evidence in the case to warrant or sustain the verdict of the Jury and the judgment of conviction in said Court of Quarter Sessions and the said Supreme Court erred in affirming said judgment of said Court of Quarter Sessions.

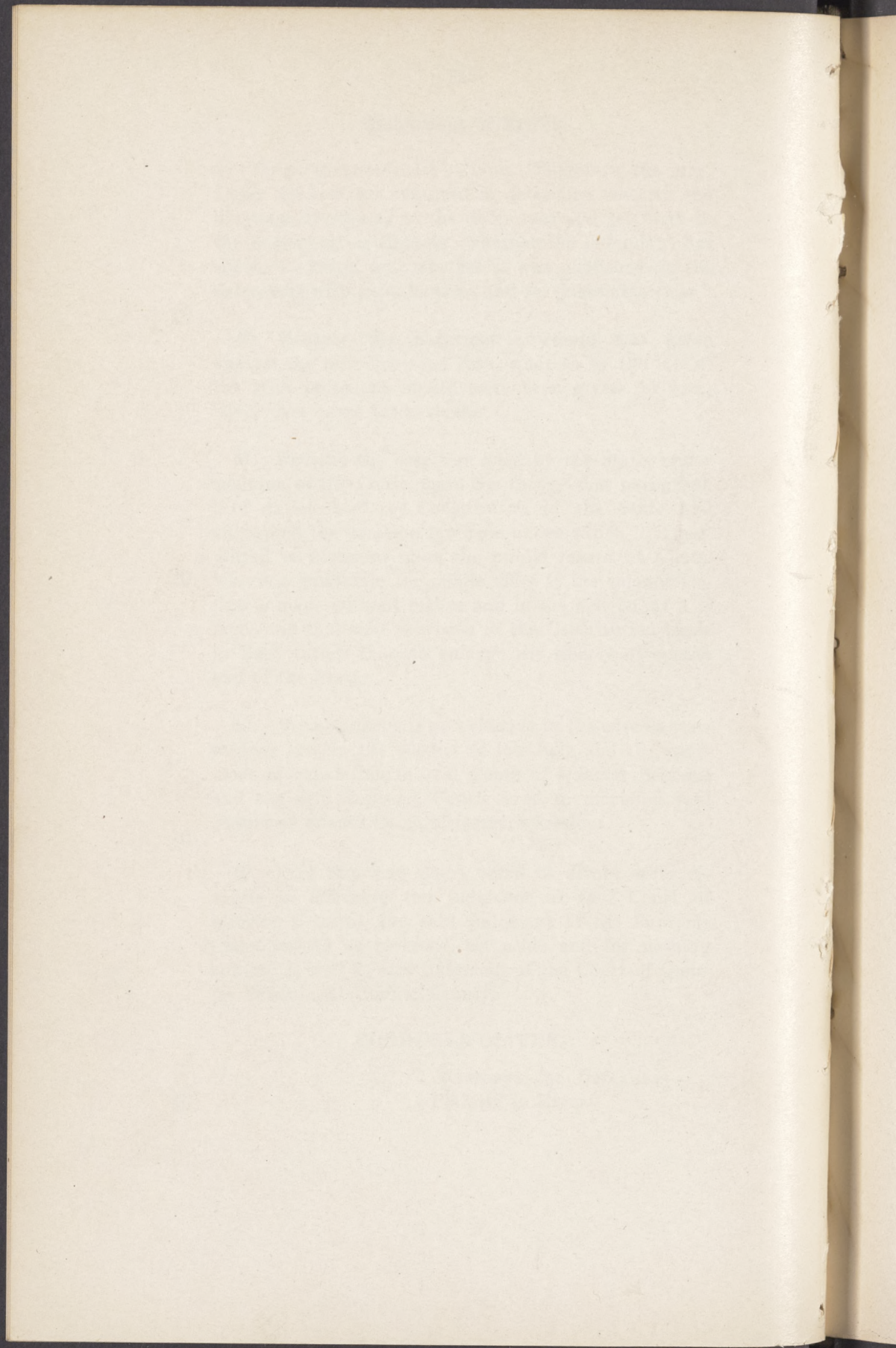
43. Said Supreme Court erred in divers other respects in affirming the judgment of said Court of Quarter Sessions and said judgment of the Supreme Court should be reversed, set aside and for nothing holden, as well as said judgment of the Court of Quarter Sessions of Union County.

CODDING & OLIVER,

Attorneys for Defendant—
Plaintiff in Error.

40





New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,)
 Defendant in Error,) IN ERROR TO
 VS.) SUPREME COURT
HARWOOD FISH,)
 Plaintiff in Error.) 10

BRIEF FOR DEFENDANT IN ERROR

Defendant was convicted at the January Term Nineteen Hundred and Sixteen, of the Union County Court of Quarter Sessions of the crime of criminal libel and sentenced to pay a fine of two hundred and fifty dollars.

On appeal the judgment of the lower court was affirmed by the New Jersey Supreme Court. 20

The libel consisted of the use of certain language in a part of a circular published by defendant concerning William E. Johnson, to wit, "As a member of a Grand Jury he succeeded in protecting the biggest swindler, to my mind, that ever struck Union County, and although I understand an indictment was voted against his friend, for some unexplained reason, it was never handed in."

While there are forty-three assignments of error, I will confine myself only to the points raised by counsel for plaintiff in error in their brief. They are as follows:— 30

1

Johnson being a candidate for office, Fish a legal voter residing in his district, was entitled to communicate to other legal voters information as to the character and fitness of Johnson for office provided he acted in good faith and without malice 40

and *in the belief* that the statements contained in the statement were true, even though such circular might otherwise be libelous.

While it is not disputed that a man running for public office may be criticized verbally or in writing, it is insisted that a publication which charges a Grand Juror with misconduct in his office of the gravest kind is libel *per se*, and is not a privileged communication.

10

Gray *vs.* Sharpe, 62 N. J. Law, page 101.

“To accuse one holding a public office of an offense, is not privileged and if the charge be false, it is libelous, however good the motive, and the publication not being privileged, could not be successfully justified except by proving the truth of the statements therein.”

20

Benton *vs.* State, 59 N. J. Law, page 55.

The Supreme Court in disposing of this contention, in its opinion affirming the judgment below, well said: “No authority is cited for any such contention, and it is manifestly without support in law.”

30

The case of King *vs.* Patterson, 49 N. J. Law, page 417, cited by counsel in support of this proposition, was a civil suit affecting defamatory publication concerning the financial condition of Mrs. Patterson, and a reading of that case will demonstrate that it bears no analogy to the one before the Court.

2

It is nextly argued that the conviction should be set aside because the Court below over-ruled testimony in support of the charges contained in the publication *other than* the particular charge set up in the indictment.

40

Manifestly the Court was correct in over-rul-

ing an offer to prove the truth of slanderous statements in the circular which were not the subject matter of the indictment for such evidence could in no way prove the truth or afford a justification for the untruthful statement which is made the subject of the indictment.

3

It is nextly argued that the judgment should be reversed because certain questions were over-ruled by the Court which were asked with a view to showing that Fish *had reason to believe* that the charge against Johnson complained of in the indictment was true. The questions asked are set forth in brief of counsel commencing with page 23 and upon reading them, it will appear at once that the defendant attempted to justify the publication by showing (A) what Joseph A. McDevitt testified to before the Grand Jury; (B) what Joseph A. McDevitt told the defendant had transpired while he was a witness in the Grand Jury; (C) what the defendant testified to before the Grand Jury, and (D) why the defendant believed Snowden was a swindler and that an indictment had been found against Snowden.

The libelous language charged was that "Johnson as a member of the Grand Jury succeeded in protecting the biggest swindler * * * that ever struck the county, and that although he (the defendant) understands an indictment was voted against his friend, for some unexplained reason it was never handed in."

