

1957

Richard H. Mortensen and Alfred Tredway v. Life Insurance Corporation of America et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

RICHARD H. MORTENSEN,
and ALFRED TREDWAY,
Respondents,

34 - 1957

— vs. —

LIFE INSURANCE CORPORA-
TION OF AMERICA, a Utah
corporation; CLEO H.
BULLARD, and RICHARD
DON CAFFERTY,
Appellants.

Chief Justice, Supreme Court, Utah

Case
No. 8551

Respondents' Brief

Appeal from the District Court of Salt Lake County,
Utah, Joseph E. Jeppson, Judge

CLYDE & MECHAM

By James L. Barker, Jr.

Attorney for Respondents.



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NATURE OF CASE

This appeal was taken by the defendants from a judgment of the Third Judicial District Court in and for Salt Lake County. The action was one for libel brought by Richard H. Mortensen and Alfred B. Tredway against Life Insurance Corporation of America, Cleo H. Bullard and Richard Don Cafferty. The judgment for damages in favor of plaintiffs was based upon a jury verdict.

The only question raised by the appeal is a question of privilege. The appellants contend that statements made to the Commissioner of Insurance about the plaintiffs are so privileged that no liability can attach to them even though the statements were false, defamatory, and malicious.

DESIGNATION OF PARTIES

The plaintiffs-respondents, Richard H. Mortensen and Alfred B. Tredway, shall hereinafter be referred to as “Mortensen” and Tredway,” respectively.

The defendants-appellants, Life Insurance Corporation of America, Cleo H. Bullard and Richard Don Cafferty, shall hereinafter be referred to as “Licoa,” “Bullard” and “Cafferty,” respectively.

Respondents feel that an understanding of the circumstances is necessary in order for the court to reach a decision, and therefore, the facts of the case are here presented with more detail than in appellants’ brief.

STATEMENT OF FACTS

LICOA, BULLARD AND CAFFERTY, DELIBERATELY AND MALICIOUSLY LIBELED MORTENSEN AND TREDWAY, FOR THE EXPRESS PURPOSE OF PROHIBITING MORTENSEN AND TREDWAY FROM SECURING EMPLOYMENT WITH OTHER INSURANCE COMPANIES.

Mortensen and Tredway were career insurance salesmen, who, while employed by Licoa, applied for a better position with another insurance company.

In October of 1954, Mortensen and Tredway were working for Licoa in the capacity of insurance salesmen. Both Mortensen and Tredway had for several years been engaged in the profession of selling insurance, which was their principal means of earning a living. Bullard was then president of Licoa, and Cafferty was its general sales manager. (R-1,4; Ex. 18)

Some time during the first week of October, 1954, Mortensen and Tredway approached Frank B. Salisbury, president of Reliance National Life Insurance Company, seeking employment with that company. Reliance National Life Insurance Company was just starting business and was in need of administrative officers. At this first meeting the possibility of Mortensen and Tredway serving as joint agency directors over all sales personnel of the company was discussed. Such a position would have given Mortensen and Tredway a commission on all insurance sold by Reliance National Life Insurance Company. (R-93, 94, 100)

Salisbury wanted to investigate Mortensen and Tredway thoroughly before entrusting them with such an important position. This he did, and at a meeting held about a week later Salisbury reported that he was well satisfied with the results of his investigation. The terms of a joint agency director's contract were discussed. A

third meeting was agreed upon to put the terms of the contract in writing. (R-93, 94, 95)

Upon discovering that Mortensen and Tredway were negotiating for a better position with Salisbury, defendants-appellants announced that they would prohibit Mortensen and Tredway from selling insurance for any other insurance company.

Cafferty learned that Mortensen and Tredway were negotiating with Salisbury, reported this fact to Bullard (R-160), and boasted to the personnel of Licoa that Mortensen and Tredway would never be able to sell insurance for any other company. (R-117)

Around the middle of October, 1954, Cafferty, speaking of Mortensen and Tredway, made the following statement to Rowe Fielding, at that time an insurance agent for Licoa:

“Well, I don’t know I would get in with those fellows because they won’t be writing insurance business after the next ten days. *They won’t write in this or any other state when we get through with them.*” (R-73) (Italics supplied)

At about the same time Cafferty, speaking of Mortensen and Tredway, told Howard Saunders, another employee of Licoa, that he (Cafferty):

“Was getting rid of them, and they had stolen some of his materials and been double-dealing him, in a short time he did not expect them to be in the insurance business.” (R-74)

During the first week in October, 1954, Cafferty told Wallace Stephensen, a Licoa salesman, that he was going to have plaintiff's licenses canceled with prejudice, adding:

"I am going to get them out of the insurance business. I don't want them to sign insurance in Utah or any other state." (Italics supplied) (R-67)

Bullard also complained to Saunders that Mortensen and Tredway had wrongfully taken materials belonging to Licoa and were using them to earn a living in competition with Licoa. (R-79, 80)

Letters discrediting plaintiffs were solicited by defendants from persons to whom plaintiffs had sold insurance, and Cafferty bribed an insurance salesman to write a letter containing false derogatory statements concerning Tredway.

