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Libel and Slander—Judicial Extension of Absolute Privilege in Defamation

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to conceal these payments to the wife, ". . . it is commendable that they were straightforward about it."[40]

This decision leaves unresolved the uncertainties surrounding separation agreements in New York. The Court has reaffirmed the broad "direct tendency" rule of *Rhinelander*. The task of deciding whether a particular agreement violates the statutory prohibition against contracts "to alter or dissolve the marriage" remains with the trier of fact and he must approach this determination with but a bare indication of the applicable legal standard. Those agreements which are part of a plan to obtain or facilitate a divorce must be condemned, but only if they "directly" tend to dissolve the marriage. The Court rejected the more rigid legal rule that would test the validity of such agreements by the presence of some undue benefit to one party. Considering the equitable origin of these agreements and the unique relationship of the parties who enter into them, it is perhaps not possible to establish an absolute measure of their validity. The Court, cognizant of the impossibility of establishing a strict legal standard that would insure an equitable result in every case, left the final decision to the discretion of the fact finder. Practical human experience, more so than any legal "test," can best ascribe the proper force to be given the various factual elements in each case. However, it is not a mere academic wish for symmetry and exactness that prompts the desire for a more explicit standard by which these agreements may be interpreted. There is a very real and practical need for clarification of what may be provided in a separation agreement under New York law. In the present state of uncertainty New York residents who have settled their marital differences by contract and who wish to insure that such an agreement will not be upset by a New York court as promotive of divorce, are forced to incorporate the separation agreement in a divorce action brought in another state. The foreign divorce decree will then act as a binding adjudication of the validity of the incorporated separation agreement.[41] Such a burdensome and undesirable procedure could be eliminated to a great extent by a clearer interpretation of the presently ambiguous language of the law governing separation agreements in New York.

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LIBEL AND SLANDER

JUDICIAL EXTENSION OF ABSOLUTE PRIVILEGE IN DEFAMATION

The plaintiff, an appraiser for the City of New York, submitted an appraisal report of certain land known as Edgemere Park, located in the Borough of Queens. At the time, the city was planning to condemn and purchase the land described in the report. Shortly thereafter, in March of 1958, the defendant,

40. *Ibid.*

41. Hess v. Hess, 276 N.Y. 486, 12 N.E.2d 170 (1937); Hoyt v. Hoyt, 265 App. Div. 223, 38 N.Y.S.2d 312 (1st Dep't 1942).

then serving as President of the Borough of Queens and as a member of the Board of Estimate, also submitted a report to the Mayor concerning the City's acquisition by condemnation of real property located in his borough. In his report, the defendant sharply criticized plaintiff's report, stating that it was incredible ". . . that the City's appraiser [plaintiff] could have reached the conclusions set forth in his appraisal report except on the basis of misinformation, ignorance, distortion and incompetence."[1] Moreover, the defendant requested that the plaintiff be removed from the panel of appraisers of the City of New York. Since there was considerable public interest in the subject of condemnation at this time, the press eagerly awaited release of this report. Some three months after defendant had made his report he made a copy of it available to newspaper reporters. This libel action was based on the references to the plaintiff in both the report to the Mayor and to the newspapers. The defendant, after joinder of issue, moved for summary judgment on the ground that he was absolutely privileged as a matter of law to make the defamatory[2] statements. The Supreme Court denied the motion, the Appellate Division affirmed the order[3] and an appeal was taken with three questions certified: (1) Did the Appellate Division properly affirm the denial of motion for summary judgment; (2) did the record establish as a matter of law that the alleged defamatory statements were absolutely privileged; and (3) were they qualifiedly privileged so as to render the defendant immune from liability? The Court of Appeals *held*, that a Borough President is absolutely privileged to make defamatory statements about a lesser city official so long as it is done within the scope of his official duties. It further said that even if the Borough President were only qualifiedly privileged to make the defamatory statements there was insufficient evidence in this case from which a jury might infer malice.[4] *Sheridan v. Crisona*, 14 N.Y.2d 108, 198 N.E.2d 359, 249 N.Y.S.2d 161 (1964).

