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RECENT DECISIONS

CRIMINAL LAW—CRIMINALITY OF NON-PHYSICAL PARTICIPANTS IN A LARCENY FOR CRIME OF RECEIVING, CONCEALING OR WITHHOLDING STOLEN PROPERTY.—*Y*, an employee of the *X* Indemnity Company, dealt in the course of his employment with claims of clients of the Company for services rendered and was authorized to sign drafts in payment therefor. While so employed, he and defendant evolved a scheme whereby *Y* agreed to approve fictitious "duplicate" or "advance" payments and turn the drafts for same over to defendant to be cashed, the two arranging to split the proceeds. Pursuant to the conspiracy seventy-two such drafts were obtained by *Y* and placed by him in the possession of defendant who forged the endorsements of the payees, persons who actually had business with the Company, and cashed the drafts with third parties to whom he falsely represented that the endorsements were genuine. Defendant was convicted in the court of General Sessions under an indictment which included charges of grand larceny of the drafts of the *X* Indemnity Company and concealing and withholding stolen property, said property being three of the drafts of the *X* Indemnity Company. Upon a motion by defendant for a certificate of reasonable doubt pending appeal, defendant urged that the counts of grand larceny and concealing and withholding stolen property were inconsistent and that he could not be legally convicted of both. *Held,* motion granted and defendant admitted to bail, a substantial question of law being presented. *People v. Romanov,* 124 N. Y. L. J. 107, col. 6 (Sup. Ct. July 21, 1950).

The court in ruling upon the motion for a certificate of reasonable doubt stated: "It would seem, therefore, that a thief may not be convicted of withholding and receiving property which he has stolen. The converse of the proposition is, however, presented in the instant case. Here, the defendant has been convicted of receiving and withholding the property stolen by another and, in addition, has been convicted of stealing the property as an aider and abettor. It may well be that the reasoning of the Court of Appeals in People, &c., v. Daghita . . . applies with equal force to a receiver who is also charged as principal by reason of being an aider and abettor."[1] Here the court was obviously referring to the theft of the drafts by *Y* from the *X* Indemnity Company and his subsequent giving them to defendant.[2]

In the *Daghita* case, the defendant was a physical participant in the larceny. Defendant was convicted of grand larceny and concealing and withholding the stolen property. The Appellate Division affirmed the conviction, but upon review by the Court of Appeals the judgment was modified to the extent of reversing the conviction for criminally concealing and withholding stolen property and dismissing that

1. 124 N. Y. L. J. 107, col. 6 (Sup. Ct. July 21, 1950). The citation of People v. Daghita is 301 N. Y. 223, 93 N. E. 2d 649 (1950), *affirming as modified,* 276 App. Div. 20, 92 N. Y. S. 2d 799 (3d Dep't 1950).

2. A close question arises in the instant case as to whether the larceny was completed when *Y* took the drafts into his personal possession *animo furandi* or at the time he handed them to defendant to be cashed. If the latter, defendant became a physical participant as a thief in the larceny of the drafts, and not an aider and abettor in a larceny completed by another. For a strikingly similar state of facts upon which it was held that the larceny was completed when an employee (who dealt with a co-defendant in the same manner as did *Y*) exceeded his authority and pocketed the checks with intent to steal, see People v. Lobel, 298 N. Y. 243, 82 N. E. 2d 145 (1948); 18 FORD. L. REV. 143 (1949).

count of the indictment.[3] The court reasoned that a thief may not be convicted of buying or receiving the very goods which he has stolen, since the withholding is a continuation of the larceny itself and that a conviction under Section 1308 would result in double punishment for the same crime.[4] The court construed Section 1308 as directed against persons "who do not physically participate as thieves in the larceny."[5]

It is no doubt a general principle of law, supported by decisions in many jurisdictions, that one whose participation in the larceny is merely preliminary to the commission of that offense, such as acts of instigation, inducement, encouragement and the like, which ordinarily characterize such person as an accessory before the fact, and who is not present at and assisting in the actual caption and asportation, may properly be charged with and convicted of the crime of receiving the stolen property.[6] There are some cases where this principle has been applied notwithstanding statutes, such as Section 2 of the New York Penal Law,[7] making accessories before the fact principals.[8] The general rule originated and developed in the adjudication

3. The Appellate Division's affirmance relied on the case of People v. Vitolo, 297 N. Y. 575, 74 N. E. 2d 552 (1947), *affirming*, 271 App. Div. 959, 68 N. Y. S. 2d 3 (1st Dep't 1947), which convicted a physical participant in a larceny of concealing and withholding the property which he had stolen. The *Vitolo* case was affirmed in the Appellate Division with a strong dissent and affirmed in the Court of Appeals without opinion. The Court of Appeals in the *Daghita* case said that in the *Vitolo* case the court had not decided on the question as to whether or not a thief may be convicted of concealing and withholding the stolen property following his theft. 301 N. Y. 223, 225, 93 N. E. 2d 649, 650 (1950).

4. N. Y. PENAL LAW § 1308 provides: "A person who 1. a. Buys or receives any property knowing the same to have been stolen or obtained in any way under circumstances which constitute larceny or who conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this article, if such misappropriation has been committed within the state, whether such property were so stolen or misappropriated within or without the state" is guilty of a misdemeanor or a felony depending upon the value of the property involved.

N. Y. PENAL LAW § 1290. "A person who, with intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny."

5. 301 N. Y. 223, 227, 93 N. E. 2d 649, 651 (1950).

6. People v. Day, 30 Cal. App. 762, 159 Pac. 457 (1916); Bailey v. State, 76 Fla. 103, 79 So. 748 (1918); People v. Feinberg, 237 Ill. 348, 86 N. E. 584 (1908); Delahayde v. People, 212 Ill. 554, 72 N. E. 732 (1904); State v. Gargare, 88 N. J. L. 389, 95 Atl. 625 (1915); People v. Rivello, 39 App. Div. 454, 57 N. Y. Supp. 420 (1st Dep't 1894); Kolb v. State, 88 Tex. Cr. Rep. 593, 228 S. W. 210 (1920); Kaufman v. State, 70 Tex. Cr. Rep. 438, 159 S. W. 58 (1913).

