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Torts—Fair Comment

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In holding for the plaintiff, who brought an action against the estate of his former wife, the Court found defamatory material in her will which said that the plaintiff had abandoned her and left her destitute during life. The Court limited itself to considering whether or not the will contained libelous matter, thus not holding specifically whether a cause of action in "testamentary libel"[8] may be brought. In so holding, the Court said that counsel for the defendant had not raised the latter issue in timely fashion below, so that it could not be considered at this level.[9] The dissenters limited themselves only to considering the point dealt with by majority, but said the matter in issue was not libelous per se.

The Court's holding seems to fit readily into the traditional definition of defamation per se[10] and its concepts in the area of marital relations.[11] Further, it would seem that the decision impliedly recognizes such a cause of action against a defendant estate, since one never loses his objection to a court's jurisdiction over the subject matter of an action.[12]

Fair Comment

Fair comment, a policy measure protecting a free press, is a recognized defense to libel actions in New York.[13] This privilege protects a defendant who comments on matters germane to public interest, provided: (1) the statement made is a matter of comment or opinion rather than the assertion of a factual proposition; (2) is based on facts truly stated; (3) is a fair and reasonable inference from these facts, and (4) is made without actual malice.[14]

In the case of *Julian v. American Business Consultants,*[15] the plaintiff alleged he was libeled in defendant's book, which pictured him as a Communist "dupe"

8. The majority of reported cases have held a cause of action to exist against the testator's estate, but not against the executor personally. Annot. 87 A. L. R. 234 (1933). A lower court case in New York has adhered to this view. *Brown v. Mack,* 185 Misc. 368, 56 N. Y. S. 2d 910 (Sup. Ct. 1945). The case of *Citizens' and So. Nat'l Bank v. Hendricks,* 176 Ga. 692, 168 S. E. 313 (1933), disallowed a cause of action against the testator's estate.

9. N. Y. Civ. Prac. Act §446. Exception to the charge given to a jury by the court or any part thereof and to the granting or refusal of requests to charge, shall not be deemed to have been taken unless expressly noted by the party adversely affected before the jury have rendered their verdict. See also *Buckin v. Long Island R. Co.,* 286 N. Y. 146, 36 N. E. 2d 88 (1941).

10. *Mencher v. Chesley,* 297 N. Y. 94, 75 N. E. 2d 257 (1947).

11. *Keller v. Phillips,* 39 N. Y. 351 (1868); *Woolworth v. Star Co.,* 97 App. Div. 525, 90 N. Y. Supp. 147 (1st Dep't 1904); *O'Neill v. Star Co.,* 121 App. Div. 849, 106 N. Y. Supp. 973 (1st Dep't 1907).

12. *Newham v. Chile Exploration Co.,* 232 N. Y. 37, 133 N. E. 120 (1921).

13. *Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers,* 260 N. Y. 106, 183 N. E. 193 (1932); *Hall v. Binghamton Press Co.,* 263 App. Div. 403, 33 N. Y. S. 2d 840 (3d Dep't 1942), *aff'd.,* 296 N. Y. 714, 70 N. E. 2d 537 (1946).

14. See note 13, *supra.*

15. 2 N. Y. 2d 1, 137 N. E. 2d 1 (1956).

or "sucker", though not himself a Communist. Without mentioning plaintiff's name, the book told of party influence in the radio-TV fields. In a later section, the book listed actors who had at some time lent their names or talents to "Red Front" activities. The plaintiff was listed as a participant in two rallies. He admitted the truth of the listings and their character as depicted. He alleged, though, that the whole content of the book falsely pictured him as a "fellow traveler" or "tool". The Court of Appeals *held* (4-2) that the trial court correctly dismissed his complaint.

The majority held that the defendant was protected by its fair comment defense as a matter of law, and could express an opinion as to plaintiff's activities though such would reflect on his fitness for a job in his field. They also reasoned that the book could not be said to libel the plaintiff.[16] This was so because its contents were not ". . . shown to have been published of and concerning the plaintiff and consequently . . . the complaint did not state a cause of action." Since the plaintiff could not show defendant's statements to concern him specifically, he also was precluded from showing any damages from the publication.

Judge Fuld, dissenting, argued that the questions of libel and fair comment were for a jury. He said that a jury, looking at the book's overall tenor, could find it placed plaintiff in such public suspicion or contempt as to support a libel action. As to the fair comment defense, the dissent asserted that a jury should decide whether the defendant exceeded its bounds of privilege, either through personally attacking the plaintiff or through writing of him in a reckless fashion.

It seems certain that the plaintiff was harmed in his occupation by this book. Further, he might have a good cause of action, were his mentioned activities not admittedly "Red Front" ones, or were the publication not for the public. Yet it seems that the interests of a free press must outweigh his harm here. Inflammatory and over-zealous writings of this sort often tarnish American journalism. However, the good achieved through restraining them would appear inherently productive of a muzzled press. Moreover, the plaintiff might be deemed to have known that such appearances by him might result in unfavorable publicity to him personally.

Finally, the plaintiff was to some extent a "public figure" because of his profession. He might, therefore, be considered as "public property",[17] and hence somewhat more open to comment than others and resultantly less able to avail himself of a defamation remedy.

16. The two lower courts found that the book was not libelous and thus did not reach the question of fair comment. *Julian v. American Business Consultants*, —— Misc. ——, 131 N. Y. S. 2d 374 (Sup. Ct. 1954), *aff'd. mem.*, 285 App. Div. 944 (1st Dep't 1955).

17. *Oma v. Hillman Periodicals*, 281 App. Div. 240, 118 N. Y. S. 2d 720 (1st Dep't 1953); *Sidis v. F-R Pub. Corp.*, 113 F 2d 806, 809 (2d Cir. 1940), *cert. denied*, 311 U. S. 711 (1940). *Cf.* N. Y. CIVIL RIGHTS LAW §51.