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Civil Procedure—Attorney-Client Privilege and Necessity of Subpoena Under Civil Practice Act Section 406

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same issue determined in the Virginia property action, specifically that plaintiff's husband was negligent, was a common and vital element in a wrongful death action. And, since plaintiff is only being substituted into her husband's right, the finding in the property action must resultingly be binding on her action for wrongful death.

As to the second argument, the Court holds that the letters of administration issued to plaintiff expressly authorized her to administer the estate of the deceased. The only limitation on the authority granted to her was that she could not compromise the wrongful death action or enforce a judgment obtained therein until further court order. She had every right and in fact every reason to appear in the Virginia action in order to protect her claim for wrongful death.

By a unanimous decision the Court affirms, holding plaintiff had her day in court and is barred from relitigating the issues decided adversely to her in the Virginia action.

ATTORNEY-CLIENT PRIVILEGE AND NECESSITY OF SUBPOENA UNDER CIVIL PRACTICE ACT SECTION 406

Section 353 of the Civil Practice Act establishes the privileged relationship of attorney and client and prohibits the attorney from disclosing communications between them. Since the purpose of this statute is to secure the orderly administration of justice, by encouraging frank disclosures to attorneys by their clients, it is permissible for a client to waive the privilege. However, an attorney may never disclose privileged communications unless authorized to do so by his client.[36]

In *In re Kaplan*,[37] an attorney who represented a trade association voluntarily appeared before the Municipal Commissioner of Investigation and gave information concerning illegal parking of trailer trucks on the waterfront. The attorney indicated that this condition was allowed to exist because of the influence of two powerful politicians. In answer to questions of the Commissioner the attorney revealed that he obtained his information from a member of the trade association but declined to give the name of the member, claiming the attorney-client privilege.

The Commissioner moved for an order for the arrest of the attorney, pursuant to Section 406 of the Civil Practice Act, for refusal to answer the question. The Special Term granted the order stating, "Until there is a client, there is no attorney-client relationship. So in order to establish it the name must be revealed."[38] The Appellate Division affirmed the order with two justices dissenting.[39] The Court of Appeals unanimously reversed the lower courts on the ground that the imprisonment of a witness, under Section 406

36. People v. Farmer, 194 N.Y. 251, 87 N.E. 457 (1909). Matter of Reinhardt, 95 Misc. 413, 160 N.Y. Supp. 828 (Surr. Ct. 1915).
37. 8 N.Y.2d 214, 203 N.Y.S.2d 836 (1960).
38. In re Blumenfeld, 22 Misc. 2d 839, 840, 200 N.Y.S.2d 836, 837 (County Ct. 1960).
39. In re Blumenfeld, 10 A.D.2d 909, 202 N.Y.S.2d 198 (1st Dep't 1960).

of the Civil Practice Act, for refusal to answer a question must conform strictly to the provisions of that statute.[40] Since, there was no subpoena issued requiring the attorney to appear and since his voluntary appearance did not constitute a waiver of subpoena for the purposes of this Section, the court had no authority to order his confinement.

Although this case was actually decided on the grounds indicated above, the Court went to great lengths to indicate that they felt that the attorney was privileged to withhold the name of his client under the circumstances of this case. The Court acknowledged that an overwhelming majority of the cases dealing with this aspect of the attorney-client relationship hold that the privilege does not extend to the identity of the client, but only to communications between the two.[41] There are two well founded reasons for these decisions; (1) Every litigant is in justice entitled to know the name of his opponent; (2) The veil of secrecy should not be used as a cover for wrong doing. In the present case neither of these reasons existed. There was no litigant that was likely to be taken advantage of by the non-disclosure nor was there any wrong doing. On the contrary, the attorney was voluntarily working for the best interests of society and secrecy served the desirable purpose of protecting the client from reprisals. Thus, it appears that the basic rule of privileged relationship extends to all communications in the normal course of business between attorney and client including the clients identity, unless litigation or wrongdoing by the client is involved. This privilege is possible not withstanding the illogical statement of the Special Term, ". . . in order to establish it the name must be revealed."[42] for it is obvious that the relationship can be proven by the surrounding circumstances without the name of the client.

NECESSARY ELEMENTS TO LIBEL ACTION

Defamation is that which tends to injure reputation in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.[43] To sustain an action for libel, the plaintiff must allege and prove the following elements: (1) the alleged defamatory statement or representation, (2) its publication by the defendant, (3) its falsity, (4) the colloquium or reference to the plaintiff if this is not apparent from the statement itself, (5) the innuendo or libelous meaning of the statement when this is not evident upon the face of the publication, (6) malice, where the words are qualifiedly privileged, and (7) damage to the plaintiff.[44] A defamatory statement which has a tend-

40. Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360 (1939).

41. People ex rel. Vogelstein v. Warden of County Jail, 150 Misc. 714, 270 N.Y. Supp. 362, aff'd 242 App. Div. 611, 271 N.Y. Supp. 1059 (1st Dep't 1934).

42. In re Blumenfeld, 22 Misc. 2d 839, 200 N.Y.S.2d 836 (County Ct. 1960).

43. Prosser, Torts, 574 (2d ed. 1955).

44. 4 Carmody-Wait, N.Y. Practice § 132 (1953).