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Libel and Slander -- Publication -- Privilege -- Dictation to a Stenographer

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question actually raised and the reasoning of the lower courts could have been disposed of by reference to the removal cases discussed above.

Speculation arises as to the motives of the Court in discussing—and then adversely—the doctrine of *Toland v. Sprague*. Was it merely an attempt to educate the lower courts on the distinction between the use of attachment in cases of removal and in cases of original jurisdiction? Such a purpose would hardly necessitate criticism of the doctrine. Or was the Court intimating that on a future occasion it may not refuse to allow a federal district court to acquire original jurisdiction by way of attachment and constructive service? Such an intimation would not be surprising from a Court which has recently displayed its willingness to re-examine any questionable precedents.[28] The disparity between the scope of attachment in the state courts and in the federal courts may be an unfortunate retention.[29] In the light of the recent revision of federal procedure allowing federal process to run throughout the state in which the court sits,[30] a change permitting federal courts to acquire original jurisdiction over a nonresident defendant by means of attachment and constructive service might be a desirable adjunct to the usefulness of the federal courts.

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Libel and Slander—Publication—Privilege—Dictation to a Stenographer.

Plaintiff, having been discharged from the employ of defendant company for alleged misconduct, went to defendant's manager and requested a separation notice which was required to be filed with the Unemployment Compensation Commission. The manager made a notation on a blank notice that the cause of separation should be "Misconduct", and, at his request, plaintiff took the notice to defendant's stenographer who filled it out and inserted as the cause of separation the word "Misconduct". In an action for libel, the Court sustained the defendant's demurrer, holding that there was no publication to support the action, as communication to a stenographer was insufficient.[1]

Much authority supports the decision reached here. On the theory that a corporation can act only through its agents,[2] it is held that com-

[28] Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 (1938); Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466, 59 Sup. Ct. 595, 83 L. ed. Adv. Ops. 577 (1939).

[29] Early criticism was found in Dormitzer v. Illinois & St. Louis Bridge Co., 6 Fed. 217, 218 (C. C. D. Mass. 1881).

[30] Federal Rules of Civil Procedure 4(f).

[1] Satterfield v. McLellan Stores, 215 N. C. 582, 2 S. E. (2d) 709 (1939).

[2] Cartwright-Caps Co. v. Fischel and Kaufman, 113 Miss. 359, 74 So. 278 (1917).

munications between agents of a corporation concerning corporate business are not thereby published.[3] A leading case,[4] cited and followed by the North Carolina Supreme Court, holds that the acts of a manager and stenographer of a corporation constitute a single corporate act. Those involved are not regarded as third parties for the purpose of publication, but as common servants with a duty to carry out the single act of the corporation.[5] As to the stenographer of an individual, the same result would probably be reached, the stenographer being considered only the confidential instrumentality of the employer.[6] Under modern business conditions, a stenographer is necessary to the transaction.[7] The taking and transcribing of the dictation is mainly a mechanical process,[8] so the stenographer is not considered to possess such an independent third party personality as would warrant a holding of publication.[9] "It is inconceivable how the business of the country, under the present conditions, can be carried on, if a business man or corporation must be subject to litigation for every letter containing some statement too strong, where it is only sent to the person to whom directed, and only heard by a stenographer to whom the letter is dictated."[10]

A number of cases adopt the view that dictation to a stenographer is by itself sufficient to constitute publication.[11] Under this view, a

[3] Briggs v. Atlantic Coast Line Ry., 66 F. (2d) 87 (C. C. A. 5th, 1933); George v. Georgia Power Co., 43 Ga. App. 596, 159 S. E. 756 (1931); Prins v. Holland-North American Mortgage Co., 107 Wash. 206, 181 Pac. 680 (1919).

[4] Owen v. Ogilvie Publishing Co., 32 App. Div. 465, 53 N. Y. Supp. 1033 (2d Dep't. 1898).

[5] Central of Georgia Ry. v. Jones, 18 Ga. App. 414, 89 S. E. 429 (1916); Cartwright-Caps Co. v. Fischel and Kaufman, 113 Miss. 359, 74 So. 278 (1917); Wells v. Belstrat Hotel Corp., 212 App. Div. 366, 208 N. Y. Supp. 625 (1st Dep't. 1925); Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S. W. (2d) 255 (1929); Chalkley v. Atlantic Coast Line Ry., 150 Va. 301, 143 S. E. 631 (1928). Accord: Briggs v. Atlantic Coast Line Ry., 66 F. (2d) 87 (C. C. A. 5th, 1933); Prins v. Holland-North American Mortgage Co., 107 Wash. 206, 181 Pac. 680 (1919); *cf.* George v. Georgia Power Co., 43 Ga. App. 596, 159 S. E. 756 (1931).

