1893

The Press and its Privileges

William Algar Wheeler
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses

Part of the Law Commons

Recommended Citation

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
The Press and its Privileges.

A thesis presented for the degree of Bachelor of Laws at Cornell University

by

William Algar Wheeler.

Ithaca, N. Y.
1893.
Contents

History of Press in England 5
" " " " America 12
What is "Liberty of the Press"? 17
What is a libel 23
Liabilities of the Press 25
Its privileges 33
As to Judicial Proceedings 36
As to Legislative Reports 49
Criticism of Public Officers and Candidates 50
The English Rule 54
" American Cases 57
The Rule Stated 70
Where Patronage sought 71
The printing press may justly be called the principal invention of modern days. Its potency in swaying public opinion, in education of the masses, its great and marvelous influence in uplifting the common people, all combine to make it an object of fear to those who dread the full, fair and fearless views, which are now recognized as the just and rightful possession of the press. The range of useful news is unlimited. The ever-existing line of thought and business of the possessor of journals of its own religion guides its most powerful ally in the publication devoted to its dissemination, at some time. It leads to the commonalty of the great man, the modern sages, he who would be indeed a wise man.
true. Some of the opportunities and valuable accidents presented by that dumb creature who still makes men and women familiar with the good and bad alike.

The history of the world is the history of modern civilization, reflecting as it does in an uncircumscribed manner, the struggle for liberty and freedom of thought. Look for a moment upon one of the modern daily newspapers of our best civilization and compare it with the crude efforts of the eighteenth century. The older publication contained only a short and uncritically selected account of the local happenings. This of to-day seems with more of the most distant parts of the earth, from its fellow
educator, the telegraph. Every department of art, every profession, every business has its column. The best minds of the day submit to this page as a means of presenting their thoughts to mankind, and the lyceum and meeting politician in no way dispute the means as fierce of advancing his schemes. Odd, failure it comments upon all with impartial judgment, sparing none who rightfully may be deemed subject to criticism.

Sure, if we will to a country which yet hangs back upon the verge of universal liberty and freedom. You see reasons of the press, whose duty it is to tone down or cultivate in latent, any criticism of government. Nothing is allowed, contrary
to the recognition of authority upon religion, politics, or philosophy, however laudable may be the design and purpose of the motive; nor the Bible itself, the guide and light of the Christian world, being forbidden to the people. Freedom of conscience of mind with mind is truly the palladium of modern liberty. Can any one doubt the influence of the press, the reflector of public opinion?

Let us have a real survey of the struggle for the freedom in our Mother Country; we were to set it in our own land, which next of constitutional rights, speech, religion, and the press. The examination of the common law will show that liberty of the press was far from being neglected.
new placed around it, which a more
child form of government considered
essential, deeming the press an
agent for evil rather than for good
and considering itself the judge
of what ought to be published
in England, after the Reformation
no book could be published with¬
out the approval of the royal
 censor. The notorious Star Cham¬
brs published the regulations in
Mary's reign, strictly limiting the
number of presses and of men,
and allowing only the Stationers
Company to operate presses.
Elizabeth, too, confined printing
to London, Cambridge and Ox¬
ford, the entire subject being
controlled by the censor, the Arch¬
fish of Canterbury. The temper
of the authorities is well shown
By the ease of one Sibley, at Lincoln, who wrote a pamphlet addressed to Elizabeth, demonstrating upon her proposed marriage with the Duke of Guise. The writing "very far from being a sculent libel, is, in a sensible manner and manner sung loyalty to the queen," yet he lost his hand as a punishment.

The act of 23 Eliz. ch. 2 (1581) was aimed at the outings of the seminary priests. This act made it a capital felony "to write, print... any book containing any false or seditious matter to the defama-


tion of the Queen's Majesty or con-

cerning any insurrection in the

realm." The same restrictions are found in the Star Chamber Act of 1637 which limited the number of printers to twenty (20), each being ol.
laced two pieces, the penalty for illegal printing being pillorying and imprisonment.

Books could neither be reprinted without a new licence nor brought from abroad unless examined in London. The case of Leghion (site 442), is an interesting one.

One Leghion having been found guilty of publishing a certain book, entitled an Appeal to Parliament, or Time's Rea on Public, was found £10,000, degraded from orders, set in the pillory, deprived of one ear, his nose slit and one cheek branded S.S., a somewhat more severe punishment than any times admits of. Preyner's Case is Brodie's Hailing of the British Empire (II, p. 334) as another good illustration of the times.
Yet it was in these stormy days that we find the "Weekly News of May 23d, 1623, seeking public favor and attention. The destruction of the Star Chamber opened the doors of the printing houses from which issued forth a deluge of political pamphlets and newspapers. May in his Constitutional History of England (II, p. 341), estimates that no fewer than 50,000 of these appeared from 1640 to the Restoration.