While Mortensen was employed by Licoa he sold a policy to Shirley Leyshon Averett and her husband. The Averetts, subsequently having decided that they could not afford the policy, canceled payment on the check they had given Mortensen, and wrote Licoa of their decision, assigning as their sole reason for not taking the policy the fact that they could not afford it. (R-236) Thereafter, a representative of Licoa visited the Averett home several times for the purpose of getting Mr. Averett to write a letter to the company concerning Mortensen. (R-237) Finally, Mr. Averett was persuaded to write a letter, as dictated to him by the Licoa representative. (R-238) The representative stated he wanted the letter because:

“there had been several complaints about Mr. Mortensen, and he had been misrepresenting things in the contract, and he wanted us to write the letter.” (R-239)

During the first week of October, 1954, Cafferty also had approached Wallace Stephensen and offered him \$100.00 for a favor. Stephensen, a recent employee of Licoa, was then only 21 years old and had never before been employed in the insurance business. (R-44) About two weeks later Cafferty told Stephensen that the desired favor was a letter from Stephensen to Bullard containing derogatory statements about Tredway. The statements sought were known by both Cafferty and Stephensen to be false. Cafferty said

“he wanted the letter to back up his claim to cancel the licenses with prejudice.” (R-59)

The following is taken from Stephensen’s testimony at the trial:

Q. What brought about the discussion about Mr. Mortensen and Mr. Treadway?

A. Well the first time that Mortensen and Treadway were discussed was in Provo right after we had returned from a trip to Richfield, and Mr. Cafferty and I were sitting in his automobile on Main street in Provo, and Mr. Cafferty asked me if I would like to make \$100.00. I told him I would.

At that time he did not tell me what it was he wanted me to do. It was later, oh some two or three weeks later, when we were in the Riverside Motel in Provo, where we were staying, and Mr. Cafferty and I and a few of the other fellows were in the

room, and any way they all left, and I and he were together.

He asked me to do thhis little favor for him he had asked me ten days or two weeks earlier to that date, and I said I would. I asked him what he wanted me to do. He said he wanted me to write a letter to Mr. Bullard, president of Life Insurance Corporation of America, and he asked me if I had worked—he knew I had worked with Tredway in Price, Utah, and Helper and that—he asked me if I went out on any contact or presentation with them, when I did, seeing I was the youngest salesman started, about my first two weeks with the company.

Anyway, he got the typewriter out and paper and everything and I asked him what he wanted me to write. He told me he had terminated Mortensen and Tredway's licenses with the company, with prejudice, and that he wanted me to write a letter to the president stating a few facts I had observed while working with them in Helper and Price.

I told him I did not know what to write, there wasn't anything derogatory, anything wrong. He said, "I will tell you what to write," so I wrote the letter, dictated to me by Mr. Cafferty." (R-45, 46) (Italics supplied)

Q. To the best of your recollection, give us what he dictated?

A. The letter said that I, being an employee of the Life Insurance Corporation of America, with the company, full hearted and everything, that I had noticed a few things in Price and Provo among two agents, Mortensen—not Mortensen, excuse me, Tredway—and that he had offered to rebate part of his commission to one of his clients or

fellows he was presenting this insurance policy to, and that he had misrepresented the contract in many phases and instances, and that he had—after his termination, had offered to induce me to leave the company and go to work for him as a licensed agent with Reliance National.

Q. Did you willingly type this letter?

A. Not at first, no I didn't. I didn't want to write it, but seeing how I was going with the company and work for the company — being an employee of Mr. Cafferty, I assumed that I was supposed to do what I was told to do,

Q. Had you ever seen Tredway do anything that you alleged in the letter?

A. No. (R-47, 48)

On October 11, 1954, Mortensen and Tredway resigned as agents of Licoa. (R-1, 178) On October 15, 1954, Bullard sent to the Insurance Commissioner a written notice canceling Mortensen's and Tredway's licenses with Licoa. The notice of cancellation contained derogatory statements which were not sufficient to cause the Insurance Commissioner to take affirmative action against Mortensen and Tredway, but were sufficient to cause other insurance companies to refuse to hire them. (R-89, 312, 313, 315)

On October 11, 1954, Mortensen and Tredway resigned as agents of Licoa. (R-1, 178) On October 15, 1954, Bullard sent a written notice to the Insurance Commissioner of the State of Utah canceling, among others, the licenses of Mortensen and Tredway. The par-

agraph referring to Mortensen and Tredway states as follows:

