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Libel and Slander - Absolute Privilege

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Beatrice A. McMichael, Clerk
United States District Court.

LIBEL AND SLANDER — ABSOLUTE PRIVILEGE

Defendant, as former employer of plaintiff, was required by statute and by rules and regulations of the North Dakota Workmen's Compensation Bureau to fill out in triplicate a furnished form, stating the reasons for plaintiff's separation from his employ, copies of which were to be delivered to the plaintiff and the Bureau, and the defendant to retain a copy. Plaintiff contends that when defendant placed thereon an "X" opposite the words "Misconduct connected with work," and added thereto the words "Falsification of Audit Report," and submitted it to the Bureau, it was a libel. Held, that this being a communication required by statute, it was absolutely privileged. Stafney v. Standard Oil Co., et al., 299 N. W. 582 (N. D., 1941).

Then general rule has been that communications made in pursuance of a duty, public or private, legal or moral, are only qualifiedly privileged. 36 C. J. pp. 1241 and 1244; Townshend, Slander and Libel (4th Ed., 1890), p. 300; Odgers, Libel and Slander (5th Ed., 1881), p. 249; Newell, Libel and Slander (4th Ed., 1924), p. 416; Robertson, Criminal Law, Sec. 592; Cooley, Torts (3rd Ed., Vol. 1, 1932), Sec. 158. This rule dates at least from 1855. Harrison v. Bush, 5 El. & Bl. 349, 119 Eng. Rep. at 512, 32 Eng. Law & Eq. 173, 1 Jur. (N. S.) 846, 25 L. J. Q. B. 25, 3 W. R. 474, 85 E. C. L. 344.

It has also been the rule that courts have steadily refused to enlarge the limits of the class of occasions which are absolutely privileged. 36 C. J. p. 1240. These classifications are generally stated as communications made in the course of judicial, legislative, or executive or administrative proceedings. 36 C. J. p. 1241. By statute, North Dakota has substituted for executive or administrative proceedings, communications made " . . . or in any other proceeding authorized by law." Sec. 4354 (2), Comp. Laws 1913. The court points out that the North Dakota statute omits the word "official," which is usually found in this type of statute,

in its reference to other proceedings, thus making the statute broad enough to cover the occasion at bar. Furthermore, the court says: "Among absolutely privileged communications are those made in the discharge of a duty under express authority of law, by or to heads of departments of the state," citing Tanner v. Stevenson, 138 Ky. 578, 128 S. W. 878, 881, 30 L. R. A. (N. S.) 200 (1910). A Workmen's Compensation Board is an administrative agency. Broadway etc. Realty Co. v. Metcalfe, 230 Ky. 800, 20 S. W. (2d) 988 at 990, 45 Wds. & Phr. (Perm.) 522 (1929). The alleged libel can thus be classed as a communication to a head of a state department.

The case history indicates that the rule of absolute privilege was applied in 1895 to include the heads of executive departments of the government. Spaulding v. Vilas, 161 U. S. 483, 61 S. Ct. 631, 40 L. Ed. 780 (1895). This was extended so as to reach and include subordinate government officers when engaged in the discharge of duties imposed upon them by law. De Arnaud v. Ainsworth, 24 App. D. C. 167, 5 L. R. A. (N. S.) 163 (1904); Farr v. Valentine, 38 App. D. C. 413, Ann. Cass, 1913C 821 (1912); U. S. v. Brunswick, 63 App. D. C. 65, 69 F. (2d) 383 (1934); Miles v. McGrath, D. C., 4 F. Supp. 603 (1933); Harwood v. McMurtry, 22 F. Supp. 572 (1936). Under an application of this rule, a report from the head of a veteran hospital to the Veterans' Bureau, regarding the conduct of an employee, was held absolutely privileged. Donner v. Francis, 255 Ill. App. 409 (1930). Likewise a letter from a State Superintendent of Public Instruction to a county superintendent regarding the conduct and qualifications of a teacher. DeBolt v. McBrien, 96 Neb. 237, 147 N. W. 462 (1914). These last two cases both involved a duty to communicate. And a voluntary affidavit to the Naturalization Bureau of the Federal Department of Labor, regarding the character of an applicant for citizenship, was also held absolutely privileged. Krumin v. Bruknes, 255 Ill. App. 503 (1930).

