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LIBEL AND SLANDER - PRIVILEGED REPORTS OF PUBLIC PROCEEDINGS - CONFESSION TO PROSECUTING ATTORNEY IMPLICATING PLAINTIFF

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LIBEL AND SLANDER — PRIVILEGED REPORTS OF PUBLIC PROCEEDINGS — CONFESSION TO PROSECUTING ATTORNEY IMPLICATING PLAINTIFF — Defendant published in its newspaper the contents of confessions made to a prosecuting attorney by third parties, implicating plaintiff in crimes for which he had been indicted but the commission of which he denied. In an action for damages for libel, *held*, that the taking of the confession was neither a judicial proceeding nor an official proceeding authorized by law, and therefore its publication was not privileged. *Caller Times Publishing Co. v. Chandler*, (Tex. 1939) 130 S. W. (2d) 853.

The perplexing problem of certainty and flexibility, conflicting desiderata of any legal system, is conspicuous in that field of privileged publication concerned with the printing and circulation of reports of public proceedings. The applicable rule of qualified privilege, which results fundamentally from a balancing of public as against private interests, was an easy victim of a judicial crystallization which restricted its application to inflexible, arbitrary categories. Judicial and official proceedings have been the principal of these,[1] and most of the cases, disregarding the really basic issue, turn on the question whether or not the particular facts can be so classified.[2] Depositions have been excluded from privilege because they are not a part of judicial proceedings until introduced in evidence.[3] Pleadings have generally met the same fate,[4] on the ground that "there must be at least so much of a public investigation as is implied in a submission to the judicial mind with a view to judicial action." [5] Whether a certain matter is privileged as an official proceeding has sometimes depended upon the fine distinction between acts required of the official and those which he is authorized to perform.[6] The principal case seems to make some use of this mechanical reasoning.[7] A more logical approach would be concerned directly with the conflicting interests involved; mere definition of terms would not

[1] In general, see HARPER, TORTS, § 250 (1933); 36 C. J. 1273 (1924); 3 TORTS RESTATEMENT, § 611 (1938).

[2] This tendency is probably abetted by the statutes in most jurisdictions which expressly make judicial and official proceedings privileged. But they are merely declaratory of the common law. 24 MICH. L. REV. 489 at 491 (1926). Hence, they should not be regarded as exclusive.

[3] Mannix v. Portland Telegram, 144 Ore. 172, 23 P. (2d) 138 (1933); United States v. United States Shoe Machinery Co., (D. C. Mass. 1912) 198 F. 870.

[4] HARPER, TORTS, § 250 (1933); 17 R. C. L. 347 (1917); Cowley v. Pulsifer, 137 Mass. 392 (1884); Park v. Detroit Free Press, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599 (1888). A statute making pleadings privileged was upheld in Heimlich v. Dispatch Printing Co., 6 Ohio App. 394 (1917).

[5] 36 C. J. 1276 (1924).

[6] A. H. Belo & Co. v. Lacy, (Tex. Civ. App. 1908) 111 S. W. 215; Houston Chronicle Publishing Co. v. McDavid, (Tex. Civ. App. 1914) 173 S. W. 467.

[7] The court argued that the taking of the confession was not an official proceeding because "the law does not require" that the prosecuting attorney take confessions, but merely "empowers" him to do so. Semble, Jastrzembski v. Marxhausen, 120 Mich. 677 at 682, 79 N. W. 935 (1899), wherein the court said, "The publication was not privileged. The conversation between the officer and plaintiff's wife was not a judicial investigation. . . ."

supply the answer. Then, even though the decisions might still be the same, the ratio decidendi would be more convincing. Admittedly influenced by a spirited law review discussion,[8] one respected court, in bringing pleadings within the qualified privilege, discarded "frivolous legal fictions" in favor of a rule "consistent with practical experience." [9] Another court, in a more recent case,[10] came to the same conclusion as to pleadings, but by the medium of the old rationale and not upon a wholesome, express consideration of first principles. Yet it cannot be conceded that the liberal view would be the more practical. Modern news agencies, in attempting to stretch the doctrine of privileged publication, are seldom serving a true public interest, but rather seeking primarily to increase circulation at the expense of private, individual interests by satisfying a morbid curiosity in stories lurid and sensational. For that reason judicial reliance on an established classification, which would make even less likely the possibility of bringing under privilege situations such as the principal case presents, is not without merit, and newspapers which must submit to it will be unable to evoke heartfelt sympathy.[11]

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[8] 24 MICH. L. REV. 489 at 492 (1926): "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. . . ." Have the courts carefully developed a sound rule or "merely blundered on it through an inborn desire to protect reputation?" The issue should not be one "merely of a definition of terms."

[9] Campbell v. New York Evening Post, 245 N. Y. 320 at 326, 157 N. E. 153 (1927). The court recognized that incongruities had arisen as "the inevitable result of the endeavor of the courts to mitigate by piecemeal the harshness of the old rules which protected only reports of trials in open court." Logically, it was a question of allowing publication of pleadings or withholding privilege until after final judgment. Accord, Siegel v. Sun Printing & Publishing Assn., 130 Misc. 18, 223 N. Y. S. 549 (1927). See also, Mengel v. Reading Eagle Co., 241 Pa. 367, 88 A. 660 (1913).

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

[11] It has been suggested that drawing a line is perhaps not ignoring first principles but rather applying the results of a balancing of social interests. However illogical in itself, "the line must be drawn somewhere, and there will always be a number of cases on the border line of any doctrine. The trend of the present development of the law to recognize and protect new rights such as the right of privacy would seem to make any court hesitate, in this age of glaring headlines, to open the doors to newspapers to publish with impunity any libelous matter contained in a complaint, where a summons has only been served and filed." 52 A. L. R. 1438 at 1442 (1928).