

Torts--Libel--Reports of Sealed Judicial Proceedings Not Privileged (Danziger v. Hearst Corp., 304 N.Y. 244 (1952))

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servient to the title of another,"¹⁵ thus adhering to the concept enunciated in *La Frambois v. Jackson*.

As a result of the decision in the present case, the party attempting to show adverse possession now has a more difficult task than previously. Evidently, mere possession and cultivation of the land will no longer suffice to establish the claim of right¹⁶ now demanded; but exactly what additional facts are necessary is not clear. There is a strong dissent to this change,¹⁷ based on the reasoning that "[t]he object of the statute is that the real owner may, by the unequivocal acts of the usurper, have notice of the hostile claim, and thereby be called upon to assert his legal title."¹⁸ If this latter view is correct, then it seems improper to require more than the mere possession and cultivation that has hitherto sufficed to give this notice.

The majority of American jurisdictions recognize that the fundamental requisites for adverse possession are physical possession and proper cultivation, and that these will give rise to a claim of right. The present view in New York, however, is that these two elements do not spell out a claim of right.¹⁹ The failure to define this claim of right, or the hostility with which it is equated, leaves the courts without a workable criterion of what constitutes adverse possession.



TORTS — LIBEL — REPORTS OF SEALED JUDICIAL PROCEEDINGS NOT PRIVILEGED.—This libel action was brought against defendant for its publication of material contained in pleadings filed by plaintiff's wife in a separation action and sealed by court rules. The privi-

¹⁵ *Monnot v. Murphy*, 207 N. Y. 240, 100 N. E. 742 (1913); *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441 (1889).

¹⁶ *Accord*, *De Forrest v. Bunnie*, 107 N. Y. S. 2d 396, 401 (Sup. Ct. 1951) (Possession, to be adverse, need not be under color of title, but must be with a claim of right.); *Evans v. Francis*, 101 N. Y. S. 2d 716 (Sup. Ct. 1951).

¹⁷ See *Van Valkenburgh v. Lutz*, 304 N. Y. 95, 102, 106 N. E. 2d 28, 31 (1952) (dissenting opinion, see note 3 *supra*).

¹⁸ See *St. William's Church v. New York*, 296 N. Y. 861, 863, 864, 72 N. E. 2d 604, 605 (1947) (dissenting opinion by Fuld, J.).

¹⁹ With respect to acts of improvement as an essential element, the court in deciding that the acts in the instant case did not suffice, laid some emphasis on the fact that the work was done by the defendant with knowledge that the land was not his. *Van Valkenburgh v. Lutz*, 304 N. Y. 95, 99, 106 N. E. 2d 28, 30 (1952). *Query*: Will the court now construe the fact of the settler's knowledge of no record title in his favor as militating against the establishment of adverse possession? See the dissenting opinion in the *Van Valkenburgh* case, *supra* at 102, 106 N. E. 2d at 31-32, wherein Judge Fuld contends that it should not.

lege accorded full and fair reports of judicial proceedings was pleaded by the defendant as a defense. Plaintiff's motion to strike out this defense, on the ground that the rule which sealed the pleadings¹ also withheld the privilege claimed, was granted. The Court of Appeals affirmed, *holding* that the privilege granted to the reports of *public* judicial proceedings does not extend to records that are sealed by the Rules of Civil Practice.² *Danziger v. Hearst Corp.*, 304 N. Y. 244, 107 N. E. 2d (1952).

From early common law through present statutes, a privilege has been granted to full and fair reports of judicial proceedings.³ The reasons advanced were that a well informed public, and a greater assurance that justice will be properly administered, are best promoted by this rule.⁴ Courts, however, fearing that the privilege would be abused by the indiscriminate publication of matters in the record, sought to prevent dissemination of this information by limiting the privilege to public proceedings.⁵

Against the background of these considerations, some states, including New York,⁶ enacted statutes granting the privilege to reports of legislative, judicial and other proceedings.⁷ These statutes, however, failed to define adequately the limitations of this privilege, and its precise application in cases involving filed pleadings. The majority of states, at one time including New York,⁸ have construed these laws to mean that the privilege arises only after there

¹ N. Y. RULES CIV. PRAC. 278 (1952). "An officer of a court with whom the proceeding in an action to annul a marriage or for divorce or separation are filed, or before whom the testimony is taken, or his clerk . . . 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."