[6] See Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S. W. (2d) 255 (1929); *cf.* Morgan v. Wallis, 33 T. L. R. 495 (K. B. 1917).

[7] Wells v. Belstrat Hotel Corp., 212 App. Div. 366, 208 N. Y. Supp. 625 (1st Dep't. 1925).

[8] Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S. W. (2d) 255 (1929); *cf.* Western Union Tel. Co. v. Cashman, 149 Fed. 367 (C. C. A. 5th, 1906).

[9] Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S. W. (2d) 255 (1929).

[10] Cartwright-Caps Co. v. Fischel and Kaufman, 113 Miss. 359, 363, 74 So. 278, 279 (1917).

[11] Nelson v. Whitten, 272 Fed. 135 (E. D. N. Y. 1921); Ferndon v. Dickens, 161 Ala. 181, 49 So. 888 (1909); Berry v. City of New York Ins. Co., 210 Ala. 369, 98 So. 290 (1923); Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730 (1901); Ostrowe v. Lee, 256 N. Y. 36, 175 N. E. 505 (1931); Bradley v. Conners, 169 Misc. 442, 7 N. Y. Supp. (2d) 294 (Sup. Ct. 1938); Pullman v. Hill, (1891) 1 Q. B. 524; see Sun Life Assurance Co. v. Bailey, 101 Va. 443, 445, 44 S. E. 692, 693 (1903); *cf.* Bacon v. Michigan Central Ry., 55 Mich. 224 (1884); Kennedy v. James Butler, Inc., 245 N Y. 204, 156 N. E. 666 (1927). RESTATEMENT, TORTS (1938) §557, comment (h).

stenographer's transcription of the dictated matter is more than a mere mechanical process; there is produced in the mind as full and clear a perception of the dictated material as if there had been a slower copying by one not so skilled in stenographic work.[12] The stenographer, therefore, whether of a corporation or of an individual, in reading and transcribing the notes, is the human third party necessary to publication.[13] It is further argued that statements so communicated to a stenographer are no less injurious,[14] as they will certainly influence the stenographer in his estimation of the person defamed, who is as much entitled to the respect and esteem of the stenographer as of anyone else.[15] Where the communication is sent to the person defamed, "the outrage is without redress if the libel is not published when written out and read" by the stenographer.[16]

It seems to be the more logical and better rule to hold every dictation to a stenographer a publication, because actually the stenographer is a separate and distinct human being, as required by the law of defamation. Even under this holding, the defendant is not deprived of other defenses, unless he dictated the communication maliciously.

The principal case might have been decided without considering the question of defendant's publication to the stenographer. The plaintiff went to the defendant's manager and requested the separation notice, and the reason for her discharge was stated on the blank that she took to the stenographer. As a consequence, the plaintiff might have been denied recovery as she only got what she asked for,[17] because she herself, and not the defendant's manager, published it.[18]

Where there is a publication, the defendant may still escape liability if his communication is privileged. "The question of privilege must be kept distinct from the question of publication. Privilege, of course, in no sense negatives publication; it justifies it."[19] In order for a defendant to rely on this defense, there must have been a privileged

[12] Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730 (1901).

[13] Bradley v. Conners, 169 Misc. 442, 7 N. Y. Supp. (2d) 294 (Sup. Ct. 1938); Adams v. Lawson, 17 Gratt. 250 (Va. 1867).

[14] Nelson v. Whitten, 272 Fed. 135 (E. D. N. Y. 1921).

[15] Berry v. City of New York Ins. Co., 210 Ala. 369, 98 So. 290 (1923).

[16] Ostrowe v. Lee, 256 N. Y. 36, 40, 175 N. E. 505, 506 (1931).

[17] Melcher v. Beeler, 48 Colo. 233, 110 Pac. 181 (1910); Hoff v. Pure Oil Co., 147 Minn. 195, 179 N. W. 891 (1920); Miller v. Donovan, 16 Misc. 453, 39 N. Y. Supp. 820 (Sup. Ct. 1896); Schoepflin v. Coffey, 162 N. Y. 12, 56 N. E. 502 (1900); Taylor v. McDaniels, 139 Okla. 262, 281 Pac. 967 (1029). Accord: Burdett v. Hines, 125 Miss. 66, 87 So. 470 (1921); *cf.* Beeler v. Jackson, 64 Md. 589, 2 Atl. 916 (1885). But *cf.* Nelson v. Whitten, 272 Fed. 135 (E. D. N. Y. 1921).

[18] Shepard v. Lamphier, 84 Misc. 498, 146 N. Y. Supp. 745 (Sup. Ct. 1914); Fonville v. McNease, Dud. Eq. 303 (S. C. 1838); Sylvis v. Miller, 96 Tenn. 96, 33 S. W. 921 (1896): Wilcox v. Moon, 64 Vt. 450, 24 Atl. 244 (1892).

