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Torts—Intentional Torts—Libel

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televised to a large visual audience presents a situation unknown to the draftsmen of the CIVIL RIGHTS LAW. But the injury is still there, and the New York Court of Appeals should have interpreted the statute consistently with today's means of reproducing an individual's portrait.

Libel

A suit for libel produces a conflict of interests; plaintiff's right to have his reputation free from invasion and defendant's right to freedom of speech and press. Where a newspaper reports a judicial proceeding, although in a defamatory way, it is privileged from suit for libel.⁷² The private right of the individual must be subordinated to the public interest in free dissemination of news⁷³ and "the security which publicity gives for the proper administration of justice."⁷⁴ However, if the judicial proceedings are not open to the public, but are private, the reason for the privilege ceases, and so it was held last term in *Danziger v. Hearst Corp.*⁷⁵

In that case an affidavit in support of a motion for alimony by the wife of the plaintiff was published by defendant newspaper. The *affidavit* falsely accused plaintiff of assaulting and physically torturing his wife. Such an affidavit in a matrimonial action was not available for public inspection; moreover, it was barred from examination by anyone other than the parties to the proceeding.⁷⁶ The Court of Appeals sustained plaintiff's motion to dismiss the defense of privilege as insufficient in law.

NEW YORK CIVIL PRACTICE ACT §337 gives to the one who reports a judicial proceeding a privilege from suit for libel.⁷⁷ The privilege extends not only to reports of the proceedings had in open court but also to papers filed in the course of the action, if these papers are accessible to public perusal.⁷⁸ CIVIL PRACTICE

72. *Lee v. Brooklyn Union Co.*, 209 N. Y. 245, 103 N. E. 155 (1913).

73. *Stevenson v. News Syndicate*, 276 App. Div. 614, 96 N. Y. S. 2d 751 (1950), *aff'd on other grounds*, 302 N. Y. 81, 96 N. E. 2d 187 (1951).

74. Holmes, J., in *Crowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

75. 304 N. Y. 244, 107 N. E. 2d 62 (1952).

76. RULE OF CIVIL PRACTICE 278: An officer of a court with whom the proceedings in an action to annul a marriage or for a divorce or separation are filed . . . shall not permit a copy of any of the pleadings or testimony, or any examination or perusal thereof, to be taken by any other person than a party . . ."

77. C. P. A. § 337: "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial, legislative or other public and official proceedings . . ."

78. *Campbell v. New York Evening Post*, 245 N. Y. 320, 157 N. E. 153 (1927).

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ACT §337 does not purport to define what judicial proceedings or papers are public. This, however, is done by rule 278 of the RULES OF CIVIL PRACTICE, which provides that the public shall not have right of access to papers filed in matrimonial actions.⁷⁹ The rule does not remove the qualified privilege accorded by statute in §337 of the CIVIL PRACTICE ACT; if it attempted to do so it would be ineffective.⁸⁰ Nor does rule 278 prohibit publication of details of a matrimonial action that are obtained from a source other than the files of the court.⁸¹ The instant case holds, only that the privilege does not extend to matrimonial papers filed with the clerk and not otherwise acted upon. In so holding, however, the New York Court of Appeals unequivocally limits the privilege to publish reports of judicial proceedings. The balance of convenience has been shifted in favor of the individual and against the public good.⁸²

79. If defendant's reporter obtained the information in violation of RULE 278, he is guilty of contempt of court. *Stevenson v. News Syndicate Co.*, 276 App. Div. 614, 618, 96 N.Y.S. 2d 751, 756 (2d Dep't 1950). "A contempt of court cannot be privileged." Holmes, J., in *Crowley v. Pulsifer*, 137 Mass. 392, 396 (1884).

80. *Broome Co. Farmers' Fire Relief Assn. v. New York State Elec. & Gas Corp.*, 239 App. Div. 304, 268 N. Y. Supp. 131. (3d Dep't 1933), *aff'd* 264 N. Y. 614, 191 N. E. 591 (1934).

81. *Stolow v. Hearst Corp.*, 201 Misc. 504, 105 N. Y. S. 2d 284 (Sup. Ct. 1951).

82. The Court of Appeals in the instant case allowed a partial defense under C. P. A. § 338, reversing the lower courts. C. P. A. § 338 provides: "In an action for libel or slander, the defendant may prove mitigating circumstances, including the sources of his information and the grounds for his belief, notwithstanding that he has pleaded or attempted to prove a justification."