² In addition, the court ruled that the facts, if substantiated, would constitute a partial defense under the New York Civil Practice Act § 338, which states that damages may be mitigated upon proof of the source of the information and the grounds of the belief.

³ "The rule is not questioned that a full, fair and impartial report of a judicial proceeding is qualifiedly privileged. That was the rule at common law and the statutes of this state so provide." *Lee v. Brooklyn Union Pub. Co.*, 209 N. Y. 245, 247, 103 N. E. 155, 156 (1913).

⁴ *Lee v. Brooklyn Union Pub. Co.*, *supra* note 3 at 248, 103 N. E. at 156; *see* *Rudd v. Hazard*, 266 N. Y. 302, 307, 194 N. E. 764, 765 (1935).

⁵ *See* *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731, 734 (1888); ODGERS, *LIBEL AND SLANDER* 314 (5th ed. 1911).

⁶ N. Y. CIV. PRAC. ACT § 337. "A civil action cannot be maintained . . . for the publication of a fair and true report of any judicial, legislative or other *public* and official proceedings. . . ." (emphasis added).

⁷ CAL. CIV. CODE § 47(4) (Deering, 1949); GA. CODE § 105-704 (1933); THROCKMORTON'S OHIO CODE §§ 11343-1, 11343-2 (Baldwin, ed. 1948).

⁸ *Williams v. N. Y. Herald Co.*, 165 App. Div. 529, 150 N. Y. Supp. 838 (1st Dep't 1914); *see* *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 478, 82 N. Y. Supp. 401, 408 (1st Dep't 1903).

has been a hearing or other judicial action on the pleadings.⁹ It was realized that, whereas on the one hand testimony in open court is open to prompt rebuttal and therefore less likely to contain exaggerated, unsupported charges; on the other hand, filed pleadings are usually not immediately contested and are easily withdrawn, and hence might well contain unfounded accusations, that, if published, would ruin reputations.

Notwithstanding these considerations, the court, in *Campbell v. N. Y. Evening Post*,¹⁰ rebelled against the majority construction, and granted the privilege to pleadings merely filed with the court.¹¹ The Court of Appeals was swayed by the argument that the advantages of logically applying the privilege outweighed the possibility of its abuse.¹² This interpretation has since been followed in many jurisdictions not already bound by precedent to the contrary.¹³

In 1847, prior to the statute granting the privilege, the Supreme Court of New York promulgated a rule sealing the testimony and filed pleadings in "an action founded on adultery."¹⁴ With the advent of the *Campbell* case, an apparent conflict developed between the interpretation of the statute in this decision and the above-mentioned court rule. This disparity existed for almost three decades until presented to the Appellate Division in *Stevenson v. News Syndicate*,¹⁵ wherein it was decided that the privilege did not attach to sealed pleadings.¹⁶ That conclusion is reiterated in the instant litigation.

⁹ *Cowley v. Pulsifer*, 137 Mass. 392 (1884); *Sanford v. Boston Herald Travelers Corp.*, 318 Mass. 156, 61 N. E. 2d 5 (1945); see *Park v. Detroit Free Press*, 72 Mich. 561, 40 N. W. 731, 734 (1888); 3 RESTATEMENT, TORTS § 611, comment c (1938); see Note, 52 A. L. R. 1438 (1928).

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

¹¹ "We may as well disregard the overwhelming weight of authority elsewhere and start with a rule of our own consistent with practical experience.