[19] 18 HALSBURY, THE LAWS OF ENGLAND (1911) 658.

occasion for the publication, and the defendant must have remained within the scope of the privilege.[20]

A communication is privileged, although it contains matter otherwise defamatory, and therefore actionable, if it is honestly made in good faith on a subject concerning which the sender and receiver both have an interest or duty.[21] Communications between parties engaged in a common business transaction or dispute,[22] or between an employer and employee or a principal and agent,[23] relating to the subject matter of the business involved, fall within the limits of a privileged communication. Both parties to the communication have an interest and duty therein, since it concerns the business in which both are engaged. To insure the establishment of a privilege, a communication must be confined to the subject matter or purpose of the business involved, and not go beyond it by dwelling on irrelevant matter.[24]

There is also a privilege when a person gives information, either voluntarily or by request, concerning the character of a former employee who seeks to obtain employment from another.[25] Such privilege is based on a moral or social duty to give the information,[26] and the communication need not be confined to facts which the sender knows of his own knowledge, or to information which he has fully investigated.[27]

[20] Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911); Stewart v. Riley, 114 W. Va. 578, 172 S. E. 791 (1934).

[21] Montgomery Ward & Co. v. Watson, 55 F. (2d) 184 (C. C. A. 4th, 1932); Aetna Life Ins. Co. v. Mutual Benefit Ass'n., 82 F. (2d) 115 (C. C. A. 8th, 1936); Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911); Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937); Harrison v. Garrett, 132 N. C. 172, 43 S. E. 594 (1903); Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914); Alexander v. Vann, 180 N. C. 187, 104 S. E. 360 (1920); Elmore v. Atlantic Coast Line Ry., 189 N. C. 658, 127 S. E. 110 (1925).

[22] Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914); Roff v. British and French Chemical Mfg. Co. (1918) 2 K. B. 677; Osborn v. Thomas Boulter & Son, L. R. (1930) 2 K. B. 226. Accord: Edmondson v. Birch & Co. (1907) 1 K. B. 371.

[23] Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911); Nichols v. Eaton, 110 Iowa 509, 81 N. W. 792 (1900); Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937). Accord: Hebner v. Great Northern Ry., 78 Minn. 289, 80 N. W. 1128 (1899); Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R. (1869) 4 Q. B. 262; *cf.* Louisiana Oil Corp. v. Renno, 173 Miss. 609, 157 So. 705 (1934).

[24] Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911).

[25] Solow v. General Motors Truck Co., 64 F. (2d) 105 (C. C. A. 2d, 1933); Radovich v. Douglas, 84 Colo. 149, 268 Pac. 575 (1928); Fresh v. Cutter, 73 Md. 87, 20 Atl. 774 (1890); Dale v. Harris, 109 Mass. 193 (1871); Doane v. Grew, 220 Mass. 171, 107 N. E. 620 (1915); McKenna v. Mansfield Leland Hotel Co., 55 Ohio App. 163, 9 N. E. (2d) 166 (1936). Accord: Missouri Pacific Ry. v. Behee, 2 Tex. Civ. App. 107, 21 S. W. 384 (1893). NEWELL, SLANDER AND LIBEL (4th ed. 1924) §404.

[26] Radovich v. Douglas, 84 Colo. 149, 268 Pac. 575 (1928); NEWELL, SLANDER AND LIBEL (4th ed. 1924) §404.

[27] Doane v. Grew, 220 Mass. 171, 107 N. E. 620 (1915); NEWELL, SLANDER AND LIBEL (4th ed. 1924) §404.

That the communication contains untrue or mistaken statements will not necessarily destroy the privilege.[28] The only material requirement is that the communication be made in good faith with a belief in its truth.[29] Herein lies the ground upon which the decision of the principal case should have been reached. There was a privilege between the defendant and the Unemployment Compensation Commission that would protect the communication. The Commission, by its very nature, had a duty to receive the notice from the plaintiff's former employer and file it in order that the plaintiff might receive its benefits. When the notice was requested, to be filed with the Commission as required, the defendant's manager had a duty to give it, and there is no indication that he did not do so in good faith, or that he did not believe in its truth. A privilege once established protects the defendant who uses the reasonable and customary methods of communication.[30] Dictation of the communication to a stenographer or clerk is within this rule as an ordinary way for a corporation or business man to handle legitimate business, so that such dictation does not destroy the privilege.[31]

Since dictation to a stenographer is not an excessive publication a plaintiff cannot recover without proof of excess malice.[32] Mere mistake[33] or falsity[34] in the communication is insufficient to constitute

[28] McKenna v. Mansfield Leland Hotel Co., 55 Ohio App. 163, 9 N. E. (2d) 166 (1936); Missouri Pacific Ry. v. Behee, 2 Tex. Civ. App. 107, 21 S. W. 384 (1893); NEWELL, SLANDER AND LIBEL (4th ed. 1924) §404.