The Long Parliament in its endeavors to restrain pamphlets and prophetic writers by most tyrannical ordinances called forth Milton's celebrated pamphlet, "A Speech for Liberty of Unlicensed Printing," in which he pleaded for liberty to know, to utter
and to argue freely, according to conscience above all other liberties.
It was a wonderful conception of the bright liberty of speech to come.
The act of 1662 was the next legislation, confining printing to London and the universities of Oxford and Cambridge. The penalty for illegal printing was hanging and quartering, with the unpleasant division of decay spent in the pillory beforehand. The act was allowed to expire in 1679.
The next year however the court with Chief Judge Sproge at its head in Cussco Trial (the State Trial) declared it to be criminal at common law to publish any thing concerning government, whether true or false, if serious." If you write any
thing of the government, whether in
form of praise or censure, it is
not material. For no man has a
right to say anything of the go-
ernment’s a decision not over-
ruled until 1765 by C. J. Camden
in Entick v. Carrington (31. St. in 107)
All newspapers were stopped ex-
cept the two government publica-
tions, the London Gazette, which
consisted of mere without comments
and the "Observer", containing
comment without news. During
this period the coffee houses ac-
quired their great popularity be-
cause they were more convenient
places for the exchange of
news and the discussions of
questions of the day. The
last attempt at censorship of
the press occurred in 1695.
the House of Commons negative it, and from that time it ceased to exist, although the question of its revival was repeatedly agitated in Parliament, as is seen by a paper of 1763, entitled "Reasons against Restraining the Press", and in 1796 by a bold pamphlet entitled "Letters to a Great Man concerning the Liberty of the Press".

From this time we find the Press theoretically subject only to the restraint of the Stamp Duty removed in 1861, and the law of libel. The size, however, was restricted till 1826. Still these restrictions removed, the newspapers began to show the first clearly. "The Daily Courant" being published in 1709, as 'Crown Anne's sine, they assumed their Press
form, combining now with political
discipline, and yet even in her reign
it is said to be a well established
fact that the House of Commons
exercised a censorship of the press.
Handwritten publications were called
libelous; innocent authors were prose-
cuted; such men as John Sache-
Fleetwood suffering from these un-
punanted attacks upon the press.
(Locky Nest of Eng. 18th Cent. 5, 458.)
Yet the government professed for many
years to forbid the publishing
of matter concerning public offices
and their administration of affaires
considering them offences against
good order.

Such restrictions can be found
in the history of the American
Colonies. Massachusetts was
conformed by the people in 1649
to publish the laws, latterly deemed but kept away from the people in order that they might remain in ignorance of the exact line between allowed and prohibited actions. "Perusers of the press" were appointed in 1662, who had the pleasure of prohibiting the publishing of the "Publick Occurrence" (1690), the first paper published in the New World. Books were burned when found to be "offenders against God and order." Bancroft speaks of the burning of "Watts" book in defense of unmixed principles of popular freedom (2 Bancroft 73). Hildreth in his History of the United States (Vol. II, p. 298) says that Joseph Story and the legislature having become involved in a quarrel, tried in
pain to have the printer punished for printing a remonstrance against, which resulted in the future
and publication of state documents.
The state printer of Va. in 1692 was arrested for publishing treasonable
and thrown into prison to await
the action of the King, who declared
there should be no printing in the
King. Only twenty years before
for Berkeley of the same colony. We
thankful that he was not bothered
with free speech and printing.
Treasurers calling them "breeders of
sedition, heresy and sects."
In 1692 New York obtained its
first printing press. The result
of the flight of a printer from
Philadelphia, who had been ac-
cused of having published an
address in which Quakers were
charged with holding office with "inconsistency in exercising political authority" while professing the principles of the Friends. At the 1779 "imprimatur" of the Mass Bay Colony licenses, it found and the licensers only gradually ceased to exercise their functions. (James A. H. Hutson, "Printing in America," p. 207-8.) The turbulent days prior to the Revolution and the indepen
dent tone of American printi
ners made the home government fear to allow the free and unre
stricted use of the printing press at least to the same extent as in the old country. Only in our days of national independence has the attempt been made given to liberty of the press. The famous or rather infamous Sedition Law of 1798...
was that attempt, and it was a most unpopular act, under which rigorous
punishments were made, and died a
natural death—three years later it
was declared unconstitutional from
the first, and was deemed a blow
at national independence, a free
press being considered the highest
and best safeguard of a free and
independent people. Judge Coley
said (Note: Law 1:48): "Repression of
full and free discussion is dangerous
in any government resting upon
the will of the people. The people
cannot fail to see that they are
deprived of rights, and will be
certain to become discontented when
their discussion of public measures
is sought to be circumscribed by
the judgment of others upon their
taste and fairness."
The Constitution of the United States (15th amendment), provides among other things that "Congress shall make no law abridging the liberty of the press." That is meant to be a bar from the subject of novel
tiscus among text rules. Colby in discussing the question (Con. Lim p. 415) says: "It is to be observed of these amendments (first ten), that they recognize certain rights as existing and seek to protect and perpetuate them; by declaring that they shall not be abridged or that they remain inviolate. They do not assume to create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed."

It has accordingly become a constitutional principle
that every citizen may publish what is fit, being responsible for abuse of that right." Blackstone says (Contr. 15): "The liberty of the press ... consist in laying no pre-

ons restrictions upon publication and not in freedom from censure for criminal matter when published. Every freeman has the right to say what sentiment he pleases before the public, but forbid this is to destroy the freedom of the press," but he adds, "he must take the conse-

neces of his own temerity." And he concludes, "so true will it be found that to renew licentiousness is to

maintain the liberty of the press." James, better as he was against established doctrines yet says:

"The liberty of the press is the balladum of all civil, political,
and religious rights of an Englishman, and also "the laws of England provide as effectually as any human law can do, for the protection of the subject in his reputation. If the characters of private men are insulted or injured, a double remedy is opened to them by action and by indictment." Story (1880) says: "It is plain that the language of the amendment imports no more than that every man shall have the right to speak, write, and print his opinion without prior restraint, provided he does not injure anyone in his rights or disturb public peace." He further declares it neither more nor less than an expansion of the great doctrine recently brought into operation into the law of libel that every man
shall be at liberty to publish what is true with good motive and justifiable ends. To curb the threatened publication of a libel be restrained by injunction (see the state of Ca. Monroe 84 SuAn. 744) where it was declared that it could establish a complete censorship over the press to enjoin. Under the operation of such a law, with a subservient or corrupt judiciary, the press might be completely smothered and its just influence upon public opinion entirely paralyzed. Such power does not exist in courts and they have been constantly disclaimed by the highest tribunes of Europe and America.

