Congressional Investigations:

DEFAMATION IMMUNITY

RECENT congressional investigations have raised in acute form the problem of the remedies for defamation in congressional hearings. A person seeking to bring a libel suit is confronted, first of all, by the absolute privilege of legislators to publish false and defamatory matter in the performance of legislative functions, a privilege based on immunity explicitly granted by the United States Constitution and the constitutions of a large majority of the states. Further, these provisions have been liberally construed by extending immunity to all things generally done in a session of the legislature, whether in committees or the general assembly. This privilege does not extend, however, to a congressman's repetition outside Congress of remarks originally made within the scope of his legislative duties. An absolute immunity from defamation suits is also usually considered to protect witnesses compelled to appear before congressional investigating committees. The privilege, which was extended by analogy to that granted judicial witnesses, appears to be limited only by the requirement that the witness's answers must be such that he could reasonably believe them to be pertinent to the questions asked; he need not decide for himself whether the questions are relevant to the

1 Prosser, Torts § 94(a)(2) (1941); Rest., Torts § 590, Comment a (1938).
3 In Coffin v. Coffin, 4 Mass. 1 (1808), Chief Justice Parsons discussed the scope of a legislator's privilege at length, stating that it extended to debates and speeches, voting, written reports—whether exercised according to the rules or irregularly—and even extends, in certain cases, outside the walls of the representatives' chamber. In sum, a legislator's privilege included everything said or done by him in the exercise of the functions of that office. In Kilbourne v. Thompson, 103 U.S. 168 (1880), the Supreme Court held a resolution, the report to the House, and the vote on it to be privileged. Cochran v. Couzens, 42 F. 786 (App. D.C., 1900) and Cole v. Richards, 108 N.J.L. 356, 158 Atl. 466 (1932), held a speech on the floor to be privileged. A liberal construction will also be used in determining whether the statements made are pertinent and relevant to the matter under inquiry. Tanner v. Gault, 20 Ohio App. 243, 153 N.E. 124 (1926); cf. Barsky v. United States, 167 F. 2d 241 (App. D.C., 1948).
4 Van Riper v. Tumulty, 26 N.J. Misc. 37, 56 A. 614 (S.Ct., 1948); see Coffin v. Coffin, 4 Mass. 1 (1808).
5 "There is no absolute privilege to disseminate the Congressional Record or reprints therefrom, either by a Senator, or a Congressman, or by a third person." Republication of legislative proceedings has only qualified privilege. Rest., Torts § 590, Comment b (1938). See Long v. Ansell, 69 F. 386 (App. D.C., 1933), aff'd 293 U.S. 76 (1934).
6 Prosser, Torts § 94(a)(2) (1941).
matter under inquiry.\textsuperscript{7} The protection afforded a voluntary witness is more in doubt. In *Wright v. Lothrop* the Massachusetts court decided that the privilege of one who testifies voluntarily before a legislative committee is conditional rather than absolute and may be defeated by malice; in determining malice the court may consider whether the statement was relevant to the inquiry.\textsuperscript{8} Nevertheless, extension of the analogy between legislative and judicial witnesses might provide a basis for granting a more complete privilege to voluntary witnesses in legislative hearings.\textsuperscript{9} It has, on the other hand, been argued that in the absence of the many procedural limitations serving to curb defamation in court all witnesses before legislative hearings should be granted only a conditional privilege.\textsuperscript{10} As the law stands, however, the immunity from suit of legislators and at least those witnesses compelled to testify is absolute. Various changes in the present law have been proposed, ranging from congressional procedural reforms to a proposal making congressmen subject to suit for libel with the government paying the expenses of recovery. But the difficulty of obtaining an effective remedy against either congressman or witnesses is apparent when it is remembered that it would be dependent for its initiation upon congressional action.

The problem of defamation in congressional investigations is magnified many times when newspapers all over the country republish libelous statements.\textsuperscript{*} As a recent example, Owen Lattimore described the strategy used by his lawyers as having been adopted knowing the battle was being fought largely in the newspapers.\textsuperscript{12} Yet, as he saw it, his only recourse was to write a book setting forth the facts in rebuttal of the charges made against him. The general impression apparently is that newspapers which reprint defamatory remarks made in Congress are immune from libel suits. And the *Cresson* cases,\textsuperscript{13} as the most recent judicial expression on this issue, indicate that such an impression may be justified. Defamatory remarks made during a congressional investigation were picked up by several nationwide news services and published by newspapers all over the country. Libel suits brought against four newspapers resulted in decisions by courts in Pennsylvania, Kentucky, Minnesota, and Texas agreeing that the plaintiffs were not entitled to relief. Since the state-

\textsuperscript{*} Consult Dillard, The Role of the Press, page 585 supra.


\textsuperscript{8} 149 Mass. 385, 21 N.E. 963 (1889).

\textsuperscript{9} Compare Prosser, Torts § 94, at 824 (1941) with ibid. § 94, at 828.