7. See note 10 *infra*.

8. Weisberg v. United States, 258 Fed. 284 (D. C. Cir. 1919); Leon v. State, 21 Ariz. 418, 189 Pac. 433 (1920); People v. Spinuzza, 99 Colo. 303, 62 P. 2d 471 (1936); State v. Boyd, 195 Iowa 1091, 191 N. W. 84 (1922); People v. Rivello, 39 App. Div. 454, 57

of situations wherein the defendant was a common law accessory before the fact and the cases proceeded on the theory that a thief could not receive from himself the very property which he had stolen. However these cases distinguish a non-physical participant in the larceny from the thief and allow such a participant to be convicted of receiving stolen property. It is indeed logically sound to say that one who actually steals property cannot receive the same property from himself. But before a decision can be reached in regard to the liability for the crime of receiving of a non-physical participant who is a principal in the larceny the situation requires further examination. Today in New York the common law distinction[9] between an accessory before the fact and a principal has been abolished by Section 2 of the Penal Law.[10] No longer are those parties who merely aid, abet, counsel, command, procure or induce others to commit the crime considered in a different legal status than one who actually participates and is present at the criminal act. Since by statute all of these types of participation are made the same in the eyes of the law, it is difficult to discern a sound reason for distinguishing between a physical participant and a non-physical participant in the theft as a test for determining criminality and punishment for both the crimes of larceny and receiving stolen goods. The sole test of criminality should be statutory participation. A person may become associated with the larceny through his immediate physical participation while another through less immediate acts of procuring, commanding, inducing, planning or aiding and abetting. The statute does not distinguish between any of these acts. It considers persons performing any of them principals and therefore no principal to the crime of larceny should be convicted as a receiver of stolen property. An examination of the New York case law discloses two very early cases dealing with the issue at hand. In *People v. Brien*[11] the court in holding that one guilty of the actual theft may not be convicted of receiving apparently relies on the statute making an accessory a principal. There the appellant engaged one Williams to obtain from one of the public stores certain merchandise and gave him for that purpose forged orders, in form such as were required to obtain its possession. In reversing the conviction for concealing stolen property, the court referred to Section 2 of the Penal Law and commented: "It is conceded that Williams was the thief . . . and the law thus places appellant side by side with him."[12] The court said the criminal act was done by both and that therefore it was a taking by both and not a receipt by one from the other. *People v. Rivello*,[13] a later decision, appears to be *contra* and to support the view prevailing in other jurisdictions.

The *Daghita* opinion observes the harsh, unreasonable and anomalous result that would be achieved if a thief were also to be convicted of violating Section 1308, but in its dictum states that such a result would be avoided by construing Section

N. Y. Supp. 420 (1st Dep't 1899). *Contra:* People v. Brien, 53 Hun 496, 6 N. Y. Supp. 198 (1889); State v. Keithley, 83 Mont. 177, 271 Pac. 449 (1928).

9. For a statement of the distinctions between an accessory before the fact and a principal see the note on accessories in HALL AND GLUECK, CASES ON CRIMINAL LAW 486 (1940).

10. N. Y. PENAL LAW § 2 defines a principal as: "A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime. . . . "

11. 53 Hun 496, 6 N. Y. Supp. 198 (1889).

12. *Id.* at 498, 6 N. Y. Supp. at 199.

13. 39 App. Div. 454, 57 N. Y. Supp. 420 (1st Dep't 1899).

1308 as directed against persons who do not physically participate as thieves. Such a conclusion might have had merit under the common law when accessories were treated separately and punished less severely in some crimes. Thus, if an accessory to the larceny were subject to only a slight penalty the imposition of an additional penalty for receiving would not necessarily be considered too unreasonable. But today both the common law accessory before the fact and the common law principal are subject to the same punishment. It would be at least as harsh and unreasonable to convict as a receiver a non-physical participant in the larceny as it would be to convict a physical participant.

Before the legislature enacted Section 1308 of the Penal Law those persons who received stolen goods with guilty knowledge thereof were free from any criminal liability. A person who knowingly received stolen goods was not an accessory after the fact in a larceny, since such an accessory is one who harbors or conceals the felon himself and not one who conceals the subject matter of the crime. The *Daghita* case points out that "section 1290 is aimed at those who steal, section 1308 at those who deal with the thieves in any one of several different ways after the larceny has been committed. The latter section, in other words, is directed at the traditional 'receiver' and at those who hover in the background in order to provide thieves with a market or a depository for their loot."[14] A reasonable conclusion is that the legislature merely wanted to extend criminality to those receivers of stolen goods who had previously gone unpunished and that in doing this it had no desire to impose a double penalty on non-physical participants in the larceny.

CRIMINAL LAW—ENTERING A STORE DURING BUSINESS HOURS AS CONSTITUTING A BURGLARY—DOES A CONVICTION FOR BREAKING IN PRECLUDE A CONVICTION FOR BREAKING OUT?—The defendant entered a department store during business hours by pushing open the door, committed a larceny in the store and pushed open the door in leaving. The defendant was convicted of petit larceny and two counts of burglary in the third degree based upon breaking in and breaking out respectively. On appeal, *held*, without opinion, judgment affirmed, one justice dissenting in a memorandum opinion. *People v. Sine*, 277 App. Div. 908, 98 N. Y. S. 2d 588 (2d Dep't 1950).

The affirmance without opinion by the majority of the court in this case has apparently decided two unsettled questions of criminal law in the state of New York. The first is the holding, excepted to in the dissent, that one who enters a store during business hours with the intent to commit a crime therein has made an entry under Section 404 subdivision 1 of the Penal Law and the second, not noted in the dissenting opinion, is the holding that one can violate both subdivisions 1 and 2 of Section 404 of the Penal Law in the course of the same transaction.

In the light of the common law[1] and statutory[2] definitions there is no doubt that by opening and closing the department store door the defendant committed a physical "breaking." Whether the defendant has "broken" and "entered" the store within the terms of the common law and the statute is disputable since the cases stating

14. 301 N. Y. 223, 225, 93 N. E. 2d 649, 650 (1950).

1. State v. Lapoint, 87 Vt. 115, 88 Atl. 523 (1913).

2. N. Y. PENAL LAW § 400.

the common law[3] and those interpreting the statute[4] require that the "breaking" and the "entry" must be without consent. Entry under a right,[5] *e.g.*, membership in a club, or tenancy, or by invitation,[6] is made with consent and without regard to the intention of the party so entering no burglary can be committed. Since privileges of entry are often expressly or impliedly restricted as to time, it follows that entrances made on other occasions are made without consent.[7] A typical problem arises in the master and servant relationship, when because of the necessities of the situation a very broad privilege of entry is extended to the servant. Some courts have intimated that so long as the privilege given to the servant is general as to time, no burglary can be committed no matter what reason motivates the entry;[8] while other courts have held that the servant or employee's privilege is extended to him only so long as he uses it without a criminal intention, and therefore if he does enter with intent to commit a crime inside his privilege is extinguished and his entrance is without consent.[9] Since the rationale behind this rule is the necessity of giving servants entrance, it is not extended to cases of general privilege where no such prior necessity existed.[10] One state has settled this problem by a statute providing that entry with intent to commit a theft by a domestic servant or other inhabitant of the house is not burglary unless it is effected by an *actual*[11] breaking as distinguished from the mere opening of a door.[12] The cases dealing with the nature of the privilege of entry extended by a storeowner to the public are split in their holdings along the same general lines as the master-servant cases: some courts holding that the public has a general privilege[13] and others, as the instant case, that the privilege is restricted to good faith entrances.[14] It is submitted that irrespective of the merits of the argument in favor of finding a general privilege given to servants and employees, it is unsound to find such a general privilege in the storeowner's invitation to the public, because not only does necessity require the public to enter his shop but also he has no real or effective control over the particular persons who desire to enter. It is this fact of the employer's ability to choose his employees and the storeowner's inability to choose his patrons which realistically points out the propriety of finding a restricted privilege in the public regardless of the finding in the master-servant cases.[15]

