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Absolute Privileges

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ABSOLUTE PRIVILEGES

An absolutely privileged communication is one for which, by reason of the occasion on which it is made, no remedy is provided for damages in a civil action for slander or libel. If a communication is absolutely privileged, a civil action for defamation is absolutely barred, even if express malice is present.¹

Generally speaking, absolute privilege is confined to cases in which the public service, the public interest, or the administration of justice requires complete immunity from being called to account for the language used.² It includes statements made in the course of the proceedings of legislative bodies, judicial proceedings, and the proceedings of other public officials in the pursuit of their public duties.³

DIFFERENCES BETWEEN ABSOLUTE AND QUALIFIED PRIVILEGE

A qualified privilege is defeated by a showing of actual malice on the part of the speaker, but not necessarily by a showing merely that the statement was false. On the other hand, an absolute privilege will protect the speaker even though the speech is both false and malicious. This distinction has been recognized by Illinois courts, in common with the courts of the other states, the federal courts, and the English courts, for many years. In *Wharton v. Wright*⁴ the Illinois Appellate Court expressed this distinction in these words:

Communications which are absolutely privileged are those where the public interest requires the defendant to be allowed to speak or write fully and freely even though the writing is knowingly false and malicious, while a qualified privilege only [sic] insofar as it is done honestly for the common good but will not defeat recovery if it can be shown that the occasion was used in bad faith to willfully and knowingly traduce the plaintiff.⁵

Because of the irrelevance of truth and of malice when an absolute privilege is extended, and because of a natural reluctance to protect malicious behavior, the courts of Illinois have been consistently reluctant to expand the areas of absolute privilege. The only significant area of change has been with respect to extension of protection to statements made by inferior public officials.⁶

There are some early Illinois cases in which statements are made im-

¹ 53 C.J.S., *Libel and Slander* § 88 (1948).

² See Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463.

³ 53 C.J.S., *Libel and Slander* § 102 (1948).

⁴ 30 Ill. App. 343 (1st Dist. 1888).

⁵ *Id.* at 348.

⁶ *Haskell v. Perkins*, 165 Ill. App. 144 (1st Dist. 1911). See also Note, *Extension of the Doctrine of Absolute Privilege to Inferior Executive and Administrative Officials*, 40 Mich. L. Rev. 919 (1942).

plying a requirement of good faith on the part of the speaker before an absolute privilege will be extended. For example, in *Rall v. Donnelly*,⁷ a third person submitted an affidavit to the court to the effect that the plaintiff was a woman of lewd character and a common prostitute. The affidavit was to be used as evidence by her husband in defending her effort to secure temporary alimony and attorneys' fees in a divorce action. The action was found to be a judicial proceeding, the affidavit was found to be a judicially related statement, and the court held that the affidavit was therefore privileged. But it added these words: ". . . if the suitor uses it in good faith and with an honest purpose in furtherance of his defense."⁸

The requirement of good faith is not, however, typical. More accurately reflecting Illinois law is a statement from the early case of *Strauss v. Meyer*,⁹ which involved defamatory material included in a bill in chancery. The defendants were seeking to have the plaintiff removed as a trustee. For that purpose they filed a bill in which they included statements to the effect that the plaintiff's general character for honesty was bad and that the plaintiff was dishonest and not suitable to serve as a trustee. In holding these statements privileged, the court said:

It has been the long and well recognized rule of the law that proceedings in the regular course of justice are privileged . . . And it is not material whether the charge be true or false, or whether it be sufficient to effect its object or not; if it be made in the due course of a legal or judicial proceeding, it is privileged, and cannot be the basis of an action for defamation.¹⁰

Clearly, this court declined to require anything except that the statement be made "in the due course of a legal or judicial proceeding" for it to be privileged.

EXTENT OF THE CLASS OF "LEGAL AND JUDICIAL PROCEEDINGS"

There are a wide variety of proceedings—and of classes of speakers and types of documents—which are included in the category called "legal and judicial proceedings." For convenience, we can classify the kinds of proceedings into three groups, corresponding to the three branches of government: judicial and quasi-judicial administrative proceedings, legislative proceedings, and executive proceedings. Of the three, statements made in court or in connection with a judicial proceeding are the most clearly protected, the most clearcut example of absolute privilege, and perhaps the easiest to justify.

JUDICIAL PROCEEDINGS

The category of "judicial proceedings" is not restricted to trials but includes every proceeding of a judicial nature before a court or before a tribunal or officer clothed with judicial or quasi-judicial power.¹¹

⁷ 56 Ill. App. 425 (2d Dist. 1894).

⁸ *Id.* at 430.

⁹ 48 Ill. 385 (1868).

¹⁰ *Id.* at 387.

¹¹ *Kimball v. Ryan*, 283 Ill. App. 456 (1st Dist. 1936).

