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Torts—Defamation—Privilege of Reporting Judicial Proceedings

TORTS — DEFAMATION — PRIVILEGE OF REPORTING JUDICIAL PROCEEDINGS

Roxie Henry, in a false oral statement to an assistant district attorney, accused plaintiff of theft. This defamatory statement was incorporated in an affidavit by the district attorney's office and a copy given to defendant's agent by Henry's counsel. Defendant newspaper published the statement, and plaintiff brought a libel action against the newspaper. Defendant did not plead truth as a defense but claimed the article was the report of a judicial proceeding and was therefore privileged. Trial court rendered judgment for the plaintiff. On appeal, held: affirmed. The qualified privilege afforded the reporting of a judicial proceeding does not extend to charges made, in an affidavit, to a prosecutor if no further action has been taken on those charges.[1]

Based upon the premise that every citizen is entitled to know how his government is being managed, there is a generally recognized privilege to publish true and accurate reports of legislative, executive, and judicial proceedings.[2] With respect to that phase of the more general privilege which permits the non-malicious reporting of judicial proceedings, its reason for existence is to enable the citizenry to evaluate how well their *judges* are handling the work of judicial administration.[3] Consequently it has been frequently held that the privilege extends only to those phases of judicial administration which demand action on the part of the judge, although it includes *ex parte* proceedings.[4]

More recently a line of cases has developed in which the term "judicial proceeding" has been expanded to include steps in the process which do not require action on the part of the judge.[5] Dissatisfied with what it termed "a rule of privacy in relation to litigation that no longer has substance . . . ,"[6] the New York

1. Pittsburgh Courier Pub. Co. v. Lubore, 200 F.2d 355 (D.C. Cir. 1952), *affirming* 101 F. Supp. 234 (D.D.C. 1952).
2. PROSSER, TORTS 844 (1st ed. 1941).
3. *Id.* at 845.
4. Peck v. Wakefield Item Co., 280 Mass. 451, 183 N.E. 70 (1932); Cowley v. Pulsifer, 137 Mass. 392 (1884); Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888); Barber v. St. Louis Dispatch Co., 3 Mo. App. 377 (1877); Fitch v. Daily News Pub. Co., 116 Neb. 474, 217 N.W. 947 (1928); American Publishing Co. v. Gamble, 115 Tenn. 663, 90 S.W. 1005 (1906); Ilsley v. Sentinel Co., 133 Wis. 20, 113 N.W. 425 (1907). See PROSSER, TORTS 845, 846 (1st ed. 1941).
5. Glenn v. Gibson, 75 Cal. App. 2d 649, 171 P.2d 118 (1946); Kurata v. Los Angeles News Publishing Co., 80 Cal. App. 537, 40 P.2d 520 (1935).
6. Campbell v. New York Evening Post, 245 N.Y. 320, 324, 157 N.E.

Court of Appeals held, in *Campbell v. New York Evening Post*,[7] that the privilege extended to the publication of defamatory material contained in a filed pleading but on which no judicial action had been taken. Thrusting aside the argument that such a rule may permit the airing of personal malice with impunity, the court pointed out that many law-suits are dropped prior to verdict but after some judicial act has been done, situations in which the person bringing the suit gets just the opportunity to vilify publicly which is objected to in the instant case. Finally, recognition was given by the court to the fact that newspaper publishers do not as a matter of practice distinguish between defamatory matter in a pleading and that in *ex parte* proceedings, for example. Practicality, logic, and consistency were said to join together to demand this result. Later cases adopting the rationale of the *Campbell* case have bolstered the position there taken by pointing out that while the rule does give an opportunity to get slanderous material before the public, the same result could be reached under the older rule simply by the device of moving to amend the complaint. This demands judicial action if only to deny the motion, and so the privilege attaches.[8]

While granting the essentiality of giving publicity to the working of our courts, many cases have declined to follow the lead of the New York Court of Appeals in extending the privilege.[9] Reasoning that it is not the duty of newspapers to publish accusations made by one party against another, these courts have rejected the importance of removing from the newspaper business that additional degree of inconvenience and uncertainty attendant upon the stricter rule. The "small additional risk of harm to maligned individuals"[10] is thought to outweigh the re-

153, 156 (1927). It is interesting to note that the New York court expressed a similar attitude toward the right of privacy in the case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). They held that the "right of privacy" had not found its place in our jurisprudence.

7. 245 N.Y. 320, 157 N.E. 153 (1927).