3. Kent v. State, 84 Ga. 438, 11 S. E. 355 (1890).

4. People v. Kelley, 253 App. Div. 430, 3 N. Y. S. 2d 46 (3d Dep't 1938).

5. People v. Kelley, *supra* note 4; Clarke v. Commonwealth, 25 Gratt 908 (Va. 1874).

6. Davis v. Commonwealth, 132 Va. 521, 110 S. E. 356 (1922).

7. State v. Corcoran, 82 Wash. 44, 143 Pac. 453 (1914).

8. Hawkins v. Commonwealth, 284 Ky. 33, 143 S. W. 2d 853 (1940); State v. Corcoran, *supra* note 7; 2 Hale P. C. 354 (1778).

9. Lowder v. State, 63 Ala. 143 (1879); State v. Howard, 64 S. C. 344, 42 S. E. 173 (1902).

10. Davis v. Commonwealth, 132 Va. 521, 110 S. E. 356 (1922).

11. TEX. PEN. CODE ANN. art. 1401 (1936).

12. Neiderluck v. State, 23 Tex. App. 38, 3 S. W. 573 (1887).

13. State v. Newbegin, 25 Me. 502 (1846); State v. Love, 52 Tex. Cr. Rep. 84, 105 S. W. 791 (1907).

14. Pinson v. State, 91 Ark. 434, 121 S. W. 751 (1909); People v. Barry, 94 Cal. 481, 29 Pac. 1026 (1892); *cf.* Rosenthal v. American Bonding Co., 143 App. Div. 362, 128 N. Y. Supp. 553 (1st Dep't 1911), *rev'd on other grounds*, 207 N. Y. 162, 100 N. E. 716 (1912).

15. In interpreting § 459 of the California Penal Code which provides that, "every

In upholding the conviction of the defendant for violating subdivisions 1 and 2 of Section 404 of the Penal Law, the court held that by breaking, entering and leaving the store the defendant violated both subdivisions of the statute. There can be no quarrel with this decision of double burglary if Section 404 is to be read and interpreted literally. By an analysis of the English statute from which subdivision 2 of Section 404 of the Penal Law was drawn it will be shown that a literal interpretation is not proper.

At common law both a breaking and entering had to be shown in order to establish the crime of burglary.[16] To settle a dispute[17] as to whether breaking out of a dwelling-house after having entered it with intent to commit a felony therein but without breaking in, constituted burglary the statute of 12 Anne was enacted.[18] This statute provided that one who with intent to commit a felony therein entered without breaking a dwelling-house and broke out of the same was guilty of burglary, and that one who being in a dwelling-house committed a felony and then broke out was likewise guilty of burglary.[19] Did the framers of this statute intend by the latter provision to set forth a separate crime without regard to the circumstances of the entry or did they intend this part to be a catchall provision which would operate only if the requirement, common to both the common law crime and the crime described in the first part of the statute, of entering with intent to commit a felony therein cannot be shown? It must be kept in mind at the outset that this statute was dealing with a problem, *i.e.*, breaking out, which heretofore had not been considered a crime when the normal breaking and entering were shown. It would seem that the former proposition can not have been intended for if it were a person who without breaking but with the intent to commit a felony therein entered a dwelling-house and did actually commit the felony and broke out would be guilty of violating both parts of the statute and therefore guilty of burglary on two counts plus being guilty of the felony itself. Under this interpretation the commission or omission of the felony would be the fact which would determine whether the criminal had committed one or two burglaries and yet burglary at common law had never been concerned with the actual commission of a felony but only with the intent to commit it and the breaking and entry. Why did the framers of the statute require proof of the commission of the felony? It is logical that special insistence was placed on the commission of the felony in this statute because the framers intended

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person who enters any house, room, store . . . with the intent to commit grand or petit larceny or any felony, is guilty of burglary." People v. Barry, 94 Cal. 481, 29 Pac. 1026 (1892), contains dicta that this statute had little in common with the common law crime of burglary since a provision for "breaking" was omitted and therefore any entry with intent to commit a crime inside made with or without consent would be burglary. This dicta was followed in People v. Vitos, 62 Cal. App. 2d 157, 144 P. 2d 393 (1944), and in People v. Brittain, 142 Cal. 8, 75 Pac. 314 (1904). *Contra*: State v. Mish, 36 Mont. 168, 92 Pac. 459 (1907) interpreting a statute identical with the California statute held that the entry must be unlawful.

16. State v. Lapoint, 87 Vt. 115, 88 Atl. 523 (1913).

17. 4 BL. COMM.* 227.

18. 12 Anne, c. 7, § 3 (1713). The preamble states that this statute was passed to settle this dispute.

19. The provisions concerning the time and other details of breaking in or breaking out made in this and later statutes are not here pertinent. The reader is cautioned to consult the statutes themselves for a full knowledge of the technicalities.

to cover a situation where the entry was made without intent to commit a felony inside and thus failure to prove entry with intent to commit a felony would not be fatal to the prosecution's case if as a substitute the commission of a felony could be shown. Thus the framers intended in the second part of the statute to define a crime of burglary covering a factual situation completely different and incompatible with both the normal common law breaking and entries and the situation proscribed by the first part of this statute, *i.e.*, having established the rule governing cases of entry with intent to commit a felony inside without a breaking they wanted to set forth in the second part a rule for cases of entry without intent to commit a felony. If the statute is thus interpreted it follows that once entry with intent to commit a felony inside is shown this latter part of the statute was never intended to apply. Furthermore, if this statute of 12 Anne can be shown to have been adopted and kept essentially unmodified by New York, the decision in the instant case is unsound because defendant entered with intent to commit a crime inside.