An early example of a holding that an official proceeding was not "judicial," and that statements made during it were therefore not privileged, is the case of *Rausch v. Anderson*,¹² in which a school teacher was orally accused, in a public meeting of the local school board, of stealing books which belonged to the school. The court listed three types of proceedings to which absolute privilege had traditionally been extended: parliamentary proceedings, judicial proceedings, and naval and military affairs. The court found that an open meeting of a school board, at which a teacher's superior made defamatory accusations, was not a judicial proceeding because it was not necessary to the procedure involved in securing the revocation of a teacher's license and that the revocation had already been accomplished. The court observed that the board had no right to hold a public meeting to provide the principal with an opportunity to make defamatory charges and to provide the board with a forum for explaining to the public what it had done and why.¹³

In the course of a judicial proceeding defamatory statements may be made by any of the participants—the judge, in the course of the trial or in his opinion; a juror; a witness either in open court, by affidavit, or in answer to interrogatories; an attorney for one of the parties; or anyone else who may participate in the proceedings.¹⁴ Illinois cases dealing with all these possibilities have not been found, but there are cases dealing with each of the following:

A witness in open court. An early case on this point was *McDavitt v. Boyer*,¹⁵ a slander case, in which the defamatory statements were made on the witness stand by the defendant while he was acting as his own attorney. The parties were neighboring farmers who were engaged in a long standing feud. The defendant, in an earlier case, had accused the plaintiff of perjury and of subornation of perjury in connection with a trial at which the plaintiff had accused the defendant of permitting his hogs to damage the plaintiff's corn. In the slander case the court on appeal said that the action could not be brought for words used by a witness (defendant) in giving testimony in a judicial proceeding, if the testimony was pertinent and material to the subject of inquiry, in spite of the fact that it might be malicious or false.¹⁶

A witness by affidavit. This area of protection can be illustrated by the case of *Krumin v. Bruknes*.¹⁷ The defendant had submitted an affidavit in a naturalization proceeding, in which were contained statements defamatory to the plaintiff. Specifically, the defendant accused the plaintiff, who was applying for United States citizenship, of being a bootlegger. The communi-

¹² 75 Ill. App. 526 (2d Dist. 1897).

¹³ *Id.* at 535.

¹⁴ Harper & James, Torts § 5.22 (1956).

¹⁵ 169 Ill. 475, 48 N.E. 317 (1897).

¹⁶ *Id.* at 483, 48 N.E. at 319.

¹⁷ 255 Ill. App. 503 (1st Dist. 1930).

cation was held to be absolutely privileged, in part because a naturalization proceeding was presumed to be a judicial proceeding,¹⁸ and in part because of policy considerations which will be discussed below.

Answers to interrogatories. Clearly, answers to interrogatories are analogous to statements from the witness stand, and in *Sarelas v. Alexander*¹⁹ they were held to be equally privileged.

Statements by an attorney for one of the parties. There are a substantial number of these cases, many of which are concerned with the use of intemperate invectives by an attorney in court. In addition to the *McDavitt* case, in which the slanderer filled the dual role of attorney and witness, there is another early case, *Burdette v. Argile*,²⁰ in which the court observed that words in a judicial proceeding are privileged, "even though they may be harsh and offensive, if they are material and pertinent."²¹ A more recent case, in which a liberal rule of absolute privilege for the language of lawyers was upheld, was *Parker v. Kirkland*.²² In that case the court cited and followed what it referred to as "the English rule" that all statements of counsel which are pertinent to the case are protected regardless of the speaker's motive.²³

Not only can defamatory statements be made by any of the participants in the proceeding and be protected, they may appear in several different kinds of documents. There are cases dealing with such material published in complaints,²⁴ affidavits,²⁵ and motions; in pleadings,²⁶ briefs,²⁷ arguments,²⁸ and statements of counsel.²⁹ In all these circumstances, the question of pertinency or relevancy is never left for the jury but is always a question of law for the court.³⁰

THE QUESTION OF RELEVANCY

The federal government and all the states except Louisiana extend an absolute privilege to statements made in the course of judicial proceedings if the statements are in any way pertinent or related to the proceedings,³¹

¹⁸ *Id.* at 512.

¹⁹ 32 Ill. App. 2d 339, 177 N.E.2d 867 (1961), *cert. denied*, 370 U.S. 904, 82 Sup. Ct. 1251 (1962).

²⁰ 94 Ill. App. 171 (1st Dist. 1900).

²¹ *Id.* at 176.

²² 298 Ill. App. 340, 18 N.E.2d 709 (1939).

²³ *Id.* at 340, 18 N.E.2d at 709.

²⁴ *Spaids v. Barrett*, 57 Ill. 289 (1873).

²⁵ *Hibbard, Spencer, Bartlett & Co. v. Ryan*, 46 Ill. App. 313 (1st Dist. 1892); *Rall v. Donnelly*, 56 Ill. App. 425 (2d Dist. 1894).

²⁶ *Maclaskey v. Mecartney*, 324 Ill. App. 498, 58 N.E.2d 630 (1st Dist. 1945).

²⁷ *Annot.*, 32 A.L.R.2d 423 (1953).

²⁸ *McDavitt v. Boyer*, 169 Ill. 475, 48 N.E. 317 (1897); *Burdette v. Argile*, 94 Ill. App. 171 (1st Dist. 1901).

