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Torts - Defense of Absolute Privilege Held Available to Officers of the Executive Branch below Department Head Level - Howard v. Lyons, 360 U.S. 593 (1959); Barr v. Matteo, 360 U.S. 564 (1959)

DePaul College of Law

In *Bell v. Nye*,[14] it was shown that a grantee had constructive notice, for the purpose of denying equitable estoppel, if the conflicts as to where the title was to be situated were present in a recorded deed. As applied to the *Cook* case, the grantees would be deemed to have constructive knowledge of all the provisions in the first deed to the grantor's brother. Therefore, they would not be allowed to rely on the grantor's misrepresentations and would be precluded from applying the doctrine of equitable estoppel.

However, constructive notice is effective to deny one's right to the use of equitable estoppel only where the conduct creating the misrepresentations is mere silence. If any affirmative act or statement creates the reliance, equitable estoppel cannot be nullified by constructive notice.[15] The grantor in *Cook* was an active participant in the transactions affecting his interest and made several oral statements and overt acts to create the reliance on his misrepresentations. Equitable estoppel was not, therefore, nullified since constructive notice had no effect because the affirmative acts lead to the representations and the reliance thereon.

The lot when first conveyed out was free of any restrictions since reciprocal negative easements do not ordinarily apply retroactively. The defendant, in the position of a subsequent purchaser, could therefore use the land in any manner. However, the defendant had by his representations, induced the purchasers of other lots to buy, thinking that all the land was restricted. These representations on his part gave rise to an equitable estoppel which precluded him from asserting that the restrictions do not apply to his lot and thus, we find in effect, a reciprocal negative easement applied retroactively.

[14] Ibid.

[15] Bean v. Harris, 93 Okla. 10, 219 Pac. 300 (1923); Robbins v. Moore, 129 Ill. 30, 21 N.E. 934 (1899); Morris v. Herndon, 113 N.C. 236, 18 S.E. 203 (1893).

TORTS–DEFENSE OF ABSOLUTE PRIVILEGE HELD AVAILABLE TO OFFICERS OF THE EXECUTIVE BRANCH BELOW DEPARTMENT HEAD LEVEL

Petitioner Howard, a United State Navy Captain, was sued for allegedly false and libelous statements. The respondents were officers of the Employees Association recognized by the Navy in its Boston Naval Yard. The libelous communique was sent by Howard to various members of the Department of the Navy and to the Massachusetts congressional body. Subsequently, the libelous statements appeared in the papers. On summary judgment, the district court held for petitioner; on appeal the court of appeals remanded the case, asserting that Howard's claim of

absolute privilege in communication to his superiors was in error. The Supreme Court, on a writ of certiorari reversed and ruled that petitioner had absolute privilege. *Howard v. Lyons*, 360 U.S. 593 (1959).

Matteo and Madigan, employees of the Office of Housing Expeditor, had proposed a plan to make terminal-leave payments out of 1950 funds appropriated for that purpose rather than out of general funds the following year if the life of the agency was extended by Congress. The plan provided that agency employees would be discharged, given their terminal-leave payment, rehired immediately as temporary employees and restored to permanent status should the life of the agency be extended, as it subsequently was. Barr, general manager of the agency, expressed his opposition to the Expeditor who declined to adopt the plan generally, but gave permission for its own use on a voluntary basis to a small number of employees, including respondents. Later, the Office of Rent Stabilization which replaced the Expeditor Office, received an inquiry from Senator Williams regarding those payments. Madigan drafted a reply and sent the same to petitioner. Barr's secretary thereupon signed the response without Barr's knowledge of the entire transaction. The reply produced strong criticism on the Senate floor which was widely reported in the press. Barr, as acting director of the Rent Office, notified Matteo and Madigan of their dismissal and issued a statement to the press explaining his action. On this publication respondents received a favorable verdict. It was affirmed by the court of appeals; petitioner, before the Supreme Court, claiming to have qualified privilege, abandoned his previous defense of absolute privilege. The case was remanded to the court of appeals which, in turn remanded the case to the district court, stating that petitioner's claim of qualified privilege was a valid defense, but that the evidence showed facts which might defeat this defense. On a writ of certiorari, Barr re-asserted his claim of absolute privilege. The Supreme Court now ruled that Barr's original defense of absolute privilege be granted. *Barr v. Matteo*, 360 U.S. 564 (1959).

At first glance, the facts in the above-described cases seem to be identical. Both petitioners were government employees; both were sued for libel in a communication issued by them; both claimed absolute privilege as a defense and both were ruled to be entitled to this privilege. One glaring deviation is apparent. Howard's libel, although published in the newspapers, ensued from a communication to his superior officers in the line of his official duties. Barr's libel involved a direct press release with no transmission to a superior involved.

Absolute privilege is a specie of immunities guaranteed to officers in the agencies of the government. This privilege as regards the executive branch is the concern of this paper and, therefore, it is essential to understand the origin of its creation. By constitutional interpretation and

by common law rule, legislative and judicial immunities, respectively, were permitted during the exercise of legislative or judicial duties.[1] Unlike absolute privilege, these immunities were not restricted to libelous acts, but applied to any breach, felonious or tortious, while in the performance of one's duties.