The point was discussed and sustained in People vs Crossell & John G. 315 (see Conn. V Blandin & Pick 316).
313. *Cm. v. Cleph. 4 Mar. 163." In this case also came up the question as to intent of defendant and whether the publication was libelous or not, and whether the defendant can give the truth in evidence. The last point discussed was: Are the jury to decide on the law and the fact? An evenly divided court with an opinion for the upholding of these views by Chief Justice Kent led to the passage of Chap. 90 of laws of 1804 Dec. 18, which has been copied substantially into the constitution of the states of the Union. This article gives to every man the right to speak or to write whatever be placed being responsible for the abuse of that right. In all criminal prosecutions the facts
shall be received in evidence to the jury, if the matter is true and published with good motives and for justifiable ends, the party shall be acquitted and the jury shall have the right to determine the law and the fact. It is to be found now incorporated into the state constitution of 1846 Art. 58.

In striking contrast to the modern doctrine that the truth is a defense in the old law—now law—paving in criminal cases: "The greater the truth, the greater is the law." (Rev. Dr. Dean of St. Raphael, 2nd Trial, 1844)
We see from the foregoing that the Libel laws of our various states are the only restrictions at present upon the press. A discussion of them separately would lead us far beyond the limits of this paper. Our attempt, briefly, will be to see what are the rights, duties and liabilities of newspapers at the present time.

What is a libel?

Many attempts have been made to define it, but they are all more or less unsatisfactory. A fair sample of attempt is Jeremy Bentham's: "A libel is anything, published upon any matter, of any body, which anyone was pleased to dislike."

In People v. Coewell (supra), Mr. Hamilton, who has been often quoted since, gave a clear and fairly comprehensive...
Definition, as follows:—"A libel is a censorious or ridiculing writing, picture or sign made with a mischievous and malicious intent towards government, magistrates or individuals."

One better suited to our purpose is that given by the U.S. Penal Code (§ 142), which at the time of the revision was said to be declaratory of the common law, being based upon Blackstone (II. 150), Kent (II. 16) and the Indian Penal Code. It is:—A malicious publication by writing, printing, effigy, sign or otherwise than by mere speech, which exposes any living person or the memory of any person deceased to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause, any person
to be shunned, or avoided, or which has a tendency to injure any person, corporation, or association of persons, in his or their business or occupation.

The test is whether in the mind of an intelligent man, the terms of the article and the language used import a criminal charge. (Moore v. Bennett, 48 N.Y. 472.)

Privileges and Obligations of the Press

It is the privilege and duty of the press to discuss freely all that relates to the health, (27 C. & L. 178) welfare, and progress of the people, but it must not abuse the privilege.

This privilege accorded to journalists and reporters in writing and commenting upon current public affairs is no defence to an action for libel, if it affirmatively appear.
to have been used as a means of
gratifying malice (Harb v. Bronson,
67 How P. 88). So in Foster v. Crepps,
(39 Mich. 350) it is said, that whatever
functions a journalist performs are
assumed and performed under the
same responsibility attaching to other
persons. And he must defend him-
self upon the same legal ground,
when he abuses his right to pub-
lish comments upon any subject.
(Bronson v. Bruce, 59 Mich. 467).
This liability extends to all concern-
ed—the writer, proprietor, printer,
and even to the news agent who
participated in the publication.
In Fry v. Bennett (28 N.Y. 324) it was
held that the editor and proprietor
is presumed to have knowledge of the
contents of his paper. And this is true.
when the proprietor is absent and
the paper in charge of an agent to
whom he gave express instructions
not to publish anything exception-
able, personal or abusive, brought
in by the author of the libel (Dum.
V. Hall, 1 Qd., 344). But the publisher
may be liable for an article clearly
libellous, yet it is not so when he
is not shown and cannot be pre-
sumed to have known that the
article was intended to have an
injurious effect and meaning.
(Caldwell v. Raymond, 2 Abb. 193.)

While there is a joint and
several liability among all who
participate, if one be compelled
to pay damages, he cannot force
contribution from another who
might have been sued jointly.
with him, there being "no contribution among wrong doers." Where a proprietor was convicted and fined for a libellous article inserted without his knowledge, it was held that he had no right of action against the editor who inserted it (7 C.R. R., 32).

You can be take security to be indemlineed against the consequences of an illegal act, as in publishing a libel, the promise being void, that renewed after the publication of the libel (Atkinson v. Johnson, 43 Qt. 78).