²⁹ *Parker v. Kirkland*, 298 Ill. App. 340, 18 N.E.2d 709 (1st Dist. 1939).

³⁰ *Young v. Lindstrom*, 115 Ill. App. 239 (2d Dist. 1904).

³¹ *Lescale v. Jos. Schwartz Co.*, 116 La. 293, 40 So. 708 (1906).

and "all doubts are resolved in favor of relevancy."³² In England even irrelevant matter is protected,³³ but most states have not gone so far. Illinois, like the majority of states, has on occasion ruled that a statement is so far out of bounds that it is not privileged.³⁴

However, it should be remembered that the criterion for extension of the privilege is much broader than that which the word "relevant" would at first suggest. In no sense must the privileged material be legally relevant in the same way that evidence must be relevant to be admissible.³⁵

The question of the outer limits of relevancy has been considered in several Illinois cases. Among them is *Talley v. Alton Box Board Company*,³⁶ in which the plaintiff was an attorney who had filed a petition to secure court approval of his fee in a prior proceeding. The defendant corporation in its reply criticized the plaintiff's conduct in the earlier proceeding and raised the question whether, if that conduct had been unethical, the plaintiff was entitled to his fees. The court held that comments on the conduct of an attorney in performing services for which he is seeking compensation are absolutely privileged in judicial proceedings. These comments were privileged, said the court, "regardless of whether the final decision was that the alleged impropriety was a defense, no defense, or false."³⁷

Another case involving the question of relevancy is *Guttman v. Guttman*,³⁸ in which a witness made the statement that his brother "had to marry the girl" whom he had taken across state lines. The examination of the witness who made the defamatory statement was concerned with whether or not he had known of his mother's conveyance of land in which he, his brother, and his brother's wife would have had an interest if there had been a valid marriage. The court held that the statement may have been relevant, and that if so, it would be absolutely privileged. However, the court added the qualification, "if they [the words] were not uttered simply out of malice without regard for relevancy."³⁹

In only one recent Illinois case was defamatory material whose relevancy was questioned found to be beyond protection. In *Malecki v. Stroller*,⁴⁰ a lawyer made statements at a hearing before the local state's attorney to the effect that the plaintiff had defrauded him in the purchase of an automobile, that the plaintiff ran a bucket shop, was a criminal and a thief, and passed hot money. These statements, made in the state's attorney's

³² *Harrell v. Summers*, 32 Ill. App. 2d 358, 362, 178 N.E.2d 133, 134 (4th Dist. 1961).

³³ *Parker v. Kirkland*, *supra* note 29.

³⁴ *Malecki v. Stroller*, 33 Ill. App. 2d 320, 179 N.E.2d 433 (1st Dist. 1959).

³⁵ *Ginsberg v. Black*, 192 F.2d 823 (7th Cir. 1951), *cert. denied*, 343 U.S. 934, 72 Sup. Ct. 770 (1952).

³⁶ 37 Ill. App. 2d 137, 185 N.E.2d 349 (4th Dist. 1962).

³⁷ *Id.* at 146, 185 N.E.2d at 353.

³⁸ 37 Ill. App. 2d 137, 185 N.E.2d 349 (4th Dist. 1962).

³⁹ *Id.* at 146, 185 N.E.2d at 353.

⁴⁰ *Malecki v. Stroller*, 33 Ill. App. 2d 320, 179 N.E.2d 433 (1st Dist. 1959).

office during the course of an investigation of the allegedly fraudulent activities of the plaintiff, were held to be irrelevant to the purposes of the inquiry, which were to find out whether or not the client of the defendant attorney—and not the attorney himself—had been defrauded.

Passing attention to the scope of the privilege was given in *Harrell v. Summers*,⁴¹ in which the plaintiff, who was the subject of a commitment proceeding for insanity, claimed unsuccessfully that allegations about his mental health were irrelevant; and in *Johnson v. Stone*,⁴² a federal case, in which statements made by opposing counsel in the course of another trial were held to be absolutely privileged. It was in *Harrell v. Summers* that the statement was made that “all doubts are resolved in favor of relevancy or pertinency,”⁴³ and the Illinois cases on absolute privilege in judicial proceedings certainly bear out this contention.

POLICY REASONS FOR THE EXISTENCE OF ABSOLUTE PRIVILEGE IN CASES INVOLVING JUDICIAL PROCEEDINGS

Absolute privilege for judges is typically said to be founded upon the “general principle of highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.”⁴⁴ This attitude is consistent with the philosophy that the bench should be independent and free from outside pressures.

It has also been pointed out that in addition to the importance of protecting judges, other participants are equally in need of protection if they are to be encouraged to speak freely. Furthermore, if there is any merit to the theory that the adversary system of justice is a reliable method of arriving at the truth, then false defamatory statements will be revealed as such during the course of the original proceeding, at which point the defamed person has at least as good an opportunity to reply as he would have in a subsequent lawsuit.⁴⁵

The judicial process itself includes several safeguards against the likelihood that a participant's reputation will be injured by defamatory statements. Witnesses are sworn to tell the truth and are subject to penalties for perjury if they do not. Their statements can be kept within bounds by the judge, and their false statements can be revealed by cross-examination. Lawyers and judges, as part of their professional training, have learned to adhere to a standard of conduct which prohibits the use of malicious false-

⁴¹ 32 Ill. App. 2d 358, 178 N.E.2d 133 (4th Dist. 1961).