[29] Fresh v. Cutter, 73 Md. 87, 20 Atl. 774 (1890); Doane v. Grew, 220 Mass. 171, 107 N. E. 620 (1915). Accord: Solow v. General Motors Truck Co., 64 F. (2d) 105 (C. C. A. 2d, 1933); McKenna v. Mansfield Leland Hotel Co., 55 Ohio App. 163, 9 N. E. (2d) 166 (1936). NEWELL, SLANDER AND LIBEL (4th ed. 1924) §404.

[30] Globe Furniture Co. v. Wright, 265 Fed. 873 (App. D. C. 1920); Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R. (1869) 4 Q. B. 262; Boxsius v. Goblet Frères, (1894) 1 Q. B. 842; Edmondson v. Birch & Co., (1907) 1 K. B. 371; Roff v. British and French Chemical Mfg. Co., (1918) 2 K. B. 677; Osborn v. Thomas Boulter and Son, L. R. (1930) 2 K. B. 226.

[31] Boxsius v. Goblet Frères, (1894) 1 Q. B. 842; Edmondson v. Birch & Co., (1907) 1 K. B. 371; Osborn v. Thomas Boulter & Son, L. R. (1930) 2 K. B. 226. Accord: Globe Furniture Co. v. Wright, 265 Fed. 873 (App. D. C. 1920); Roff v. British and French Chemical Mfg. Co., (1918) 2 K. B. 677; *cf.* Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911). *Contra:* Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730 (1901); Pullman v. Hill, (1891) 1 Q. B. 524 (these two cases, holding that the prevalence of business conditions or business pressure do not warrant resort to stenographic assistance, if rightly decided, were so decided because the respective courts found that business conditions at the time did not justify disclosing any letter to another employee).

[32] A court will not imply or impute malice when privilege has been established. Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911); Hebner v. Great Northern Ry., 78 Minn. 289, 80 N. W. 1128 (1899); Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937); Harrison v. Garrett, 132 N. C. 172, 43 S. E. 594 (1903); Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914); Stewart v. Riley, 114 W. Va. 578, 172 S. E. 791 (1934); Flynn v. Western Union Tel. Co., 199 Wis. 124, 225 N. W. 742 (1929).

[33] Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914).

[34] Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911).

malice. Malice may be shown if the plaintiff can prove that the communication was not made in good faith,[35] but that the defendant availed himself of the privileged occasion wilfully and knowingly for the purpose of defaming the plaintiff,[36] or made the communication in reckless disregard of the justifiability of the defamatory statements.[37]

It seems rather unfortunate that the North Carolina court, in deciding its first case on this point, should base its opinion on the artificial holding that there is no publication to the stenographer because she is not a third person in her duties as an employee of a corporation, when the same result could have been more logically reached on the grounds of a privileged publication. If this latter method had been used, subsequent plaintiffs would be more adequately protected against similar communications maliciously dictated.

J. B. CHESHIRE, IV.

Mortgages—Deeds of Trust—Power of Sale—Rights of Mortgagor Not in Default After Wrongful Sale.

P procured a loan from *D* land bank, securing the bank by a deed of trust on her farm. *P* then made an agreement with *W*, joined as a defendant, whereby he became her tenant and agreed to apply a certain rental each year toward discharging the principal of the obligation and the interest thereon. *P* alleges that *W* failed to apply the rents and profits properly, and that instead he entered a separate agreement with the bank whereby he became its tenant; and that after several years, during which *W* and *D* failed properly to apply rental value, and committed waste by selling timber, *D* declared *P* in default, and procured a sale by the trustee. The bank, *D*, was the purchaser, and later conveyed to *H*, also joined as a defendant, from whom *W* subsequently acquired through purchase. *P* claims that she was improperly deprived of her land through the fraud of the defendants, and of others whose mention is not necessary; she asks for an accounting as to rents and profits, for the sale of the land to be set aside as void, for recovery of the amount of waste and of timber cut, and for a chance to redeem her land.

P was nonsuited in the lower court, and the Supreme Court sustained this as to all defendants save *D*. The court was of the opinion that the evidence in the light most favorable to *P* showed that *D* had become

[35] Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937); Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914); Elmore v. Atlantic Coast Line Ry., 189 N. C. 658, 127 S. E. 110 (1925).

[36] Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937); Elmore v. Atlantic Coast Line Ry., 189 N. C. 658, 127 S. E. 110 (1925).

[37] Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937).