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LIBEL--A LIMITATION ON THE PRIVILEGE OF PUBLISHING REPORTS OF JUDICIAL PROCEEDINGS

LIBEL—A LIMITATION ON THE PRIVILEGE OF PUBLISHING REPORTS OF JUDICIAL PROCEEDINGS.—Is a newspaper privileged in fairly publishing the substance of a petition for divorce or other pleading immediately after it is filed in court? In the recent case of *Washington Times v. Hines,* (1925) 5 F. (2d) 541, in the District of Columbia, it appeared that defendant had published a typically facetious newspaper account of the divorce grounds alleged in a petition filed against plaintiff. The court of appeals, reversing a judgment of the trial court for plaintiff, held that the report was as a matter of law not libellous, since the bill was not susceptible of any other interpretation than that given it by the newspaper, notwithstanding use of the word "slugged" instead of "assaulted," and statement that assaults had occurred *"ad lib."*

The general rule is undisputed that a fair and accurate report of the proceedings in a public law court is privileged. NEWELL ON SLANDER AND LIBEL, 3rd ed. sec. 649. The reason for the privilege is not that people are essentially interested in the controversies of one citizen with another, but because it is believed that the trial of causes should take place under the public eye. Newspapers have the same right to give information that others have and no more. *Barnes v. Campbell,* 59 N. H. 128. It is often stated that the report need not be verbatim; it may be abridged or condensed, but it must not be partial or

garbled. *McBee v. Fulton*, 47 Md. 403. In determining fairness and accuracy the court in the instant case acted correctly in reading the petition and the publication each in its entirety, *Bathrick v. Detroit Post & Tribune Co.* 50 Mich. 629, 16 N. W. 172; and in applying the rule, that: "A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it was addressed would ordinarily understand it." *Washington Post v. Chaloner*, 250 U. S. 290, 293. See also NEWELL ON SLANDER AND LIBEL, 3rd ed. sec. 655 *et seq.*

Whether these rules of qualified privilege should apply to a case such as the instant case, or where other types of pleadings have been filed but before there has been any hearing in open court presents a somewhat nicer question. The law on this point, at least to newspaper owners and editors, would seem to be of more than passing interest, yet most text-writers have barely mentioned it, if at all, and there seems to be very little discussion of it in the legal periodicals. See CHAPIN ON TORTS, sec. 73; and notes: 14 COL. L. REV. 594; 15 Am. St. Rep. 333; 104 Am. St. Rep. 110; 12 L. R. A. (N. S.) 188; 38 L. R. A. (N. S.) 913. In a number of jurisdictions where the application of the general rule has been questioned by resourceful attorneys the negative has almost without exception been held, generally on the ground that the filing of a pleading is not a "judicial proceeding," or because it was said such files of the court are not open to the public. *Cowley v. Pulsifer*, 137 Mass. 392; *Barber v. St. Louis Dispatch*, 3 Mo. App. 377; *Flues v. New Nonpareil Co.* 155 Ia. 290, 135 N. W. 1083; *Finnegan v. Eagle Printing Co.* 173 Wis. 5, 179 N. W. 788; *Nixon v. Dispatch Co.* 101 Minn. 309, 112 N. W. 258; *Park v. Detroit Free Press*, 72 Mich. 560, 40 N. W. 731 (*semble*); *Byers v. Meridian Printing Co.* 84 Oh. St. 408, 95 N. E. 917; *Todd v. Every Evening Printing Co.* 22 Del. 233; *Stuart v. Press Co.* 83 App. Div. 467, 82 N. Y. S. 401, *Cf. Lee v. Brooklyn Union Pub. Co.* 209 N. Y. 245, 103 N. E. 155; but see *Mengel v. Reading Eagle Co.* 241 Pa. St. 367, 88 Atl. 660; *Good v. Grit Pub. Co.* 36 Pa. Super. 238; *Below v. Lacy*, 111 S. W. 215, (decided under a slightly different statute). The identical point seems not to have arisen in England. And in the case at bar the point was not mentioned, though there appears to be no decision of the District of Columbia which precisely covers this situation.

It is well settled that publication of proceedings on a preliminary or *ex parte* hearing or motion is privileged. *Usill v. Hales*, L. R. 3 C. P. D. 319; *Kimber v. Press Ass'n.* [1893] L. R. 1 Q. B. 65; *McBee v. Fulton, supra; Metcalf v. Times Pub. Co.* 20 R. I. 674, 40 Atl. 864; and see the Massachusetts and Minnesota cases, *supra;* but see those of Ohio, Delaware and Michigan, *supra.* An *ex parte* proceeding is one carried on at the application of one side only, in the absence of the other party and usually without notice to him. See BLACK'S LAW DICTIONARY, 2d ed. p. 452. Is there any real distinction, or any sound reason for trying to draw a distinction between an ex parte proceeding and the filing of a pleading? Mr. Justice Holmes is quoted in the *Metcalf* case, cited above, at page 679, as saying in the *Cowley* case, cited above, that the reason the trial of causes should take place under the public eye is "***Because 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," and hence, the Rhode Island court adds, the feelings of the individual are not considered. Suppose P files a declaration in