In 1866 the case of *People v. Arnold*[20] held that the statute of 12 Anne[21] had been incorporated into the Revised Statutes of New York as constituting the crime of burglary in the second degree.[22] A Reviser's Note to the Revised Statutes of 1830 commenting on New York's transliteration of the statute of 12 Anne indicates that that part was intended as a catchall section to operate only when the ordinary burglary could not be proved.[23] In the proposed Penal Code, drafted by the Commissioners and submitted by them to the legislature in 1865, the above discussed latter part of 12 Anne and a provision that one who breaks and enters a dwelling-house with intent to commit a crime therein in such manner as not to constitute any burglary in the first, second or third degrees, were set forth as subdivisions of the same section and each was made burglary in the fourth degree. The first part of 12 Anne was changed, by omitting the requirement of breaking out, to provide that anyone who entered a building with intent to commit a felony, larceny or any malicious mischief[24] therein but in circumstances or in a manner not constituting burglary, was guilty of a misdemeanor.[25] In a Commissioner's Note there is an indication that regardless of what was intended by the creation of this new misdemeanor no change of the law with regard to the second part of 12 Anne was contemplated.[26] The legislature in 1881 enacted into law the Commissioners' draft of the Penal Code with only minor changes.[27] These same statutes are the law of New York today and it is submitted that the court in the instant case has failed to effectuate the intention of the framers of such laws.

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20. 6 Park. Cr. Rep. 638 (N. Y. 1866).

21. 7 & 8 Geo. 4, c. 27 (1827) repealed 12 Anne, c. 7, § 3 (1713) and 7 & 8 Geo. 4, c. 29, § 11 (1827) reenacted it, clarifying the requirement that a breaking out be shown in each of the two crimes described. People v. Arnold, *supra* note 20, held that New York had adopted 12 Anne as modified by these statutes.

22. 2 N. Y. REV. STAT. 668, § 13 (1830).

23. 5 EDMONDS' STAT. 545 (1863).

24. In 1935 the provision: " . . . with intent to commit a felony, larceny or any malicious mischief," was changed to: " . . . with intent to commit a crime." N. Y. PENAL LAW § 405 (1935).

25. N. Y. PENAL CODE §§ 546, 547, 554 (Commissioners' Proposal, 1865).

26. PENAL CODE OF N. Y., REPORTED COMPLETE BY COMMISSIONERS OF THE CODE, 196 (1865).

27. N. Y. PENAL CODE, c. 676 (1881).

DOMESTIC RELATIONS—FOREIGN DIVORCE DECREES—COLLATERAL ATTACK BY THIRD PARTIES.—Petitioner, decedent's daughter and sole legatee, contested the validity of the claim of decedent's third wife to a right of election for an intestate share of decedent's estate provided for by Section 18 of the New York Decedent Estate Law. Petitioner's contest was based on the contention that decedent's third marriage was void and hence the third wife was not the surviving spouse of decedent. Evidence was introduced by petitioner to the effect that decedent's second wife failed to comply with the Florida residence requirements in obtaining a divorce from decedent in which the latter both appeared and answered but did not question the jurisdictional requirement. The Appellate Division unanimously affirmed a decree of the Surrogate's Court which declared the third wife the widow of decedent and allowed a right of election. Upon appeal, *held,* reversed. Notwithstanding decedent's appearance and answer in the Florida proceeding, the petitioner, a stranger to said proceeding, could collaterally attack the validity of the decree of divorce on the ground that the second spouse failed to comply with the Florida residence requirement. In re *Johnson's Estate,* 301 N. Y. 13, 92 N. E. 2d 44 (1950).

The problem raised in the principal case adds another link in the already complex chain of decisions regarding the effect of the Full Faith and Credit Clause[1] on the recognition of foreign divorce decrees. The Full Faith and Credit Clause has been interpreted to mean that the judgment of one state shall have the same force and effect in sister states as it would have in the state of its rendition.[2] However, this interpretation does not preclude a sister state from inquiring into the jurisdiction of the court rendering the decree.[3]

In the principal case the court, relying upon *State* ex rel. *Willys v. Chillingworth,*[4] allowed a collateral attack upon the ground that the petitioner, a stranger to the Florida divorce action, could collaterally attack the decree in the Florida courts. However the Florida Supreme Court by the later decision in *de Marigny v. de Marigny*[5] recently denied the right of a third party collaterally to attack a divorce granted in that state. The court stated in the *de Marigny* case, that the plaintiffs would have to introduce evidence *dehors* the record which the Florida courts have held not permissible in a collateral attack.[6] The court further stated that the

1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof." U. S. CONST. Art. IV, § 1.

2. 28 U. S. C. § 1738 (1948).

3. "On the whole, we think it clear the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the Law of 1790, and notwithstanding the averments contained in the record of the judgment itself." Thompson v. Whitman, 18 Wall. 457, 469 (U. S. 1874).

4. 124 Fla. 274, 168 So. 249 (1936). But, it is to be noted that Bemis v. Loftin, 127 Fla. 515, 173 So. 683 (1937), a case decided by the Florida Supreme Court a year after the decision in the *Chillingworth* case cites the latter decision as authority for the difference between a direct, and a collateral, attack upon a decree, and the allowability of a collateral attack under special circumstances. It is submitted that any statement in the *Chillingworth* case regarding the right of a stranger to attack a divorce decree is only dictum.

5. 43 So. 2d 442 (Fla. 1949).

6. *Id.* at 445.

plaintiff was precluded from collaterally attacking the divorce, since at the time the divorce was granted she had no status or rights which were or could have been affected thereby.[7]

It is submitted that the ground upon which the court in the principal case allowed petitioner to attack the decree, *i.e.*, that such decree could be attacked *in Florida*, is open to question in the light of the *de Marigny* case which denied such an attack. Whether a decree which is not subject to collateral attack in the state of its rendition can be collaterally attacked in a sister state by a stranger to the foreign divorce proceeding is a question not considered by the court in the principal case.

Florida, by statute,[8] requires a complainant in a divorce action to have resided in the state for more than ninety days before the filing of the complaint. This requirement has been consistently interpreted as being jurisdictional rather than procedural in nature.[9] Since the Full Faith and Credit Clause does not prevent an inquiry into the jurisdictional facts upon which a foreign decree is based, notwithstanding the averments contained in the record of the judgment itself,[10] the state was allowed collaterally to attack an *ex parte* divorce decree in the second case of *Williams v. North Carolina*.[11]

The court in the principal case cited the second *Williams* case as authority for the allowance of a collateral attack by a third party when the jurisdictional facts fall short of the statutory requirements.[12] While not unwarranted in view of the language in that case, the *Williams* case is distinguishable upon its facts as the Court in *Sherrer v. Sherrer*[13] stated: "Here, unlike the situation presented in *Williams v. North Carolina* . . . the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated."[14] In view of this language and the fact that a state's interest in the marital relationship was involved,

7. *Id.* at 447.

8. FLA. STAT. § 65.02 (1941). "In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint." The word "resided" in the statute has been interpreted to mean that the party must be *domiciled* in the state for the required period. Fowler v. Fowler, 156 Fla. 316, 22 So. 2d 817 (1945); Wade v. Wade, 93 Fla. 1004, 113 So. 374 (1927).