“Also please cancel with prejudice the licenses of Alfred B. Tredway and R. H. Mortensen, whose actions were not in the best interests of the Company. Our books indicate an agency debit of \$89.75 on R. H. Mortensen and \$428.00 on A. B. Tredway.” (R-1, 4)

The derogatory statements in this paragraph were not sufficient to cause the Insurance Commissioner to take any affirmative action against either Mortensen or Tredway, other than cancel their licenses with Licoa, which the commissioner would have had to do even if no derogatory language had been used. (R-120, 126, 127; 31-17-10, U.C.A., 1953) However, the statements were sufficiently derogatory in nature to cause other insurance companies to refuse to hire either Mortensen or Tredway. (89, 312, 313, 315)

AT THE TIME OF THE TRIAL, DEFENDANTS-APPELLANTS DID NOT OFFER ANY EVIDENCE TO JUSTIFY THE REQUEST THAT MORTENSEN'S AND TREDWAY'S LICENSES BE CANCELED "WITH PREJUDICE," NOR TO SHOW THAT MORTENSEN'S AND TREDWAY'S "ACTIONS WERE NOT IN THE BEST INTEREST OF THE COMPANY."

Cafferty, although present during the entire trial, did not refute the testimony that he bribed Stephensen to write a letter about Tredway containing derogatory

statements which both Cafferty and Stephensen knew to be false. Bullard did not appear at the trial.

To support its allegations of debit balances for Mortensen and Tredway as of October 15, 1954, the date of the notice of cancellation of their licenses, Licoa deprived Mortensen of an earned commission for the sale of life insurance policy, and charged Tredway for an amount which was not due for approximately six months after said date, and then was payable to Cafferty and not to Licoa.

An account of an insurance agent with an insurance company is in a constant state of fluctuation. It is extremely difficult to say at any one time exactly what the balance is, and a final balance can be determined only after a lapse of time when the plus and minus of paid premiums and canceled policies has been established. (R-123)

On October 15, 1954, four days after Mortensen and Tredway had resigned (R-1, 4) the above quoted notice of cancellation listed debit balances for both Mortensen and Tredway.

In order to justify the debit balance for Mortensen, it was necessary for Licoa to deprive him of an earned commission for the sale of a life insurance policy which he had sold. This was done by crossing out Mortensen's name on an application for a policy and substituting the name of Cafferty. (Ex. 22; R-373-374) The commission was then credited to Cafferty (R-379, 380, 360, 361, 372, 373,

374) The office manager for Licoa, Frank Schmidt, testified that if Mortensen had been credited with the commission for this sale he would have a credit balance of \$110.20 as of October 15, 1954. (R-392, 393)

Some time during the first part of October, 1954, Treadway borrowed \$500.00 from Licoa through Cafferty. On October 11, 1954, the date Treadway resigned, he (Treadway) signed a note for this \$500.00, the note being payable to Cafferty, personally. (Ex. 2) The \$500.00 was charged to Cafferty's account by Licoa, and Cafferty testified that he subsequently repaid it to Licoa. According to its terms, the note was not due until six months after date. (R-175, 176, 178)

In order to show a debit balance for Treadway on October 15, 1954, Licoa charged Treadway with the \$500.00 advance, represented by the note that had been executed by Treadway only four days previously, and which was not due for almost six months. The notice of cancellation alleges a debit balance of \$428.00 as of October 15, 1954, for Treadway. If the note had not been counted in determining this debit balance, Treadway would have had a credit of \$72.00 as of that date.

The records of the Insurance Commission of the State of Utah are public. (31-2-4, U.C.A., 1953) The above quoted notice of cancellation was read by Salisbury, who then refused to hire Mortensen and Treadway in the capacity of agency directors.

About three or four days after his second meeting with Mortensen and Tredway, Salisbury received a telephone call from Mrs. Burns, an employee of the office of the Insurance Commissioner, State of Utah, informing Salisbury of the derogatory contents of the notice of cancellation sent the commission by Licoa. Salisbury subsequently went to the commission offices and read the letter. (R-96, 97)

At a third meeting, Salisbury told Mortensen and Tredway that in view of the derogatory statements contained in the Licoa notice of cancellation he would be unable to hire them in the capacity of agency directors as previously contemplated. They were subsequently hired as general agents with limited jurisdiction. (R-98, 103)

AS A RESULT OF LOSING THE AGENCY DIRECTOR'S POSITION, MORTENSEN AND TREDWAY SUFFERED A LOSS OF \$20,377.07 IN COMMISSIONS. (R-258, 259) IN ADDITION, TREDWAY WAS SUBSEQUENTLY UNABLE TO GAIN EMPLOYMENT IN THE INSURANCE BUSINESS (R-89, 213, 214), AND MORTENSEN WAS FORCED TO MOVE TO LAS VEGAS, NEVADA, IN ORDER TO ENGAGE IN HIS PROFESSION AS AN INSURANCE SALESMAN. (R-191)

After considering the above evidence, the jury returned a verdict in favor of Mortensen and Tredway and against Licoa, Bullard and Cafferty in the sum of \$8,500.00.