⁴² 268 F.2d 803 (7th Cir. 1959).

⁴³ *Supra* note 41, at 362, 178 N.E.2d at 134.

⁴⁴ *Bradley v. Fisher*, 80 U.S. (13 Wall.) 646, 649 (1871).

⁴⁵ *Handler and Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 Harv. L. Rev. 44, 54 (1960).

hood as a tool of their art, and they are subject to disciplinary sanctions if they make use of it.⁴⁶ In general, therefore, the existence of absolute privilege in this area seems well accepted and consistent with public policy.⁴⁷

LEGISLATIVE PROCEEDINGS

The Constitution of the United States⁴⁸ and the Constitution of the State of Illinois⁴⁹ both include provisions protecting legislators from defamation suits arising out of statements made in the legislative halls. In addition, Illinois has made statutory provision for a person who feels that he has been defamed during the course of a committee hearing to be given the right of reply.⁵⁰ No Illinois cases have been found involving defamatory statements by members of the General Assembly in which absolute privilege was claimed or granted, but there is no question but that the privilege would apply.

Indeed, unlike most other states, Illinois grants absolute privilege to city councilmen for statements made in the course of council proceedings. At least two such cases have arisen. In the earlier of the two, *Iddings v. Houser*,⁵¹ the defendant was an alderman of the City of Atlanta, Illinois, who criticized the mayor at a city council meeting. In the second, *Larson v. Doner*,⁵² the plaintiff was the city clerk and the defendants were the mayor and commissioners of the City of South Beloit. In the *Larson* case, the defendants had passed and published a resolution temporarily suspending the plaintiff from office pending an audit and publicly accusing her of malfeasance and neglect of duty. The court, in upholding the defendants' claim of absolute privilege, stated:

The rule that the publication of defamatory matter in due course of legislative proceedings is absolutely privileged is broad and comprehensive and includes all such proceedings, whether federal, state or municipal.⁵³

EXECUTIVE PRIVILEGE

American jurisdictions are divided as to whether or not public employees of the executive branch of government should be extended the protection of absolute privilege. The federal government, Illinois, and many other states do extend the privilege; but a large number of states extend a qualified privilege only.⁵⁴ The propriety and advisability of extending

⁴⁶ *Id.* at 55.

⁴⁷ *Id.* at 54.

⁴⁸ U.S. Const. Art. I, § 6.

⁴⁹ Ill. Const. Art. IV, § 14.

⁵⁰ Ill. Rev. Stat. ch. 63, § 13.5 (1957).

⁵¹ 237 Ill. App. 236 (3d Dist. 1925).

⁵² 32 Ill. App. 2d 471, 178 N.E.2d 399 (2d Dist. 1961).

⁵³ *Id.* at 474, 178 N.E.2d at 401.

⁵⁴ Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 Colum. L. Rev. 131, 141 (1910).

absolute privilege to statements made by minor government functionaries has been vigorously debated by writers in the law journals.⁵⁵

The federal position was first established in *Spalding v. Vilas*,⁵⁶ in which the Postmaster General was the defendant. The plaintiff, a lobbyist seeking to increase the salaries of his client postmasters, accused the Postmaster General of distributing a circular containing defamatory matter. The Postmaster General had sent letters to the plaintiff's clients informing them that the plaintiff had engaged in fraud and fraudulent use of the mails, and these letters were the basis for the libel action. The United States Supreme Court held that the Postmaster General's obligation to fulfill the duties of his office required that he be free from the threat of such an action.⁵⁷

The ensuing years saw a gradual expansion of the privilege to federal executive officers below the cabinet level, including a special assistant to the Attorney General,⁵⁸ various officers in the Comptroller General's office,⁵⁹ a prison warden and members of a parole board,⁶⁰ a consul,⁶¹ a government psychiatrist,⁶² and others.⁶³ In only one case was the privilege denied.⁶⁴ In that case the defendant was a United States marshal, and whether the court thought an absolute privilege should be denied because the marshal was not within the scope of his duties or because the office of federal marshal is not entitled to an absolute privilege is not clear.⁶⁵

The federal position was further expanded in *Barr v. Matteo*.⁶⁶ This case involved a libel suit against the head of the Office of Rent Stabilization who had issued a press release in which he gave reasons why he intended to suspend two employees of the agency. These employees sued, charging that the press release in itself, and news reports resulting from it, defamed them. The majority opinion has been generally understood to hold that *any* federal official, regardless of the level of his office, is absolutely privileged with respect to *any* statements he may make while acting within the scope of his employment.⁶⁷ The *Barr* doctrine has since been applied to a claims

⁵⁵ See, e.g., Handler and Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 Harv. L. Rev. 44 (1960).

⁵⁶ 161 U.S. 483, 16 Sup. Ct. 631 (1896).

