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Torts--Libel--Privilege to Publish a Defamatory Grand Jury Report

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The word 'fair' has a well-recognized meaning, when thus used to express the character of the report as an abridgement of the full judicial proceedings. It is used to characterize the report in the sense that it must be just and impartial as to the party complaining. The report may be inaccurate, and yet not be unfair, . . . and in such cases the defense of privilege would not be forfeited. . . . But the law does not admit of degrees in the quality of the fairness of the report. To come within the privilege, it must be fair and reasonably correct.\textsuperscript{10} (Writer's italics)

It is the writer's opinion that it should not be decided as a matter of law that the publication complained of was a full and fair report of the proceedings, or that the headlines read in connection with the articles were not libelous. When a publication is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether or not it is defamatory. But if the publication is capable of two meanings, one of which would render it libelous and actionable and the other not libelous, it is for the jury to say, under all the circumstances surrounding publication, which of the two meanings would be attributed to it by its readers.\textsuperscript{11} It is believed by the writer to be a question for the jury as to whether or not calling a person a rustler, when he has only been charged with the crime, is actionable as exceeding the bounds of fair newspaper comment. The liberty of the press should not include imputation of actual guilt to a person who has merely been accused of a crime. Where vituperation begins, the liberty of the press should end.

ROBERT A. PALMER

\textbf{Torts—Libel—Privilege to Publish a Defamatory Grand Jury Report—Plaintiffs, officers of the city of Hopkinsville, brought libel actions against defendants for publishing a report of a federal grand jury accusing plaintiffs of being members of an extensive “vice ring.” The report had been published in full in the defendant newspaper’s regular editions. The individual defendant had read from the report at a political meeting. Both defendants pleaded privilege on the ground that the report was part of a judicial proceeding and that publication of it was privileged. Plaintiffs contended that the publication was not privileged as a report of a judicial proceeding since the grand jury had acted beyond its authority in issuing the report. The trial court held for the defendant, and the plaintiffs appealed. Held: judg-}

\textsuperscript{10} Id., 144 S.W. at 444.

The plaintiffs, apparently conceding that reports of judicial proceedings are generally privileged, based their case chiefly on the theory that the particular action of the grand jury was not a "judicial proceeding," since, first, the grand jury had not returned an indictment or an information, but had merely issued a "report" on conditions in the city of Hopkinsville, and, second, the grand jury had no authority to take any action since the matters inquired into were not proper subjects for federal investigation. In its opinion the Court of Appeals accepted, for purposes of argument, the plaintiff's contention that the report was in fact unauthorized. The Court concluded, however, that the publication of the report was nevertheless privileged.

It is believed that in so ruling the Court of Appeals adopted the better view. Unless grand jurors are permitted to discharge their duties without fear of being called to account in a subsequent libel action for erroneous charges they might make, the machinery of justice would be seriously impeded. Otherwise, grand juries, unless composed of bankrupts or fools, would not comport themselves with the vigor and diligence which their position requires. The grand jurors should not be subjected to liability for mistake. That the particular mistake is an erroneous assumption of jurisdiction should not alter the situation. In concluding that the grand jury was privileged even though, by hypothesis, acting without jurisdiction, the Court has adopted the position taken by most of the authorities. In specifically repudiating the rationale of the cases contra, instead of trying to distinguish the cases, the court added to the clarity of the Kentucky law on the subject, and indicated its complete acceptance of the doctrine of absolute privilege for grand jurors, even when acting outside the scope of their real authority. Not only is this the better view; it is also the majority view.

The Court, having concluded that the officials making the report would have been privileged, went on to exonerate the publishers of the report with these words:

[W]here a third party publishes a public record made in the course of a judicial proceeding he is within the protection of the

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1 Mundy v. McDonald, 216 Mich. 444, 185 N.W. 877 (1921); Hayslip v. Wellford, 195 Tenn. 621, 263 S.W. 2d 136 (1953); RESTATEMENT, TORTS sec. 559, comment c (1938) (Note that the Restatement rule protects the grand jurors only if they reasonably believe they have jurisdiction); Pnossen, Tort 610 (2d Ed., 1955).