And should be publish a false communication the giving the name of the author, he would still be liable in damages to the parties who consider themselves aggrieved. (Perrett v. H. O. Denney, 25 Pa. Ann. at 73.)
"The regard the doctrine as no longer con
trverted that the publication of any
communication, with or without the
name of the author, which is defam-
atory and false, subjects the publisher
as well as the author to damages
in favor of the party aggrieved.
Circumstances may be shown in
mitigation of damages. The law
looks to the animus of the publish-
er in permitting his columns to be
used as a vehicle for the dissemina-
tion of calumny, whereby the fair
character of an individual may be
blasted and his business pursuits
ruined. The law implies malice
in the publisher from the act of
publishing the libel, not malice in
the sense of spite, antipathy or ha-
tred towards the party assailed", but
the evil disposition, the malice inti-
muse which induced him wantonly, 
recklessly or negligently, in disregard
of the rights of others to aid the slau-
derer in his work of defamation
by the potent machinery of the public
press, written or printed slander
being justly considered more perni-
cious than that uttered by words
only." In this case the libel was
published as a card, paid for, with
an accompany statement that the
editor disclaimed all responsibil-
ity. The disclaimer did not save
him from a judgment of £5,000.
That the proprietor is responsible
for advertisements has been decided
in many states. Robertson v. Bennett,
(44 N.Y. Sup.Ch. 66) turns on the point
that the proprietor is responsible for
everything appearing in his paper,
citing Huff v. Bennett (4 S. W. 120) as
authority.

We have seen from the quotation
from Perrett v. D. O. Times (supra) that
malice of a peculiar kind is in-
ferred. But actual malice is not
essential unless the communicat-
ion is a privileged one. It may be shown
to increase or diminish damages.
And while it is true that the prop-
ietor is responsible tho he knew not
of the publication, still he may
show that he has acted with reason-
able care in the selection of his
assistants and then he cannot be
compelled to pay punitive dam-
gees (Littlejohn v. Greeley, 13 Abb. Jr. 441) and
In the latter case an article alleged
to be libellous was copied into defendant's paper from another, and was preceded by a statement that it was so copied. This it was selected without the knowledge of defendant by one in his employ, it was deemed a published libel, the fact of repub-
lication rendering it none the less so. (Sanford v. Bennett, 24 N.Y. 20.)
While it is no justification that the article is copied yet the defendant
may show it in mitigation of damages (Hurt v. Pioneer (B., 23 Minn. 78).
But one who first publishes a libel cannot be held responsible for repub-
lication of it by others. (Burl vs. Adv. C. 28 Ill. (Mass) 1.

From what has been said, it
might be inferred that anything
published bearing heavily upon a
man renders the proprietor liable under all circumstances. Such is not the case, however, and the exceptions, or as they are called—Privileges of the Press—will be considered next and more at length.

A newspaper has no more freedom of discussion than a private citizen (Sweeney v. Baker, 132 U.S. 158). Matters of public interest can be discussed in its columns but it must be done bona fide and without malice or anything beyond what is necessary for public discussion. (Quiceo v. Reed, 1 F. & F. 149)

Just what "public interest" has been much discussed. In Raw v. Walters (10 Fed. Rep. 647) it is said—Perhaps the right of legislative interference may
be taken as a fair test of the right of public discussion since they both depend upon the same condition.

Followed in his work on Facts (p. 22) says that what is open to public comment is a question of "judicial common sense rather than technical definition" and proceeds to put them into two classes. I think of interest to the common reader as for example, affairs of persons in authority. II. Those laid open to the public by the voluntary act of the person concerned - a book or picture placed upon the market. Under the first class, we have events which may be placed in a separate class of its own - the reports of Judicial and Legislative proceedings.
In these cases the free is
given protection, and the pre-
sumption that the belief is
prompted by malice does not
apply, and if made in good
faith, and fairly there is no
responsibility.

The New York Penal Code
(S244) says: "The publication is
excused when it is honestly made
in the belief of its truth and
upon reasonable grounds for
this belief and consists of fair
comments upon the conduct
of a person in respect of public
affairs or upon a thing which
the proprietor thereof desires to
explain to the public."
Reports of Judicial Proceedings

In publishing a full, fair and true report of judicial proceedings, the newspaper is entitled to absolute privilege and is not punishable except where there is proof of actual malice (Salisbury Union & Ad., 45 Ind., 120). The reason for the rule is laid down in Thompson v. Powning (15 Dec., 202), where it is said "the public have a right to know what takes place in a court of justice and unless the proceedings are of an immoral, blasphemous or indecent character or accompanied with indecent observations or comments, the publication is privileged."

The old decisions stand on the ground that courts of justice
are open to the public (Stockdale v. Howard, 9 A. 7 E. 212)

In Bowley v. Pulser (137 Mass. at 394) Holmes says "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 importance that those who administer justice should act always under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode a public duty is performed."

The power of the court to restrict the publications of proceed

ings is granted in some instances
for example, till the termination of the trial, and the court will have power to punish as a contempt of court a disregard of what has been ordered. (Dishon on Criminal Law III, § 254.) This power has been held to extend to the punishment of all who took part in the publication, when, in the opinion of the court, the matter tended to corrupt the source of justice or diminish the influence of the courts.

New York has legislated upon this subject as follows (Penal Code § 143). No one is to be punished for a full, fair and true report of any trial or proceeding had in court.
When the matter contained in the report is blasphemous or obscene, the privilege does not attach. A celebrated case was the public Rex v. Mary Carlyle (3 B. & Ald. 167) where the defendant was found guilty of libel in publishing an account of the trial of Richard Carlyle, who had read the whole of Paine's Age of Reason to the jury upon his trial. Mary incorporated the whole book into her report and the judges declared that the privilege did not extend to such a palpable reproduction as the proofs showed that to be.