⁵⁷ *Id.* at 498, 16 Sup. Ct. at 637.

⁵⁸ *Yaselli v. Goff*, 12 F.2d 135 (2d Cir. 1926), *aff'd mem.* 275 U.S. 503, 48 Sup. Ct. 155 (1927).

⁵⁹ *Cooper v. O'Conner*, 99 F.2d 135 (D.C. Cir. 1938), *cert. denied*, 302 U.S. 686, 59 Sup. Ct. 146 (1938).

⁶⁰ *Lang v. Wood*, 92 F.2d 211 (D.C. Cir. 1937), *cert. denied*, 302 U.S. 686, 58 Sup. Ct. 35 (1937).

⁶¹ *United States ex rel. Parravicino v. Brunswick*, 69 F.2d 383 (D.C. Cir. 1934).

⁶² *Taylor v. Glotfelty*, 201 F.2d 51 (6th Cir. 1952).

⁶³ For a more complete list, see Note, 48 Cornell L.Q. 159, 201 (1962).

⁶⁴ *Colpays v. Gates*, 118 F.2d 16 (D.C. Cir. 1941).

⁶⁵ *Ibid.*

⁶⁶ 360 U.S. 564, 79 Sup. Ct. 1335 (1959).

⁶⁷ See, e.g., Note, 48 Cornell L.Q. 159, 200 (1962).

representative of the Department of Health, Education and Welfare⁶⁸ and to a naval ordnance laboratory guard.⁶⁹

Illinois law is quite protective of communications between governmental employees who are engaged in government business, but the extent to which public statements (such as a press release) would be protected is an open question. Two cases illustrate the extent of the protection given to intra-agency materials.

In the first, *Haskell v. Perkins*,⁷⁰ the defendant Perkins was the architect for the Chicago Board of Education. The plaintiff Haskell was the superintendent of construction and was responsible to Perkins. In a proceeding to dismiss Haskell, Perkins wrote out a specification of charges in which he accused Haskell of insubordination, of accepting construction work which was improperly done or not done in accordance with specifications, with accepting work contrary to Perkins' instructions, with general incompetence, and so forth. These charges were the basis for a hearing to dismiss Haskell, and Haskell claimed they were false. In extending the protection of absolute privilege to the document in question, the court said:

It is well settled that all communications, either verbal or written, passing between public officials pertaining to their duties and in the conduct of public business, are of necessity absolutely privileged . . . these matters cannot be made the basis of recovery in a slander or libel suit.⁷¹

Exactly the same language was used in *Donner v. Francis*,⁷² in which the plaintiff, a senior bacteriologist at Hines Hospital and a civil service employee, brought an action against his superior officers based on accusations they had made about him. The defendants had charged the plaintiff with "conduct prejudicial to the service," specifically with making false charges directed against another of his superiors, and had caused these allegedly defamatory statements to be entered on the plaintiff's personnel record.

In extending absolute privilege to the defendants in this case, the court compared the statements to those which might be made in a judicial proceeding and said: "The acts complained of were done by the defendants in an official capacity, in what may be called a quasi-judicial capacity."⁷³ To that effect, the court cited *Spalding v. Vilas*,⁷⁴ *McDavitt v. Boyer*,⁷⁵ and *Haskell v. Perkins*,⁷⁶ among other cases.

⁶⁸ *Pass v. Lieberman*, 299 F.2d 358 (2d Cir. 1962).

⁶⁹ *Carr v. Watkins*, 187 F. Supp. 841 (E.D.N.Y. 1960).

⁷⁰ 165 Ill. App. 144 (1st Dist. 1911).

⁷¹ *Id.* at 150.

⁷² 255 Ill. App. 409 (1st Dist. 1930).

⁷³ *Id.* at 413.

⁷⁴ 161 U.S. 483, 16 Sup. Ct. 631 (1896).

⁷⁵ 169 Ill. 475, 48 N.E. 317 (1897).

⁷⁶ *Supra* note 70.

THE INFORMER'S PRIVILEGE

Both the *Haskell* and *Donner* cases were concerned with defamatory material published only within the public agency concerned and for the purpose of providing information about the conduct of an agency employee. Somewhat different considerations enter the picture when an outsider provides information about someone to a governmental agency, information which if true may be quite valuable, and which if false can be extremely damaging. Illinois decisions on the type of privilege to be extended to this kind of communication are in conflict. The nature of the conflict will be apparent from the following examples.

In an early case, *Elam v. Badger*,⁷⁷ which involved the reputation of a schoolteacher, a citizen and parent arose at a public meeting of the local board of education and made damaging statements about the teacher's chastity. In particular, he accused her of engaging in sexual intercourse with the big boys in her class. The Illinois Supreme Court held that these statements were not privileged at all, without really explaining why. The circumstances were such that the court might have felt that such information—whether true or not—should have been communicated to the board in a more private way. The proceeding was not in any sense judicial, since the teacher's conduct was not the subject of inquiry at the meeting.

The outcome of the case suggests that if an informer has damaging information about which someone in authority should be informed, he would be well advised to communicate that information privately and confidentially if he wishes to be extended "the informer's privilege."

