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Practice--Annulment of Marriage--Physical Examination Before Trial--Evidence--Waiver of Privileged Communications Between Physician and Patient (Galligano v. Galligano, 245 App. Div. 743 (2d Dept. 1935))

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ing personal business.[4] Every proceeding of a judicial nature which relates to the trial of the issues of a case or to a public matter comes within the rule.[5] Thus the privilege prevails as to proceedings in the federal courts, and as to hearings before referees, registrars, commissioners, examiners, masters in chancery, and legislative committees.[6] A non-resident who appears upon examination of his adversary's witness before a notary public is immune,[7] but not one who appears at the sale of land under a judicial decree.[8] *Sampson* v. *Graves*[9] denied the privilege to a non-resident who appeared at the Appellate Division to hear his case on the ground that he was a mere spectator and that he in no manner aided the administration of justice. But the court here overruled *Sampson* v. *Graves*[10] maintaining that on occasion attorneys require aid of parties and witnesses in the preparation of appeals. This observation, while true, strains the reason for the rule and does not seem to warrant the decision when weighed against the right of the creditor to press his claim and the existing practical difficulties of effecting service of process.

I. J. B.

PRACTICE—ANNULMENT OF MARRIAGE—PHYSICAL EXAMINATION BEFORE TRIAL—EVIDENCE—WAIVER OF PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.—The plaintiff brought an action for the annulment of a marriage on the ground of fraud, alleging that he had married the defendant in reliance on her representations that she was in good health, whereas she knew that she was a victim of tuberculosis. The plaintiff made a motion to compel defendant to submit to a physical examination to determine the state of her health. Defendant was willing to waive her privileged communications as to one physician, but not as to two others who had examined her. She refused, however, to submit to an examination before trial. *Held,* motion granted, unless defendant stipulates to waive the statutory privilege as to all physicians who exam-

[4] Finucane v. Warner, 194 N. Y. 160, 86 N. E. 1118 (1909); *cf.* Burroughs v. Cocke and Willis, 56 Okla. 627, 156 Pac. 196 (1916).

[5] Parker v. Marco, 136 N. Y. 585, 32 N. E. 989 (1893); 2 CARMODY, N. Y. PRACTICE (1930) § 648.

[6] Larned v. Griffing, 12 Fed. 590 (C. C. D. Mass. 1882); Roschynialiski v. Hale, 201 Fed. 1017 (Dist. Ct. Neb. 1913); Parker v. Marco, 136 N. Y. 585, 32 N. E. 989 (1893); Powers v. Arkadelphia Lumber Co., 61 Ark. 504, 33 S. W. 842 (1895); Mulhern v. The Press Publishing Co., 53 N. J. L. 153, 21 Atl. 186 (1890); Burroughs v. Cocke and Willis, 56 Okla. 627, 156 Pac. 196 (1916).

[7] Parker v. Marco, 136 N. Y. 585, 32 N. E. 989 (1893).

[8] Greenleaf v. Bank, 133 N. C. 292, 45 S. E. 638 (1903).

[9] 208 App. Div. 522, 203 N. Y. Supp. 729 (1st Dept. 1924).

[10] *Ibid.*

ined her. *Galligano* v. *Galligano,* 245 App. Div. 743, 280 N. Y. Supp. 419 (2d Dept. 1935).

The right of a physical examination of the person of a party to an action before trial, is given by statute only in a personal injury action.[1] There is one other case in which the court will exercise its inherent power to order a physical examination of a party to an action.[2] In an annulment action the court will in a proper case order a physical examination of the defendant. This right is an outgrowth from the civil and common law and "rests upon the interest which the public as well as the parties, have in question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction." [3] The right to a physical examination is in the discretion of the court and the court must proceed cautiously in the exercise of this discretion.[4] The courts have given to parties seeking examination before trial wide scope and great latitude so that the issues to be determined upon the trial of the action shall be narrowed down.[5] The information sought to be elicited is necessary to prove plaintiff's cause of action. The plaintiff cannot procure this information elsewhere, for it is within the knowledge of defendant and her physicians. Plaintiff's attempt to procure this evidence from other sources failed, by reason of the fact that defendant claims all relations between her and her physicians are confidential and privileged under Section 352 of the Civil Practice Act.

The defendant waived the statute as to one physician who had examined her but refused to waive the privilege as to two other physicians who had examined her. A party cannot waive the statutory privilege as to one physician and reserve the right to others who have examined her; it must be waived as to all, otherwise the waiver is ineffective.[6] A party will not be compelled to submit to a physical

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[1] N. Y. CIV. PRAC. ACT (1935) § 306.