9. Kutner v. Kutner, 159 Fla. 870, 33 So. 2d 42 (1947); Phillips v. Phillips, 146 Fla. 394, 1 So. 2d 186 (1941); Wade v. Wade, 93 Fla. 1004, 113 So. 374 (1927).

10. See note 3 *supra*.

11. 325 U. S. 226 (1945).

12. 301 N. Y. 13, 18, 92 N. E. 2d 44, 47 (1950). Even prior to the *Williams* case if the defendant was served constructively and did not appear, the foreign decree was subject to collateral attack by the defendant or third parties. Davis v. Davis, 279 N. Y. 657, 18 N. E. 2d 301 (1938); Lefferts v. Lefferts, 263 N. Y. 131, 188 N. E. 279 (1933); Cross v. Cross, 108 N. Y. 628, 15 N. E. 333 (1888). The plaintiff in the original action was barred from collaterally attacking, upon a theory which partakes of estoppel, in Krause v. Krause, 282 N. Y. 355, 26 N. E. 2d 290 (1940). Fischer v. Fischer, 245 N. Y. 463, 173 N. E. 680 (1930) (collateral attack by second spouse allowed). Matter of Lindgren's Estate, 293 N. Y. 18, 55 N. E. 2d 849 (1944) (allowed a collateral attack by a child of the first marriage upon a divorce *originally ex parte*). See Lenhoff, *The Rationale of the Recognition of Foreign Divorces in New York*, 16 FORD. L. REV. 231 (1947).

13. 334 U. S. 343 (1948).

14. *Id.* at 349.

it is submitted that the second *Williams* case should be limited to its facts.[15] The *Sherrer* case denied a collateral attack upon a foreign divorce wherein both spouses appeared, by one of the parties to the action, on the ground that the decree was *res judicata as to the parties*. This holding is in accord with the general principle that a judgment in a former suit between the same parties, on the same cause of action is res judicata as to every matter which might have been litigated including jurisdictional facts.[16] It has the effect of an in personam decree, as clearly indicated in the *Sherrer* case, in that it binds only the actual parties to the action.[17]

In *Shea v. Shea*,[18] relied upon by the Appellate Division in the instant case,[19] the executors of the will of plaintiff's second husband were denied the right collaterally to attack a foreign divorce decree obtained by the wife from her first husband, who had personally appeared in the action but did not question the jurisdictional requirement. The majority in the *Shea* case based its opinion upon *O'Donoghue v. Boises*[20] which states that in a case where jurisdiction depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction, then the question of jurisdiction is judicially decided and is conclusive until set aside by a direct proceeding. The minority relied primarily upon the argument that: "The appearance of the parties, in the absence of domicile, cannot confer jurisdiction to render the judgment."[21]

Thus it would appear that the right of a stranger collaterally to attack a divorce decree which is not subject to attack in the state of its rendition is still, to some extent at least, an open question since the court in the principal case did not consider the Florida decision in the *de Marigny* case. Although the Full Faith and Credit Clause does not prohibit an inquiry into jurisdictional facts by a stranger to the original action, it is submitted that not every stranger should be permitted to do so and that only those strangers who, if the decree is given full force and effect, would be prejudiced in regard to some pre-existing right should be allowed collaterally to attack it.[22] In the principal case, the petitioner's position as sole legatee under the will did not give her any right or interest in the testator's estate so long as he lived, and this is further reenforced by the fact that the will under

15. The majority in the *Williams* case stated in a footnote that the Court was not concerned with "a situation where a State disregards the adjudication of another State on the issue of domicile squarely litigated in a truly adversary proceeding." 325 U. S. 226, 230 n. 6 (1945). The concurring opinion of Justice Murphy and the dissent by Justice Black would seem to restrict the case to *ex parte* proceedings. *Id.* at 234, 263. But see 17 FORD. L. REV. 281, 284 (1948).

16. United States v. De Angelo, 138 F. 2d 466 (3d Cir. 1943).

17. The case of Senor v. Senor, 272 App. Div. 306, 70 N. Y. S. 2d 909 (1st Dep't 1947), *affirmed without opinion*, 297 N. Y. 800, 78 N. E. 2d 20 (1948), was an attack on a Nevada divorce, in which both parties had appeared, by the spouse who had procured the divorce. The Appellate Division's affirmance of a dismissal of the action is in accord with the later decision in the *Sherrer* case. The portion of the opinion cited by the court in the principal case as authority for allowing a collateral attack by third parties is clearly dictum since the attack was by a party to the original action.

18. 270 App. Div. 527, 60 N. Y. S. 2d 823 (2d Dep't 1946).

19. 275 App. Div. 848, 88 N. Y. S. 2d 783 (2d Dep't 1949).

20. 159 N. Y. 87, 53 N. E. 537 (1899).

21. Shea v. Shea, 270 App. Div. 527, 534, 60 N. Y. S. 2d 823, 830 (2d Dep't 1946).

22. 1 FREEMAN, JUDGMENTS § 319 (5th ed. 1925).

which petitioner claims was not in existence at the time the divorce decree in question was obtained.

The possible consequences of allowing a collateral attack were considered and succinctly stated in *de Marigny v. de Marigny*,[23] a Florida decision, in which the court stated: "If the appellant-petitioner may maintain the instant suit it would be possible for any party to a fraudulent divorce decree, which is valid on the face of the record, to conspire with another person to enter into a marriage with him or her with the sole purpose in mind of having said spouse thereafter bring a proceeding to impeach the divorce decree and thus accomplish indirectly, by means of such conspiracy and fraud, that which could not be accomplished directly."[24] Some of the evils anticipated by the court in that case would be prevented if a stranger to the divorce proceeding is precluded from collaterally attacking the decree except where a pre-existing right or interest would be prejudiced by giving effect to the decree.

PARTNERSHIP LAW—VENUE IN THE FEDERAL COURTS.—Plaintiffs, constituting a partnership, brought suit in their individual names against the defendant corporations and one Kaiser for violating an alleged fiduciary obligation to plaintiffs arising out of a joint venture entered into by plaintiffs and defendants. The defendants were residents of or corporations doing business in California and all of the plaintiffs did not reside within the jurisdiction of the Southern District of New York. The jurisdiction of that court was invoked solely on the ground of diversity of citizenship. Defendants moved to dismiss the action for lack of venue or in the alternative to transfer the action to the proper district court. *Held,* defendant's motion granted and action transferred to the United States District Court for the Northern District of California, Southern Division, on the ground that neither all of the plaintiffs nor all of the defendants resided in the Southern District of New York or the State of New York. *Koons* et al. *v. Kaiser* et al., 91 F. Supp. 511 (S. D. N. Y. 1950).

