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## LIBEL AND SLANDER - ABSOLUTE PRIVILEGE - AFFIDAVIT TO SUPPORT PETITION TO SET ASIDE JUDGMENT

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**LIBEL AND SLANDER — ABSOLUTE PRIVILEGE — AFFIDAVIT TO SUPPORT PETITION TO SET ASIDE JUDGMENT** — Judgment in a case against Dorothy Mann by the administratrix of a certain estate was rendered in April, 1934. Action to vacate this judgment was instituted in September, 1936. In May, 1936, Irving Mann, defendant in the principal case, executed an affidavit which contained libellous matter defaming the present plaintiff; this affidavit was used to support the petition to set aside the earlier judgment. *Held*, the defamatory affidavit would not support plaintiff's defamation action; the occasion was one of absolute privilege. *Schmitt v. Mann*, (Ky. 1942) 163 S. W. (2d) 281.

In what appears to be the only case of the sort, the Kentucky court decided that the petition to set aside the judgment was merely a step in the preceding case and that, under the circumstances, the affidavit was like a pleading filed in a judicial proceeding. The court reasoned that had the defendant testified to the same matter the occasion would have been one of absolute privilege, therefore that the statements in his affidavit should be similarly protected. Anyone familiar with the rather casual attitude taken, quite generally, by those who are asked to sign affidavits, will agree that the more formal atmosphere of the court room would be more likely to curb the tongue of the witness. In the instant case, for example, it is interesting to note that the defendant repudiated the statements contained in the affidavit, claiming that he was intoxicated when he signed it. There may be no reason to doubt the validity of the arguments which support the general doctrine of absolute privilege; there would appear to be good reason to doubt the advisability of extending the privilege except where it is necessary to protect the public interest in the "free and unfettered administration of justice." The court which is confronted with a case like the one here discussed is facing somewhat the same question as is involved in those cases which relate to the qualified privilege to publish a "fair and accurate report of a judicial proceeding" where there is publication of defamatory material contained in the plaintiff's declaration or petition. The "ex parte" nature of the affidavit, in the principal case, and of the plaintiff's initial pleading, in the "fair and accurate report" cases, would justify the denial of protection for the offending party, at least to the extent, in the instant case, of reducing the privilege to a conditional one.<sup>1</sup>

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<sup>1</sup> See *Campbell v. New York Evening Post*, 245 N. Y. 320, 157 N. E. 153 (1927), and comments in 24 MICH. L. REV. 489 (1926), 14 COL. L. REV. 594 (1914), and 27 COL. L. REV. 225 (1927). The author of the latter note, commenting upon the *Campbell* case, suggests that "the overwhelming weight of authority" denies the qualified privilege which was recognized by the New York Court of Appeals in that case.