Now, the questions asked were directed to Johnson's conduct during the examination of the witness and to what the witness said to the defendant after he came out of the Grand Jury room and of the belief of the defendant formed from these things and what lead Fish to think an indictment had been found. But the charge made by Fish against Johnson in his libelous statement cannot be interpreted

to mean that he attempted, by his questioning or his conduct during the taking of testimony in the Grand Jury to protect Snowden, the swindler, but rather that he *succeeded* during the deliberations of the Grand Jury on the question of a bill or no bill in having his co-members dismiss the matter or a bill having been voted, he succeeded in having it reconsidered or having been voted and not reconsidered he succeeded in having the Prosecutor
10 and the Grand Jury fail to present the same to the Court. This is the only interpretation that can be placed upon the language used by him and the truth of this charge was nowhere attempted to be proven by the defense.

It is submitted and should be noted that what the defense attempted to prove all through this case was (a) the truth of matters not set out in the indictment, (b) what a witness testified to before the Grand Jury; (c) what transpired while a witness
20 was in the Grand Jury room; (d) what the defendant testified to before the Grand Jury, (e) and *why* the defendant believed Snowden was a swindler and that an indictment was found against him. All of which testimony, it is respectfully submitted, was very properly excluded, firstly, because if allowed, such evidence would not prove the truth of the libel set forth in the indictment and secondly, that the only evidence which could be offered in
30 support of the truth of this libel would be proof of what Johnson said, and did, if anything, during the deliberations of the Grand Jury after the close of the testimony and before the vote of the jurors was taken, in order to meet with the success attributed to him.

Now, it is generally conceded that Grand Jurors cannot be permitted to state how many members of a Grand Jury voted or to testify as to opinions expressed by their fellows or themselves upon any question before them.

20 Cyc., p. 1353.

Commonwealth *vs.* Hill, 11 Cushing 137
(Mass.).

People *vs* Shattuck, 6 Abbott N. Cass, 33
(N. Y.).

Commonwealth *vs.* Twitchell, 1 Brewster
551 (Penn.).

In *U. S. vs. Farrington*, 5 Federal Reporter,
347, the Court said, "The rule which may be ad- 10
duced from the authorities and which seems most
consistent with the policy of the law, is that when-
ever it becomes essential to ascertain what trans-
pired before a Grand Jury it may be shown, no
matter by whom, and the only limitation is that it
may not be shown how an individual voted, or
what was said during their investigation because
this cannot serve any of the purposes of justice,"
and

Underhill on Criminal Evidence, page 238, 20
says of Grand Jurors, "He cannot be compelled to
disclose as a witness, the number of Grand Jurors
concerned in the finding of an indictment or to
state the evidence on which it was founded, in order
to impeach it, or what opinion any juror expressed,
or how many jurors voted on any question."

"Persons who are present in the Grand Jury
room, but not under oath of secrecy, as the Clerk
of the Grand Jury or the State's attorney, the
witnesses or any other person, are not competent 30
as witnesses to prove anything that was said or
done."

In *ex parte Sontag*, 2 Pac. Reporter, page 402,
a Grand Juror was imprisoned for contempt for
having refused to answer whether he had voted in
favor of finding an indictment and the Court held,
"A Grand Juror cannot be compelled to disclose
how he or any other juror voted upon an indict-
ment, but he may be required to give testimony of
a particular witness in the matter before them." 40

Starkey on Evidence, page 170, says, "Grand Jurors have not been allowed to disclose who, or how many were present when a case was brought before them, or who agreed or refused to find a Bill of Indictment, neither can they be called to detail the evidence on which a Bill was founded or to show that a witness gave before them evidence different from that he has given on the trial, or to explain their finding, and the Clerk attending the
10 Grand Jury is included in the same rule."

Greenlief on Evidence, Vol. 1, page 287, section 252, "It is the policy of the law that the preliminary inquiry as to the guilt or innocence of a party accused should be secretly conducted; and in furtherance of this object every Grand Juror is sworn to secrecy." * * * * "The rule includes not only the Grand Jurors themselves, but their Clerk and Prosecuting Officer, if he is present at their deliberations, all of these being equally
20 concerned in the administration of the same portion of the penal law. They are not permitted to disclose who agreed to find the Bill of Indictment, or who did not agree, nor to detail the evidence on which the accusation was founded."

It is claimed that the defendant was denied the right under the Constitution of the State to give in evidence the truth of the libelous language in question.

30 Assuming the evidence offered would establish a complete defence, nevertheless the vote of the Grand Jury, what was said or done during its deliberations, is not competent evidence, on the grounds of public policy, because, "greater mischief would probably result from permitting its admission than from wholly rejecting it." Greenlief on Ev., Vol. 1, Sec. 236.

"On like principles of public policy, official discussions between heads of the departments of state and their subordinate officers are in general
40 treated as privileged communications. The Presi-

dent of the United States and the Governors of the several States are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosure would, on public consideration, be inexpedient, and where the law is restrained by public policy from enforcing the production of papers the like necessity of restraint is had over doing what would be the same thing in effect, namely, the receipt of secondary evidence of their contents." Greenlief on Evidence, 10 Vol. 1, Sec. 251.

Under the Constitution of the United States, Senators and Representatives can not be questioned outside of Congress for any speech or debate which took place in either house and this is due out of proper regard to public policy and while a Senator or a Representative in Congress, in the course of a speech or debate uses language germane to the subject under discussion which may impute a crime or misconduct to another nevertheless the person 20 so spoken of, although in fact, not guilty, cannot, under the terms of the Constitution make such Member of Congress answerable to him directly or indirectly by means of a criminal or civil action in the Courts. The theory, no doubt, being that the interests of the public is paramount to the interest of the individual and this doctrine has the same force and the like application to proceedings of the Grand Jury."

See also in this connection *State vs Dayton*, 30 23 N. J. L., 49.

3

Nextly it is complained that the Court denied a motion for the direction of verdict at the close of the State's case. (The motion to direct verdict appears at case page 127.) Proof of its publication had been made and if what Fish said concerning Johnson in the circular was untrue, there can be no question under the law but what it was libelous 40

and it was a question for the jury to say, under the proofs made whether the charge in the circular was true or not.

4

It is complained that there was error because the Court refused to charge the jury that the publication complained of was one of qualified privilege (case page 210, assignment No. 46, Supreme Court No. 27), and that an honest mistake was not punishable and that the publication of character or record of a candidate for public office were proper subjects for comment (case page 210, assignment No. 47, Supreme Court No. 38) and that it is one of the privileges of citizens to give the people this information in that the truth must not be concealed (case page 210, assignment No. 50, Supreme Court No. 31).

To accuse one holding public office of an offense is not privileged.

13 American and English Encyclopedia of Law, page 419.

Curtiss vs. Mussey, 6 Gray 261.

Hamilton vs. Eno, 81 N. Y., page 116.

Benton vs. State, 59 Law, page 560.

5

Nextly it is urged as a cause for reversal that the Court refused to allow the minutes of the Grand Jury to be introduced into evidence (case page 156).

Francis V. Lowden, as appears by case pages 155, 156, 157, was appointed Clerk of the Grand Jury in June, 1915, and had been subpoenaed to bring the minutes of the May Term, 1911 Grand Jury. His testimony substantially shows that the minutes of the May Term, 1911, Grand Jury were in the Prosecutor's office, but not in his possession.

The objection of the State (case page 155) to the introduction of such minutes in evidence was

based upon the ground that there were no official minutes and that there was no statute in New Jersey requiring official minutes to be kept, and upon the further ground that if there were minutes they would be in the custody and control of the Prosecutor. The Court thereupon ruled that if Lowden had the minutes in his possession he would not allow them to be offered unless they could be shown to be official minutes. Thereupon council took his exception.