An "informer case" in which the court was willing to extend only a qualified privilege involved an accusation of theft which was made by an employer to a magistrate. In that case, *Young v. Lindstrom*,⁷⁸ the defendant was a butcher who owned a meat market, and the plaintiff was his only employee. The defendant suspected the plaintiff of filching cash from the cash drawer; he consulted his attorney on two occasions to see if the attorney thought he had enough evidence for an arrest and prosecution. The defendant's attorney was at the time also serving as an assistant state's attorney for the county. Following the second consultation, the attorney was of the opinion that there was a case for prosecution for larceny, and the employee was arrested. The case was, however, dismissed.

The slander charge was based on remarks made by the employer at the time the plaintiff was arrested. On that occasion, the plaintiff, the defendant, the magistrate who had issued the warrant, and the arresting officer were present. The appellate court sustained a verdict for \$450 for damages for slander, holding that the remarks made at the time were only qualifiedly

⁷⁷ 23 Ill. 445 (1860).

⁷⁸ 115 Ill. App. 239 (2d Dist. 1904).

privileged, not necessary to the arrest and charge, and that the jury could have found the existence of actual malice.⁷⁹

Now let us look at two cases in which an absolute privilege was extended to a private citizen who communicated defamatory information to a public official. The leading federal case in this field is *Vogel v. Gruaz*,⁸⁰ and a substantial number of Illinois cases have cited it and purported to follow it.

In the *Vogel* case the defamatory statements were made by a private citizen, in a private interview, to the local state's attorney. During the period when the grand jury was in session the defendant consulted the state's attorney about the possibility of securing an indictment charging the plaintiff with larceny. The state's attorney advised the defendant that he had a good case and that he should go into the grand jury room and make his charges there.

In holding that an action for defamation could not be brought for statements made to the state's attorney, the United States Supreme Court relied on three separate grounds: First, the confidentiality and privileged nature of the attorney-client relationship; second, the public policy of encouraging citizens who are aware of possible criminal activity to make this information available to the authorities; and third, the duty of a citizen to communicate information concerning an offense.

With respect to the first—the attorney-client privilege—the Court said:

We are of opinion that what was said by [defendant] to Mr. Cook was an absolutely privileged conversation. It was said to Mr. Cook while he was state's attorney or prosecutor. . . . If all this had taken place between [defendant] and an attorney consulted by him . . . clearly the communication would have been privileged. . . . The fact that Mr. Cook held the position of public prosecutor and was not to be paid . . . did not destroy the relation which the law establishes between them.⁸¹

With respect to the second—the desire to encourage such activity—the Court continued:

It made that relation more sacred on the ground of public policy. . . . Defendant might have gone before the grand jury directly. . . . Any person who desires to pursue the same course should not be deterred by the fear of having what he may say in the confidence of a consultation with a private adviser . . . disclosed afterwards in a civil suit. . . . It was the province and the privilege of any person who knew of facts tending to show the commission of a crime, to lay these facts before the public officer whose duty it was to commence a prosecution for the crime. Public policy will protect all such communications, absolutely and without reference to the

⁷⁹ *Id.* at 248.

⁸⁰ 110 U.S. 311, 4 Sup. Ct. 12 (1884).

⁸¹ *Id.* at 315, 4 Sup. Ct. at 14.

motive or intent of the informer or the question of probable cause. . . . The free and unembarrassed administration of justice in the criminal law is involved in cases like the present.⁸²

The Court, however, saved its most persuasive argument for the end:

But there is another view of the subject. . . . It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws; and . . . a court of justice will not compel or permit any such information to be disclosed . . . without the permission of the government, the evidence being excluded not for the protection of the witness . . . but upon general grounds of public policy, because of the confidential nature of such communications.⁸³

On the basis of the third reason for extending the privilege, the case of *Vogel v. Gruaz* can reasonably be characterized as an "informer's privilege" case.

An Illinois case in which the same philosophy was expressed is *Krumin v. Bruknes*,⁸⁴ in which an affidavit submitted by a private citizen to the Naturalization Bureau, describing the plaintiff, who was seeking naturalization, as a bootlegger, was given the protection of absolute privilege. Although, as suggested earlier, this case could have been decided on the theory that a naturalization proceeding is a judicial proceeding and all related documents are therefore absolutely privileged, the court laid greater emphasis on the necessity for protecting informers. It said:

A privilege exists against the disclosure of official documents and communications, the publication of which would be injurious to the government as destructive of freedom of official communication in furtherance of duty. . . . May voluntary communications from citizens and informers to the United States government be absolutely privileged? . . . The weight of authority . . . seems to hold that such communications are absolutely privileged because persons having knowledge regarding the commission of a crime ought to be encouraged to reveal the same to the proper authorities fully, freely, and unreservedly.⁸⁵

The court relied on cases from Massachusetts,⁸⁶ Kansas,⁸⁷ and Texas,⁸⁸ and on *Vogel v. Gruaz*⁸⁹ in arriving at its conclusion that voluntary communications from informers to a governmental agency are absolutely privileged.

