

Scope of Disclosure in Matrimonial Actions

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the principal case contended that the granting of a pretrial examination would, in effect, be a futile procedure.¹²³ The court, however, did not wish to be so restrictive and held that, hereafter, pretrial examinations will be granted in defamation actions despite the possibility that the defendant might claim his privilege. It was felt that the existence of such a possibility should not preclude any examination at all; the defendant may take advantage of his privilege when the privileged matter itself is sought.

Scope of Disclosure in Matrimonial Actions

In *O'Donovan v. O'Donovan*,¹²⁴ the complaint contained four causes of action. The plaintiff sought a judgment declaring the defendant's Mexican divorce invalid, a separation on the grounds of abandonment and adultery and a divorce. The defendant moved to vacate or modify the plaintiff's notice, which sought to examine him before trial upon all the relevant and material facts put in issue by the pleadings. The court granted the defendant's motion, limiting the plaintiff to an examination of the defendant upon factual issues material and necessary to plaintiff's cause of action to establish the invalidity of the Mexican decree, which matters do not strictly relate to the relations between the parties during their marriage.

Under the CPA, there were general limitations on disclosure based upon distinctions: (1) between witnesses and parties; (2) between admissible evidence and information leading to admissible evidence on the one hand, and necessary and material evidence on the other; and (3) between categories of actions.¹²⁵ In matrimonial actions, pretrial examinations were generally denied on the ground that such an examination might prevent a reconciliation of the parties.¹²⁶ Pretrial examinations were not permitted in divorce actions,¹²⁷ or in separation actions, unless special circumstances were shown.¹²⁸ However, examinations were allowed in annulment

¹²³ See *Corbett v. De Comeau*, 44 Super. Ct. 306 (N. Y. 1878), wherein it was held that a pretrial examination would not be granted in a libel action because it would be a waste of time.

¹²⁴ 41 Misc. 2d 82, 244 N.Y.S.2d 996 (Sup. Ct. 1963).

¹²⁵ FIRST REP. 118.

¹²⁶ *Hunter v. Hunter*, 10 App. Div. 2d 291, 294, 198 N.Y.S.2d 1008, 1012 (1st Dep't 1960).

¹²⁷ *E.g.*, *Simmons v. Simmons*, 182 Misc. 860, 49 N.Y.S.2d 929 (Sup. Ct. 1944).

¹²⁸ *E.g.*, *Wightman v. Wightman*, 7 App. Div. 2d 859, 182 N.Y.S.2d 31 (2d Dep't 1959); *Augustin v. Augustin*, 277 App. Div. 777, 97 N.Y.S.2d 430 (2d Dep't 1950); *Tavalin v. Tavalin*, 13 Misc. 2d 909, 179 N.Y.S.2d 137 (Sup. Ct. 1958).

actions,¹²⁹ actions for separate maintenance¹³⁰ and actions to set aside separation agreements.¹³¹

In the instant case the court states that no change in the former procedure regarding examinations before trial in matrimonial actions has been effected by the CPLR. Although the court concedes that the Revisers originally intended to abolish the limitations on disclosure,¹³² the opinion points out that substantial changes were later (and prior to enactment of) made in section 3101(a) and that, as finally enacted, that section was intended to continue the scope of disclosure that existed under prior practice.¹³³

Disclosure With Respect to Third-Party Actions

In *Ciaffone v. Manhattantown, Inc.*,¹³⁴ the third-party defendant moved for a pretrial examination of a defendant other than the third-party plaintiff. The requested pretrial examination sought to encompass all the issues of the main action. The court denied the motion but held that the third-party defendant may examine the codefendant in the main action only as to those matters which were material and necessary to the third-party action.

In most of the instances involving pretrial examinations in third-party actions, it is the original plaintiff who seeks to conduct an examination of the third-party defendant and vice versa. Early CPA cases held that unless the original plaintiff amended his claim so as to assert a claim against the third-party defendant or the third-party defendant denied the allegations of the main complaint so as to become an adverse party as to the plaintiff, the demand by either the original plaintiff or the third-party defendant

¹²⁹ *E.g.*, *Grinnell v. Grinnell*, 15 App. Div. 2d 468, 222 N.Y.S.2d 144 (1st Dep't 1961); *Mook v. Mook*, 13 App. Div. 2d 465, 212 N.Y.S.2d 21 (1st Dep't 1961); *O'Connor v. O'Connor*, 12 App. Div. 2d 627, 208 N.Y.S.2d 343 (2d Dep't 1960); *Sefranka v. Sefranka*, 190 Misc. 541, 74 N.Y.S.2d 519 (Sup. Ct. 1947).

¹³⁰ *E.g.*, *Berlin v. Berlin*, 17 Misc. 2d 768, 187 N.Y.S.2d 553 (Sup. Ct. 1959).

¹³¹ *E.g.*, *Vose v. Vose*, 250 App. Div. 883, 295 N.Y. Supp. 244 (2d Dep't 1937); *Rosenthal v. Rosenthal*, 230 App. Div. 483, 245 N.Y. Supp. 253 (1st Dep't 1930); *Cavallo v. Cavallo*, 33 Misc. 2d 245, 224 N.Y.S.2d 937 (Sup. Ct. 1962); *Sallah v. Sallah*, 28 Misc. 2d 130, 219 N.Y.S.2d 311 (Sup. Ct. 1960).

¹³² FIRST REP. 117.

¹³³ 1962 N.Y. LEG. DOC. NO. 8, SIXTH REPORT TO THE LEGISLATURE BY THE SENATE FINANCE COMMITTEE ON THE REVISION OF THE CIVIL PRACTICE ACT 30, 43 [hereinafter cited as SIXTH REP.].

¹³⁴ 20 App. Div. 2d 641, 246 N.Y.S.2d 298 (2d Dep't 1964) (memorandum decision).