STATEMENT OF POINTS

1. DEFAMATORY STATEMENTS ENJOY ABSOLUTE PRIVILEGE ONLY IN JUDICIAL AND LEGISLATIVE PROCEEDINGS, PROCEEDINGS OF EXECUTIVE OFFICERS CHARGED WITH RESPONSIBILITY OF IMPORTANCE, AND COMMUNICATIONS BETWEEN HUSBAND AND WIFE. (Prosser on Torts, Hornbook Series, 2d Ed., par. 95, p. 606)
2. IN REVOKING MORTENSEN'S AND TREDWAY'S LICENSES WITH LICOA THE INSURANCE COMMISSIONER WAS MERELY PERFORMING A MINISTERIAL DUTY, IN WHICH HE WAS GIVEN NO DISCRETION, AND THE CONTENTS OF THE REVOCATION NOTICE WERE ONLY QUALIFIEDLY OR CONDITIONALLY PRIVILEGED.

ARGUMENT

POINT I

DEFAMATORY STATEMENTS ENJOY ABSOLUTE PRIVILEGE ONLY IN JUDICIAL AND LEGISLATIVE PROCEEDINGS, PROCEEDINGS OF EXECUTIVE OFFICERS CHARGED WITH RESPONSIBILITY OF IMPORTANCE, AND COMMUNICATIONS BETWEEN HUSBAND AND WIFE. (Prosser on Torts, Hornbook Series, 2d Ed., par. 95, p. 606)

Affording a shield of absolute privilege to the author of defamatory statements so that character and earning capacity may be destroyed without fear of retribution

is extremely dangerous to society and to the individual members thereof. For this reason absolute privilege is a defense only in those cases where public policy dictates that the public good outweighs the harm that may be done to any one individual. Thus, public policy has defended with the shield of absolute privilege defamatory statements made in judicial and legislative proceedings, proceedings of executive officers charged with responsibility of importance, and communications between husband and wife. (Prosser on Torts, Hornbook Series, 2d Ed., par. 95, p. 606) However, the courts have been extremely reluctant to extend the protection of this privilege beyond the limits stated.

The policy of extending the defense of absolute privilege was discussed in the case of *Tanner v. Stevenson*, 128 S.W. 878, 138 Ky. 578, 30 L.R.A. (N.S.) 200, and quoted by the Court in the case of *Bonham v. Dotson*, 288 S.W. 297, 216 Ky. 660. We quote from 288 S.W. at page 298:

“The cases to which this privilege applies are few in number and ought not to be enlarged. *It would be a dangerous and vicious thing to license people to write and speak without any restraint. There are many evil minded and recklessly disposed who would shelter if they could under the protection afforded by absolute privilege and give free bridle to tongue and pen to injure or destroy an enemy.* * * * *The law holds good character in high esteem and has made it a serious offense to wantonly assault it; but there are a few instances in which the interest of the public is esteemed more important than that of the individual, and occasions in*

which private rights must yield to public good. In these cases there is no penalty attached to malice or falsehood. . . . But the cases to which this immunity from liability applies are confined to judicial and legislative proceedings, matters involving military affairs, and communications made in the discharge of a duty under express authority of law by or to heads of executive departments of state.” (Italics added)

In the *Tanner* case the county superintendent of schools had written a defamatory letter to the state superintendent of public instruction concerning a school teacher who was seeking to obtain a state certificate in the effort to prevent her from so doing, and it was held that such communication was not absolutely privileged. (See also *Ranson v. West*, 125 Ky. 457, 101 S.W. 885, 31 Ky. Law Rep. 82)

There have been a multitude of cases that have refused to extend the defense of absolute privilege beyond the boundaries above listed. For the convenience of the court we quote from a few such decisions.