However, there is a recent Illinois case which appears to hold to the

⁸² *Ibid.*

⁸³ *Id.* at 316, 4 Sup. Ct. at 14.

⁸⁴ 255 Ill. App. 503 (1st Dist. 1930).

⁸⁵ *Id.* at 509.

⁸⁶ *Worthington v. Scribner*, 109 Mass. 487 (1872).

⁸⁷ *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537 (1909).

⁸⁸ *Hutt v. Yarborough*, 112 Tex. 179 (1922).

⁸⁹ 110 U.S. 311, 4 Sup. Ct. 12 (1884).

contrary. In *Flannery v. Allyn*,⁹⁰ the defendant wrote a letter to the Chief of Police of the Chicago Park District, in which he inquired about a check which his daughter had made out to "cash" and given to a traffic officer on Lake Shore Drive when the officer stopped the car in which she was riding and gave the driver a ticket for speeding. Defendant Allyn's letter showed clearly that he assumed the check had been given as a bribe, and he concluded his letter with a demand that immediate disciplinary action be taken against the police officer who had, in the words of the letter, "solicited the check."

As it turned out, no bribe had been solicited or accepted; the officer had cashed the check with his own money so that the driver would have cash with which to post bond. Mr. Allyn, on so learning, wrote another letter withdrawing his charges; but Officer Flannery filed suit for libel. At the trial Flannery won, following instructions to the jury that the letter imputing bribery was libel per se. On appeal, the court held that the letter was *qualifiedly* privileged and that the case must be retried to permit the jury to determine whether or not there was actual malice.⁹¹

Under the doctrine of *Vogel v. Gruaz*⁹² and *Krumin v. Bruknes*,⁹³ Allyn's letter should have been absolutely privileged, since there is surely no more important matter of public interest and concern than that police officers be free from corruptibility. However, the court followed *Judge v. Rockford Memorial Hospital*,⁹⁴ in which a letter from a former employer to the Rockford Nurses' Registry, accusing the plaintiff of mishandling narcotics, was held to be only qualifiedly privileged.

CRITICISM OF GOVERNMENT

There is one more type of defamatory speech to which Illinois extends the protection of absolute privilege. Criticism of government or a governmental agency may not be made the subject of an action for civil libel. This protection is based on the first amendment right of citizens to express their opinions freely and fully on public issues without fear of reprisal. The outstanding Illinois case on this point is *City of Chicago v. Tribune Co.*,⁹⁵ which arose out of the political campaign of 1920, during which the Tribune published statements to the effect that the city's finances were in bad shape, that the city government was insolvent, and that bankruptcy was just around the corner. The city brought suit for libel, contending that these statements had caused its credit to be impaired and interfered with its ability to sell bonds and raise money.

⁹⁰ 47 Ill. App. 2d 308, 198 N.E.2d 563 (1st Dist. 1964).

⁹¹ *Id.* at 319, 198 N.E.2d at 568.

⁹² *Supra* note 89.

⁹³ 255 Ill. App. 503 (1st Dist. 1930).

⁹⁴ 17 Ill. App. 2d 365, 150 N.E.2d 202 (2d Dist. 1958).

⁹⁵ 307 Ill. 595, 139 N.E. 86 (1923).

In deciding that as a matter of law a city could not bring an action for defamation, the Illinois Supreme Court said:

When any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government he may be punished, but all other utterances or publications against the government must be considered absolutely privileged. . . . It is clear that a civil action is as great, if not a greater restriction than a criminal action. . . . It follows, therefore, that every citizen has a right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution. This *absolute privilege* is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely.⁹⁶

The court pointed out that in an action for criminal libel there is a limit on the fine a losing defendant can be required to pay, while in a civil action there is no limit on damages. In addition, the criminal action provides the customary criminal procedural safeguards—including proof of guilt beyond a reasonable doubt—while the civil action does not.⁹⁷

Another reason for extending absolute privilege to criticism of an organ of government was stated by the court in these words:

For the same reason that members of the legislature, judges of the courts and other persons engaged in certain fields of the public service or in the administration of justice are absolutely immune from actions, civil or criminal, for libel for words published in the discharge of such public duties, the individual citizen must be given a like privilege when he is acting in his sovereign capacity.⁹⁸

All the arguments quoted above were cited with approval in the case of *McDonald v. Chicago Daily News Printing Co.*,⁹⁹ which involved an action by a special state's attorney against the Daily News, which had published material accusing him of neglect of duty and want of integrity. However, in spite of its approval of the philosophy of *City of Chicago v. Tribune Co.*,¹⁰⁰ the court in *McDonald* was still willing to look to see whether or not the defamatory statements were libel per se. It is true that the court found that the statements did not constitute libel per se since they did not "reflect upon the character and integrity of the plaintiff . . . ; and a writing, although charging wrongful conduct or dereliction of duty, is not libelous per se . . . unless it imputes a dishonest or fraudulent motive or interest."¹⁰¹ A distinction was apparently being made between defamation of an organ

⁹⁶ *Id.* at 608, 139 N.E. at 90.