10

“In the absence of a statute the Grand Jury is not bound to keep a record of the evidence before it and even though it did so for its own convenience they would not be official minutes or evidence of what transpired before them.”

U. S. *vs.* Reed, 27 Fed. Case No. 16134.
2 Blachford 435.

Gardner 64 N. Y. Sup. 760.

20

7 Federal, Case No. 3925, holds that the minutes of the evidence of a Grand Jury should be delivered to the District Attorney and should be kept by him among the records of his office.

Also it will be noted that counsel for the defendant was endeavoring to prove minutes of the Grand Jury by a person who did not have them in his possession and who it appears, was not Clerk of the Grand Jury at the time, to wit: May, 1911.

30

6

My remarks in this regard are complained of (case page 41) as a mis-statement of the law of libel in the presence of the jury, but it will be noted that no exception was taken and signed and sealed at the time and no application was made to the Court to deal with the statement. Likewise it is

40

further complained that this statement of the Prosecutor was concurred in by the Court (case page 182). No exception was signed and sealed to the statement of the Court.

The judgment of the Supreme Court should be affirmed.

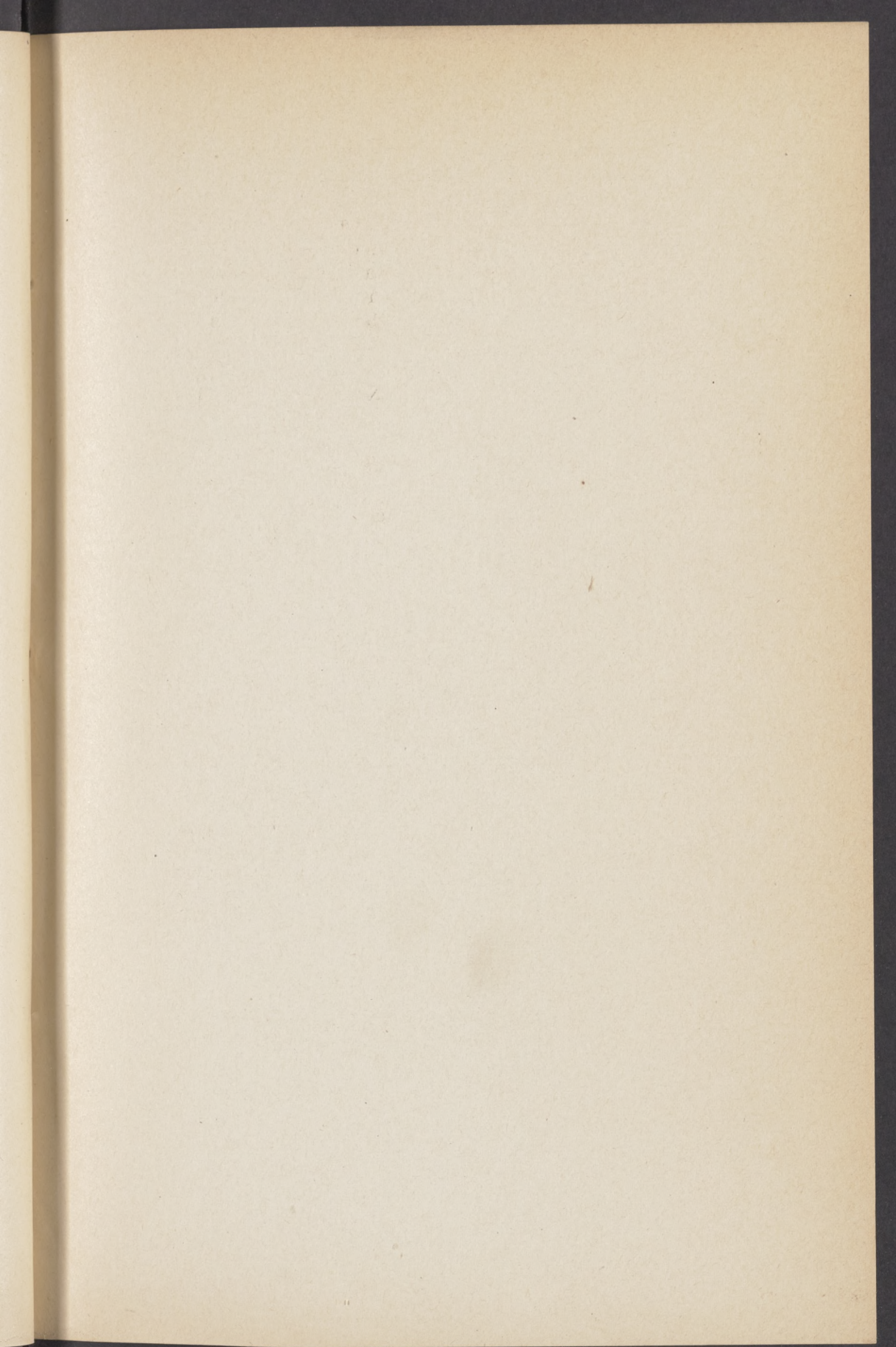
ALFRED A. STEIN,
Prosecutor of the Pleas,
Of Counsel for Defendant in Error.

