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North Carolina. Should the Pennsylvania courts construe the principal case as deciding that no tort was committed in North Carolina, plaintiff might be in the unenviable position of having been definitely injured without a right of redress. This is because a cause of action, if any, must arise at the place of injury and not at the place where the act or omission which caused the injury occurred.⁴⁰ North Carolina being the place of injury, and no cause of action arising in North Carolina, plaintiff would have no right to recover. Of course the result is absurd, but it is within the realm of possibility. Moreover, several North Carolina cases⁴¹ in the area of defamation and negligence have previously intimated that the tort occurred as of the time of the act or omission rather than at the time of the injury. In *Powers v. Planters National Bank and Trust Co.*,⁴² the court said: "It is well settled in an action for damages, resulting from negligent breach of duty, the statute of limitations begins to run from the breach, from the wrongful act or omission complained of without regard to the time when the harmful consequences were discovered."⁴³ While this pertains to the statute of limitations, the implication is that the tort occurred at the time of the act.

Whatever the actual basis of the decision on this tort issue, the court did refrain from any open discussion of the question of multi-state defamation just as so many other courts have done. In view of the constitutional issues presented, it was probably not an ideal case for treatment of the defamation aspect. It is hoped that when such a case does arise, the court will devise a working formula.

HAMLIN WADE.

Libel and Slander—Immunity of Counsel for Defamatory Matter Published in a Judicial Proceeding

In *Wall v. Blalock*,¹ the Supreme Court of North Carolina was confronted with a problem not often presented to the Court.² The defendant,

⁴⁰ *Smyth Sales, Inc. v. Petroleum Heat and Power Co.*, 128 F. 2d 697 (3d Cir. 1942); *Mike v. Lian*, 322 Pa. 353, 185 Atl. 775 (1936); 86 C. J. S., *Torts* § 24 (1954).

⁴¹ *Lewis v. Shaver*, 236 N. C. 510, 73 S. E. 2d 320 (1952); *Powers v. Planters Nat'l Bank and Trust Co.*, 219 N. C. 254, 13 S. E. 2d 431 (1941); *Bank of Spruce Pine v. McKinney*, 209 N. C. 668, 184 S. E. 506 (1936); *Gordon v. Fredle*, 206 N. C. 734, 175 S. E. 126 (1934); *State v. Grizzard*, 117 N. C. 105, 23 S. E. 93 (1895).

⁴² 219 N. C. 254, 13 S. E. 2d 431 (1941).

⁴³ *Id.* at 256, 13 S. E. 2d at 432.

¹ 245 N. C. 232, 95 S. E. 2d 450 (1956).

² For North Carolina cases dealing generally with this problem see, *Scott v. Veneer Co.*, 240 N. C. 73, 81 S. E. 2d 146 (1954); *Jarman v. Offutt*, 239 N. C. 468, 80 S. E. 2d 248 (1954); *Perry v. Perry*, 153 N. C. 266, 69 S. E. 130 (1910); *Taylor v. Huff*, 130 N. C. 595, 41 S. E. 873 (1902); *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775 (1891); *Nissen v. Cramer*, 104 N. C. 574, 10 S. E. 270 (1889); *Shelfer v. Gooding*, 47 N. C. 175 (1855); *Biggs v. Byrd*, 34 N. C. 377 (1851).

a defense attorney in a prior criminal trial, had told the jury that the plaintiff, a witness for the state, had a "mental condition" and that was the reason for his testifying against his client. Thereafter the plaintiff brought this action based on the alleged slanderous statements. The lower court sustained a demurrer to the complaint and the plaintiff appealed. The Supreme Court affirmed and in so doing discussed the two prevailing rules regarding the attorney's absolute privilege or immunity³ from civil prosecution for defamatory matter published in the course of a judicial proceeding. The rule in England is settled that judges, counsel, parties, and witnesses are absolutely exempt from responsibility for words, otherwise defamatory, published in the course of a judicial proceeding.⁴ The majority of courts in this country have refused to extend the privilege this far, requiring that the defamatory matter published in a judicial proceeding, in order to be absolutely privileged, be pertinent, relevant, or material to the proceeding at hand.⁵ The minority view in this country is to the effect that the attorney's privilege is conditional,⁶ *i.e.*, the defamatory matter is privileged if material and made with probable cause without malice. According to this view, if the plaintiff can prove malice on the part of the attorney in publishing the defamatory matter the privilege is destroyed, and the plaintiff has a good cause of action for libel or slander. This position is squarely opposed to the weight of authority in this country.⁷ Under the majority view, if the defamatory publication is pertinent, material, or relevant to the issue at hand, it is privileged notwithstanding the fact it was published maliciously and falsely.⁸ The rule of the *Restatement of Torts*⁹ is even more broad than the majority rule, permitting the publication to be privileged if it "has some relation" to the judicial proceeding, thereby omitting the requirement of relevancy.¹⁰ The *Restatement* has been followed in a recent federal case.¹¹