New York's Code of Civil Procedure (§1907) is indicative
of the state law. "In action, civil or criminal cannot be maintained against an editor, reporter—of a newspaper for the publication therein of a fair and true report of any judicial, legislative or other public and official proceeding, without proving actual in making the report.

What is meant by a fair and true report?

In Salisbury v. Union Ad. Co. (supra), it is stated that it need not be verbatim nor embrace the entire proceeding, but it was further held that the suppression of parts of testimony as to defamatory would destroy the privilege.
Testimony of one witness may render the whole report unfair. 
Duane v. Phoelites (3 P. 160).
So where a trial extends through several days, daily reports will be protected but all comments on the case must be suspended till the proceedings terminate (Fierro v. Levy, 6 P. 537).
While the report, if substantially correct and written by one regularly employed, is presumed to be in good faith, yet if sent by an outsider, with a fair account, it is not privileged and if malice is shown the author is liable. Stevens v. Sampson, 6 Ex. 510.
This privilege of communication extends to all courts even to justices of the peace, if held.
with open doors and the procedure is not ex parte. The contrary was held in England till the case of Neil v. Hallo (7 T.L.R. 314). The doctrine has not been adopted by all the States, Stanley v. Webb (4 Sandf. 21) and Gazette v. Timberlake (10 Ohio St. 548) bring to the contrary. These cases however are strongly criticized in McRee v. Fulton (47 Ind. 403) which holds that the privilege extends to preliminary examinations which are ex parte by consent of the accused. Stanley v. Webb cannot be considered as authority in this State now, as it was decided before the enactment of § 1907 of the Plead Code (supra).

Aderman v. Jones (3 Ill. Sup. 42)
a more recent case holds that a true
and true record of an expert
affidavit presented to a police
magistrate is privileged as a
judicial proceeding and no
action could be maintained
thereon by a party who, the named
in the affidavit, was not the
party arrested under the warrant
so obtained. (See also Russell v. Press Co.
17 Mo. 8, 273).

If the proceeding is ex parte
and results in the discharge of
the prisoner, the report is privi-
leged. But a report of paper filed
before suit, is not to be considered
as a petition in a divorce suit
before action begins. (Barber v.
St. Louis Dec. 5, 1 Mo. App. 377).
not yet presented to court, asking for the disbarment of an attorney and containing allegations which are actionable unless justified is likewise not privileged (Croley v. Pulver, 137 Mass. 99). But if a paper publishes reports that a breach of promise suit is about to be begun against a man, it is liable for it has a tendency to disgrace the person and bring him into ridicule (Morey v. Journal (N.Y. 25716, 161).

Nor does the privilege extend to Grand Jury reports. In McCabe v. Coldwell (1886 Ill. Rep. 370) it was held that such proceedings are not "proceedings before a judicial body" and that the law of 1867, ch. 130 relating to privileged con-
communications did not apply.

Nor are statements made by a justice of the peace as to what had been said before him and which did not appear in any affidavit privileged (O'Toole v. Evening Journal, 43 N.J. 488).

What has been said so far relates to the publishing of reports. Let us look for a moment upon the effect of comment or criticism of them.

Odgers in his work on Libel (p. 257) says "The reporter must add nothing of his own. He must not state his opinions of the conduct of the parties or impute motives therefore. Above all he must not insinuate that a particular witness committed perjury. That is
not a report of what occurred."
Such comments may often be justified on the ground of being matters of public interest. In Andrews v Chapman, (3 P.K., 287), it is said "If any comments are made, they should not be a part of the report and the two things should be kept separate."
The intermingling of comment destroys the privilege and renders it actionable (Patrick v. O'Neill, 63 P. 123.) And where a criticism that it was infamous was added to a report of a verdict by a jury, it was held to be shown of its privilege and an action could be maintained by anyone of the twelve jurors, the defense that it was against a class being held not good.
(Dyers v. Martin, 2 Cal. 605.)

The N.Y. Code of Civil Procedure (§ 1958) declares that privileges shall not extend to anything not said and done in the course of the trial or to anything added by way of comment, including in the latter the "headlines" of the article. That the addition of comments destroys the privilege was decided in this state in 1811, by the celebrated case of Thomas v. Prosser, (7 Johns. 264). But see John v. Press Co. (19 N.Y. 53.)

A report may be fair and impartial yet owing to the heading placed upon it become libellous. In Velsatt v. Hall (6 Mass. 514) the heading was "Shameless Conduct" of an
attorney" thus destroying the privilege. Again in Edsall v. Brooks (17 Abb. 3d 221), "Blackmailing by a Police man" was declared a libel regardless of what the article itself contained.

An attorney while conducting a trial is allowed absolute privilege as to what he may say (save contempt of court). He may vilify whom he pleases if in course of duty. But the same privilege does not extend to the reports of the trial published by the papers. The paper is responsible for all securable matter that it may publish and it cannot urge as a defense that it is a true report of the trial.
Legislative Reports.