Under federal decisions it has long been held that an executive official is absolutely privileged to publish false and defamatory matter of another in the exercise of his executive function if the matter has some relation to the proceeding in which the official is acting.[5] In the most recent case involving absolute privilege the Supreme Court extended the privilege to the Director of the Office of Rent Stabilization, protecting him from a libel suit arising out of

1. Sheridan v. Crisona, 14 N.Y.2d 108, 111, 198 N.E.2d 359, 360, 249 N.Y.S.2d 161, 162 (1964).

2. See 3 Restatement, Torts, § 559 (1938).

3. Sheridan v. Crisona, 18 A.D.2d 1140 (2d Dep't 1963) (memorandum decision).

4. For judicial definitions of malice see Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 106, 172 N.E. 139, 142 (1930) (personal spite or ill-will, or culpable recklessness or negligence) and Loewinthan v. LeVine, 270 App. Div. 512, 519, 60 N.Y.S.2d 433, 438 (1st Dep't 1946) (wanton and reckless disregard of the rights of another).

5. See, *e.g.*, Barr v. Matteo, 360 U.S. 564 (1959) (Director of Office of Rent Stabilization); Spalding v. Vilas, 161 U.S. 483 (1896) (Postmaster General); Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941) (Secretary of Interior); Mellon v. Brewer, 18 F.2d 168 (D.C. Cir. 1927) (Secretary of Treasury). See also 3 Restatement, Torts, § 591 (1938).

statements he had made about two employees in a press release.[6] The basis for this privilege is that in exercising the function of his office an executive, keeping within the limits of his authority, should be free from the fear that his motives may become the subject of inquiry in a civil suit for damages. Such restraint would seriously cripple the proper and effective administration of public affairs.[7]

In this state, absolute privilege has been given to judicial proceedings, legislative proceedings and executive communications.[8] The circumstances under which absolute privilege is available to officials of political subdivisions have been variously expressed both with relation to the nature of the occasion and the subject matter of the communication. In some instances the particular statement must be pertinent to the subject under discussion.[9] The trend has been away from conferment of the privilege on the basis of rank and toward conferment on the basis of the duties the official is expected to perform.[10] The doctrine of immunity is based upon "considerations of public policy and to secure the unembarrassed and efficient administration of justice and public affairs."[11] It has been held to include "official reports and communications by or to the executive head of a department of the government."[12] If these reports and communications are in the nature of an official proceeding, a fair and true report of them can be published without fear of liability.[13]

The defense of absolute privilege is lost if the alleged defamatory statements were made by an official when not acting within the scope of his official duties. To decide when an official is acting within the scope of his powers may be a difficult factual determination. A general guideline seems to be that the occasion would have justified the act if the official had been using his power for any of the purposes on whose account it was vested in him.[14] In a decision[15] cited by the majority in the instant case, the Court found for the plaintiff when the defendant, then State Conservation Commissioner, accused him of deliberate sabotage or gross neglect in his conduct with relation to a wildlife experiment. The remarks were made to a group of sportsmen and civic leaders in an after dinner speech. The rationale of the Court was that the privilege should not be extended to comments made in the course of an after dinner speech to people who can do nothing about the alleged gross neglect.[16] The same

6. Barr v. Matteo, 360 U.S. 564 (1959); Jaffee, *Suits Against Government and Officers: Damage Actions*, 77 Harv. L. Rev. 209, 234-35 (1963).

7. Spalding v. Vilas, 161 U.S. 483, 498 (1896).

8. Peeples v. State, 179 Misc. 272, 38 N.Y.S.2d 690 (Ct. Cl. 1942); see also 3 Restatement, Torts, §§ 585, 590, 591 (1938).

9. See Annot., 40 A.L.R.2d 941 (1955).

10. Prosser, Torts 612 (2d ed. 1955).

11. Hemmens v. Nelson, 138 N.Y. 517, 523, 34 N.E. 342, 344 (1893).

12. *Ibid.*

13. N.Y. Civil Rights Law § 74.

14. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

15. Cheatum v. Wehle, 5 N.Y.2d 585, 159 N.E.2d 166, 186 N.Y.S.2d 606 (1959).

16. *Id.* at 593, 159 N.E.2d at 170, 186 N.Y.S.2d at 612.

reasoning was applied by the Appellate Division in a later case[17] in which the Court said "It is not alleged that the words were in the nature of an official report, or uttered pursuant to any duty of office, or that they were addressed to anyone empowered to receive them or act upon them."[18] The Attorney General had made statements about the plaintiff to a newspaper reporter during a preliminary investigation of the plaintiff company. The privilege is not extended to cover informal statements or assertions by public officers concerning their investigations.[19]