In *Spalding v. Vilas*,[2] the Supreme Court extended judicial immunities to encompass cabinet heads in the executive department also. Nearly all subsequent decisions concerning executive immunities involved the issuance of libelous statements. Hence, absolute privilege and immunity were used interchangeably, but it must be remembered that absolute privilege is only one form of immunity.

This immunity is designed to protect an officer from civil suits and damages for alleged libel while in the performance of his duties.[3] However, from the decisions in the *Howard* and *Barr* cases, it is readily apparent that expansion of this doctrine has occurred since the *Spalding* decision. This development affected the use of absolute privilege in a dual manner. It affected the type of personnel protected by the immunity and also defined the class of communications to which the doctrine of absolute privilege could apply.

It should be noted that immunities for governmental officials were created by the need to effect an efficient government. The creation of executive immunity was no exception.

> [T]he same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law.[4]

The basis for all following cases regarding absolute privilege for the executive department stems from this statement. In the *Spalding* case, suit was brought against Vilas, the Postmaster General, for the allegedly malicious circulation among postmasters of information concerning plaintiff which he knew to be false. The decision, in effect, allowed a cabinet member absolute privilege in the internal communications issued by him in performance of his duties.

In *DeArnaud v. Ainsworth*,[5] defendant, as Commissioner of Pensions,

[1] U.S. Const. Art. I, § 6; Bradley v. Fisher, 13 Wall. (U.S.) 335 (1871).

[2] 161 U.S. 483 (1896).

[3] Ibid.; cf. Gregoire v. Biddle, 177 F.2d 579 (C.A.2d, 1949).

[4] Spalding v. Vilas, 161 U.S. 483, 498 (1896).

[5] 24 App. D.C. 167 (C.A.D.C., 1904), app. denied 199 U.S. 616 (1905). Accord: Farr v. Valentine, 38 App.D.C. 413 (C.A.D.C., 1912).

refused to believe plaintiff's claim of being a war hero and therefore deserving of the Congressional Medal of Honor. Defendant notified the proper congressional subcommittee effecting publication of plaintiff's request and subsequent refusal. In a libel suit, judgment was for defendant. Communication, as in the *Spalding* case, was internal but it was communicated by an inferior officer to a superior officer. The converse was true in the *Spalding* case. Hence, the *Ainsworth* case, in effect, broadened the privilege to include officers, other than department heads. It based this extension on the agency theory stating:

> [I]t is impossible for a single individual to perform in person all the various duties assigned to the particular department of which he is head. [He must] perform the larger portion of such duties through the agencies of the heads of bureaus and divisions of his department.[6]

Ainsworth also broadened the limit as to disclosure, by allowing full privilege in the performance of one's entire duties and protected an officer from civil suit even though his communication was in error or released by mistake.[7]

Subsequent decisions were based on the precedents established in *De Arnaud*. The courts, however, remained in doubt as to exactly which officers in the executive department were allowed absolute privilege. In *Miles v. McGrath*,[8] the District Court of Maryland settled this issue by stating: "It is not for the court to determine the relative importance of the executive arm that is brought into the controversy; but merely to apply the principle [from the *DeArnaud* case]."[9] All federal courts subsequently followed this concept. From *Smith v. O'Brien*,[10] one can perceive the effect the *Miles* decision brought to the court's thinking. In the *Smith* case, plaintiff, a retired government employee, was unsuccessful in securing an annuity. Consequently, Smith asked the Tariff Commission for assistance. Upon recital of the facts which plaintiff hoped would secure the annuity, defendant accused Smith of embezzlement. The court of appeals reasoned that defendant's statement was encompassed in his duties and, therefore, absolutely privileged. As long as the defendant's actions were within the scope of his duties, the courts would extend absolute immunity for such action without the need of inquiring into the importance of his responsibilities.

[6] DeArnaud v. Ainsworth, 24 App. D.C. 167, 180 (C.A.D.C., 1904).

[7] United States v. Brunswick, 69 F.2d 383 (C.A.D.C., 1934); Brown v. Rudolph, 25 F.2d 540 (C.A.D.C., 1928).

[8] 4 F. Supp. 603 (Md., 1933).

[9] Ibid., at 606.

[10] 88 F.2d 769 (C.A.D.C., 1937); cf. Newbury v. Love, 242 F.2d 372 (C.A.D.C., 1957); Lang v. Wood, 92 F.2d 211 (C.A.D.C., 1937).

In *Brewer v. Mellon*,[11] the court did not touch upon the personnel affected by absolute privilege, but concerned itself with and extended the use of communications covered by this immunity. Brewer, as an investigator of the United States, allegedly claimed and reported to Congress of certain discrepancies shown in the Treasury Department. Mellon, as head of the Treasury, dispatched a letter to the President defending himself and his department from Brewer's assertions. The letter also contained libelous statements regarding Brewer's character. Mellon released an identical copy of the communique to the press.[12] In *Ainsworth*, a similar press publication occurred, but the court overlooked this aspect and concentrated on the fore-mentioned personnel expansion thesis. The *Mellon* court relied on that decision for precedent and repeated from the case:

> Public policy affords absolute protection and immunity for what may be said or written by an officer in his official report or communication to a superior, when such report or communication is made in the course and discharge of official duty.[13]

The Court interpreted from the foregoing that public policy would warrant publication in the press of any official communication. The *Mellon* case thus resulted in absolutely privileged press releases if an official communication was at the foundation for such a release.