But a further support of this case, as against the general rule, is seen in the analogy to a witness in a judicial proceeding. It is generally said that the statements of a witness are absolutely privileged (subject, in America, to relevancy), because of the public interest and policy. Newell, Libel and Slander (4th Ed., 1924), p. 391. But it is submitted that it is more correct to base the absolute privilege of a witness on his legal duty to speak, to-wit: his oath to tell the truth, the whole truth, and nothing but the truth. Basing the privilege on such legal duty, the question of relevancy is also automatically provided for. (In England the rule is broader, extending as absolute privilege even to irrelevant remarks volunteered by a witness; but it is submitted that that fact does not delete the cogency of this argument for the reason that there has long existed a category of absolutely privilvant remarks, than does a duty to speak.) Thus since it appears pears that there has long existed a category of bsolutely privileged communications, consisting of those made under a legal duty, into which the present communication readily falls, the court has

not extended the classes of absolute privilege. But since this statement is in derogation of the general rule, a further examination of such rule is required. It is submitted that a comprehensive search exposes the fact that none of the cases cited by the foregoing authorities in support of the rule that a communication under a legal duty is but qualifiedly privileged, actually involved an explicit duty imposed by law such as in the case at hand. And it is further submitted generally that any cases which purport to lay down such rule, do so by way of dicta or under a distinguishable state of facts.

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OUR SUPREME COURT HOLDS

In the Matter of the Application of Clarence Kist for a Writ of Habeas Corpus, Petr., vs. O. K. Butts as Sheriff of Stutsman County, Respt.

That Section 3604 Compiled Laws 1913, provides alternative methods of commencing actions for the violations of city ordinances; they may be commenced either by the issuance and service of a summons or in a proper case by the issuance of a warrant of arrest.

That the penalty clause of a city ordinance is not wholly void because it authorizes a penalty in excess of that permitted by state statute and a judgment and sentence pronounced under such an ordinance may be enforced to the extent that it is within the statutory limitation.

Appeal from the District Court of Stutsman County, Jansonius, J. Opinion of the Court by Burke, J. WRIT DENIED.

In Horace P. Fish and E. J. Olson, Respts., vs. H. H. France, et al as Board of County Commissioners of Logan County, et al., Applts.

Proceedings under the provisions of chapter 225 of the Session Laws of 1939 are not available to one seeking reduction in assessment and taxation of real estate for years prior to the enactment of the statute. Murray vs. Mutschelknaus, 70 N. D. 1, 291 N. W. 118 followed.

That a delinquent taxpayer may not set up as a defense to proceedings to enforce the payment of taxes that the authorities have failed to take steps to collect taxes from other delinquent taxpayers.

That the fact that a delinquent taxpayer has failed to take steps to have alleged unjustly excessive taxes abated by the county commissioners under the provisions of chapter 276 of the Session Laws of 1931 does not bar an action to have tax deeds cancelled, as the remedy provided by said chapter 276 is not exclusive.

That under the provisions of section 2193 of the Compiled Laws a certificate of tax sale is prima facie evidence that all the requirements of law with respect to the sale have been duly complied with; and unless the defects relied upon are specified in the statute or are beyond the power of the legislature to remedy, they may not be asserted after the certificate has been issued. Anderson vs. Moynier, ante, followed.

That where a delinquent taxpayer commences an action, seeking to have taxes cancelled, and tax certificates set aside, he should do equity by tendering the amount of taxes justly chargeable against the real estate involved.