[2] Devanbagh v. Devanbagh, 5 Paige Ch. 553 (N. Y. 1836); Newell v. Newell, 9 Paige Ch. 25 (N. Y. 1841); Gore v. Gore, 103 App. Div. 168, 93 N. Y. Supp. 396 (3d Dept. 1905); Geis v. Geis, 116 App. Div. 362, 101 N. Y. Supp. 845 (1st Dept. 1906); Cahn v. Cahn, 21 Misc. 506, 48 N. Y. Supp. 173 (1897); Cowen v. Cowen, 125 Misc. 755, 211 N. Y. Supp. 840 (1925); Yelin v. Yelin, 142 Misc. 533, 255 N. Y. Supp. 708 (1931); WIGMORE, EVIDENCE (2d ed. 1923) § 2220.

[3] Devanbagh v. Devanbagh, 5 Paige Ch. 553 (N. Y. 1836); Newell v. Newell, 9 Paige Ch. 25 (N. Y. 1841); Cahn v. Cahn, 21 Misc. 506, 48 N. Y. Supp. 173 (1897); Anonymous, 34 Misc. 109, 69 N. Y. Supp. 547 (1901); Yelin v. Yelin, 142 Misc. 533, 255 N. Y. Supp. 708 (1931).

[4] Welch v. Verduin, 121 Misc. 545, 201 N. Y. Supp. 324 (1923); it was *held,* "an order for the examination of the person of the plaintiff in an action for breach of promise of marriage, to procure evidence to substantiate a defense that she was and is incapacitated from entering into and fulfilling the usual relations between husband and wife, will be denied for want of power."

[5] Samols v. Mayer, 120 Misc. 516, 199 N. Y. Supp. 754 (1923).

[6] Steinberg v. New York Life Ins. Co., 263 N. Y. 45, 51, 188 N. E. 589 (1933). In Morris v. N. Y., O. & W. R. R., 148 N. Y. 88, 42 N. E. 410 (1895), the court said, "the plaintiff could not sever her privilege and waive it

examination, where it appears that she already submitted herself to the examination of competent physicians whose testimony can be readily obtained and she waives the statutory privilege as to the testimony of said physicians acquired in attending a patient in a professional capacity.[7]

M. B. G.

REAL PROPERTY—EASEMENTS—LAW OF CUSTOM—INJUNCTION. —The complaint seeks to enjoin the defendants from interfering with the use by the plaintiffs (and others) of a certain beach, alleging a right in the nature of an easement in their favor as residents of the locality arising from the customary use of the land for a period of more than twenty years. The plaintiffs do not claim that the right is an appurtenant easement by express grant, implication, dedication or prescription or an easement in gross running to particular persons. Defendants moved to dismiss the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. This motion was granted on the theory that no such right of custom can be created in New York and that the doctrine of the English law of custom (predicated upon custom or use from time immemorial) is not recognized here. *Gillies et al.* v. *Orienta Beach Club and Orienta Realty Corporation* (Sup. Ct.), reported in the Westchester Law Journal, Nov. 29, 1935.

Custom is unwritten law established by common consent and uniform practice from time immemorial and is local having respect to inhabitants of a particular district.[1] It is deemed to have had its origin in a lost governmental act.[2] An easement, on the other hand, is an interest in another's land and must be founded upon an express or implied grant or upon prescription which presupposes a grant.[3] Rights in real property arising out of custom are not favored in our

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in part and retain it in part. The whole question turns upon the legal consequences of the plaintiff's act in calling one of the physicians as a witness. She then completely uncovered and made public what before was private and confidential. It amounted to a consent on her part that all who were present at the interview might speak freely as to what took place. The seal of confidence was removed entirely, not merely broken into two parts and one part removed and the other retained."

[7] Cowen v. Cowen, 125 Misc. 755, 211 N. Y. Supp. 840 (1925); Yelin v. Yelin, 142 Misc. 533, 255 N. Y. Supp. 708 (1931).

[1] Lindsay, Gracie & Co. v. Cusimano, 12 Fed. 504 (C. C. E. D. La. 1882); Albright v. Cortright, 64 N. J. L. 330, 45 Atl. 634 (1900).

[2] United States v. Arredondo, 31 U. S. 691 (1832).

[3] Canfield v. Ford, 28 Barb. 336 (N. Y. 1858); White v. Manhattan Ry., 139 N. Y. 19, 34 N. E. 887 (1893); Emerson v. Bergius, 76 Cal. 197, 18 Pac. 264 (1888).