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TORTS-LIBEL-PUBLICATION OF ALLEGATIONS IN A DECLARATION

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TORTS—LIBEL—PUBLICATION OF ALLEGATIONS IN A DECLARATION—Defendant published as a news items in its newspaper the fact that the plaintiff had been sued for the alleged alienation of one Emerson's wife, and also printed matter contained in Emerson's declaration. This publication occurred before the alienation suit was tried. Later, a verdict was rendered in that suit in favor of the present plaintiff. The lower court in the libel action decided in favor of the plaintiff. *Held,* affirmed. The publication of the report of the filing of the action and the charges made in the declaration before any judicial action had been taken was not privileged. *Sanford v. Boston Herald-Traveler Corporation,* (Mass. 1945) 61 N.E. (2d) 5.

The rule followed by the court in the principal case is still the general

rule at common law,[1] and it has long been the rule in Massachusetts.[2] Almost twenty years ago criticism was leveled at the rule which allowed a newspaper the privilege of publishing reports of a judicial proceeding but not the steps preliminary to such proceeding.[3] It was said that the courts were avoiding the significant issue when all that they inquired into was whether or not the filing of the complaint was a "judicial proceeding"; that the real question ought to be whether the interests involved are sufficient to warrant allowing a privilege to attach to the publication of the proceeding before the stage of the actual trial.[4] Soon after this criticism was published, the New York Court of Appeals decided that the general rule did not prevent harm to an individual falsely accused at a preliminary hearing and later exonerated, and it could therefore see no logic in the distinction made by that rule.[5] As a result, the New York court extended the privilege to publication of the accusations in a complaint even before hearings by a court of the accusations. To reach this conclusion that court held that the pleadings were part of the judicial proceedings. Following this decision ,South Carolina,[6] Nebraska,[7] Oregon,[8] California,[9] Wisconsin,[10] and Kentucky [11] adopted the New York doctrine,[12] and the defendants in the principal case proposed that the Massachusetts court do likewise,[13] but without success. Considering the only possible justification for any privilege in such a situation (that as a matter of policy it is more important to keep the public advised of the administration of justice than to safeguard the reputation of individuals [14]) it is surprising that the court in the principal case refused to follow the New York decision. If the desire to safeguard the reputation of the defendant were the sole motive of the courts, the rule would undoubtedly deny any privilege of publication until the final verdict was rendered. A plaintiff could drop his action at any time before the final verdict; so the privilege of publishing after the actual trial has commenced would be but small protection of a defendant unjustly accused. However, if the privilege of publication were delayed until the final verdict, the belief that " . . . it is of the highest moment that those who administer justice should always act under the sense of public

[1] 52 A.L.R. 1438 (1928).

[2] Cowley v. Pulsifer, 137 Mass. 392 (1884); Kimball v. Post Publishing Co., 199 Mass. 248, 85 N.E. 103 (1908).

[3] 24 MICH. L. REV. 489 (1926).

[4] Ibid.

[5] Campbell v. New York Evening Post, 245 N.Y. 320, 157 N.E. 153 (1927). Previous to this decision, the Pennsylvania court had ignored the distinction. Mengel v. Reading Eagle Co., 241 Pa. 367, 88 A. 660 (1913).

[6] Lybrand v. State Co., 179 S.C. 208, 184 S.E. 580 (1935).

[7] Fitch v. Daily News Pub. Co., 116 Neb. 474, 217 N.W. 947 (1928).

[8] Kilgore v. Koen, 133 Ore. 1, 288 P. 192 (1930).

[9] Kurata v. Los Angeles News Pub. Co., 4 Cal. App. (2d) 224, 40 P. (2d) 520 (1935).

[10] Williams v. Journal Co., 211 Wis. 362, 247 N.W. 435 (1933).

[11] Paducah Newspapers, Inc. v. Bratcher, 274 Ky. 220, 118 S.W. (2d) 178 (1938).

[12] 104 A.L.R. 1124 (1936).

[13] (Mass. 1945) 61 N.E. (2d) 5 at 7.

[14] Cowley v. Pulsifer, 137 Mass. 392 (1884).

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" [15] would have to be completely ignored. To accomplish this objective, the privilege must be brought forward at least to the time when the actual trial begins, and it has been argued that it is just as important that the privilege be extended to the filing of the declaration because of the delays and adjournments which can occur before a case is brought to actual trial.[16] Thus, it would seem that the New York rule more closely conforms to the reason set forth for the general rule at common law, ante, and that the Massachusetts rule is an attempt to compromise between the desire for public surveillance of the administration of justice and the protection of the reputation of the defendant. The objection against such a compromise is that it leads to great uncertainty as to when there has actually been a "judicial proceeding" and, consequently, when the privilege to publish becomes effective.[17] The New York rule does away with this uncertainty with but little difference in the possible damage to the reputation of the defendant, and, at the same time, it establishes as paramount the desire to inform the public of the administration of justice.

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[15] Justice Holmes in Cowley v. Pulsifer, 137 Mass. 392 at 394 (1884).

[16] Note 3, supra.

[17] 24 MICH. L. REV. 489 at 491 (1926).