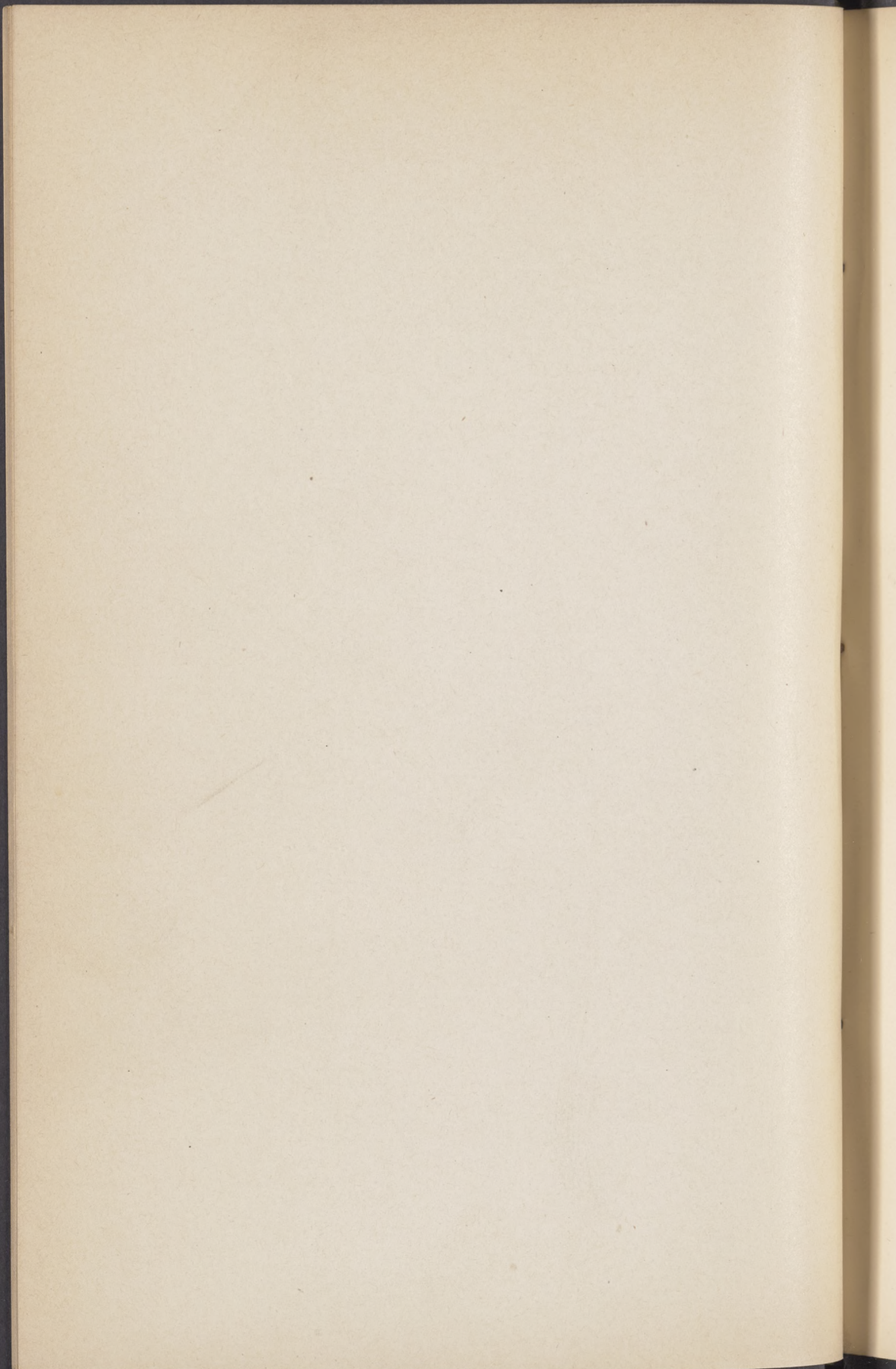
10

20

30

40





NEW JERSEY
COURT OF ERRORS AND APPEALS

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

HARWOOD FISH,
Plaintiff-in-Error.

In Error to
Supreme
Court.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The defendant at the time of the publication of the alleged libel for which he was indicted was Mayor of the Borough of Roselle Park, in the County of Union, and Chairman of the Progressive (Roosevelt) Party of Union County. The local organization in Roselle Park which supported his administration was known as "The Good Government League." In the campaign in the fall of 1915, the Republican Party had nominated for Chosen Freeholder, to represent the political division of which the Borough of Roselle formed a part, a candidate named William E. Johnson and the Democratic candidate was Noah Woodruff. The Good Government League endorsed Mr. Woodruff, who defeated Mr. Johnson by a large plurality. It was during this campaign that Mayor Fish issued the circular complained of, known as Exhibit P-2 (page 177 of the case) and it was mailed to the legal voters of the political division in which Mr. Johnson was

a candidate and circulated in no other way and to no other persons. The circular charged Mr. Johnson with a number of misdeeds, some of which were indictable, but from this list only one was selected as libelous by the Grand Jury and the defendant was indicted.

The indictment was presented at the January Term, 1916, of the Union Oyer and Terminer and charged the plaintiff-in-error with criminal libel in publishing of and concerning Johnson the following words: "As a member of a Grand Jury he succeeded in protecting the biggest swindler to my mind that ever struck the County, and although I understand an indictment was voted against his friend, for some unexplained reason it was never handed in."

(See State of case, p. 3.)

Upon a plea of "Not Guilty" the trial came on before his Honor James C. Connolly, and a jury in the Union Quarter Sessions on February 10th, 1916. (Case p. 9.)

The defendant attempted to prove the truth of the charge complained of but was met by the refusal of the trial court to allow any evidence of whatever nature as to what transpired in the Grand Jury room to be offered. Defendant then proceeded upon the theory that the publication of this circular by Fish, a legal voter of the Borough of Roselle Park, for the purpose of informing his fellow voters regarding the character and fitness for office of a candidate for their suffrages, was such an act as was qualifiedly privileged under the common law, and the law of this State, and that if Fish published it in good faith and in the belief that it was true, he was not guilty of libel.

To show good faith and lack of malice, testimony

was offered to prove the truth of statements contained in the same circular other than that quoted in the indictment. These offers were overruled and the correctness of the ruling is raised by Assignments of Error Nos. 11, 13, 22, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 50, 41, 42 and 44 and causes for Reversal Nos. 11, 19, 20 and 23 in the Supreme Court and by Assignment of Errors Nos. 2, 15, 16, 17, 18, 19, 22, 23, 24 and 25.

The defendant, in an effort to prove the truth of the statement complained of in the indictment, attempted to get in evidence the minutes of the Grand Jury of the May Term, 1911, but was not permitted to do so.

This ruling is raised by Assignment of Error No. 38 and Cause of Reversal No. 24, in the Supreme Court and by Assignment of Error No. 20 in this Court.

He attempted to prove by witnesses the truth of the statement contained in the indictment, but was not permitted to do so. The correctness of the ruling upon these questions is raised by Assignments of Error Nos. 12, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26 and by Causes for Reversal Nos. 12, 13, 14, 15, 17, 18, 19, 20, 21 and 25 in the Supreme Court and by Assignments of Errors Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 in this Court.

In the course of the trial, the Prosecutor made the unqualified statement before the Jury that if the state showed that the circular was sent out by Mr. Fish, it made him guilty of libel, and the Court responded "Certainly." This is alleged as Error and is raised by Exception (Case p. 182), by Assignment of Error No. 9 and Cause for Reversal No. 10 in the Supreme Court, and by Assignment of Error No. 1 in this Court.

At the close of the State's case, the defendant's attorney moved for a direction of a verdict of ac-

quittal, which was refused by the trial court and an exception allowed. This ruling is raised by Assignments of Error No. 19 and Cause for Reversal No. 16 in the Supreme Court, and by Assignment of Error No. 26 in this Court.

Various requests to charge were refused by the trial court and exceptions to such refusal were allowed. Various exceptions to the charge of the Court as delivered were prayed and allowed. The propriety of the charge and of the refusals to charge are raised by Assignments of Error No. 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58 and 59, and by Causes for Reversal Nos. 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39 in the Supreme Court, and by Assignments of Errors Nos. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39.

The Jury returned a verdict of guilty and the court imposed a fine of Two Hundred and Fifty Dollars (\$250).

The proceedings and judgment of the Union Quarter Sessions were affirmed by the Supreme Court on Writ of Error, bringing up the entire record under section 136 of the Criminal Procedure Act (Case p. 1); also on Bill of Exceptions (Case p. 181).

The questions presented are the refusal to direct a verdict of acquittal; the admission and rejection of evidence, the charge and refusals to charge of the trial court, the prejudicial statement made by the trial judge during the progress of the trial, and the judgment of affirmance in the Supreme Court upon each and every one of said questions.

Those relied upon for reversal are as follows:

1. Because said Supreme Court decided that the judgment ought not to be reversed for the reason that the trial judge said, in response to this state-

ment of the Prosecutor made during the trial in the presence of the Jury, to wit: "Now, then, this circular, even though it never bore the signature of anybody, if we show it was sent out by Mr. Fish, it makes him guilty of libel," "Certainly."

2. Because said Supreme Court decided that the Court of Quarter Sessions of Union County properly refused to admit testimony in support of charges contained in the publication other than the particular charge set up in the indictment.

3. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the witness, Joseph A. McDevitt, to testify about what happened before the Grand Jury.

4. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for the defendant to ask Joseph A. McDevitt, a witness for the State, the following question: "Without stating the testimony you gave, what was the subject matter upon which you testified before the Grand Jury on that day?"

5. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for the defendant to ask Joseph A. McDevitt the following question: "Did your testimony before the Grand Jury on that day relate to the sale of stock in this printing company by Snowden to your father?"

6. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for the defendant to ask Joseph A. McDevitt the following question: "You don't know. Did you tell Mr. Fish after you came out

of the Grand Jury Room after you had been before the Grand Jury, that Johnson, sitting in that Grand Jury, had conducted himself in such a manner, while you were in there, that he was called to order by another member of the Grand Jury?"

7. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for the defendant to ask Joseph A. McDevitt the following question: "Did you tell Mr. Fish that the questions that Johnson put to you in that Grand Jury Room made it appear to you as if Johnson were taking the part of this Dr. Snowden?"

8. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to testify as to the statement made to him by Joseph A. McDevitt outside of the Grand Jury Room.

9. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "What were the facts, without stating now what you testified to before the Grand Jury, what were the facts regarding the charge that you made?"

10. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to testify why he believed that Snowden was a swindler.

11. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "What did Mr. McDevitt tell you, if anything?"

12. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "Mr. Fish, what, if anything, led you to believe that an indictment had been found against Snowden?"

13. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to testify as to statements that had been made to the defendant by others about Mr. Johnson having ordered goods from Mr. Snowden.

14. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "What led you to believe that in that Grand Jury an indictment had been found against Snowden?"

15. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "How did you know he was an ex-hotel keeper in the West?"

16. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "What led you to say: 'As a Councilman in Roselle Park, Johnson was so dictatorial and abusive and so disgusted the decent people in the borough that he did not have the presumption to run for re-election?'"

17. Because said Supreme Court decided that said Court of Quarter Sessions properly refused

to permit the defendant to answer the following question: "What ground, if any, did you have for saying on this circular, of Johnson: 'He used the borough team for private work about his residence, and when I insisted upon his paying Fifteen Dollars for the use of it, he violently abused me at a council meeting and said that he had a perfect right to use the team in return for the work he did as a Councilman. I told him his idea of honesty in public life was very different from mine, and that having taken the office of Councilman without salary, he must pay for the team, which he did.'"

18. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to testify as to the discussion with Johnson in council meeting in Roselle Park relative to Johnson's use of the borough team for his private work.

19. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the defendant to answer the following question: "As a result of that conversation or after that conversation at the same meeting, did Johnson pay anything for the use of the borough team?"

20. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the minutes of the Grand Jury of the May Term, 1911, to be put in evidence.

21. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit Joseph A. McDevitt, a witness on the part of the defendant, to answer the question: "Did you or did you not tell Mayor Fish that

while you were in the Grand Jury Room a member of the Grand Jury called Johnson to order?"

22. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for defendant to ask Louis V. Hobbs, a witness for the defendant, the following question: "Upon a certain occasion after Mr. Fish became Mayor, and while you and William Johnson were both members of the Borough Council, did any discussion occur at a council, to your recollection, about Mr. Johnson having used the borough team for private work?"

23. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit the attorney for defendant to ask Louis V. Hobbs, a witness for the defendant, the following question: "At the meeting referred to did you see—did you or did you not see Johnson pay any money for the use of the borough of Roselle Park?"

24. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit William D. Finkle, a witness for the defendant, to testify as to a conversation which occurred at a meeting of the Borough Council between Mr. Fish and Mr. Johnson regarding Johnson having used the borough team for private work and not having paid for it.

25. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to permit William D. Finkle, a witness for the defendant, to answer the following question: "On that occasion, did you, as a result of that conversation or otherwise, see Johnson pay any money

to anyone for the use of the Borough of Roselle Park on account of using that borough team?"

26. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to direct a verdict of acquittal on motion of the attorney for the defendant after the testimony on the part of the State had been closed.

27. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

"If you are satisfied that defendant believed the charge complained of to be true, then I charge you that the publication was one of qualified privilege, and unless the State has proved beyond a reasonable doubt that the defendant was actuated by express malice against Johnson you must acquit."

28. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

"The selection of suitable persons for the performance of official service is essential to the interests of both the government and the citizen. These interests can be protected only by the communication of information and by free discussion concerning the fitness of applicants. It would tend to repress this necessary freedom, and would be a manifest injustice to the citizen, if communications of this character subjected the person making them to punishment in the event of an honest mistake. But these considerations disclose no ne-

cessity for a privilege broad enough to cover charges which are unfounded and malicious. A just distinction is established and reasonable protection afforded to every interest, by holding communications of this nature to be prima facie privileged. By virtue of this privilege, a defendant who has made a statement which cannot be substantiated is relieved from the effect of a legal presumption of malice, and is made liable only by proof of actual malice. The occasion in question was not one of absolute privilege, but was so far privileged as to protect a communication made in good faith and from an honest motive."

29. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

"When a man becomes a candidate for public office, his character for honesty and integrity and his fitness for the position are put before the public and are thereby made proper subjects for comment."

30. Because Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

"If in commenting upon the qualifications for public office of a man who is a candidate for that office, a person publishes a statement which he believes to be true and in making such publication is not moved by actual malice against such candidate, he is guilty of no criminal offense."

31. Because said Supreme Court decided that said Court of Quarter Sessions properly refused

to charge the Jury, when duly requested by said defendant to so charge, as follows:

“The people have a right to know how their public affairs are being conducted, and how the duties of their officers are being performed, and it is one of the privileges of citizens to give the people this information, and that, if the information so given is true, or if the publishers believe it to be true and have reasonable and probable cause for so believing, the law protects them in that the truth must not be concealed; that the public good requires that it be allowed to be known, and that all which the law requires of publishers is good faith and an honest belief that their statements are true, and that such belief be founded on reasonable and probable grounds.”

32. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

“Defamatory words uttered in a privileged communication are not indictable unless there be proof of actual malice. If such words are uttered in good faith on a privileged occasion, in an honest belief that they are true, the party injured is without remedy.”

“The occasions which give rise to the privilege of speaking or publishing words which otherwise would be defamatory and, indictable are various, but among them are comments by electors upon the character of candidates for office and a criticism of the public acts of a candidate for office may be inserted in a public newspaper or be proclaimed by a circular.”

33. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

“Malice is manifested by the intentional doing of a wrongful act to the injury of another, without just cause or excuse.”

34. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

“If you find that the defendant honestly believed from his own experience in the Grand Jury Room and from what he had been told by other persons who had been before the Grand Jury in the same matter and were in a position to form an opinion as to Johnson’s attitude, that Johnson had protected Snowden from indictment, then you must acquit unless you are satisfied beyond a reasonable doubt that the circular was published from some other motive than that expressed in the circular.”

35. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

“The circular itself states that it sets forth the public record of William E. Johnson, a candidate for office, as to which the voters are entitled to be informed. There is no evidence that the circular was published outside of Roselle Park Borough and Union Township, the political division of which Johnson was a candidate.

“In these circumstances the State must prove

beyond a reasonable doubt: That Fish knew the charge against Johnson to be false, and that he was actuated by malice and ill-will against Johnson in making the charge."

36. Because said Supreme Court decided that said Court of Quarter Sessions properly refused to charge the Jury, when duly requested by said defendant to so charge, as follows:

"If it is true, as stated in the circular, that its purpose was to inform the voters of Johnson's public record, and if Fish believed the charge complained of to be true, then Fish must be acquitted unless you believe that he was actuated by malice in publishing the circular, and by malice, in this connection, I mean some motive different from that which made the statement privileged, and which was itself contrary to good morals. Indignation towards Johnson for his supposed offenses would not be, per se, contrary to good morals.

37. Because said Supreme Court decided that the Court of Quarter Sessions properly charged the jury as follows:

"Now, having become a candidate for office, Johnson necessarily submitted himself to the criticism of his fellow citizens, and the defendant or any other citizen had a right to show his want of qualification for the office he sought. His inexperience, his failure to have properly discharged the duties of other offices which he filled, but, as I have said, when the criticism attacks one's honesty and integrity, it must be true, and be published with good motives and for justifiable ends."

"You are to take the whole paper submitted in evidence, containing the alleged libelous matter,

and the testimony in the case and say whether the defendant told the truth of Johnson, and in so doing, was prompted by good motives and for justifiable ends."