³ See Veeder, *Absolute Immunity in Defamation: Judicial Proceeding*, 9 COLUM. L. REV. 463, 469 (1909).

⁴ 11 Q. B. D. 588, 603 (C. A. 1883); 33 AM. JUR., *Libel and Slander* § 146 (1941).

⁵ *Wall v. Blalock*, 245 N. C. 232, 95 S. E. 2d 450 (1956); 30 N. Y. U. L. REV. 171, 178 (1955).

⁶ *White v. Nichols*, 44 U. S. (3 How.) 266 (1845) (*dictum*); *Atlanta News Pub. Co. v. Medlock*, 123 Ga. 714, 51 S. E. 756 (1905); *Waldo v. Morrison*, 220 La. 1006, 58 So. 2d 210 (1952); *Viosca v. Landfried*, 140 La. 690, 73 So. 698 (1916); *Andrews v. Gardiner*, 224 N. Y. 440, 121 N. E. 341 (1918).

⁷ *Shelfer v. Gooding*, 47 N. C. 175 (1855) (An attorney may choose to say whatever is relevant and pertinent to the matter before the court, and no inquiry will be made into his motives); *La. Porta v. Leonard*, 88 N. J. L. 666, 97 A. 251 (1916) (Counsel is not liable in a slander action even if the words spoken were malicious and intended to defame, provided the words were relevant and pertinent).

⁸ 33 AM. JUR., *LIBEL AND SLANDER* § 146 (1941); 53 C. J. S., *Libel and Slander* § 104 (1948).

⁹ 3 RESTATEMENT, *Torts*, § 586 (1938).

¹⁰ *Ibid.*, comment a (1938).

¹¹ *Ginsbury v. Black*, 192 F. 2d 823 (7th Cir. 1951).

The attorney's privilege is based on public policy.¹² Public policy dictates that the attorney be free to speak and write whatever is relevant and material to the cause without fear of being harassed with slander suits and by attempts to prove that he acted maliciously and irrelevantly in the discharge of his duties toward his client.¹³ The power of this privilege is obvious. It permits an attorney to violate maliciously an individual's basic right not to be slandered, and yet remain exempt from civil or criminal¹⁴ prosecution provided the defamatory matter was pertinent and relevant.¹⁵

Since the judicial proceeding is the most obvious instance for allowing this privilege, this necessitates an inquiry into two things: (1) What tests have the majority of courts applied in determining relevancy, pertinency, or materiality? (2) What is the nature of a judicial proceeding to which the attorney's privilege attaches?¹⁶ Prosser states that the test of pertinency adopted in this country is a standard of good faith,¹⁷ requiring only that the statement or writing have some "reasonable relation" or reference to the subject of inquiry,¹⁸ or be one that may "possibly be pertinent."¹⁹ The earlier cases applied a stricter test, even to the extent of requiring colorable evidential relevance.²⁰ But the modern trend is opposed to this test, and it is well settled that a defamatory publication does not have to meet the test of legal relevance.²¹ Possibly the most liberal test is one applied in a recent North Carolina decision, *Scott v. Statesville Plywood and Veneer Co.*,²² where the court said, ". . . the matter to which this privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety."²³

In regard to the nature of a judicial proceeding to which the attorney's privilege attaches, there are certain prerequisites common to all

¹² *Wall v. Blalock*, 245 N. C. 232, 95 S. E. 2d 450 (1956); *Shelfer v. Gooding*, 47 N. C. 175 (1855).

¹³ *Ibid.*

¹⁴ *La Porta v. Leonard*, 88 N. J. L. 666, 97 A. 251 (1916).

¹⁵ 30 N. Y. U. L. Rev. 171, 172 (1955).

¹⁶ *Veeder, op. cit. supra* note 2 at 484.