It is unquestioned that the federal court has jurisdiction in the instant case based upon diversity of citizenship.[1] The question before the court is whether the action has been laid in the proper district court, *i.e.*, a question of proper venue. Where, as here, jurisdiction is based solely upon diversity of citizenship, venue must be laid in that district where all of the plaintiffs or all of the defendants reside.[2] Since the defendants are residents of or corporations doing business[3] in California, venue cannot be laid in the Southern District of New York by virtue of their residence. Plaintiffs individually are not all residents of the Southern District of New York and consequently the statutory requirement can only be met if the partnership itself can be regarded as a resident of that district within the meaning of the statute dealing with venue.[4]

At common law a partnership could not be a party to an action in its artificial

23. 43 So. 2d 442 (Fla. 1949).

24. *Id.* at 446.

1. 28 U. S. C. § 1332 (1948); Camp v. Gress, 250 U. S. 308 (1919).

2. 28 U. S. C. § 1391 (a) (1948).

3. 28 U. S. C. § 1391 (c) (1948).

4. Darby v. Philadelphia Transp. Co. *et al.*, 73 F. Supp. 522 (E. D. Pa. 1947).

or common name,[5] since a partnership, unlike a corporation, could not claim the status of a legal person.[6] While the corporation traditionally has been accorded the status of a legal person, an entity distinct from its members, the courts have found little difficulty in disregarding the entity where the demands of justice or the dictates of common sense indicated that it should be ignored.[7] So, too, have the courts at times seen fit to regard the unincorporated association as though it were an entity where the exigencies of the case required it.[8]

The argument generally raised against the expediency, as well as the wisdom, of regarding the partnership as an entity for some purposes is that to do so would affect the substantive rights and duties of partnerships. Such arguments have weight only if their basic premise be granted, namely, that *occasionally* treating the partnership as though it were an entity tends to create a real legal person distinct from the individual partners for *all* purposes of the law.[9] A more realistic view recognizes that on occasion to regard the partnership as though it were an entity is to do no more than provide the courts and the legal profession with a technique by which they may more readily handle problems now needlessly complicated by persistent retention of the common law view. The reports are replete with cases where courts have used the entity concept as a working hypothesis to achieve a desired result without upsetting substantive liabilities and obligations.[10]

The expediency and wisdom of regarding partnerships as though they were entities for some purposes of the law becomes more readily intelligible in the realm of adjective law. Many cases and statutes have revealed how easily may be obviated the former problems of obtaining jurisdiction over and bringing suit against partnerships, where the identity of all the partners is unknown or they are not residents of the jurisdiction, by the simple expedient of considering the partnership as though it were an entity for procedural purposes.[11] Thus, the New York Civil Practice Act now permits a partnership to sue or be sued as though it were an entity[12] and also makes possible in personam jurisdiction over a nonresident partnership by permitting service of process to be made upon its representative, where the partnership is doing business in this state.[13] Such statutes do not change the essential nature of

5. Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753 (1906); Dunham v. Shindler & Co., 17 Ore. 256, 20 Pac. 326 (1889).

6. Park v. Union Mfg. Co., 45 Cal. App. 2d 401, 114 P. 2d 373 (1941); *see* Puerto Rico v. Russell & Co., 288 U. S. 476 (1933); see CRANE, PARTNERSHIP § 3 (1938).

7. See WORMSER, THE DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATE PROBLEMS 83 (1927).

8. United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 (1922).

9. See Foster and Magruder, *Jurisdiction over Partnerships*, 37 HARV. L. REV. 793 (1924).

10. *E.g.*, Johnson v. Shirley, 152 Ind. 453, 53 N. E. 459 (1899); Fourth Nat. Bank v. Mead, 216 Mass. 521, 104 N. E. 377 (1914); Menagh v. Whitwell, 52 N. Y. 146 (1873); Wilson v. Robertson, 21 N. Y. 587 (1860). See § 8 of the UNIFORM FRAUDULENT CONVEYANCE ACT.

11. Johnston v. Matthews, 32 Md. 363 (1869); Walsh v. Kirby, 228 Pa. 194, 77 Atl. 452 (1910). The first legislative step in this direction was the so-called joint-debtor statutes, enacted first in New York and later adopted in most of the states. See N. Y. CIV. PRAC. ACT §§ 1191-1201.

12. N. Y. CIV. PRAC. ACT § 222-a.

13. N. Y. CIV. PRAC. ACT § 229-b. See Prashker, *Service of Summons on Non-Resident Natural Persons Doing Business in New York*, 15 ST. JOHN'S L. REV. 1 (1940).

the partnership under the substantive law.[14] They simply treat the partnership as though it were an entity for purposes of procedure.

A similar approach has been adopted in the Federal Rules of Civil Procedure. Rule 17 (b) provides that a partnership may sue or be sued as an entity in the federal courts if a federal substantive law question is involved and where, though no federal question is involved, the state law so provides. It is true that, in determining whether jurisdiction exists on grounds of diversity of citizenship, the citizenship of the individual partners must be shown to be wholly diverse from that of the opposing party or parties.[15] But the question of jurisdiction is quite distinct from that of venue. The first is fundamental; the second is more a matter of propriety and convenience. The two grounds of jurisdiction in the federal courts[16] are found in the Federal Constitution[17] which gives to Congress the power to fix the jurisdiction of the inferior federal courts.[18] On the other hand whether a particular district or division of the federal judicial system is the proper venue for a suit should not depend upon the substantive nature of the partnership but rather upon its capacity to sue in the particular district or division which it chooses. In this respect capacity to sue is to be viewed as a procedural question.[19]

In *Sperry Products v. Association of American Railroads* et al.[20] the court said that, since "for the purpose of suit it [the law] has come to regard them [unincorporated associations] as jural entities, we can see no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents."[21] The court then decided that the defendant association was to be regarded as an "inhabitant" of that state and district where it had its "principal place of business."[22] In *Darby v. Philadelphia Transportation Co.* et al.[23] the same question arose as appears in the principal case. Defendants were partners, not all of whom were residents of the district where suit was brought. The court held that the partnership was to be regarded as an entity for purposes of residence. The basis of the holding was the fact that the objective of the Federal Rules

14. Williams v. Hartshorn, 296 N. Y. 49, 69 N. E. 2d 557 (1946).

15. Thomas v. Board of Trustees, 195 U. S. 207 (1904); Chapman v. Barney, 129 U. S. 677 (1899); Levering & Ganigues Co. v. Morrin, 61 F. 2d 115 (1932).

16. 28 U. S. C. §§ 1331, 1332 (1948).

17. U. S. CONST. Art. III, § 2.

18. Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940); Bankers Trust Co. v. Texas & Pac. R. R., 241 U. S. 295 (1916).

19. 3 MOORE, FEDERAL PRACTICE § 17.25 (2d ed. 1949).

20. 132 F. 2d 408 (2d Cir. 1942). The venue question in this case arose in a patent proceeding. The statute then applicable to patent suits provided that the action must be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business." 36 STAT. 1100 (1911). The present statute provides that in a patent suit, venue must be laid in the federal district "where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U. S. C. § 1400 (1948). The complaint did not allege where the act of infringement took place.