"Therefore, we proceed to the logical conclusion and uphold the claim of privilege on the ground that the filing of a pleading is a *public* and *official* act in the course of judicial proceedings." (emphasis added). *Campbell v. N. Y. Evening Post*, *supra* note 10 at 328, 157 N. E. at 156.

¹² See *Campbell v. N. Y. Evening Post*, *supra* note 10 at 326, 157 N. E. at 155.

¹³ *Lybrand v. State Co.*, 179 S. C. 208, 184 S. E. 580 (1936); *Kurata v. Los Angeles News Pub. Co.*, 4 Cal. App. 2d 224, 40 P. 2d 520 (1935); *Paducah Newspaper, Inc. v. Bratcher*, 274 Ky. 220, 118 S. W. 2d 178 (1937); see Note, 104 A. L. R. 1124 (1936).

¹⁴ N. Y. RULES CIV. PRAC. § 118 (1847). The only major change was made in 1921 when the words "an action to annul a marriage or for divorce or separation" were substituted for "an action founded on adultery." N. Y. RULES CIV. PRAC. 278 (1921), as re-enacted, N. Y. RULES CIV. PRAC. 278 (1952), see note 1 *supra*.

¹⁵ 276 App. Div. 614, 96 N. Y. S. 2d 751 (2d Dep't), *aff'd on other grounds*, 302 N. Y. 81, 96 N. E. 2d 187 (1950).

¹⁶ *But cf. Stolow v. Hearst Corp.*, 105 N. Y. S. 2d 284 (Sup. Ct. 1951). The court distinguished the cases in the following language: "In the . . . [Stolow] case . . . the affidavit which furnishes the content of the published report was submitted, opposition papers were submitted, the motion was heard

In the principal case, the statute was construed to grant the privilege to *public* judicial proceedings, since any other construction would defeat the public policy behind the statute. The privilege is thereby denied whenever the proceedings have been made *private* by court rules sealing the record.

Although the decision is sufficiently broad to encompass other sealed matter,¹⁷ nevertheless, it may be limited to the specific type of matter here involved, that is, filed pleadings in matrimonial actions. The rule, as a practical matter, should not be extended to cover sealed testimony. The latter conclusion is supported by the distinct legal histories,¹⁸ public policies and practical considerations attending testimony and filed pleadings.

Viewed practically, the decision would curtail undesirable newspaper sensationalism, which in turn would implement the protection of public morals, especially of young and impressionable adolescents. A further result of this case will be the protection of the reputation of those so often falsely accused as correspondents in matrimonial actions.



TORTS — MUNICIPAL LIABILITY FOR ILLEGAL ACTS OF THIRD PARTIES.—Plaintiff sued on a negligence theory to recover damages for injuries caused by fireworks illegally discharged¹ by invitees in defendant-municipality's park. Defendant's employees had previously seen, but had not stopped, similar fireworks. Although an admission fee was normally charged, none was required at the time of the injury, nor were the above-mentioned employees present. The

and . . . relief was awarded . . .” Whereas in the *Stevenson* case “. . . the published report was the contents of the affidavit of the plaintiff . . . made in support of a motion . . . The affidavit and notice of motion were served and filed in court. No opposition papers were served or filed and the motion was never submitted or argued but was withdrawn.” *Id.* at 288. Judgment was rendered for the defendant, the court holding that Rule 278 did not take away the privilege.

¹⁷ As, for example, the records and documents relating to the admission or discipline of attorneys, or for the confinement of the mentally ill. N. Y. JUN. LAW § 90(10); N. Y. MEN. HYG. LAW § 74(6).

¹⁸ With the exception of a few early cases, the courts have consistently recognized the applicability of the privilege to reports of testimony. Only recently have merely-filed pleadings come within the scope of the privilege. Moreover, to extend the rule to include sealed testimony would appear to be a futile act in view of the fact that spectators are often allowed to witness the testimony as it is given. Thus they could disseminate what the court had sealed.

¹ N. Y. PENAL LAW § 1894(a)(2).