¹⁷ PROSSER, *TORTS*, § 95 at 609 (2d ed. 1955).

¹⁸ *Ginsburg v. Black*, 192 F. 2d 823 (7th Cir. 1951); 3 RESTATEMENT, TORTS, § 586, comment c (1938).

¹⁹ *Bleeker v. Drury*, 149 F. 2d 770 (2d Cir. 1945); *Lefler v. Clark*, 287 N. Y. Supp. 476, 247 App. Div. 402 (1936); *People v. Warden of City Prison*, 258 N. Y. 55, 179 N. E. 257 (1936).

²⁰ *Carpenter v. Ashley*, 148 Cal. 422, 83 P. 444 (1906); *Myers v. Hodges*, 53 Fla. 197, 44 So. 357 (1907); *Hasting v. Lusk*, 22 Wend. 410 (N. Y. 1839); *Dodge v. Gilman*, 122 Minn. 177, 142 N. W. 147 (1913).

²¹ *Taliafero v. Sims*, 187 F. 2d 6 (5th Cir. 1951); *Johnston v. Shlarb*, 7 Wash. 2d 528, 110 P. 2d 190 (1941).

²² 240 N. C. 73, 81 S. E. 2d 146 (1954).

²³ *Id.* at 76, 81 S. E. 2d 146, 149 (1954); *See also, McGinnis v. Philips*, 224 Mo. App. 702, 27 S. W. 2d 468 (1930).

proceedings²⁴ that must be complied with before counsel is exempt from liability. These are: (1) the attorney must be acting in a professional capacity when he publishes the defamation;²⁵ (2) the court or tribunal must have jurisdiction over the subject matter;²⁶ (3) and the proceeding must have commenced at the time of the publication.²⁷ Assuming these requirements have been met, it has been held that the term judicial proceeding includes all actions in law and equity whether in tribunals of general or limited jurisdiction, whether public or not, *ex parte* or otherwise,²⁸ and that all communications pertinent to the judicial proceeding are accorded an absolute privilege.²⁹ Furthermore, it has been held that communications are privileged even as against a third party, *i.e.*, a party who is not connected in any way with the judicial proceeding in which the defamation was published,³⁰ and the immunity has been extended to cover letters written by an attorney for his client.³¹ As a general rule all communications are privileged which constitute a "step in," or "arise out of a judicial proceeding," or "have some relation thereto."³²

The immunity granted counsel is not limited solely to "judicial proceedings," but has been enlarged to cover "quasi-judicial" proceedings.³³

²⁴ See 30 N. Y. U. L. Rev. 171, 172 (1955).

²⁵ 3 RESTATEMENT, TORTS § 586, comment c (1938).

²⁶ Accord: *Anonymous v. Trenkman*, 48 F. 2d 571 (2d Cir. 1931); *Taylor v. Alropa Corp.*, 138 Fla. 137, 189 So. 230 (1939); *Parker v. Kirkland*, 298 Ill. App. 304, 18 N. E. 2d 707 (1939). Contra: *Bleecker v. Drury*, 149 F. 2d 770 (2d Cir. 1945); PROSSER, TORTS, § 95 (2d ed. 1955).

²⁷ *Robinson v. Home Fire Ins. Co.*, 242 Iowa 1120, 69 N. W. 2d 521 (1951) (An attorney is privileged to publish false and defamatory matter of another in the institution of, or during the course and as a part of judicial proceeding in which he participates as counsel, if it has some relation thereto); *Roberts v. Pratt*, 174 Misc. 585, 21 N. Y. S. 2d 549 (1940) (The commencement of a judicial proceeding does not necessarily mean the actual beginning of the court session. The privilege arises immediately on the doing of any act required or permitted by law in due course of a judicial proceeding, and it is not absolutely essential that the slanderous language be used in open court, or in the communications therein); *Beezley v. Hansen*, 4 Utah 2d 64, 286 P. 2d 1057 (1955) (Where relationship of attorney and his client existed at a time when alleged slanderous words were published in the presence of only the attorney and his client and pertained to suit, such publication, if made, was absolutely privileged).

²⁸ 53 C. J. S., *Libel and Slander*, § 104 (1948); PROSSER, *Torts*, § 95 (2d ed. 1955).