38. Because said Supreme Court decided that the Court of Quarter Sessions properly charged the Jury as follows:

"The law does not require actual malice to be proved if the libel is one that imputes to another the perversion of public justice in his office of Judge or juror. In that case the law will presume malice, and the burden is on the defendant to show that he was not actuated by malice. I therefore repeat if the defendant has shown that what he published was true and that it was published with good motives and for justifiable ends, then the jury should acquit."

39. Because said Supreme Court decided that the Court of Quarter Sessions properly charged the Jury as follows:

"The defendant insists that the publication was a privileged one. And that, under the circumstances he cannot be held to answer for it. A person is conditionally privileged to communicate to his fellow citizens what is of public interest, and conducive to public good, even when the publication proves injurious to another, but then he must not be swayed by malice, and the publication must be true. Therefore, the jury, under the law, are required to determine whether the language attributed to the defendant and set forth in the indictment is libelous; whether the defendant has shown its truth, and whether it was published by the defendant with good motives and for justifiable ends."

40. Because the judgment aforesaid was given against the said Harwood Fish, whereas by the law of the land, judgment should have been given for him; which is a cause for reversal.

41. Because the case was tried by the State, under sanction of the Court, upon the theory that paragraph 5 of Article 1 of the Constitution of the State had abrogated the common law rule under which it is permitted to comment upon the public record of a man who is a candidate for public office if the communication is made without malice and in the belief that it is true; and that said provision of the Constitution tends to limit rather than to enlarge the liberty of speech and of the press.

42. Because there is no evidence in the case to warrant or sustain the verdict of the Jury and the judgment of conviction in said Court of Quarter Sessions and the said Supreme Court erred in affirming said judgment of said Court of Quarter Sessions.

43. Said Supreme Court erred in divers other respects in affirming the judgment of said Court of Quarter Sessions and said judgment of the Supreme Court should be reversed, set aside and for nothing holden, as well as said judgment of the Court of Quarter Sessions of Union County.

Brief of Argument.

It is stated in the opinion of the Supreme Court (case p. 232) that the defendant contends that he was entitled to circulate libelous articles with relation to the character of Johnson, a candidate for office, provided he acted in good faith, believing

them to be true, by which it appears that the defendant has failed to make his contention clear to the Supreme Court.

What the plaintiff in error does claim is that inasmuch as Johnson was a candidate for the office of freeholder, he, Fish, a legal voter of the political district to be represented by Johnson if elected, was entitled to communicate to the other legal voters of such district, by a circular, information as to the character and fitness for office of Johnson, provided he acted in good faith and without malice, and in the belief that the statements contained in the circular were true, though such circular might otherwise be libelous.

While the rule contended for is not universally accepted, it is the settled law in many jurisdictions. With the utmost deference to the Supreme Court, we submit that it was adopted as the law of this State by this Court in *King vs. Patterson*, 49 N. J. L. 417.

In the case of *Marks vs. Baker*, 9 N. W. (Minn.) 678, the newspaper owned by the defendant had published an article which accused the plaintiff, who was the City Treasurer of Mankato, and was at the time a candidate for re-election to that office, of embezzling city funds.

The Court said: "The rule is that a communication made in good faith upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral or social, if made to a person having a corresponding interest or duty, is privileged; that in such case the inference of malice which the law draws from defamatory words is rebutted, and the onus of proving malice is cast upon the person claiming to have been defamed. That the subject matter is one of public interest in the community of which the parties to the com-

munication are members is sufficient as respects interest to confer the privilege. The subject matter of the communication in the case at bar was one of public interest in the City of Mankato where the publication was made and one in which the defendants had an interest as residents and tax payers of the City. It was therefor a privileged communication within the rule mentioned, if made in good faith."

From *Briggs vs. Garrett* (2 Atl. p. 513), we quote the following:

"Privilege is protection to a citizen who makes a defamatory publication, when his interest or those of society require that he should speak. * * * It is mistakes, not lies, that are protected under the doctrine of privilege. A communication, to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made, in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel; actual malice must be proved before there can be a recovery; and whether a communication be privileged or not is a question for the Court, not the jury."

The other and more liberal view, which has the sanction of considerable authority, holds that a charge made against a candidate for public office is privileged regardless of the fact that the charge is a false statement of fact, provided the person making it acts in good faith, without malice, believing the charge to be true with reasonable and probable ground for such belief.

Pattangall vs. Mooers, 94 Atl., p. 561-566.

"I conceive the law to be that though that which

is spoken or written may be injurious to the character of the party, yet if done bona fide, as with a view to the investigation of a fact in which the party is interested, it is not libelous."

Lord Ellenborough in *Delany vs. Jones*,
4 Esp. 191.

*O'Rourke vs. Lewiston Daily Sun Pub.
Co.*, 36 Atl. (Me.) 398.

In the case of *King vs. Patterson*, 49 N. J. L. 417, Mr. Justice Depue, speaking for the Court of Errors and Appeals, said:

"The occasions which give rise to the privilege of speaking and publishing words which otherwise would be defamatory and actionable are various. Thus, memorials to officers of State respecting the conduct of magistrates and officers, *comments by electors upon the character of candidates for office* * * * come within the class of privileged communication. *A criticism of the public acts of a candidate for office may be inserted in a public newspaper or be proclaimed by a circular*, but such publicity given to comments derogatory to the character of a servant or to the financial standing of a trader would be illegal.

I.

If the circular was of such a nature and if it was published under such circumstances and in such a manner as to bring it within the class of communications which the law denominates privileged communications, then it follows that the trial court erred (1) in overruling testimony in support of the charges contained in the publication other than the particular charge set up in the indict-

ment; (2) in overruling testimony tending to show that Fish had reason to believe that the very charge quoted in the indictment was true; (3) in denying the motion that he direct the Jury to acquit; (4) in charging the jury that unless the words complained of were actually true then the Jury must acquit and that no actual malice need be proved, and (5) in refusing to charge that if they believed that defendant believed the truth of the charge published and was actuated by good motives, then in the circumstances the publication was one of qualified privilege.

1.

The Court erred in overruling testimony in support of the charges contained in the publication other than the particular charge set up in the indictment.

Assignment of Error No. 2 (case p. 235).

The questions here referred to were as follows:

Questions asked of the defendant:

Q. How did you know he was an ex-hôtel keeper in the West?

(Case p. 148) assignment No. 28. In Sup. Court No. 15.

Q. What led you to say, "As a councilman in Roselle Park Johnson was so dictatorial and abusive and he so disgusted the decent people in the borough that he did not have the presumption to run for re-election."

(Case p. 148) Assignment No. 29. In Sup. Court No. 16.

“Q. What ground, if any, did you have for saying on this circular of Johnson: “He used the Borough team for private work about his residence, and when I insisted on his paying fifteen dollars for the use of it, he violently abused me at a Council Meeting and said he had a perfect right to use the team in return for the work he did as a councilman. I told him his idea of honesty in public life was very different from mine, and that having taken the office of councilman without salary he must pay for the team, which he did.”

(Case p. 149) Assignment No. 30. In
Sup. Court No. 17.

Q. Did you have a discussion with Johnson in Council meeting at Roselle Park, relative to his using the town team, the borough team for his private work? A. I did.

Q. What was that conversation?

(Case p. 150) Assignment No. 32. In
Sup. Ct. No. 18.

Q. As a result of that conversation or after that conversation at the same meeting, did Johnson pay anything for the use of the Borough team?

(Case p. 150) Assignment No. 33. In
Sup. Ct. No. 19.

Questions asked of the witness, Hobbs:

Q. Upon a certain occasion after Mr. Fish became Mayor and while you and William Johnson were both members of the borough council, did any discussion occur at a council meeting to your recollection about Johnson having used the borough team for private work?

(Case p. 163) Assignment No. 40. In Sup.
Ct. No. 22.

