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LIBEL AND SLANDER — EXTENSION OF THE DOCTRINE OF ABSOLUTE PRIVILEGE TO INFERIOR EXECUTIVE AND ADMINISTRATIVE OFFICIALS — In accordance with the Ohio Constitution, which provides that a copy of proposed amendments shall be distributed to the electorate together with an argument both for and against the proposed amendments,1 the governor of the state appointed defendant to prepare arguments against certain proposed amendments to the state constitution. The report contained the statement that plaintiff, sponsor of the proposed amendments, was "a paid lobbyist for the single tax movement." Plaintiff brought suit for libel. Held, that since the defendants, members of the commission appointed by the governor acting in the discharge of their official duty, they were absolutely privileged in making any statement pertinent to the occasion. Bigelow v. Brumley, 138 Ohio 574, 37 N. E. (2d) 584 (1941).

In addition to utterances in legislative and judicial proceedings and communications by military and naval officers,2 it is now generally held that communications of high executive officials, made in discharge of their official duties, are absolutely privileged.3 There is also a trend to extend the doctrine to inferior judicial4 and executive5 officers and likewise to members of administrative tribu-

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1 Ohio Const. (1851), art. 2, § 1(g).
4 Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927) (commissioners, committee-men and other like functionaries who are lawfully required by courts of competent jurisdiction to examine persons or things and report their findings to the court); Mickens v. Davis, 132 Kan. 49, 294 P. 896 (1931) (report of physician appointed by a court to examine claimant in workmen's compensation action, analogous to evidence of witness in court).
This is facilitated by state statutes defining privileges. In applying the doctrine to officials of the executive department, the courts uniformly restrict the privilege to communications relative to the duties of the official involved. The scope of the executive function, however, has been given a broad interpretation.


8 See cases cited in note 5, supra.

Cooper v. O'Connor, 69 App. D. C. 100 at 104, 99 F. (2d) 135 (1938): "It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute; or even that they should be specifically directed or requested by a superior officer. It is sufficient if they are done by an officer 'in relation to matters committed by law to his control or supervision'; or that they have 'more or less connection with' the general matters committed by law to his control or supervision'; or that they are governed by a lawful requirement of the department under whose authority the officer is acting."
It is generally agreed that the immunity of absolute privilege should be limited by the considerations which give rise to its creation. The immunity has rightly been confined to those situations where public policy favoring complete freedom of expression prevents an inquiry into whether or not the speaker was motivated by malice. Individuals may be forced to suffer without a remedy because of urgent considerations of public policy requiring complete freedom of expression.

Extension of this absolute privilege to certain inferior executive officers and members of administrative tribunals is in accord with this general policy. It is not the particular office occupied by the individual that should determine the existence of the privilege, but rather the particular duties that the individual must perform. The principal case, in both reasoning and result, fits into the trend of the decided cases. To fulfill the purpose of the Ohio constitutional provision to provide the electorate with an adequate discussion of the merits and demerits of proposed amendments, it is highly desirable that those who have the duty of providing the public with information relative to the proposed amendments should be able to do so without fear of being subject to suits for libel. The fear, expressed in some quarters, that the immunity will be extended to persons not entitled to it is unwarranted provided the courts which extend the doctrine do so with a clear recognition of the public policy involved.

10 NEWELL, SLANDER AND LIBEL, 4th ed., 387 (1924), principal case, 37 N. E. (2d) 584. And see cases cited in notes 4, 5, and 6, supra.

11 In considering whether public policy is being served by the granting of the privilege, the particular official who libelled the complainant is not to be considered but rather the large body of officials who may be subjected to unwarranted suits if the privilege is withheld. "The policy of the law is, therefore, and the reason of the rule is, that although upon rare occasions judges and other public officials upon whom are imposed by law judicial or quasi-judicial duties may maliciously slander or calumniate in the exercise of their authority, it is better that they should be protected upon such occasions by this absolute privilege than that the great body of such officials in the conscientious exercise of their duties should be hampered continually by the threat of such civil actions." McAlister & Co. v. Jenkins, 214 Ky. 802 at 808, 284 S. W. 88 (1926).

12 For a general discussion of the subject of privilege in this and other fields of tort law, see 22 VA. L. REV. 642 (1936).

13 "It is, therefore, not the particular position of the party making the report or communication that entitles it to absolute privilege so much as the occasion for making it, and the reasons of public policy for the immunity." De Arnaud v. Ainsworth, 24 App. D. C. 167 at 181 (1904). "The reason now given for the rule is simply one of public policy." Cooper v. O'Connor, 69 App. D. C. 100 at 106, 99 F. (2d) 135 (1938). The American Law Institute expresses no opinion on this aspect of the question. 3 TORTS RESTATEMENT 239, § 591, comment d, caveat: "The Institute expresses no opinion as to whether the rule stated in this Section is also applicable to other civil officers or to military and naval officers of the State or Nation, who perform important governmental functions."


15 An example of the correct appreciation of public policy is Colpoys v. Gates, 73 App. D. C. 193 at 194, 118 F. (2d) 16 (1941), where the court in refusing to grant absolute immunity to a United States marshal who published statements explaining his dismissal of certain deputies when he had no duty to publish such statements
said: "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."