What has been said concerning judicial privilege applies equally to legislative reports. It could be true, however, where the body is sitting with closed doors, and where a report of proceedings of a committee appointed to investigate certain affairs is published, the report is privileged. The reason assigned being that the committee has been given power to hear and determine matters submitted to its jurisdiction by the voluntary consent of its members. (Pelo v. Green, 63 Texas, 722, citing Cooley on Cr. Law, 448)

In 1869 the Supreme Court of Louisiana held that a newspaper was not liable for publishing testiory of witnesses given before a congressional investigating committee.
It is now recognized that the privilege extends to all investigations held by legislative bodies, where the newspaper has acted in good faith by publishing a fair and true report.

Public Officers and Candidates

It has been said that if a man desires to know what a villain he is, as well as his utter lack of morals and intellect, it is only necessary that he offer himself as a candidate for a public office. While the above is putting it rather strongly, there is no doubt that in respect to this kind of comment, the validity of the press borders on conscientiousness; nothing is truer than that just and fair decisions of a man's
qualifications for office, or his acts in an official capacity, are allowable and should be privileged. Reasonable criticism is necessary to enjoin the electors as to their candidates. And the candidate undoubtedly makes himself a species of public property, and the qualities of which every one has a right to enquire, and of the fitness of which every one has a right to judge and give an opinion. The ordeal of public scrutiny is many times a disagreeable and painful operation, but it is the result of freedom of speech which is the necessary attribute of free government. (Myers v. Richardson, 171 U.S. 130, 348). Yet it is true that at least in the heat of political campaigns much eccentric...
that is libellous. Our opinion seems to excel among journalists that the surest way to check their chosen candidate is to vilify his opponent. Such an error of opinion is slowly being corrected by the payment of thousands of dollars as balm to wounded reputations.

The true rule as to limit of criticism is stated by Craig, J., in Pearce v. Wilcox (81 Ill. 781) when he says: "While the qualifications and fitness of a candidate for office might be properly discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person who is a candidate for office can be destroyed by the publication of a libellous article...."
proper, to wit, standing at election, may be attended to. The court and
understanding that not infrequently
entered in an election.

Quoted in his work on Libel
and Slander (p. 33) says that in order
to bring matters from out the law of
libel when written concerning can-
cidate for office, it must have probable
cause and be without malice; it must
be as to the candidate's capacity, or
the fitness of the candidate in relation
to the one he seeks and be addressed
to those who exercise the elec-
tional franchise or hold the appurtenant
power. (See cases cited in § 33, loc. cit.)

Again in Kelly v. Sherlock 2 H. 1. B. 689, it is said that whoever
filed a public position renders him
self open to trust. He must accept
an attack as a necessary, though unpleasant appendage to hypocrisy. The law as a criterion of this kind varies in the different states, many of them, however, following the English rule. The right to censure public men is of recent development in that country. The present century has brought forth many changes which can best be shown by an extract from the famous case of Wason v. Dickson (1 R. 4, 019, 94), "Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory form. The full liberty of the press to comment on the conduct and motives of public men has only in very recent times been recognized. Comment on Government, or members of both
Houses of Parliament, on Judges and other public functionaries, are now made everyday which half a century ago would have been the subject of actions or ex officio informations and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, although injustice may often be done, and the public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus fully brought to bear on the discharge of public duties.

In England, whatever private act, act tends to show unfitness for public office may be published along with fair comments on public acts.
(Seymour Bullenworth, 3 F. & S. 372).

Which is qualified by Gathercole v. M'Intosh (15 M. & W. 319), where the rules laid down that such comments must not extend beyond those public acts.

A paper may express an opinion as to acts already performed, even to the extent of inferring motives for them. But the publication of false charges with comment on them is not within the pale of privilege.

(H. Davis v. Sheepstone, 11 App. Cases, 187)

While discussing unfitness the English rule allows full sway as to mental qualifications.

American View

Time will not allow an extended examination of American decisions, yet it will be necessary to examine a few of the leading cases and
from them deduct whatever we may call a liberal rule.

In New York, a narrow rule was early announced in the case of Vuy. v. Root (4 Wend. 434), where Lieut.-Gov. Root, a candidate for re-election was charged with drunkennesse while officiating as the presiding officer of the Senate. The defence that it was a privileged communication was declared not a good one and the defendant being unable to prove to the jury's satisfaction that the charges were true, a verdict of $1,400 was given for the plaintiff. The court laid down the rule that it is only safe to permit editors to publish what they please in relation to character and qualifications of a candidate, holding them responsible for the truth of what
they publish. On honest belief in the truth of the charge is not considered a defense. The same view was taken in the case of Gov. Lewis against Col. Ten (6 John 135), the libel being a set of resolutions published in a report of a public meeting held to protest against the re-election of Lewis.

Most of the cases in recent years have shown a tendency to get away from the strict line of distinction between criticism and false accusation, this doctrine being substantially the same that applies to all persons, public or private.

It has been criticized in many decisions, and Judge Cooley (6 John p359-540) takes issue with the New York courts. But the recent cases bring
the State nearer the English doctrine. Hunt v. Bennett (19 Me. 178), where the office was an appointive one, was a case of privilege, the communication being made to the appointing officer. The court intimated that if the office be an elective one, a publication of charges would likewise be privileged. The most important case in this state is Hamilton v. Emo (81 Me. 116), cited approvingly in 123 Me. 432. Here it is declared that the official acts of public men may be freely criticized and the occasion will excuse everything but actual malice and evil purpose in the critic; but the occasion will not of itself excuse an attack upon the character and motives of the officer. The truth of what is published only will excuse
the publication.