As the *Ainsworth* case expanded the use of absolute privilege affecting personnel, the *Glass v. Ickes*[14] decision enlarged the immunity in application to the communications involved. In the *Glass* case, defendant, as Secretary of the Interior, issued a direct statement to the press regarding Glass' activities as an oil lobbyist and his prior employment with the government. In effect, the release cautioned all oil interests that plaintiff was of unsound character. Unlike the *Mellon* case, the press release resulted from no communication to a superior officer. The source came directly from a cabinet head's office, but the appellate court ruled the statement to be absolutely privileged. No other communication was needed and if public policy warranted, such information could be directly issued to the public in way of explanation or discussion. As long as the release was "more or less [in] connection with the general matters committed by law to his control or supervision,"[15] it would be absolutely privileged.

[11] 18 F.2d 168 (C.A.D.C., 1927), app. denied 275 U.S. 530 (1927).

[12] Many asserted that the communication was just a device to maliciously libel Brewer, but the court said this was immaterial.

[13] DeArnaud v. Ainsworth, 24 App. D.C. 167, 178 (C.A.D.C., 1904).

[14] 117 F.2d 273 (C.A.D.C., 1940).

[15] Ibid., at 278.

In *Colpoys v. Gates*,[16] the same appellate court clarified its position as to just what parties would be allowed this extended immunity. The court held:

> [In] the cases which have extended an absolute privilege to administrative officers without policy-determining functions, the thing held to be privileged has usually if not always been an act in the general line of duty, not a separate discussion or explanation.[17]

The court therefore limited this privilege to policy determining officials. This, in effect, meant cabinet heads only were to enjoy such immunity. The subject matter of the libel suit in *Colpoys* was a statement made by a United States Marshal concerning two of his deputies whom he had previously dismissed. The court conceded that Colpoy's duty included dismissal of employees, but felt that Colpoy's duty in no way allowed him to explain such actions to the public. To the court, it was obvious that the marshal was no policy maker and therefore not allowed an immunity for his direct press release.

From an analysis of the expansion of absolute privilege, it is apparent that the *Howard* case directly followed the doctrine as established in the *Ainsworth* and *Mellon* decisions. Howard's behavior was identical to that in these two cases. The communication was transmitted to a superior official and as a consequence, published in a daily journal. The *Matteo* case, on the other hand, presents a growth in absolute privilege. Not only are cabinet heads now allowed the privilege originated in the *Glass* case, but agency and bureau heads as well. Whether the Court considers a department head as a policy maker or not is an unanswered question. Thus, this rule of absolute privilege may be considered as an extension of the doctrine itself or it can be treated as an expansion of those now considered as policy makers. From either interpretation, however, it is obvious that absolute privilege is now larger in its application.

Although the perimeter of absolute privilege assumes a never ending process of growth, a strong minority is manifesting itself. The initial dissent appeared in the *Glass* case and has extended to both the *Howard* and *Matteo* decisions. Furthermore, the *Colpoy* case must now be considered as a minority ruling. The basic ground for the dissents is the conflicting interest of rights presented by such an immunity. The individual's freedom from defamation of character opposes the interest of public policy in an efficient proper functioning government. As its basis, the majority of the courts hold to the original *Spalding* decision that an official can not be:

[16] 118 F.2d 16 (C.A.D.C., 1941). This case was decided six months after the Glass opinion.

[17] Ibid., at 17.

[U]nder an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs . . . if he were subjected to any such restraint. His conduct [therefore] cannot be made the foundation of a suit . . . even if the circumstances show that . . . his action injuriously affects the claims of particular individuals.[18]

Although in harmony with the majority, the minority jurists feel that the expansion of absolute privilege is becoming too extreme in that its original basis is being exploited to destroy this basic individual freedom. To the dissenters, the granting of such a privilege removes a check on irresponsible action and makes vindication in open court of those defamed impossible. This disquieting thought was best summarized by Justice Groner in the *Glass* decision. In his dissent, he feared:

[T]hat in . . . previous cases [the court] may have extended the rule beyond the reasons out of which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law.[19]

The question remains, however, as to whether expansion of absolute privilege will continue. The *Matteo* and *Howard* decisions which were 5–4 and 6–3 decisions, respectively, would imply that the balance between the two interests is shifting. The inference is present that the doctrine of absolute privilege has reached its extensive limit and that any attempt to enlarge upon it will meet with solid judicial objection.

[18] Spalding v. Vilas, 161 U.S. 483, 498 (1896).

[19] Glass v. Ickes, 117 F.2d 273, 282 (C.A.D.C., 1940).