3 See note 1 supra.
The doctrine of absolute privilege is like a protective roof extending over judicial proceedings. If the immediate participants in the act are protected, . . . those who do no more than republish the record should not be adjudged guilty of wrongdoing.4

By this language, it appears that the Court is virtually equating the privilege of the publisher, the defendants here, with that of the grand jurors—according to each an absolute privilege. But most authorities hold that the publishers are only conditionally privileged,5 and that liability will attach if the privilege is exceeded, for example where the publication is malicious. If the court is actually espousing this doctrine6 (that the privilege to publish reports of judicial proceedings is an absolute privilege) it is pioneering in the law, but in a field where, it could be argued, some pioneering should be done.7

It is more probable, however, that the court does not desire to change the law on this subject, but is merely using the term “absolute privilege” loosely, as it has done in the past.8 The term “absolute privilege”, if it is to have any meaning at all, must mean that the privilege exists even though there is malice or knowledge of falsity.

5 Sherwood v. Evening News Ass'n., 256 Mich. 318, 239 N.W. 305 (1931); Restatement, supra note 1, sec. 611; Frossen, supra note 1 624; 33 Am. Jur. 149 (1941); 53 C.J.S. 204 (1948).
6 In the writer's opinion, the court was led into apparently equating the privileges accorded the two separate parties because of the way it conceptualized its solution to the first problem, i.e., the problem of whether the issuing of the report was a part of a judicial proceeding. In its decision of this question the court throughout talks of the report as being privileged. Such language is not quite precise. A report is not privileged; a person, or a particular publication, is privileged. But if the report itself is viewed as privileged, it almost inevitably follows that any publication of it is also privileged. It is the writer's belief that this was the logic used by the court in reaching the conclusion that the publishers of the report were absolutely privileged.
7 It could be argued that the right of the people to know about what's going on in the courts is almost as basic as the right to seek redress in the courts, and that those who inform the people by publicizing court proceedings are entitled to the same protection received by the more immediate parties involved, for example, the grand jurors. Both are acting for the public interest. Where the privilege is qualified, and therefore, according to present law, lost if there is malice against the party defamed, the privilege in point of fact may be meaningless, since there is a great risk that partisan witnesses can be found to furnish enough evidence of malice to get to a jury. Furthermore, if the public is actually benefitted by publicizing court proceedings, should malice destroy the privilege? It would seem that it should not. These arguments for extending an absolute privilege to publishers of judicial proceedings are not unanswerable, but they should not be overlooked.

8 See, for example, Begley v. Louisville Times Co., 272 Ky. 805, 115 S.W. 2d 345 (1938) where the court at 818, 115 S.W. 2d at 351, says: “[I]t is evident that the publication of the report by appellee, [the newspaper] in the form and manner as shown by appellant's proof, falls in that limited class defined as absolutely privilege.” (Writer's italics). Note that in the earlier part of the opinion at 818, 115 S.W. 2d at 349 the court quotes from the Restatement and calls this a qualified privilege. Cf. Tanner v. Stevenson, 138 Ky. 578, 128 S.W. 878 (1910) where the true rule of absolute privilege is set out.
The very word “absolute” means without conditions and without qualifications. To say that when certain conditions are present, there is an absolute privilege, is almost a contradiction in terms. Furthermore, most authorities have used the term “absolute privilege” in the sense advocated by the writer. To some extent, therefore, the words are “words of art” and the court does not seem to be speaking the language used by most legal writers when it speaks of the privilege of a publisher of judicial proceedings as “absolute.”

It must be stressed, however, that the result reached by the case was almost certainly correct, even though the court may have erred in using the adjective “absolute” in describing the privilege involved. Without malice, the publishers would be privileged, even under the more limited protection afforded by the conditional privilege. And the facts involved here show no evidence of malice on the part of the publishers. Furthermore, an examination of the judgment of the trial court and of the briefs on appeal indicate a virtual concession by the plaintiffs that there was no malice.

In conclusion, it is believed that the court has reached the proper result in this case. In holding that the privilege was not vitiated by the fact that the grand jury might not have had any real jurisdiction to inquire into the matter, the court reached what is regarded as the better rule and that in accord with the great weight of authority. In affording the publishers of judicial proceedings a privilege in this case, the court shows a high regard for the “right to know” so essential in a democracy. For without this, or some similar privilege, attempting to inform the people on these matters would be hazardous business.

In the writer’s opinion, the court did not mean to alter the present law in labeling the privilege of the defendants “absolute.” The use of the term “absolute” is unfortunate, however, in that it conveys this impression. There is, of course, the possibility that the court meant exactly what it said, and the case can serve as authority for making the privilege to publish reports of judicial proceedings an absolute privilege, a perhaps not unwarranted change in the law.

**REcENT CASES**

Tom Soyars

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9 See note 1 supra.