Again, it is not privileged to charge one holding a public office with an offense. And if false, the publisher is liable, however good his motives, although the acts are done in the discharge of his official duty.

In Copeland v. Express Co. (64 P. 364), the early U.S. doctrine was severely criticized, a comparison being made with the English decisions, holding the latter to be "well founded in reason and more nearly in accord with constitutional liberty and free republican institutions."

The Texas court held it to be a "sound principle and one supported by authority, that where a person consents to become a candidate in public office conferred by popular election, he should be considered as putting his character in issue."
so far as respects his qualifications for that office.

Virginia has gone to the other extreme, holding that where the statements relate to the mental or physical qualifications of a candidate, whether they are false or true, inspired by good or bad motives, they are allowable. Yet when it comes to moral fitness they cannot be excused (Sweeney v. Baker, 13 V. Va., 159).

In State v. Galch (31 V. A. 472), the doctrine is laid down that if the article published circulates only among the voters of the district and only for the purpose of giving what the defendant, in good faith, believed to be true, in order to enable the voters to cast their ballots more intelligently, then such publication was privileged, notwithstanding
the fact that portions were untrue and damaged the character of the candidate. This is certainly too broad and leaves a wide open door to abuses of person which even the position of the labelled person should not tolerate. The true rule is undoubtedly that no one "has a right by publication to impute to such a candidate, falsely, crimes, or publish allegations affecting his character falsely."

Michigan takes a decided stand upon this question. In Wheaton v. Beck er, (33 N. W. Rep. 503) the court held that to allow false charges of a defamatory character to be privileged a matter of law, when made in good faith, was most pernicious having a tendency, and a strong one as that, to deter sensitive
but capable men from accepting
nominations for elective positions.

The leaning toward a liberal
rule is strikingly seen in the Minnesota
cases. Aldrich v. Press (92 Minn. 138) lays
down the broad doctrine that there is
no privilege for defamatory assertions
made against public candidates and
that the newspaper stands on the
same footing as private individuals.

Marks v. Baker (28 Minn. 162) asserts
that where the plaintiff was a candidate
for re-election and was charged with
having failed to account for certain
funds, that though the charge was
 untrue, it was nevertheless privileged
if made in good faith. So decided
upon the ground that free discussion
as to fitness of candidates for elective
offices is essential to good government
"The fact of one's being a candidate for an office often affords a license or legal excuse for publishing language concerning him, as such candidate, for which publication there would be no legal excuse did he not occupy the position of such candidate."

In a recent case in Michigan (Belknap v. Ball, 53 Mich. 583), a newspaper printed a coarse and illiterate "copy" of a pretended written statement alleged to have been written by the candidate for office. In its decision the court said: - "Public journals are in the performance of a high duty when they truthfully place a charge before the public. Disqualification to hold the office cannot therefore be made the test to determine the libellous character of the
publication. Criticism is, in liberal cases, a censure of the conduct or character of the person criticized. In becoming a candidate, a person lays himself open to it, and the criticism may be according to the taste of the author provided he does not depart from an honest regard for the truth, a wide range being allowed.

Within this limit, newspapers may express opinions and criticize the character, habits, morals and mental capacity of the candidate for the position sought. Yet no one will deny that a candidate's character and reputation should be protected from malicious attack, even though a wide range is given to the press.

In Crane v. Walters (10 Fed. 620), a much cited case, Powell, C.J. anchors...
ced as the modern doctrine that the public has a right to discuss, in good faith, the public conduct and qualification of a public man with more freedom than they may take with a private matter. In such discussions they are not held to prove the exact truth of their statement, provided they are not actuated by express malice and there is reasonable ground for their statements or inferences, all of which is for the jury.

An early Michigan case, Foster v. Scripps (supra) adds as a reason for holding the press liable for falsehood, that the public might be deprived of the services of a good man and that harm result not only from privately but to the public...
argument, very worth considering.

The Maryland rule is a broad one and was early announce-
ced in Negley v Farrow (60 Md. 108).

Robinson, J., in the course of his decision said "But there is a broad distinction between a fair and legitimate discussion in regard to the conduct of a public man and the imputation of corrupt motives by which that conduct may be supposed to be governed. And if one goes out of his way to asperse the personal character of a public man and to ascribe to him base and corrupt motives, he must do so at his peril; and must either prove the truth of what he says, or answer in damages to the party injured." The court further
held that the paper was in duty bound to inform the plaintiff's constituents of his political acts; that if the publishers made reasonable inquiries as to what they published in honest belief of its truth and they further thought that the vote was given, and upon which the criticism was founded, proceeded from the corrupt business relation, they were privileged in stating such opinion through the columns of their paper.

An examination of Banner Pub. Co. v. State (16 Tenn., 176) discloses the fact that Tennessee has adopted a much to be condemned rule.

In this case a vigorous denunciation of state prison officials was published. The court held that
whether the press nor private individ-
uals has a right to discuss the
character or conduct of officers or
candidates for office, without being
liable, civilly and criminally, for
defamatory utterances published
even when made upon probable
grounds and free from malice.

In striking contrast to the
above doctrine is the rule as
stated in Briggs v. Garrett (111 Pa. St. 474)

Judge Briggs, a candidate for
reelection was falsely charged in
a letter read at a public meeting,
and published in full the next day,
with having rendered a $200,000
steal possible through his charge
to the jury in the case. The court
said in nonsuiting him, that in
the absence of malice, it was per-

The Rule Stated.