In the case of *Hancock v. Mitchell*, 98 S.E. 65, 83 W. Va. 156, the defendant had circulated a petition seeking to establish a temporary road and further seeking to remove the road engineer for “incompetency and for misfeasance and malfeasance in office.” The defendant then filed the petition in the county court. It was held that this petition was protected only by a conditional or qualified privilege, and not by an absolute privilege. Paragraphs 1 and 2 of the Syllabus (quoting from the opin-

ion of the court, Vol. 98, page 66 of the South Eastern Reporter) state as follows:

1. A citizen having an interest in the due and proper performance of the duties of a public officer or agent may petition the tribunal appointing such officer or agent and having power to remove him, for his removal, without liability for false or erroneous representations made therein as ground for removal, provided they were made in good faith for the purpose aforesaid and without malice and knowledge of their untruthfulness, even though he has no right to prosecute the removal proceeding as a party litigant, and he may set up such right as a qualified or conditional privilege by way of defense in an action against him for libel, based upon allegations of false and malicious representations contained in his petition.
2. Such right raises a presumption of good faith in the preparation, circulation, and presentation of the petition, which precludes right of recovery, in the absence of allegation and proof of express malice therein; but it does not constitute an absolute privilege, absolving the petitioner from liability without regard to his motives and conduct.

In the case of *Walker v. Hunter, et al.*, 283 P. 48, 86 Colo. 483, the defendants petitioned the Board of County Commissioners to revoke plaintiff's license to operate a dance hall. The court held that this petition was qualifiedly or conditionally privileged. Paragraphs 1 and 2 of the syllabus state as follows:

1. Board of county commissioners having full power to grant, refuse, revoke, and cancel dance hall licenses, under Laws 1927, p. 577, petition to deny license to and close dance hall, because "the management, conduct and existing immoral conditions" thereof "are such that said dance hall has become a public nuisance and a detriment to the community," was qualifiedly privileged.
2. To deprive a qualifiedly or conditionally privileged publication of such character, it must appear that it was made with express malice.

In the case of *Colonial Stores, Inc. v. Barrett*, 38 S.E. 2d 306, 73 Ga. App. 839, there was a regulation of the War Manpower Commission requiring an employer to give a discharged employee a certificate of availability. The defendant gave the plaintiff a certificate of availability stating that plaintiff was discharged because of "improper conduct toward fellow employees." The court held that there was only a conditional privilege. Paragraph 8 of the syllabus states as follows:

8. In action against plaintiff's former employer for libel in falsely stating in certificate of plaintiff's availability, required to be presented by him to prospective employers, that he was discharged by defendant because of improper conduct toward fellow employees, evidence was sufficient to authorize jury's finding of defendant's malice, so as to justify verdict for plaintiff, even if certificate was conditionally privileged."

POINT II

IN REVOKING MORTENSEN'S AND TREDWAY'S LICENSES WITH LICOA THE INSURANCE COMMISSIONER WAS MERELY PERFORMING A MINISTERIAL DUTY, IN WHICH HE WAS GIVEN NO DISCRETION, AND THE CONTENTS OF THE REVOCATION NOTICE WERE ONLY QUALIFIEDLY OR CONDITIONALLY PRIVILEGED.

American Jurisprudence, volume 33, page 124, par. 126, gives the following discussion of qualified or conditional privilege:

"A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he in good faith proceeds to do. This general idea has been otherwise expressed as follows: A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation. The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occa-

sion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.

In the absence of malice, an utterance may be qualifiedly privileged, even though it is not true, and notwithstanding the fact that it contains a charge of crime. Indeed, it has been said that the doctrine of privilege rests usually, if not always, on the assumption that the words were untrue, but were excused by the occasion and the circumstances. *But mere color of lawful occasion and pretense of justifiable end cannot shield from liability a person who publishes and circulates defamatory matter. Hence, a publication loses its character as privileged, and is actionable, on proof of actual malice.* (Italics added)

Appellants do not contend that the publication made by them concerning the respondents was not defamatory, false and malicious. The only contention of the appellants is that the publication was absolutely privileged. Respondents take the position that if any privilege attached to the publication of the appellants, that privilege was only qualified or conditional, and was lost when the publication was made with express malice.

To support their contention appellants cite two Tennessee cases, *Independent Life Ins. Co. v. Rodgers*, 55 S.W. 2d 767, 165 Tenn. 447; and *Independent Life Ins. Co. v. Hunter*, 63 S.W. 2d 668. These are companion cases arising out of the same publication of the defendant company, Independent Life Ins. Co. (plaintiff on appeal).

In the Tennessee cases Independent Life Ins. Co. wrote a letter to the Insurance Commissioner which was a "charge against Rodgers going to his eligibility to work for the Federal Union Company," and also making charges against Hunter's eligibility to go to work for any other company. Both men had been employees of Independent Life Ins. Co., but had left that company.

Chapter 46 of Public Acts of 1925 (Tennessee) contains the following provision:

"Section 1. . . . That every insurance company, including fraternal benefit associations, and all other companies licensed to do business in this State, shall obtain from the said Commissioner of Insurance and Banking a certificate of authority for every agent or solicitor writing or soliciting insurance for them as now provided in this State, and that such certificate shall be renewable in January of each year, and that the same may be revoked after a hearing for good cause shown by said Commissioner of Insurance and Banking. . . ."