\textsuperscript{10} Protection from Defamation in Congressional Hearings, 16 Univ. Chi. L. Rev. 544, 553 (1949).

\textsuperscript{11} Lattimore, Ordeal by Slander (1949).

ments published set forth the majority report of a committee appointed by Congress, they were clearly within the privilege to reprint legislative proceedings and could not afford a basis of liability, even though libelous.

However, the context of rules in which newspaper liability is set would seem to indicate the possibility, or at least the desirability, of a remedy in the form of an action for defamation. Generally, a newspaper, on the basis of its strict liability for publishing libel, is liable for intentionally publishing a remark though ignorant of its defamatory meaning, and has no privilege to publish defamation merely because of its news value. In addition, the rule is well established that one who repeats is as liable as one who originates a defamatory remark. Finally, the closely related privilege granted the press to comment on matters of public concern is limited by the requirement that the comment must be presented as honest opinion.

A privilege to reprint the proceedings of the legislature, though now well established, did not exist at early common law. The privilege, first recognized in connection with court proceedings, by analogy was extended to legislative and administrative proceedings. Since cases on judicial privilege constitute by far the majority of decisions on newspaper privilege, and since the courts themselves have not distinguished between the two instances—treating the privileges, as well as the limitations on them, as different aspects of the same problem—most of the cases concern reports of court proceedings.

In 1799 the Court of King's Bench, considering whether to grant an information for criminal libel, treated the doctrine of newspaper privilege to print judicial proceedings as well settled, justifying it in terms of the importance to the public that court proceedings should be universally known. The question of the right to report legislative as well as judicial proceedings arose in 1836, when it was decided that the fact that the defendant had been directed by the House of Commons to publish all their parliamentary reports did not justify his publishing a report containing a libel. Shortly thereafter Parliament, alarmed by the implications of this decision, passed an act providing that all such actions should be stayed on the production of an affidavit or certificate stating that any paper, the subject of an action for libel, was printed on the order of either House of Parliament. Whether a newspaper was liable for printing, on its own initiative, an accurate report of a debate in the House of Lords

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\(^{12}\) Prosser, Torts §94(b)(4) (1941).
\(^{13}\) Prosser, Torts § 93, at 812 (1941); Rest., Torts § 578 (1938); Chafee, Government and Mass Communications 79 (1947).
\(^{14}\) Prosser, Torts § 94(b)(5) (1941); Rest., Torts § 606(1) (1938); Chafee, Government and Mass Communications 83 (1947).
\(^{15}\) For a discussion of the development of the concept of privilege consult 8 Holdsworth, History of English Law 375 (1926).
\(^{16}\) Rex v. Wright, 8 T. R. 293 (K.B., 1799).
\(^{17}\) Stockdale v. Hansard, 9 A. & E. 1 (Q.B., 1839).
\(^{18}\) 3 & 4 Vict., c. 9 (1840).
was first decided in 1868 in *Wason v. Walter*. There the conclusion was reached that the need for the community to know what happened in Parliament made essential a holding that such a report was privileged.

A similar result was reached in the American cases. A year after the decision in *Wason v. Walter*, the Louisiana supreme court held that a newspaper report of testimony given before a congressional committee, parts of which were libelous, was privileged. In *Cowley v. Pulsifer*, Justice Holmes set forth the reasons behind the privilege to reprint judicial proceedings:

It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Though these cases agreed that there were valid reasons for granting a privilege to reprint legislative and judicial proceedings open to the public, they also agreed that the privilege could be defeated. Under the common law and most state statutes such a report must meet certain requirements to come within the protection of the privilege.

*A Fair and Accurate Report*

The fairness and accuracy required of a privileged report are limited to the report itself, since unfairness or procedural inadequacy within the proceedings does not affect the privilege to report them. Further, the report need be only substantially correct—a few slight deviations will not destroy the privilege. This is not to say, of course, that plaintiffs do not recover for gross inaccuracies or reports which are plainly unfair. The decision of a Rhode Island court, going so far as to hold unfair a report containing "mere arbitrary selections, consisting of those portions which impute crime or moral turpitude," indicates that even a formally accurate report which presents an obviously biased picture of proceedings may be found by a jury to be unfair. As a final consideration, there is the general rule that a newspaper cannot escape liability because of reliance on the reputation for accuracy of the news service furnishing the story.

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20 38 L.J.Q.B. 34 (1868).
22 137 Mass. 392 (1884).
23 Ibid., at 394.
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Scope of the Proceedings

A newspaper prints at its peril reports of statements which were not made during an official proceeding, though made in connection with or with regard to it. Thus the existing cases indicate that statements to the press or conversations among participants in a legislative hearing, though directly concerning the matter under investigation, would not be privileged if made before, after, or in some other way outside the hearing itself. The major problem, of course, is that of defining the boundaries of the hearing.