Q. At the meeting referred to did you see—did you or did you not see Johnson pay any money for the use of the Borough of Roselle Park?

(Case p. 164) Assignment No. 41. In
Sup. Ct. No. 23.

Questions asked of the witness, Finkle.

Q. Do you remember whether or not at a certain meeting of the borough council there arose a discussion between Mr. Fish and Mr. Johnson regarding Johnson's having the use of the borough team for private work and not having paid for it?
A. Yes.

Q. Will you state the substance of that conversation?

(Case p. 166) Assignment No. 43. In
Sup. Ct. No. 24.

Q. On that occasion, did you, as a result of that conversation or otherwise, see Johnson pay any money to any one for the use of the Borough of Roselle on account of using that borough team?

(Case p. 166) Assignment No. 44. In
Sup. Ct. No. 25.

The circular was properly admitted in evidence and as the Court truly said in this connection (p. 63, line 40) the question of malice was in issue.

Wharton's Criminal Law, 11 Ed. Vol. 3,
2160.

18 Am. & Eng. Encyc. of Law, 1005.

The entire circular being in evidence, the question was as to the malice of the defendant in sending out the circular, including its several charges and insinuations, for he published the circular, not the isolated statement quoted in the indictment.

“So where the defense is that the libel complained of is a bona fide comment on certain facts, the defendant is clearly entitled to prove those facts unless the Court rules that they are not of public interest.”

Odger’s Libel and Slander, 2 Eng. Ed. 444.

“Where the plaintiff, in order to prove malice, has given in evidence other words of the defendant not set out in the record, the defendant may prove the truth of such other words for he had no opportunity of pleading a justification.”

Same, at page 445.

Other parts of the article in which the alleged defamatory words were published may properly be given in evidence to show and explain the animus of the charge.

25 Cyc. 495.

2.

The questions which were asked with a view to showing that Fish had reason to believe that the charge against Johnson complained of in the indictment was true, were as follows:

Questions asked of the witness, McDevitt:

“Q. You don’t know. Did you tell Mr. Fish after you came out of the Grand Jury room after

you had been before the Grand Jury, that Johnson, sitting in that Grand Jury, had conducted himself in such a manner while you were in there that he was called to order by another member of the Grand Jury?"

(Case p. 116) Assignment No. 16. In Sup. Court No. 6.

Q. Did you tell Mr. Fish that the question which Johnson put to you in that Grand Jury room made it appear to you as if Johnson were taking the part of this Dr. Snowden?

(Case p. 116) Assignment No. 17. In Sup. Court No. 7.

Questions asked of the defendant.

Q. Did you have any other reason for believing that—did you have any other reason other than your personal experience in that Grand Jury Room, for believing the statement you made regarding Johnson's conduct as a member of that Grand Jury to be true? A. I did.

Q. What was the reason? A. Statements made by Mr. Joseph McDevitt, outside of the Grand Jury Room.

Q. What was the statement?

(Case p. 138) Assignment No. 20. In Sup. Court No. 8.

Q. When you wrote that article did you believe that Snowden was a swindler? A. I did.

Q. Why did you believe that?

(Case p. 141) Assignment No. 22. In Sup. Court No. 10.

Q. What did Mr. McDevitt tell you, if anything?

(Case p. 142) Assignment No 20. In Sup. Court No. 8.

Q. Mr. Fish, what, if anything, led you to believe that an indictment had been found against Snowden?

(Case p. 142) Assignment No. 21. In Sup. Court No. 12.

The Court also refused to permit the defendant to tell what others had told him about Johnson having ordered goods from Snowden. (Case p. 143). Assignment No. 25. In Sup. Court No. 13.

“The defendant may, under general issue, show as tending to disprove malice, that he believed and had reasonable ground to believe that the charge made by him was true and the facts and circumstances which induced that belief.”

Amer. & Eng. Encyc. 18-1008.

“In every case where a publication is made the foundation of a criminal action for libel, malice is an essential ingredient, and therefore any evidence which tends to show a want of malice is admissible. So, to rebut malice, any mitigating circumstances, or such as show a justifiable motive, may be admitted, and likewise any evidence which *tends* to show that the charges contained in a libelous publication are true, because, if a publication defamatory in character is found to be false, it is itself evidence of a malicious intent, and such evidence may be admitted for the purpose of repelling the legal inference of malice, even though it be insufficient in justification.

People vs. Glassman, 42 Pac. 956.

In *Lawler against Earle*, 5 Allen (Mass.) 22, testimony as to what the defendant had been told by others, was held admissible because it tended to show that the defendant spoke the words in good faith and believed them to be true, if this rebutted the charge that they were fabricated by him maliciously. "Where one's *belief* or *state of mind* is to be proved, evidence of communications made to him a considerable time beforehand is competent." Citing *Carpenter v. Allen*, 3 Allen (Mass.) 32. See also 25 Cyc. 585.

"The accused should always be permitted to testify to his own intention and may always prove all the circumstances under which publication was made, the facts on which it was based, and the source of the information which is contained in the statement."

Underhill Criminal Evidence, 425.

"Thus if the defendant has pleaded privilege, he may show that he reasonably and bona fide believed in the truth of the charge he made, and it is no objection that the grounds of his belief are so forcible as to convince every reasonable man of the plaintiff's guilt."

Huson v. Dale, 19 Mich. 17; *Odgers*, page 445.

3.

The motion that the Jury be directed to return a verdict of acquittal should have been granted.

(Case p. 127) Cause for Reversal 16 In Sup. Court Assignment No. 26.

The circular (p. 177) declares the purpose for which it was issued; there was no evidence that a single one was sent to a non-voter; the witness Woodruff (p. 89, line 17) declared that Fish had told the witness that he had nothing against Johnson, but thought the voters had a right to know what kind of a man they were voting for.

The witness Phillips testified that as far back as August, 1914, Fish had told him that he (Fish) had been told confidentially that an indictment had been found against Snowden, but through Johnson's efforts had not been turned in (p. 72, line 35, et seq.)

Thus it appeared from the state's own testimony at the close of its case that Fish had reasonable cause to believe what he wrote about Johnson; that he wrote and published it for the purpose expressed in the circular itself, and that he had no malice against Johnson.

This motion was addressed to the discretion of the Court and is reviewable under Section 136 of the Criminal Procedure Act. The denial of the motion resulted in the conviction of the defendant and the judgment should have been reversed in the Supreme Court on this ground.

The Court erred in charging the jury (a) that a person who publishes a criticism attacking one's honesty and integrity must prove not only the truth of his statements but that his motives in publishing it were good and for justifiable ends. This was in effect to deny to the defendant the benefit of the only defense he was permitted to offer and amounted to a charge to convict, (Case p. 214. Assignment No. 57. Sup. Court No. 37.) (b) that malice in such cases as the present the law will presume malice and the burden is on the defendant to show that he was not actuated by malice. (Case p. 214. Assignment No. 58. Supreme Court No. 38.)

5.

The Court erred in refusing the request of the counsel for the defendant to charge the Jury that (a) the publication complained of was one of qualified privilege and unless the State had proved beyond a reasonable doubt that the defendant was actuated by express malice they must acquit, (Case p. 210. Assignment No. 46. Supreme Court No. 27) or that (b) an honest mistake was not punishable, or that (c) the public acts or record of a candidate for public office were proper subjects for comment and that the law of this State would protect such comment made in good faith and from an honest motive, (Case p. 210. Assignment No. 47. Supreme Court No. 28) or that (d) it is one of the privileges of citizens to give the people this information in that the truth must not be concealed. (Case p. 211. Assignment No. 50. Supreme Court No. 31).