The Tennessee court interpreted this section as permitting an insurance company to bring a charge against an agent on which a hearing would have to be held, and that if the company could show "good cause," the agent's license would be revoked by the Insurance Commissioner.

Thus, in the Rodgers case, the Court held that:

"The letter (from Independent Life Ins. Co.) was understood by the commissioner as a charge against Rodgers going to his eligibility to work

for the Federal Union Company. We interpret the letter likewise.” (55 S.W. 2d 769)

On this basis the Tennessee court held that in the *Rodgers* case the publication was absolutely privileged.

However, in the *Hunter* case, based on the identical letter to the Insurance Commissioner, the court held that as Hunter was not working for another company and therefore was not licensed for another company, the letter did not come under the above statute, and Hunter was allowed to recover.

In the case of *Grubb v. Johnson*, 89 P. 2d 1067, decided Nov. 23, 1955, where the identical fact situation was presented as in the instant case, the Oregon court discussed both the *Rodgers* and the *Hunter* case at length. Regarding the *Rodgers* case the Court said (p. 1072, P. 2d reports) :

“The next case cited by the defendants is *Independent Life Ins. Co. v. Rodgers*, 165 Tenn. 447, 55 S.W. 2d 767, 768. The plaintiff was an agent in the employ of the insurance company. He left the employment and thereafter he secured from the commissioner of insurance a license to sell insurance for another company. After the second license had been issued the defendant company wrote to the insurance commissioner, stating that the plaintiff

‘took things into his own hands and collected his money before a final had been made against him and before we had time to check up and see how much he is short, but it will be slight, but we understand that he

is going to work for the Federal Union of Cincinnati, Ohio, and is going to work in Chattanooga.

* * * * *

‘* * * we procured licenses for these men and paid for them, and we think probably it will be plenty of time for them to go to work for some other company when they have a clean bill of health from us.’

We have grave doubt whether the letter was libelous per se, but the Tennessee court so held. The court then construed the letter as a charge against the plaintiff going to his eligibility to work for the new company. On receipt of the defendant's letter the commissioner notified the plaintiff thereof and ‘asked for his explanation.’ Whether a hearing was had, or with what results, does not appear. *On appeal the court held in substance that the commissioner was acting as a court and that the defendant's letter was absolutely privileged. We are unable to follow its reasoning.* (Italics added)

The *Grubb v. Johnson* case was identical with the case at bar. In discussing the *Grubb* case the Oregon court was not only unable to follow the reasoning of the Tennessee court in the *Rodgers* case, but also distinguished the *Grubb* case from the *Rodgers* case.

The Oregon statute regarding granting and revoking licenses of insurance agents (Oregon Laws 1947, Chap. 373, p. 606) is substantially the same as the Utah statute on the same subject, 31-17-10, U.C.A., 1953, which provides as follows:

31-17-10. (1) Each insurer on appointing an agent in this state shall file written notice thereof

in duplicate with the commissioner on forms as prescribed and furnished by him, and shall pay the filing fee therefor as provided in section 31-14-1 of this code. If then licensed, or as soon as licensed, the commissioner shall mail one copy of the appointment to the agent.

(2) *Each such appointment shall continue in force until:*

(a) the commissioner notifies the insurer that the agent's license is terminated or revoked; or

(b) *the appointment is revoked by the insurer by written notice of revocation filed with the commissioner* on forms as prescribed and furnished by him, and by written notice to the agent (no fee shall be charged for filing notice of revocation); or

(c) the insurer fails to renew the appointment as required by paragraph (3) of this section.

(3) * * * Prior to such first day of April the insurer shall file with the commissioner a statement listing all its agency appointments in this state which are to be renewed, and listing separately all its agency appointment in this state not to be renewed. * * * (*Italics added*)

The pertinent provisions of this statute, insofar as the instant case is concerned, are to be found in subparagraph 1(b) and paragraph 3 thereof which provide that an agent's license may be revoked by the insurer by mererly giving notice of revocation in writing to the insurance commissioner. An insurance company is not obliged to maintain agents in its employ if it does not so wish. It is therefore to be noted that this revocation can be made at the pleasure of the insurer without stating any cause, and that the insurance commissioner is not

given any discretion in the matter, but must revoke as requested.

During the trial of the instant case the Commissioner of Insurance, the honorable Walter M. Jones was questioned by Court and by counsel regarding procedure under the above statute:

THE COURT: The Company could have asked you to terminate it, and you would have done it without any cause stated?

MR. JONES: That is right, Sir, because his employment is based upon the will and pleasure of the company. (R-127)

THE COURT: In this case you used no discretion whatever; you just followed the request of the company?