⁹⁷ *Id.* at 607, 139 N.E. at 90.

⁹⁸ *Id.* at 610, 139 N.E. at 91.

⁹⁹ 252 Ill. App. 61 (1st Dist. 1929).

¹⁰⁰ *Id.* at 66.

¹⁰¹ *Id.* at 65.

of government, which was to be absolutely privileged, and criticism of a governmental official, which was to be only qualifiedly privileged and which was to be protected only if it were not libel per se.

The philosophy of *City of Chicago v. Tribune Co.* was, however, followed and quoted with approval by the United States Supreme Court in *New York Times v. Sullivan*¹⁰² and later cases involving criticism of public officials.¹⁰³

As is obvious, there is a narrow and somewhat artificial line between criticism of a governmental unit and criticism of the officials who are responsible for the administration of that unit. The United States Supreme Court, in *New York Times*, pointed out that an otherwise impersonal attack on the operation of a governmental agency may not constitutionally be transmuted into a libel on the officials responsible for the operation.¹⁰⁴ The effects of the *New York Times* case and those which followed are examined elsewhere in this survey.

FAIR REPORTING OF GOVERNMENTAL PROCEEDINGS

There is a distinct difference in the type of privilege given to a governmental agency to publish defamatory matter and the privilege extended to the press to report the same matter to the public. This difference was highlighted in the case of *Pape v. Time, Inc.*¹⁰⁵ The United States Civil Rights Commission, in its 1961 report on the administration of justice to members of minority groups, included material on police violence and brutality in Chicago. This material was based on the testimony which a man named Monroe gave to the Commission. The Commission published Monroe's charges, which implicated the plaintiff, a police officer, but it characterized them as allegations by a witness. Time, however, in reporting on the content of the Commission's report, used language which appeared to suggest that plaintiff Pape had in fact engaged in the brutal and violent conduct of which he had been accused by Monroe. Time's rewording of the report to say that Pape did what Monroe alleged he did appears to have been inadvertent and not deliberately malicious; but the court held that Time had only a qualified privilege to report on the Commission's report and that it was liable for misstatements and inaccuracies.¹⁰⁶

In an earlier Illinois case, *Cook v. East Shore Newspapers*,¹⁰⁷ the plaintiff, a judge in East St. Louis, sued the defendant newspaper publisher for libel based on statements made by a court reporter in a proceeding before the attorney general and subsequently published in the defendant's news-

¹⁰² 376 U.S. 254, 84 Sup. Ct. 710 (1964).

¹⁰³ See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 85 Sup. Ct. 209 (1964).

¹⁰⁴ *Supra* note 102, at 292, 84 Sup. Ct. at 732.

¹⁰⁵ 318 F.2d 652 (7th Cir. 1963).

¹⁰⁶ *Id.* at 655.

¹⁰⁷ 327 Ill. App. 559, 64 N.E.2d 751 (4th Dist. 1945).

paper. The court reporter accused the judge of having required that she kick back part of her salary to keep her job.

The trial judge found as a matter of fact that the court reporter's charges were false. On appeal, the judgment of the trial court for the plaintiff judge was affirmed. The defendant's position that it was accurately reporting statements which were made in a judicial proceeding and that therefore it was entitled to a privilege was held not to be correct. The court said:

It is the law in Illinois that publication by a newspaper of a statement of fact, which is not true, against an individual and which is libelous per se, is actionable and not privileged. . . . This is in accordance with the great weight of authority.¹⁰⁸

Just as in the *Pape* case, the court refused to extend the absolute privilege given to statements made in official proceedings to the publication of those statements in the press. Both these holdings appear to conflict with the holding in *New York Times v. Sullivan* and with the philosophy behind that decision; and the cases of *Pape v. Time, Inc.* and *Cook v. East Shore Newspapers* are two of many Illinois cases or federal cases based on Illinois law which have held the press to a much stricter standard of accuracy than is demanded of participants in official proceedings. Indeed, until very recently Illinois law has held the press to a much stricter standard than the doctrine of *New York Times* requires.¹⁰⁹ This point will be discussed in greater detail in the section of this survey which deals with defamation and free speech; the cases nevertheless point up one of the limits of absolute privilege: that material will not be protected as official if it appears elsewhere than in an official document.

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QUALIFIED PRIVILEGES

The concept that a communication is conditionally privileged means no more than that the occasion of making it rebuts, prima facie, the inference of malice arising from the publication of matter defamatory to the character of an individual or individuals.¹ A communication is conditionally privileged when the public interest does not demand that the speaker be free from all responsibility, but merely that he be protected as long as he is speaking in good faith² for justifiable ends.³ The public interest to be protected by having conditionally privileged communications is that

¹⁰⁸ *Id.* at 578, 64 N.E.2d at 760.

¹⁰⁹ See *infra*, Defamation of Public Officials.

¹ *Adair v. Timblin*, 186 Ill. App. 133 (1st Dist. 1914).

² *Young v. Lindstrom*, 115 Ill. App. 239 (2d Dist. 1904).

³ *Elam v. Badger*, 23 Ill. 445 (1860).