an inferior court. On the return day there may be a dismissal for non-appearance, or the court may adjourn the case at the request of the attorneys, and subsequently grant more adjournments. Would either of these be termed a judicial proceeding, so that a publication of the pleadings would then be privileged? If they are not so held the result flies in the face of Holmes' doctrine, which is generally accepted as the basis of the privilege under discussion. For surely the public should know whether justice is being promptly and effectually administered, or whether its court officials are permitting attorneys to "stall" along for petty reasons and thus make a farce of justice. (The writer recently noticed an account of the conclusion of a very minor criminal trial in which it was stated there were over forty adjournments). On the other hand if these are held to be judicial proceedings it would take a rather high powered microscope to determine why the privilege should be denied after the filing of the pleading, for in neither that case nor the situation put has the court passed in any way on the matter contained in the pleadings. And what would these courts do where a civil action is instituted directly after a criminal action on the same facts has gone to the jury, and a newspaper published the civil pleadings at once, as not infrequently happens, it having already given the criminal trial some space?

It has been stated that the reason for denying the privilege where papers are merely filed but not yet acted upon is that it would open the door to the publishing of libellous matter with impunity were the opposite held. *Barber v. Dispatch Co., supra; Nixon v. Dispatch Co. supra.* This argument, along with the contention that it destroys the chance for a fair trial by attempting to prejudge, carried the day in *Stanley v. Webb,* 6 N. Y. Super. 21, where it was held that the publication of ex parte preliminary proceedings before a police magistrate was not privileged. Soon after this a statute was passed in New York aimed to prevent suits against newspapers for publishing fair and accurate accounts of judicial proceedings or other public meetings. The case of *Ackerman v. Jones,* 37 N. Y. Super. 42, held that this statute was merely declaratory of the common law—which holding, it may be remarked, has been the fate of most of the legislation on this subject in so far as it touches judicial matters—but that an ex parte affidavit presented to a magistrate to obtain a search warrant was a judicial proceeding and its publication was privileged. Furthermore, it is obvious that the same immunity would be gained in a civil case merely by going one step further toward trial as set forth in the last preceding paragraph. It would seem that this danger of encouraging libel is more confined to the legal mind than it is real; and in any event the libelled party would rarely be remediless.

Another simple illustration may help in demonstrating that this is a matter of considerable practical importance, and appears to call for a rule of more simple application than dividing judicial proceedings and their various stages into illogical categories. The court having ruled that there must be some "judicial action," X believes that condition satisfied in a case where a litigant's declaration had not been entered in court on the return day but on petition for a late entry the court had allowed the filing upon defendant's consent. But in a suit against X, for publishing the contents of the declaration, the court, (though admitting privilege attaches after a bill in equity has been acted on by a court by making an order that defendant should appear and show cause why injunction should not issue, *Kimball v. Post Pub. Co.* 199 Mass. 248, 85 N. E. 103;

and also to fair reports of hearings had upon applications for issuance of warrants or other criminal process, or upon hearings after such process has issued though they be not final trials on the merits, *Conner v. Standard Pub. Co.* 183 Mass. 474, 67 N. E. 596) holds there is no privilege. The reason given was that it involved no examination of the averments of the declaration, no passing upon their sufficiency, no consideration of the question whether any special relief should be granted pending the action or whether any special process should issue against the defendant therein. *Lundin v. Post Pub Co.* 217 Mass. 213, 104 N. E. 480. Thus with each state tending to introduce one refinement after another, not only will the phrase "judicial proceeding" have a great variety of legal meanings, but there will be lost to the law the important element of predicability which seems here desirable. Add to the above situation the fact that our great daily papers carry the news of many states and are read by the people of many states. The resulting possibilities are obvious.

That the service of summons and complaint is regarded as a judicial proceeding in other connections is beyond dispute; e.g. jurisdiction over defendant, *Michigan Trust Co. v. Ferry,* 228 U. S. 346; record on appeal, *Chappel & Co. v. Smith,* 17 Ga. 68; malicious prosecution, *Smith v. Burrus,* 106 Mo. 94, 16 S. W. 881, *Shedd v. Patterson,* 302 Ill. 355, 134 N. E. 705. There is no magic in the words "judicial proceeding." It is a term descriptive of progressive action having a beginning, a continuation through various stages of which the trial itself is perhaps the most important, and then possibly extending through an appeal to a final ending. Each step is a part of the judicial proceeding. It is a deceit or fraud on the public, whether intentional or not, to hold otherwise. The rules of law on this point should be so stated as to be plainly understood by the layman as well as the lawyer; at least, in view of the spirit of modern procedure, the phrase should not have one meaning to the public and another to the legal profession. Those courts which simply say that there is no privilege because this is not a judicial proceeding are stating something which is not true. They are obscuring and not giving fair consideration to the real question rather than admitting that there may be exceptions to the general rule. They are clothing the rule in a fiction in order to keep the rule intact. The courts should decide the case by a consideration of the interests involved and in terms of policy and not, as many of them have, by making the issue one merely of a definition of terms. See CARDOZO, THE GROWTH OF THE LAW, pp. 66-67.

Thus the real question is not whether this is or is not a judicial proceeding, but: are the interests involved sufficient to warrant allowing a privilege to attach to the publication of this proceeding before the stage of actual trial. And in view of the consideration herein suggested it may well be asked whether the limitation developed by these cases is, as a matter of policy, the better rule, or have the courts merely blundered on it through an inborn desire to protect reputation. R. P.