²⁹ *Taliaferro v. Sims*, 187 F. 2d 6 (5th Cir. 1951) (pleading); *Fletcher v. Maupin*, 138 F. 2d 742 (4th Cir. 1943) (pleading); *Anonymous v. Trenkman*, 48 F. 2d 571 (2d Cir. 1931) (pleading); *Schmitt v. Mann*, 219 Ky. 80, 163 S. W. 2d 281 (1942) (libelous affidavit filed for a new trial after judgment has been entered); *Speenburgh v. Schwartz*, 156 Misc. 508, 300 N. Y. S. 196 (1937) (pleading); *Scott v. Veneer Co.*, 240 N. C. 73, 81 S. E. 2d 146 (1954) (pleading); *Perry v. Perry*, 153 N. C. 266, 69 S. E. 130 (1910) (affidavit).

³⁰ *Viera v. Meredith*, 123 A. 2d 743 (R. I. 1956) (third party libeled in defendant's answer).

³¹ *Richardson v. Keesler*, 73 Idaho 548, 255 P. 2d 707 (1953) (letter written by attorney to the presiding judge); *Zirn v. Collum*, 187 Misc. 241, 63 N. Y. S. 2d 439 (1946) (letter to adversary regarding settlement).

³² *Ibid.*

³³ *Myer v. Parr*, 69 Ohio App. 344, 37 N. E. 2d 637 (1941); *Shumway v. War-rick*, 108 Neb. 652, 189 N. W. 30 (1922).

The courts differ as to what is a "quasi-judicial proceeding,"³⁴ but the test for determining whether to extend the privilege to a certain administrative agency is an examination of the agency's procedural requirements.³⁵ If similar to the procedure in a court and the agency has power to punish for contempt, the court will generally extend the privilege.³⁶ However, confusion still exists in this area. For example, in *Andrews v. Gardiner*,³⁷ the court held that an application presented to the Governor of the state in a pardoning proceeding was not a "quasi-judicial" proceeding, and accordingly, was not absolutely privileged. On the other hand, in *Brown v. Glove Printing Co.*,³⁸ it was held that a proceeding before the Governor to extradite a fugitive from justice was a "quasi-judicial" proceeding. In this area North Carolina has by statute³⁹ extended the doctrine of immunity to include defamatory publications in lunacy proceedings.⁴⁰

More specifically, it has been held that the privilege extends to administrative agencies such as a county tax board,⁴¹ a state Labor Commissioner,⁴² a state Banking Board,⁴³ a Director of a state's Milk Industry,⁴⁴ an Industrial Board,⁴⁵ and to proceedings in receivership.⁴⁶

The absolute privilege of an attorney to make defamatory statements in the course of a judicial or "quasi-judicial" proceeding is well established, as long as the statement is relevant. Without question this rule is subject to serious abuse. *Quaere* should attorneys be immune from liability for defamatory matter published in the course of a judicial proceeding for purposes other than the administration of justice and in the legitimate defense of their client's rights?

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³⁴ 53 C. J. S., *Libel and Slander* § 104 (1946).

³⁵ *Roberston v. Industrial Ins. Co.*, 75 So. 2d 198 (Fla. 1954).

³⁶ *McAlister and Co. v. Jenkins*, 214 Ky. 802, 284 S. W. 88 (1926).

³⁷ 224 N. Y. 440, 121 N. E. 342 (1918).

³⁸ 213 Mo. App. 611, 112 S. W. 462 (1908).

³⁹ N. C. GEN. STAT. § 122-42 (1952); *Jarman v. Offutt*, 239 N. C. 468, 80 S. E. 2d 248 (1954).

⁴⁰ *Ibid.*

⁴¹ *Parker v. Kirkland*, 98 Ill. 340, 18 N. E. 2d (1939).

⁴² *White v. United Mills Co.*, 240 Mo. App. 443, 208 S. W. 2d 803 (1948).

⁴³ *Shumway v. Warrick*, 108 Neb. 652, 189 N. W. 301 (1922).

⁴⁴ *Rainer's Dairies v. Raritan Valley Farms*, 15 Ohio St. 330, 117 A. 2d 889 (1955).

⁴⁵ *Bleeker v. Drury*, 149 F. 2d 770 (2d Cir. 1945); *Lipton v. Friedman*, 2 Misc. 2d 165, 152 N. Y. S. 2d 261 (1956).

⁴⁶ *Bartlett v. Christhif*, 69 Md. 156, 14 A. 518 (1818).