An examination of the decisions discussed and the cases there cited leads to the opinion that when a man becomes a candidate he puts his character and fitness for the position in issue; and that anything legitimately relating to them may be regarded as influencing the minds of the voters and therefore privileged.

The publisher is not responsible for accuracy of statements or inferences, unless he is guilty of express malice or such negligence that he may be deemed to have had malice, and that there
statements, the false and defama-
tory, when made upon probable
cause honestly believed in, and
for the public good—the very
essence of the privilege—will not
be ground for prosecution. But
the publisher must not overstep
the bound to gratify spite or pub-
lish where the occasion does not
demand it. If he does so, he is
liable, this being a question for
the jury.

Criticism where Public Patronage
is sought.

The come now to the last divis-
ion of the subject as treated in this
paper. But a short space will be
devoted to it as the law is practica-
ly well settled.

Criticism of this kind has to do
only with the thing which beds for public attention, not its author
and down to beyond the work or thing done. So when it is both
the line of legitimate comment of that which forms the occasion
of it, it is deemed privileged. The harshness or strength of the
criticism is not taken into consideration.

The general rule is that who-
ever seeks notoriety or invites public
criticism to himself or his merits challenges to that extent public criticism and
cannot complain or resort to the courts, should that comment be more severe
than he anticipated.

While such criticism is privileged,
it ceases to be so when the critic goes
outside and attacks the character or
motives of the person whose work is
criticized. Just so far as he goes outside, to that extent it loses its privilege, and the burden of proving the truth of his assertions is upon him. (Campbell v. Potterwoode, 3 T. & T. 105.)

This is clearly put in the charge to the jury in Reade v. Sweitzer, 6 Abb. Pr. Rep. (N.S.) 904, where the rights of the critic are thus laid down: "The critic can say of the player that 'he mouths his speech as many players do,' or that 'he swears the air too much with his hand, or that he tears a passion to tatters, to very rage, to split the ear of the groundlings'; but he cannot abuse him as a 'robustious, fiery, opiated fellow,' and recommend that he should be whipped for overdoing Per magnant." See also Tre v. Bennett, 28 U.C. 374.

The artist bringing forth his
Productions from the studio must not complain unless the character or motives are questioned (Whistler v. Ruehl, London Times, Nov. 26, 78). And the hard working author is alike a fair target so far as his pen is the one through which the question is brought into question (Cooper v. Stone, 24 Wend. 434).

The book or other production can be called vulgar, or the critic may say it is immoral or pernicious and it will still be protected, the line being drawn sharply at the point of the vices or motives of the author.

But the modern tendency is to allow the publication of any inference that may be found by the jury to be reasonably drawn from the thing or act criticized.
If a man bids for public patronage to an exhibition, any fair comment on his performance is privileged. The leading case on this point is a somewhat recent one, a criticism of that famous impression, the "Cardiff Giant," being the bone of contention. In the course of the opinion, Gray, J., said: "The editor of a paper has the right if not the duty of publishing for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner the subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communication, for which no action can be maintained without proof of actual malice."
which malice may consent either in
direct intention to injure, or in a
reckless disregard of another's rights
and of the consequences that may
result to him." (Gott v. Gillette, 122 Vt. 221)

Or in likewise the passion of
not the duty, of the present law bare
any imposition on the public and
where a man claims to have discov-
ered a new system of any kind and
seeks patronage, he cannot recover
damages for adverse criticism
unless inspired by malice.

There is no need of multiply-
ing specific examples of this rule.
Suffice it to say that it is through
public comment that a thing's
popularity becomes possible and
should it not reach the required
standard, there is no inherent right.
raining on anyone to complain of
its failure and seek damages from
another for voicing what he honestly
thinks concerning it.

The world progresses through
comment. Its advancement is due to
the courageous position taken at
critical times by its leaders, who,
without fear of consequences, declare
what they believe to be the best and
truest safeguard of the nation.

The press wielding a pow-
erful influence, reaches every
home in our broad land. Its
unparalleled opportunities for mould-
ing the character of the nation
enjoins it with a high and sol-
emn duty to use its every effort in
the right direction.

But the struggle for prejudice
has led to evils which must and should be corrected. Newspaper enterprise, so-called, has brought about such a condition of things that even a man's private affairs are not safe from the pernicious of report. The most sacred relations are ruthlessly paraded before the public. Sensationalism runs rampant and the most spicy scandals are relied on to fill the pocket of the proprietor.

How shall this be corrected? There is more to be feared from an undue restriction of the press than from the other extreme. The people, strong in their independence will resent, and rightfully so, any attempt to limit the power of the press. But it can
Hardly be doubted that the innate
good sense of right and wrong
will fail to rebuke any paper
which goes too far in the other
direction.

One thing is true—the law
of libel has not developed in
proportion to the wonderful
advance of the press. The law
stands today practically repou
the same footing as it did
years ago, while every day sees
progress in the newspaper world.

The courts, with their much
to be admired—this oft-times to be
deplored conservatism have fail
ed to take judicial notice of
this development. Since they
refuse, there is one way left
the law making branch must
be invoked. A thorough revision of the law would put it where it belongs in the light of our increased knowledge of the press. Till then it behooves editors to bide their time, showing themselves laws respecting citizens whose voices and pens are ever to be found on the side of right and justice. In them, to a marvellous degree, lies the future progress and success of our country.

Finis.