Comment by the Reporter

Unless brought within the scope of the privilege of fair comment on matters of public interest, comments or interpolations are not privileged. The possible effect of such a rule is illustrated by a recent Georgia case in which the court stated that, when a newspaper goes beyond a report of court proceedings and inserts additional defamatory matter, such additions, if false, render the whole publication unprotected by privilege. The court added that whether the words inserted were an immaterial inaccuracy or an unauthorized enlargement was a question for a jury.

Malice

Though a report meets all of the above requirements, a qualified privilege can be defeated by proof of malice. The difficult determination, in view of the ambiguity of the word "malice" and the various legal applications of the term, is that of the kind of motivation necessary to destroy the privilege. The courts say it is "actual" or "express" rather than "implied" malice that is required. Beyond distinguishing the variety of malice implied as a matter of law when a


30 As an example, the majority rule appears to be that pleadings filed in a suit but not yet acted upon are not privileged as reports of official proceedings. Prosser, Torts § 94, at 845 (1941). However, it has also been held that complaints are privileged as soon as of public record. Shiver v. Valdosta Press, 61 S.E. 2d 221 (Ga. App., 1950); Campbell v. New York Evening Post, 245 N.Y. 320, 157 N.E. 153 (1927).

31 Prosser, Torts § 94(b)(5) (1941).


34 Malice is defined in varying situations as want of probable cause, as wanton disregard of a duty, as the intent to do a wrongful act, as personal spite or ill will, and as absence of just cause or excuse, to name but a few. Malice, 26 Words & Phrases 144 (1949).

statement is found to be defamatory, such a definition is of little help. Certainly a court will not immunize a newspaper if it can be shown, for example, that the newspaper was known to have announced its intention to "get" the plaintiff and utilized its first opportunity to do so.\textsuperscript{36} The question as yet not clearly defined, however, is whether there exist other less obvious bases for finding a defendant's motives inconsistent with the purposes and policy of the privilege. For example, lack of reasonable belief in the truth of the statements made is held to defeat the qualified privilege of fair comment.\textsuperscript{37} The conclusion might be reached, by analogy, that a newspaper printing remarks made during a congressional investigation which it actually knew or believed to be false should not be allowed to claim the immunity of privilege. It is doubtful that any more than such a minimal standard could be maintained consistently with the justification for the privilege: the desire to keep the public informed of the workings of its government.\textsuperscript{38} That a jury could find that printing detrimental remarks with knowledge of their falsity constitutes an improper motive is, nevertheless, a possibility worth considering.

Extension of the concept of malice in the foregoing manner might be accomplished without too much difficulty. Some courts have found appealing the argument that, as a correlative of immunity from liability, newspapers have a duty to keep the public informed—a duty which must be performed in a reasonably conscientious manner.\textsuperscript{39} Though at present little more than a moral obligation, the mere recognition that some sort of duty exists may be a basis for argument in future cases that the duty should be legally enforceable by requiring a high standard of reporting from newspapers wishing to avail themselves of their privilege.

Proper use of privilege could be taken to imply both proper motivation for the publication, and publication in such a manner that a fair impression would be conveyed to the average reader.\textsuperscript{40} Thus, not only proof that the newspaper was out to "get" the plaintiff, but a showing that the report was exaggerated, distorted, or colored is a possible foundation on which to build a charge of


\textsuperscript{37} Prosser, Torts § 94, at 844, 852 (1941).

\textsuperscript{38} Colwey v. Pulsifer, 137 Mass. 392 (1884). "The fact that the press is ever ready to publish any irregularities or acts of favoritism has a tendency to keep officials up to the high mark of their calling." Briar Cliff Lodge Hotel v. Citizen Sentinel Publisher, Inc., 260 N.Y. 106, 118, 183 N.E. 193, 197 (1933).


\textsuperscript{40} A third aspect would be the unexpressed motivation of the publisher of the defamation, insofar as it can be established. In addition to exaggeration and distortion in the report, refusal to retract false statements or to allow the injured person to reply might be evidence of improper motive. For a discussion of the possible value of rules requiring retraction and establishing a right of reply consult Chafee, Government and Mass Communications, c. 8 (1947).
malice. In the limited situation where an inaccuracy or exaggeration imputes crime, the courts have held that the remarks, if false, defeat the qualified privilege without the need of proving malice. Such an error would not be difficult to make in reporting some of the more sensational congressional investigations; but, unless the imputation of crime is clear, it could also easily be dismissed as accidental.

It is important to remember that newspapers do not enjoy the absolute immunity from libel suits which protects congressmen and witnesses. Their privilege to print defamation published during congressional hearings is defeasible and conditioned upon its proper use. While legislative action may be desirable, drastic extension of existing judicial rules would not be necessary to restrict newspaper privilege.

Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E. 2d 802 (1950). The defendant newspaper was held liable because, although charged with gambling by a trial witness, he was not accused of gambling with dice, as reported by the newspaper.