8. Paducah Newspaper Inc. v. Bratcher, 274 Ky. 220, 118 S.W.2d 178 (1938) (Filing of petition in office of clerk of court causing summons to be issued); Lybrand v. The State Co., 179 S.C. 208, 184 S.E. 580 (1936) (Filing of complaint with court clerk and summons issued).

9. Maloff v. Post Publishing Co., 306 Mass. 279, 28 N.E.2d 458 (1940); Thompson v. Boston Pub. Co., 285 Mass. 344, 189 N.E. 210 (1934); Peck v. Wakefield Item Co., 280 Mass. 451, 183 N.E 70 (1932); Fitch v. Daily News Pub. Co., 116 Neb. 474, 217 N.W. 947 (1928).

10. Sanford v. Boston Herald Travelers Corporation, 318 Mass. 156, 158, 61 N.E.2d 5, 7 (1945).

duction in inconvenience to a newspaper enterprise which ought to bear the risk of paying damages if accusations prove false.[11] Thus these courts have failed to find any reason for extending the privilege beyond the limits imposed by the original and, in their minds, continuing reason for its existence. It is submitted that although the courts which have extended the privilege to cover filed pleadings have abolished certain seemingly artificial distinctions, in doing so they have lost sight of the only reason for the existence of the privilege; they have sacrificed too much to gain too little.

In any event, however, it was not necessary for the court in the principal case to choose between the competing doctrines. In all the cases which follow the *Campbell* case there has been a pleading or complaint of some type filed with the court clerk.[12] In no instance was there a mere affidavit given to a prosecutor and no further action taken as in the principal case. Although affidavits given in open court have been held to be a type of judicial proceeding and therefore privileged,[13] this privilege has not been extended to the reporting of an affidavit which may possibly be used in a judicial proceeding but which has not yet been so used.[14] To extend the meaning of judicial procedure to the extent of including a statement given to a prosecutor before any action is taken to put the wheels of the judicial body into motion is defeating the purpose for which the privilege was intended.[15] In view of their definitions of "judicial proceedings" in malicious prosecution cases, it is questionable whether even the courts of

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11. *Ibid.*
12. See note 8 *supra.*
13. Stalow v. Hearst Corp., 105 N.Y.S.2d 284 (Sup. Ct. 1951).
14. Bibb v. Crawford, 6 Ga. App. 145, 64 S.E. 488 (1909).
15. Cowley v. Pulsifer, 137 Mass. 392, 394 (1884). Holmes, J., stated the purpose of such a privilege as follows:

> . . . It is desirable that the trial of causes should take place under public eye, not because the controversies of one citizen with another are public concern, but it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.
>
> If these are not the only grounds upon which fair reports of judicial proceedings are privileged, all will agree that they are not the least important ones. And it is clear that they have no application whatever to contents of a preliminary written statement of a claim or charge . . . . Knowledge of them throws no light upon administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court. . . .

New York would extend the privilege of reporting judicial proceedings to a mere affidavit without more decisive action being taken upon it.[16]

Since under neither of the above-discussed doctrines could the mere filing of an affidavit with a prosecuting attorney be considered a step in a judicial proceeding, it is clear that the decision in the principal case was correct.[17]

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16. Losi v. Natalicchio, 112 N.Y.S.2d 706, 708 (Sup. Ct. 1952): ". . . [A]n investigation conducted by the District Attorney's office is not a judicial proceeding." Schulman v. Modern Industrial Bank, 36 N.Y.S.2d 591, 594 (Sup. Ct. 1942): "As to the investigation conducted by the district attorney by reason of the defendant's complaint to him no cause of action arises in consequence. An action for malicious prosecution imports that there was a judicial proceeding commenced which terminated favorably to the defendant." It is to be noted that both cases cited the *Campbell* case.

17. It is interesting to note that the decision was further justified by the fact that defendant did not expressly or satisfactorily imply in its publication that the statement had been given to a prosecutor. This ground for the denial of a qualified privilege is supported by the following cases: Hughes v. Washington Daily News Co., 193 F.2d 922 (D.C. Cir. 1952); Lewis v. Hayes, 165 Cal. 527; 132 Pac. 1022 (1913); Wood v. Construction Pub. Co., 57 Ga. App. 123, 194 S.E. 760 (1937), *aff'd*, 187 Ga. 377, 20 S.E. 131 (1938); Storey v. Wallace, 60 Ill. 51 (1871).