MR. JONES: That is right. (R-132)

MR. BARKER: You would have to terminate, at the request of the company, the license of the agent, irregardless, would you not? I mean, you could not leave a license for a company, if that company did not want him?

MR. JONES: I am sure that is so. (R-133)

MR. BARKER: Mr. Jones, when a company sends you a letter of termination, regardless of grounds, you terminate, do you not?

MR. JONES: Yes, we have done.

MR. BARKER: As a matter of fact, I believe you testified an agent could not sell for a company if they did not want him to, no matter what the grounds — if they did not like the color of his hair?

MR. JONES: That is right.

MR. BARKER: And if the company does not want a license for him, you terminate the license?

MR. JONES: That is right. (R-137, 138)

The Utah code, as well as the Oregon code, provides for hearings to be held by the Insurance Commissioner.

Section 31-4-1, U.C.A., 1953, provides for hearings "upon written demand for a hearing made by any person aggrieved by any act or threatened act or failure of the Commissioner to act. . . ."

Section 31-4-4, U.C.A., 1953, provides that the commissioner may of his own initiative issue a show cause notice calling a hearing in which an agent would be required to show cause why action should not be taken against him.

There is no provision in the code permitting an insurance company to initiate a hearing, unless it is aggrieved by some act or failure to act of the commissioner, and there is no provision for an insurance company to be a party litigant in a hearing involving the revocation of an agent's license.

Moreover, the insurance commissioner did not regard the letter in the instant case as a request to cancel Mortensen's and Tredway's license with Reliance National.

THE COURT: In receiving that letter, did you interpret that to mean that you should have a

hearing and deprive them of their right to have a license permanently, that that was what was requested of you?

MR. JONES: I did not at the time, Sir. I did not so interpret it. (R-140)

MR. BARKER: Did you interpret this letter as a request on the behalf of Life Insurance Corporation of America that you revoke the licenses you had issued with the Reliance National Life Insurance Company?

MR. JONES: No, Sir.

Also, while the derogatory statements contained in the letter were sufficient to cause other insurance companies to refuse to hire Mortensen and Tredway (R-89, 312, 313, 315), they were not sufficient to cause the insurance commissioner to take any affirmative action against them.

THE COURT: Now you stated in this letter you received from the plaintiffs — from Mr. Bulard in this action, or the company, that there were three grounds set out.

The first one you mentioned was they were not operating in the interests of the company.

Is that sufficient grounds to terminate an agent's license if the company does not ask you to terminate it?

MR. JONES: No, I would not consider it so. I would want to know the facts.

THE COURT: The company could have asked you to terminate it, and you would have done it without any cause stated?

MR. JONES: That is right, Sir, because his employment is based upon the will and pleasure of the company.

THE COURT: Now the next ground that he had been operating in violation of the company operations; that, of itself, would not bother you unless the company complained and did not want him any more?

MR. JONES: That is right. That is the only way we would know about it.

THE COURT: And still it would not bother you, even if you did know about it, if the company was not complaining, would it? If a citizen came in, or somebody else, and complained about it, they have a chance to get this man fired, you would not pay any attention to it unless the company wanted him fired on that ground?

MR. JONES: That is right.

THE COURT: Now your third ground was you say they had in the letter there was a debit balance. That would not bother you either unless the company was complaining about it, would it?

MR. JONES: That is true, I am sure, Sir. (R-126, 127)

THE COURT: Now the fact that they were not desirable for any of these three grounds with this company, assuming that is a fact, how would that affect your giving them a license for another company; should you refuse them a license to work for another company on any one of these three grounds, or any of them?

MR. JONES: No, sir, not if we advise the company the termination of the prior employment was indicated by either one or all of those three. We would go ahead and license them. * * * (R-128)

MR. BARKER: Mr. Jones, when a company sends you a letter of termination, regardless of grounds, you terminate, do you not?

MR. JONES: Yes, we have done.

MR. BARKER: As a matter of fact, I believe you testified an agent could not sell for a company if they did not want him to, no matter what the grounds — if they did not like the color of his hair?

MR. JONES: That is right.

MR. BARKER: And if the company does not want a license for him, you terminate the license?

MR. JONES: That's right.

MR. BARKER: If this letter contained anything derogatory, material that was of such a nature that you felt the agent could never again be relicensed, that would not come up again would it, unless the agent required another license?

MR. JONES: That is right, it would not.

MR. BARKER: And so it would sit 20 years, and there would never be a hearing unless some company put in a request to have that agent licensed?