The majority of the Court based its decision on the belief, often expressed in prior cases,[20] that executive officials of the state should be able to make reports to various branches of the government without fear of reprisal by a civil suit for damages. Proceeding from this premise they apply the same general considerations of public policy to a municipal executive, such as a Borough President.[21] Contrary to the trend Dean Prosser discusses,[22] the Court confers absolute privilege because the Borough President is charged with "substantial responsibilities," not because the duties imposed would otherwise expose him to civil reprisal. This is especially true in view of the fact that the defendant's authority for making an investigation of condemnation proceedings is derived from his place on the Board of Estimate[23] and even this basis is not absolutely clear.[24] After establishing defendant's right to protection under the privilege, the Court found that his release of the report (to the newspapers) was within its scope because he was obligated to make the report available to the public on demand.[25] In a dissenting opinion, Judge Dye questions the means by which this privilege is being extended and the advisability of extending it. In reference to the first point he states that absolute privilege has been available through constitutional sources and by statute, not through decisional law.[26] More important to the whole consideration of absolute privilege is Judge Dye's reluctance to extend it. He does not find it necessary to give state officials more than a qualified privilege since they are "more likely to be responsive to the wishes of the public if they are required to account for their malicious falsehoods."[27] Judge Dye's conclusion is based on the belief that absolute privilege, or lack of it, does not greatly affect a public official's discharge of his official duties.

17. Goodyear Aluminum Products Inc. v. State, 12 A.D.2d 692, 207 N.Y.S.2d 904 (3d Dep't 1960).
18. *Id.* at 693, 207 N.Y.S.2d at 905.
19. Kelley v. Hearst Corp., 2 A.D.2d 480, 484, 157 N.Y.S.2d 498, 502 (3d Dep't 1956).
20. Cheatum v. Wehle, 5 N.Y.2d 585, 159 N.E.2d 166, 186 N.Y.S.2d 606 (1959); Manceri v. City of New York, 12 A.D.2d 895, 209 N.Y.S.2d 915 (1st Dep't 1961); Hyman v. Press Publishing Co., 199 App. Div. 609, 192 N.Y.Supp. 47 (1st Dep't 1922).
21. Instant case at 112, 198 N.E.2d at 361, 249 N.Y.S.2d at 163.
22. Prosser, Torts 612 (2d ed. 1955).
23. New York City Charter, § 384 (1936).
24. Judge Dye's dissent in the instant case at 115, 198 N.E.2d at 362, 249 N.Y.S.2d at 166.
25. New York City Charter, § 893 (1936).
26. Instant case at 116, 198 N.E.2d at 362, 249 N.Y.S.2d at 167.
27. Instant case at 116, 198 N.E.2d at 363, 249 N.Y.S.2d at 167.

The Court of Appeals has held that a municipal executive is absolutely privileged to make defamatory statements in the exercise of his official duties. While the Court's reasoning is clear it is difficult to predict how far absolute privilege will be extended in this area. The responsibilities of the official involved are an important factor but the court gives no clue as to the amount of responsibility necessary for conferment of the privilege. Trying to find criteria from further reasoning of the Court, one could come to the conclusion that the privilege will be extended to any official who is required to make a report to another official or branch of the government. Even further, from the facts of this case, the decision could be interpreted to mean that an official is privileged in any report which is within his discretion to make. Whether or not the Court will extend this privilege is not ascertainable but its language in this case certainly suggests the possibility. In its disposal of the issue of defendant's release of the report to the newspapers, the Court finds this within the scope of the privilege because members of the public could gain access to the document on demand.[28] While this may be a valid reason for protecting the official if the report happens to be printed, it does not seem to be an adequate or logical reason for allowing him to advertise it, which this decision in effect gives him license to do. The protection of this privilege has been limited (on the basis of what has been though to be for the public good) to remarks made by legislators in the course of debates, the reports of military officers to their superiors, to official acts of state and to statements made by counsel, judge, parties or witnesses in proceedings in court or for use in such proceedings, and in proceedings before tribunals and officers having the judicial attributes of a court.[29] To extend this privilege to government officials at the state level covering reports made in the course of their duties (but possibly not required) seems unwarranted. It is difficult to see why a qualified privilege is not adequate protection since the privilege is only lost when the allegedly defamatory statements are motivated by ill-will[30] or for a purpose not within the privilege. If an official acts in such a way as to lose the protection of a qualified privilege, his actions will be at least as detrimental to the operation of an efficient government as is the fear by its officials of civil reprisal. The latter consideration is the most cogent reason for this decision.

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28. Bradford v. Pette, 204 Misc. 308 (Sup. Ct. 1953).
29. Roberts v. Pratt, 174 Misc. 585, 587, 21 N.Y.S.2d 545, 548 (Sup. Ct. 1940).
30. Andrews v. Gardiner, 224 N.Y. 440, 446, 121 N.E. 341, 344 (1918).