That the Court erred in refusing to charge the Jury as follows: "Defamatory words uttered in a privileged communication, etc." (Case p. 212. Assignment No. 51. Supreme Court No. 32). These words are quoted from the opinion of the Court of Errors and Appeals of New Jersey in the case of *King vs. Patterson*, 49 N. J. L. 417 to 442 at pp. 419 and 420, and amount to a statement of the law of this State upon which the defendant relies.

That the Court erred in refusing to charge that "Malice is manifested by the intentional doing of a wrongful act to the injury of another without just cause or excuse," the definition ordinarily accepted of malice in its legal sense as the Jury were entitled to know. Consistent with the theory that in the circumstances malice was presumed, and with the Court's charge, the State made no attempt to show malice on the part of the defendant, either

in its legal sense or in its popular sense of personal animosity, but the defendant reading the law otherwise offers in his defense that throughout the trial it appeared that defendant had received information from which he might fairly believe that what he said was true. The State's own witness testified that Mr. Fish expressly stated that he had no personal feeling against Johnson (Noah Woodruff's testimony, Case p. 89). And Fish himself states that he considered what he did to be his public duty. Nor does anything in the course of the trial appear even inadvertently to the contrary.

II.

If we are wrong in our claim that the communication was a privileged one and if the only defense available to the defendant was to prove the truth of the charge in the circular which related to Johnson's service as a Grand Juror, the defendant suffered manifest injury by the rulings of the trial Court upon the offers of evidence tending to prove that charge.

In order to prove what was said about Johnson it was, of course, necessary to prove some matters that had transpired in the Grand Jury room.

The trial Court ruled that no person, Grand Juryman, witness or employee in the service of the Grand Jury, could say a word as to which was done or said in the Grand Jury room (Case pp. 104, 116, 137). Exceptions were taken and allowed to these rulings and error assigned thereon. Assignment 12, Reason 12, Assignment in Supreme Court 3.

The Supreme Court held that the ground upon which this testimony was overruled, namely, that it had a tendency to violate the secrecy of the Grand Jury room, was unsound (Case p. 231), but ap-

plied their ruling to the offer to show that the facts had been communicated to Fish by McDevitt, ignoring or overlooking the fact that we had endeavored to show directly what had been done and said in the room, in the effort to show that what the circular charged was true, not merely that Fish had reason to believe it to be true.

If, in the opinion of the Supreme Court, the exclusion of such evidence upon the ground declared by the trial Court was error then we submit that the defendant suffered manifest wrong and injury in the exclusion of such testimony and we venture to submit that if the Supreme Court had applied its ruling on the testimony of McDevitt to our effort to show by his testimony that the charges in the circular were true, the decision of said Supreme Court on this point might logically have been otherwise.

In considering the several attempts of the defendant to prove the truth of the charge complained of in the indictment it should be observed that the charge consists of several elements and we submit that it was incumbent upon the defendant to prove not only that Johnson protected Snowden, but that Johnson was a swindler, or that Fish had good reason to believe that he was. The right to offer testimony in proof of this was flatly denied by the trial court (Case pp. 140-141). In attempting to prove that Johnson, as a Grand Juror, did protect Snowden and prevent an indictment from being handed in, it was competent to prove the attitude and conduct of the man; such conduct as surprised rather than infuriated McDevitt, the State's witness, (Case p. 113) but the trial Court announced very emphatically (at page 104) that he would not permit any witness to tell anything that transpired in the Grand Jury room whether it concerned Johnson or whether it concerned any other person.

Something did occur in the Grand Jury room that did surprise McDevitt, and it was in connection with Johnson's attitude on the Snowden matter.

In support of our contention that in the Court's rulings as to the secrecy of the Grand Jury's proceedings the Court erred, we quote the following:

"These illustrations of the extent of the rule requiring secrecy of the Grand Jury's proceedings amply sustain the statement often made that any person may disclose in evidence what transpired before the Grand Jury, whenever such disclosures become necessary for the protection of public or private rights."

12 R. C. L. 1040

The Court refused to allow the minutes of the Grand Jury to be introduced in evidence (Case p. 156). The charge against Johnson was substantially that he succeeded in having the vote by which an indictment against Snowden had been ordered reconsidered, and it is submitted that the minutes or records of that Grand Jury, whether official or unofficial, which might show that such action had been taken were competent evidence to prove the truth of that charge made against Johnson in the circular. It was for this purpose that it was desired by the defendant to have the minutes offered in evidence and not to show what any particular Grand Juror did or said regarding the Snowden complaint. We ask the Court to take judicial notice of the fact that the minutes kept by the Clerks of the Grand Juries contain a list of the witnesses called, a short abstract of the testimony given by each and a memorandum as to whether an indictment was voted or not, and if an indictment be voted and reconsidered a statement of that fact. Thus "Bill." "Reconsidered." "No bill."

It appears from the evidence that there is a minute book of the Grand Jury of the May Term 1911 (Case p. 156). The trial Court said that these minutes were kept for the officer's own purposes. One of the officers for whose purposes they were kept is the Prosecutor. There was evidence from which the Jury might infer that a true bill has been voted against Snowden and that the Prosecutor had drawn it (Case p. 146) and the defendant then had to prove, if he could, that the vote upon the bill was reconsidered. Of this fact the minutes would be evidence and the best evidence.

20 Amer. & English Encyc. of Law, Second Edition, p. 799.

"All facts having rational probative value are admissible, unless some specific rule forbids."

Wigmore on Evidence, Section 10.

We beg leave to refer to the circumstances that the disclosure at the time of this trial more than four years after the session of the said Grand Jury whether or not such bill was voted and reconsidered could in no way threaten defeat of justice, which is the fundamental reason for the rule as to the secrecy of the Grand Jury's proceedings.

Further, we submit that inasmuch as Fish was debarred from giving evidence as to the testimony which was given before the Grand Jury upon the Snowden complaint, he should have been permitted to tell the facts regarding the charge (Case p. 139). Certainly, it was competent to show that Snowden had done, something for which he should have been indicted.

We complained in the ninth assignment and in the eleventh cause for reversal of the statement of the Court made in reply to a speech of the prosecution (p. 41, line 36).

It will be observed that the attorney for the defendant begged the Court to have the stenographer read back so that the error might be corrected, but that the Court hurried on and not only failed to afford an opportunity for the making of a proper motion but did not then grant an exception. Later when the matter was brought to his attention the Court did allow and seal an exception. (Case p. 182.) This exception was overlooked by the Supreme Court and the point was dismissed for the very reason that no exception had been taken.

This statement was made in the presence and hearing of the Jury and amounted to a declaration that if Fish sent out the circular, he was guilty of libel. As Mr. Fish was afterwards constrained to admit that he did send out the circular, thus supplying the only element that was lacking to conclude his guilt, how can it be said that this remark of the Court was not prejudicial to the defendant.

In *People v. Glassman* (42 Pac. at page 959) the trial Court said in the presence of the Jury, "Now, then, the defendant in this case, or the defendants in this case, are charged with publishing certain matters with respect to a citizen of the town which is libel. It is libelous by its terms and charges not only crimes, but charges matters which are intended to make a man infamous and ridiculous in the eyes of the community."

It was insisted that by the use of this language the Court declared the defendant guilty of the offense charged in the presence of the Jury, before the case was submitted to the Jury.

Held: Error.

To avoid any confusion that might arise because of the arrangement of the brief, we beg to emphasize our claim that in order to rebut the inference of malice, Fish had the right to show his belief

in the truth of the statements and his grounds for that belief, regardless of the question of privilege.

We submit that the cases cited under 1, 2, above, support this view.

For these reasons, we respectfully submit that the judgment should be reversed.

CODDING & OLIVER,

Of Counsel with Plaintiff-in-Error.

[155]

in the front of the... and the...
the... of...
the... and the... of...

for these... as...
the... of...

...

...

