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Civil Procedure—Necessary Elements to Libel Action

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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 notwithstanding 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).

ency to injure a person in his business or occupation is actionable *per se*, the innuendo⁴⁵ and resulting damage⁴⁶ being presumed.

A direct attack upon the plaintiff is not always necessary to effect a libelous result. In the case of an author or an accepted authority in a specific field, the damage to his professional standing realized by attributing to his pen false or misleading statements can be as devastating as a direct assault upon his reputation. Consequently, to publish in the name of a well-known author any literary work, the authorship of which would tend to injure an author holding his position in the world of letters, is a libel.⁴⁷

In *Clevenger v. Baker Voorhis & Co.*,⁴⁸ the complaint alleged that plaintiff, a member of the New York Bar of long standing and an accepted authority on New York Practice, for thirty-three years had edited and annually revised CLEVENGER'S ANNUAL PRACTICE OF NEW YORK which defendant published. In 1956 he terminated his editorship. The title page of the 1957 edition of the work, although initially stating that it had been edited and annotated by plaintiff, was subsequently corrected to show that the 1957 revision was done by defendant's editorial staff. Defendant's staff also prepared the subsequent revisions but the title page, stating simply "Annually Revised", did not reflect this fact. The 1959 revision of the work contained numerous errors of omission and commission which plaintiff alleged many lawyers and law librarians attributed to him by virtue of the misleading format of the title page with the consequence that his reputation as a lawyer and law writer was irreparably impaired.

The Court of Appeals reversed the Appellate Division,⁴⁹ reinstating the order of Special Term denying defendant's motion to dismiss for failure to state a cause of action. In holding that the complaint alleged a common law action in libel, the Court relied on an early precedent, *Archbold v. Sweet*,⁵⁰ decided in 1832 in *Nisi Prius* at Westminster, which paralleled the present case in virtually every respect. There, the plaintiff, a well-known barrister and legal writer, was the author of A SUMMARY OF THE LAW RELATIVE TO PLEADING IN CRIMINAL CASES of which two editions were published before he sold the copyright to defendant. The third edition was edited by someone else but was published with plaintiff's name on the title page and with no indication that he was not the editor. It contained numerous mistakes as the result of which, the plaintiff alleged, he was greatly injured in his reputation as a barrister and author. The defendant moved for a nonsuit, arguing as did defense counsel in the present case, that, having purchased the copyright, he had a right to publish the third edition and that his failure to indicate the name of the actual editor was not

45. *Kleberg v. Sipser*, 265 N.Y. 87, 191 N.E. 845 (1934).

46. *Moore v. Francis*, 121 N.Y. 199, 23 N.E. 1127 (1890).

47. *Ben-Oliel v. Press. Pub. Co.*, 251 N.Y. 250, 167 N.E. 432 (1929).

48. 8 N.Y.2d 187, 203 N.Y.S.2d 812 (1960).

49. 10 A.D.2d 365, 199 N.Y.S.2d 358 (1st Dep't 1960).

50. 5 Car. & P. 219, 172 Eng. Rep. 947 (1832).

actionable. The motion for nonsuit was denied and, after ruling that as a matter of law the work contained numerous errors, the court instructed the jury that: "The question of fact is this, whether the third edition would be understood by those who bought it to be the work of the plaintiff; for, if so, I think the errors are such as would be injurious to the plaintiff's reputation."⁵¹

The Court of Appeals held that, as in the *Archbold* decision, the crux of the claim advanced was that the title page was so worded as to convey to the reader the erroneous impression that the edition in question was the sole work of plaintiff since his name was the only name that appeared thereon. "While defendant had a right to state that plaintiff was the author of the original text, the purchase of the copyright did not carry with it a license to defame by impliedly misrepresenting plaintiff as reviser of an annual edition containing many inaccuracies for which he bore no responsibility."⁵²

SUMMARY JUDGMENT GRANTED TO PRIVILEGED COMMUNICATORS

A qualified privilege in an action for slander and libel confers its possessor with a presumption of immunity rebuttable only upon a showing of falsity and malice.⁵³

The plaintiff in *Shapiro v. Health Insurance Plan of Greater New York*⁵⁴ was a surgeon and head of one of the non-profit defendant corporation's medical groups. He was denied membership renewal by the Control Board of the defendant membership corporation on the grounds of incompetency.⁵⁵ (Two officers of "Health Insurance Plan" were joined with it as defendants). The plaintiff alleged that oral and written defamatory statements were made during an investigation into his skill and training as a surgeon and his qualifications as a member of his partnership group. In addition, plaintiff points to the charges of the defendant officers made during the hearings before the Control Board that he had wilfully misrepresented to and withheld information from that Board.

To these charges of defamation, the defendants asserted a qualified privilege based upon their acting within their undisputed scope of authority. A communication made in good faith upon a subject matter in which the party 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 contained matter which, without this privilege, would be slanderous

51. *Id.* at 227, 172 Eng. Rep. 950.

52. *Supra* note 48 at 192, 203 N.Y.S.2d 816 (1960).

53. *Byam v. Collins*, 111 N.Y. 143, 19 N.E. 75 (1888).

54. 7 N.Y.2d 56, 194 N.Y.S.2d 509 (1959).

55. This corporation was composed of thirty-two medical groups including the defendant's. Each contracted independently with the parent corporation, but the latter, through its control board, maintained standards and approved all appointments to the group.

The corporation operated under a plan of indemnifying its subscribers for medical expense incurred for services rendered by members of particular group.