21. *Id.* at 411.

22. *Accord,* Brotherhood of Locomotive Firemen and Enginemen v. Graham, *et al.,* 175 F. 2d 802 (D. C. Cir. 1949).

23. 73 F. Supp. 522 (E. D. Pa. 1947).

is "simplicity and practicality, and since the jural entity of the partnership is recognized in the Uniform Partnership Act, 59 P. S. § 1 et seq., as well as the Pennsylvania Rules of Civil Procedure, it is only in keeping with this progressive trend toward simplicity, that following its adoption as such, *with respect to capacity to sue and be sued, as well as in the service of process upon it,* its jural entity should be recognized for the purpose of venue."[24]

The court in the principal case reasons that, even though the partnership is treated as an entity under New York law for purposes of suit, Rule 17 (b) of the Federal Rules of Civil Procedure "requires an examination of the law of the state to ascertain whether a partnership is a *legal entity with a residence separate and apart from those of the partners.*"[25] But Rule 17 (b) was enacted so that the federal courts would conform with the procedure of the individual state courts as to the capacity of partnerships to sue or be sued in their common name.[26] The Rule is not concerned with the substantive law of partnerships.[27] Accordingly, it is difficult to see why the law of the state must be examined to ascertain whether a partnership is a legal entity. So long as the state law grants a partnership procedurally the capacity to sue as such in the state court, Rule 17 (b) grants it that capacity in the federal court. Refusal to treat the partnership as though it were an entity for the purposes of venue and residence is to fail to recognize the intention to facilitate procedure and achieve conformity as expressed in Rule 17 (b).

The court in the instant case distinguishes the *Darby* case on the ground that Pennsylvania law established the partnership as a separate legal entity apart from the partners. The pertinent Pennsylvania statutes are simply the Uniform Partnership Act enacted in most of the states, including New York, and they have been construed not to establish the partnership as an entity.[28] The procedural statutes of the Pennsylvania code are similar to the New York statutes[29] which have been construed to establish the partnership as though it were an entity for procedural purposes only.[30]

24. *Id.* at 524 (italics supplied). PA. STAT. ANN. tit. 12, §§ 2128, 2131 (a) (Supp. 1949); PA. STAT. ANN. tit. 59, § 1 *et seq.* (1930). As to whether or not the Uniform Partnership Act recognizes the "jural entity" of the partnership, see Crane, *The Uniform Partnership Act: A Criticism,* 28 HARV. L. REV. 762 (1915), wherein Professor Crane criticizes the Act for failing *explicitly* to adopt an entity theory and for nominally adopting the aggregate theory although containing provisions which are consonant only with the entity theory, particularly those sections dealing with partnership property. See also, in two parts, Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism,* 29 HARV. L. REV. 158 (1915), 29 HARV. L. REV. 291 (1916), wherein Dr. Lewis, the draftsman of the Act, answers Professor Crane and points out that the entity theory was rejected since it was thought adoption of it in the Act would serve only to confound the confusion of the common law and to work an injustice upon creditors of partnerships.

25. 91 F. Supp. 511, 516 (1950) (italics supplied).

26. Fennell v. Bache, 123 F. 2d 905 (D. C. Cir. 1941), *cert. denied,* 314 U. S. 689 (1941).

27. Sperry Products, Inc. v. Association of American Railroads, 132 F. 2d 408 (2d Cir. 1942), *cert. denied,* 319 U. S. 744 (1942); *See* United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 390 (1921). This case laid down the rule now contained in the "except" clause of the present Rule 17 (b).

28. *In re* Morrison's Estate, 343 Pa. 157, 22 A. 2d 729 (1942); Sumner v. Brown, 312 Pa. 124, 167 Atl. 315 (1933). See note 24 *supra.*

29. N. Y. CIV. PRAC. ACT §§ 222-a, 229-b.

30. Williams v. Hartshorn, 296 N. Y. 49, 69 N. E. 2d 557 (1946).

The court places secondary emphasis upon the fact that the plaintiffs sue as individuals and not in the partnership name. Such an error is not fatal and is readily curable by amendment by leave of the court.[31] The mere fact that an amendment is offered late in the case is not enough to bar it.[32]

It is submitted that the view taken in the instant case is too stringent. While here refusal to treat the partnership as though it were an entity for purposes of residence is not fatal to plaintiffs' cause of action, a situation is conceivable where such refusal would be fatal.[33] The better view would seem to be that of regarding the partnership as though it were an entity for the purposes of determining residence within the federal venue statutes where the legislative policy of the state does so.

TORTS—LIBEL—PRIVILEGE OF NEWSPAPER TO PUBLISH AFFIDAVITS FILED IN A SEPARATION ACTION.—Defendant published articles concerning the plaintiff, a husband in a separation action, based upon allegations in an affidavit by plaintiff's wife. The allegations were obtained from the affidavit without authority of the court. In an action by the husband for the publication of the allegedly false and libelous articles concerning him, defendant pleaded that the publication was privileged under Section 337 of the Civil Practice Act as a fair and true report of a judicial proceeding. Defendant moved for judgment on the pleadings and its motion was denied. Upon appeal, *held,* order affirmed, two justices dissenting, upon the ground that the statute which confers the privilege does not include a report of a paper filed in the course of a judicial proceeding which was not open to the inspection of the public. *Stevenson v. News Syndicate Co.,* 276 App. Div. 614, 96 N. Y. S. 2d 751 (2d Dep't 1950).

The statute under which defendant pleaded privilege provides in part: "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. . . ."[1] In *Campbell v. New York Evening Post, Inc.*[2] a unanimous court determined that the filing of pleadings and affidavits is a public act in the course of judicial proceedings and consequently the publication of a fair and true report of these papers was privileged under the statute. In the instant case, however, the affidavit was filed in support of an action for separation and hence, by Rule 278 of the Rules of Civil Practice, was not open to inspection by the public.[3]

31. FED. R. CIV. P. 15 (a); McDowall v. Orr Felt & Blanket Co., 146 F. 2d 136 (6th Cir. 1944).

32. *E.g.,* Hall v. Gordon, 128 F. 2d 461 (D. C. Cir. 1942).

33. For example, *A* and *B,* a partnership, sue *C* and *D,* a partnership, the ground of jurisdiction being diversity of citizenship. If *A* and *B* are not residents of the same district and *C* and *D* are not residents of the same district, proper venue cannot be laid in any federal district so long as the residence of the individuals must determine venue. The same result obtains where jurisdiction is based on a federal substantive right. The representative action provided for in Rule 23 of the Rules of Federal Practice is not applicable since there is not a class "so numerous as to make it impracticable to bring them all before the court."