MR. JONES: *That is right.* (R-137, 138)

After hearing the testimony of the Insurance Commissioner the Court made the following ruling:

“The Court is of the opinion on that matter that the letter was written by the defendant, using the words ‘with prejudice’ and without a detailed explanation was not sufficiently clear to constitute a request for any more than a termination of the agency with the defendant company, and the Court

is of the opinion that it did not inaugurate a judicial proceedings, and for that reason there is no privilege attached to this letter.” (R-143)

The *Grubb v. Johnson* case, *supra*, as previously stated, is identical to the instant case. In that case an Insurance company had written a defamatory letter to the insurance commissioner requesting cancellation of an agent’s license under a statute substantially the same as the Utah statute. In deciding the case the court stated as follows (89 P. 2d 1074) :

“The statute authorizes the insurance commissioner to revoke a license or refuse to issue a license to a solicitor for cause. Oregon Laws 1947, Chapter 373, p. 605. But the statute also provides that the commissioner ‘shall revoke any * * * solicitor’s license upon the written request * * * of the employing agent or for failure to comply with the provisions of this act.’ Oregon Laws 1947, Chapter 373, p. 606. The defendants had applied for a solicitor’s license for plaintiff ‘that he may solicit * * * insurance solely on my behalf * * * unless sooner revoked.’ *The revocation notice on which the charge of libel is based stated, first of all, that the plaintiff ‘has ceased to be a solicitor for the undersigned and you are hereby directed to revoke the license heretofore issued to said solicitor to solicit insurance on my behalf.’ The revocation was automatic and mandatory. The commissioner had only a ministerial duty to perform.* He testified that the notice by the defendants ‘constituted the revocation immediately.’ *Upon the revocation, which occurred merely because of the termination of plaintiff’s employment, there was no matter on which to exercise quasi judicial power, and would be none unless at some later time application should*

be made for a new license. The evidence shows that after the revocation an insurance company applied for an agent's license for Mr. Grubb. He had previously had only a solicitor's license. When the application was made the insurance company asked for a hearing 'to clear the record of Mr. Grubb,' and a hearing was held. After the revocation and before the request for a hearing, there was no issue before the commissioner, and the revocation cannot be deemed a request or prayer for a hearing. True, the defendants wrote 'It is my recommendation, based upon these misappropriations that Francis W. Grubb be denied any further license or privilege granted by the Insurance Commissioner of the State of Oregon.' But, in so writing, they were mere volunteers. That recommendation was applicable only to a situation which was then nonexistent. No hearing was possible unless and until some one again applied for a license for the plaintiff. The 'Revocation of Solicitor's License' was no part of a quasi judicial proceeding and the doctrine of absolute privilege was not applicable.' (Italics added)

It is respectfully submitteo that if any privilege attached to the publication in the instant case, that privilege was only qualified or conditional, and the defense of qualified privilege was lost upon a showing that the publication was made with malice.

The letter from Licoa did not mention any other insurance company or request that plaintiffs' licenses be canceled with any other company. The letter only requested that which the company had an absolute right to request, namely, that the commissioner cancel Mortensen's and Tredway's licenses with Licoa. This the com-

missioner had to do regardless of the reasons stated, and he was given no discretion in the matter by the insurance code. Thus, his act was purely ministerial in nature, and the letter was protected, if at all, only by a qualified or conditional privilege.

CONCLUSION

“The law holds good character in high esteem.” It would be “a dangerous and vicious thing to license people to write and speak without restraint.” there being many “who would shelter if they could under the protection afforded by absolute privilege and give free bridle to tongue and pen to injure or destroy an enemy.”

In the instant case the jury found that the defendants deliberately and maliciously defamed the respondents. Their malicious act was done for the express purpose of destroying plaintiff's earning power.

The defendants have not sought to justify their act or even to deny the evidence of their malice. Their only defense has been to seek “shelter * * * under the protection afforded by absolute privilege.”

However, this “shelter” is not available to defendants in the instant case. The publication which maliciously defamed the plaintiffs was contained in a routine request for a ministerial act. The request made to cancel plaintiffs' licenses was made pursuant to a statutory provision of the insurance code, a provision which gives no discretion to the Insurance Commissioner, and which

requires no cause to be shown in order for the request to be granted. The Commissioner's act in canceling Mortensen's and Tredway's licenses with Licoa was mandatory, purely ministerial, and the letter requesting the ministerial act was protected, if at all, only by a qualified or conditional privilege which was destroyed on the showing of actual malice.

The defamatory statements made by the defendants were gratuitous and without purpose insofar as the functions of the Insurance Commissioner were concerned. This being so, what social objective would conceivably be furthered by a ruling of *absolute* privilege? While reputations may sometimes be fit subjects of sociological sacrifice, they should not be sacrificed needlessly.

It is therefore respectfully submitted that the judgment of the district court should be affirmed.

Respectfully submitted,

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