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Civil Procedure—Pleading Requisites to Sufficiently State Slander Action Defense

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CIVIL PROCEDURE

PLEADING REQUISITES TO SUFFICIENTLY STATE SLANDER ACTION DEFENSE

In *Cheatum v. Wehle* plaintiff, a Civil Service employee in the State Conservation Department, brought an action for slander against the State Conservation Commissioner.[1] At a dinner which was attended by over 150 persons defendant had allegedly charged plaintiff with "deliberate sabotage or gross neglect" in reference to an experimental wildlife project which had failed.[2] From adverse orders of the Supreme Court, Special Term and the Appellate Division, defendant appealed upon a series of five defenses of which the defenses of "fair comment" and immunity from suit based upon "official privilege," were considered extensively by the Court.

The Court found that the defense of fair comment should not have been stricken as a complete defense. Disagreeing with Judge Dye's opinion that the defendant must "plead the truth of the statement," the majority found that, where the alleged defamation consisted of an opinion based upon certain facts, it was enough that the defendant allege the facts to be true and that the comment was warranted by those facts. The truth of the statement must be pleaded only when the defense is that of "justification," for then defendant avers that the statement is one of fact and not opinion.[3] In asserting the defense of fair comment, the defendant must also allege that he acted in good faith, believing the statement to be true.[4] These allegations were contained in defendant's answer. Fair comment was a complete defense to the action if the statement was based upon true facts, and the opinion drawn thereon was reasonable and justified.

The general rule is that in the case of a slanderous statement the law implies malice.[5] However, where the statement is made within the purview of some privilege, such as fair comment, the comment remains "fair" in absence of a showing of actual malice, and it is incumbent upon the plaintiff to show such malice. Therefore, a jury must determine whether there was fair comment or malicious slander.[6]

In order to effectuate the administration of public affairs, an executive official is clothed with an "absolute privilege," and immunity from prosecution, for publishing false and defamatory statements made in the exercise of his executive functions.[7] The courts have recognized an extention of the policy of absolute privilege to situations where the administration of executive functions

1. 5 N.Y.2d 585, 186 N.Y.S.2d 606 (1959).
2. The Commissioner was the guest of honor at a dinner attended by local sportsmen, civic and business leaders, members of the press and sports writers.
3. Bingham v. Gaynor, 203 N.Y. 27, 96 N.E. 84 (1911).
4. Foley v. Press Pub. Co., 226 App. Div. 535, 235 N.Y. Supp. 340 (1st Dep't 1929); Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers, 260 N.Y. 106, 183 N.E. 193 (1932); Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 172 N.E. 139 (1930).
5. Byam v. Collins, 111 N.Y. 143, 19 N.E. 75 (1888); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920).
6. Byam v. Collins, *supra* note 5.
7. Hemmons v. Nelson, 138 N.Y. 517, 34 N.E. 342 (1893).

is not the primary motivation of certain communications, but where there is a common interest between the communicating parties, and the one owes at least a moral or social duty to the other. Such a privilege is deemed "qualified," because it does not extend beyond such good faith statements as are made in the performance of his duty and believed to be true.[8] The Commissioner had two opportunities to make an official report upon his theory regarding the failure of the wildlife project, and thus could have acted within the absolute privilege accorded him. He neglected to make mention of it in his annual report to the Governor and the Legislature, and also in the then current issue of the *Conservationist,* an official magazine published by the Conservation Department. Since the Commissioner had a ready, effective and legal means of handling the situation, such a filing charges and giving the plaintiff an opportunity to be heard, the Court could see no need to extend a qualified privilege under the circumstances in which this statement was made. The audience addressed could do nothing about the situation, and the defendant owed them no legal or moral duty. Since the statement was not made in the exercise of his executive functions, the defendant could not avail himself of an absolute privilege, and the defense of qualified privilege was not available to the defendant because he had acted apart from his official duties.[9]

Recognizing that the absolute privilege accorded an official report or a speech on the floor of the Legislature was absent, the minority opinion favored a public policy that would allow a public officer, reporting to his constituents concerning the administration of the business of the State, to be protected by a qualified privilege. Unless qualified privilege is extended, informing the public concerning governmental affairs will become difficult and dangerous.

However, if the public interest requires that the public be informed of official acts, it equally requires that such information communicated, be truthful, reasonable and reliable. A less strict application of qualified privilege may foster ill-founded opinions, since truth is not a requisite to the privilege. Truthful and reasonable opinions may be communicated to the public through the privilege of fair comment, since such privilege provides the safeguards essential to reliable information, for such opinions must be reasonably inferred from true facts that in good faith are believed to be true.

JOINDER OF PARTIES UNDER SECTION 290-c OF TAX LAW

The certified question of whether a motion to sever a joint tax proceeding, brought under Section 290-c of the New York Tax Law was properly granted by the two lower courts was unanimously answered in the negative by the Court of Appeals. The Court held that modern practice, in the interests of mitigating expenses and facilitating justice, has become greatly liberalized concerning joinder procedures.

8. *Supra* note 3.
9. Whether or not such a privilege exists is a matter of law to be decided by the court. Byam v. Collins, *supra* note 5.