1. N. Y. CIV. PRAC. ACT § 337.

2. 245 N. Y. 320, 157 N. E. 153 (1927).

3. Rule 278 of the Rules of Civil Practice provides: "An officer of a court with whom the

A rule which is inconsistent with a statute is of no effect and cannot enlarge or abridge rights conferred by the statute.[4] Thus, the issue presented is whether the privilege contemplated by Section 337 of the Civil Practice Act is abridged by Rule 278 which denies the public access to papers filed in annulment, divorce, or separation proceedings.

The majority opinion declared that the reason for the privilege under consideration is "the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice."[5] It would appear that the privilege is a logical extension of the concept that publicity will better insure a capable judicial administration.[6]

Prior to *Campbell v. New York Evening Post, Inc.*[7] the leading New York decision in determining the extent of the application of Section 337 of the Civil Practice Act, courts invariably denied privilege to the publication of reports based on charges that had not been presented to a judicial tribunal for litigation, since until the judiciary acted upon a charge the fundamental policy of public benefit in securing and insuring the integrity of the bench was not involved. Thus, in referring to the privilege the court in *Stuart v. Press Publishing Co.*[8] stated, "the statutory privilege conferred by section 1907 of the Code of Civil Procedure, so far as it relates to judicial proceedings, likewise confines the privilege to judicial proceedings which are both public and official."[9] The court, in the *Campbell* case after a discussion of

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proceedings in an action . . . for . . . separation are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, 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, or the attorney or counsel of a party who had appeared in the cause, except by order of the court."

4. The Broome County Farmers' Fire Relief Ass'n v. New York State Electric and 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). The Appellate Division, in the *Broome* decision, cited Judiciary Law § 82, renumbered § 83 which provides: "A majority of the justices of the appellate division . . . shall have the power, from time to time, to adopt, amend or rescind any rule of civil practice, not inconsistent with any statute. . . ."

5. 276 App. Div. 614, 615, 96 N. Y. S. 2d 751, 753 (2d Dep't 1950), quoting Lee v. Brooklyn Union Publishing Co., 209 N. Y. 245, 248, 103 N. E. 155, 156 (1913). In Wason v. Walter, L. R. 4 Q. B. 73, 88 (1868) the court said that "the true ground [for the foundation of the privilege] is . . . that 'though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.'"

6. Referring to the proposition 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," Justice Holmes wrote: "If these are not the only grounds upon which fair reports of judicial proceedings are privileged, all will agree that they are not the least important ones." Cowley v. Pulsifer, 137 Mass. 392, 394 (1884).

7. See note 2 *supra*.

8. 83 App. Div. 467, 82 N. Y. Supp. 401 (1st Dep't 1903).

9. *Id.* at 478, 82 N. Y. Supp. at 408. Section 1907 of the Code of Civil Procedure is presently § 337 of the Civil Practice Act.

the law as represented in the *Stuart* case, argued from the proposition that the service of a summons commences an action and that a law suit from beginning to end is in the nature of a judicial proceeding. Hence, the court concluded that the privilege should extend to a report of all papers filed in the course of a judicial proceeding. The underlying concept that directed the prior decisions was discarded in favor of a rule consistent with practical experience.[10] The Court of Appeals, in approving the Appellate Division holding that the papers when filed become public documents, did not comment on the Appellate Division's exclusion of papers filed in proceedings for divorce.[11] There is some language in the Court of Appeals opinion which might indicate a disposition to extend the privilege to *all* documents filed in the course of a judicial proceeding.[12] That the decision, however, contemplated only such proceedings and papers to which the public had the right of access would appear from the fact that the court stated that "the filing of a pleading is a public and official act in the course of judicial proceedings"[13] and that such papers became public documents.

The principal case would not appear to be controlled by the decision of the *Campbell* case since the affidavit in the instant case was not open to inspection by the public under Rule 278 of the Rules of Civil Practice. Thus if Rule 278 is not inconsistent with Section 337 of the Civil Practice Act it would follow that the privilege would not attach.

The majority in the principal case could perceive no conflict between the privilege conferred by the statute and Rule 278 under which access was denied the public to papers filed in actions such as the instant case. The scope of the statute, it would seem, encompasses only public judicial proceedings, and, as extended by the *Campbell* case, all papers, to which the public had the right of access, filed in the course of a judicial proceeding. A declaration by a rule that the papers filed in the course of matrimonial proceedings are not open to the inspection of the public does not abridge that scope but merely indicates its boundary.[14] The statute pro-

10. "Judicial proceedings in New York include in common parlance all the proceedings in the action. We may as well disregard the overwhelming weight of authority elsewhere, and start with a rule of our own, consistent with practical experience." 245 N. Y. 320, 328, 157 N. E. 153, 156 (1927).

11. "They became public property by such filing. *With the exception of pleadings and papers in an action for absolute divorce,* the papers in any action on file with the county clerk are public property, subject to inspection or examination by any one at any time. . . ." 219 App. Div. 169, 176, 218 N. Y. Supp. 446, 452 (1926) (italics supplied). The Appellate Division was reversed by the Court of Appeals on the ground that as a matter of law it could not be said that the publication complained of was a full and fair report of the proceedings.

12. "To publish truly and without malice of one that an action has been brought against him for fraud, seduction, assault, breach of promise, *divorce,* et cetera, has become so common that the opportunity is seldom passed in silence, except when forbearance or obscurity protects the victim." 245 N. Y. 320, 327, 157 N. E. 153, 155 (1927) (italics supplied).

13. *Id.* at 326, 157 N. E. at 156.

14. "But . . . no one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal. To publish broadcast the painful, and sometimes disgusting, details of a divorce case, not only fails to serve any useful purpose in the community, but, on the other hand, directly tends to the demoralization and corruption thereof, by catering to a morbid craving for that which is

vides that a fair and true report of a designated type of proceeding is privileged; the rule states that certain actions are not of that designated type.

The dissent in the instant case considered the articles as reports of a judicial proceeding within the meaning of Section 337 and that Rule 278 was not intended to and did not abridge the absolute privilege provided in that section.

It would seem, however, not only in view of the concept of social advantage which motivated the public admittance to proceedings of justice, and thence gave rise to the phase of privilege under discussion, but also in view of the more practical consideration of the *Campbell* case in extending the privilege, that the right of public access to both the proceedings and to the filed documents is an essential requisite for the application of the privilege granted by Section 337. Because of the nature of the proceedings,[15] Rule 278 has removed this right of inspection; it has not attempted to remove the privilege granted under the statute to judicial proceedings as those proceedings are contemplated by that statute and the *Campbell* case.

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sensational and impure. The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same; but they should not be used to gratify private spite or promote public scandal .... there can be no doubt as to the power of the court to prevent such improper use of its records." *In re* Caswell, 18 R. I. 835, 836, 29 Atl. 259 (1893).

15. *Ibid.*