

# Privileges of Newspapers in Actions for Libel

Frank Composto

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## Recommended Citation

Composto, Frank (1930) "Privileges of Newspapers in Actions for Libel," *St. John's Law Review*: Vol. 5 : No. 1 , Article 39.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol5/iss1/39>

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amendment this could not be done. By the Laws of 1930, a further remedy is given against such liens by providing that an order of the court may summarily vacate liens which are not valid on their face.<sup>26</sup> These substantial changes to the Lien Law is the result of the recommendations of the Joint Legislative Committee investigating the Lien Law, which committee is continuing their study of the workings of the Lien Law and the effects of the recent changes.<sup>27</sup>

While the 1929 and 1930 amendments have had the general approbation of the many diverse interests involved, there is no doubt that new amendments will be needed in the near future to overcome some of the imperfections in the present law. Two such changes suggest themselves at this moment: 1. An amendment to invalidate any provision in a mortgage recorded prior to the commencement of an improvement, to the effect that such mortgage may be subordinated to a building loan mortgage, for by such method, the salutary effect of the amendments of 1929 and 1930 may be circumvented. 2. The requirement that a small undertaking be filed with the notice of lien on public contracts or on improvements made under a building loan contract, as a deterrent against the present practice of filing a lien to embarrass the general contractor or operator by holding up a scheduled payment. The undertaking, *i.e.*, agreeing to indemnify the party against whom the lien was asserted in the event that the party asserting fails to establish the lien.

C. JOSEPH DANAHY.

PRIVILEGES OF NEWSPAPERS IN ACTIONS FOR LIBEL.—Both State and Federal Constitutional provisions guarantee the "freedom of the press." At its best, this oft-quoted phrase is over-burdened with indefiniteness and ambiguity.<sup>1</sup> "Freedom" is not "license," and libelous statements may not be published under the cloak of news items. Newspaper publishers must, at their peril, see that the supervision of their business is such as to exclude from publication all defamatory articles.<sup>2</sup> However, the law of libel, taking cognizance of the peculiar province of newspapers in community life, as disseminators of information to the public, grants to them more latitude and privileges than it ordinarily gives to individuals. This doctrine of privilege rests on public policy.

<sup>26</sup> *Ibid.*, sec. 19, subd. 6 and sec. 21a.

<sup>27</sup> Report of Joint Legislative Committee investigating the Lien Law, p. 29.

<sup>1</sup> Cooley, *Law of Torts* (1906), 3rd ed., p. 442: "They (the Constitutions) have not, however, undertaken to define it, and what is meant by it is not made very plain by the authorities. On one point all are agreed, namely, that the freedom of the press implies exemption from censorship, and a right in all persons to publish what they may see fit, being responsible for the abuse of the right."

<sup>2</sup> *Ibid.* at 374.

The common law settled the principle that the publication by newspapers of fair, true, and impartial reports of judicial, legislative, or public proceedings<sup>3</sup> were qualifiedly privileged<sup>4</sup> provided their publication was not motivated by malice.<sup>5</sup>

In 1854, the New York Legislature enacted section 337<sup>6</sup> of the Civil Practice Act<sup>7</sup> the provisions of which were declaratory of the common law.<sup>8</sup>

What constituted a judicial, legislative, or public proceeding, so as to come within the purview of the privilege, was formerly most narrowly restricted.

“At first, however, proceedings in courts not of record were at times excluded from the privilege. So were *ex parte* proceedings. So were such proceedings as the filing of a complaint or answer, at least until the stage was reached when they laid a basis for judicial actions. One by one these exceptions dropped away.”<sup>9</sup>

The privilege fairly to report judicial proceedings has now been broadened to include reports of *ex parte*<sup>10</sup> and preliminary proceedings in inferior courts,<sup>11</sup> and in the recent case of *Campbell v. New York Evening Post*,<sup>12</sup> the Court of Appeals, expressly disregarding the overwhelming weight of authority, in New York Appellate

<sup>3</sup> This privilege of publication of fair and true reports of judicial and legislative proceedings is distinct and distinguishable from the right of newspapers to comment upon, or criticize *any* matter of public interest.

<sup>4</sup> Cardozo, *The Paradoxes of Legal Science* (1928), p. 23; 36 *Corpus Juris*, p. 1273; *Lee v. Brooklyn Union Pub. Co.*, 209 N. Y. 245, 103 N. E. 155 (1913).

<sup>5</sup> Burdick, *Law of Torts* (4th ed., 1926), p. 391.

<sup>6</sup> First sentence formerly designated as sec. 1907 of the Code of Civil Procedure, and the second sentence sec. 1908 of the Code.

<sup>7</sup> Proof of Malice in Action for Libel. An action, civil or criminal, cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein of a fair and true report of any judicial, legislative or other public and official proceedings without proof of actual malice in making the report. This section does not apply to a libel contained in the heading of the report or in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of the public and official proceedings which was not a part thereof.

<sup>8</sup> Newell, *Slander and Libel* (4th ed., 1924), p. 489.

<sup>9</sup> Cardozo, *The Paradoxes of Legal Science*, *supra* Note 4.

<sup>10</sup> *Ackerman v. Jones*, 37 N. Y. Sup. Ct. 55 (1874).

<sup>11</sup> *Lee v. Brooklyn Union Pub. Co.*, *supra* Note 4; *Breslin v. Sun Print. & Pub. Assn.*, 177 App. Div. 92, 163 N. Y. Supp. 915 (2nd Dept., 1917); *Connor v. Standard Pub. Co.*, 183 Mass. 474, 67 N. E. 596 (1903); *Bissell v. Press Pub. Co.*, 62 Hun 55, 17 N. Y. Supp. 393 (1891).

<sup>12</sup> 245 N. Y. 320, 157 N. E. 153 (1927).

Courts<sup>13</sup> and elsewhere<sup>14</sup> extended the privilege to include true and fair reports of the pleadings filed in an action even before the stage of trial. Today "judicial proceedings in New York include in common parlance *all* the proceedings in the action."<sup>15</sup>

This privilege is not without its limitations. It attaches only to reports which are accurate, impartial, fair and true. The article need not relate, verbatim, the full proceedings, but it must not be partial or garbled although it may be a condensed or abridged summary of it.<sup>16</sup> The report should be confined to a fair account of what took place in court in so far as the privilege does not extend to voluntary comments or observations made by the publisher, or to statements made by counsel.<sup>17</sup>

The measure of the privilege to be extended to head-notes of news items was definitely established in the case of *Lawyers' Co-operative Publishing Co. v. West Publishing Co.*:<sup>18</sup>

"Defamatory headlines are actionable though the matter following is not, unless they fairly indicate the substance of the matter to which they refer; and such headlines prefixed to a report of a judicial decision, or of judicial proceedings are no part of the report, but are, in effect, comments upon it, and *are not privileged, unless they are a fair index of the matter contained in a truthful report.* In determining whether headlines prefixed to a report are fair they and the matter to which they refer must be construed together. (*Edsall v. Brooks*, 2 Robt. 29; S. C., 17 Abb. Pr. 221; 26 How. Pr. 426; *Salisbury v. Union and Advertiser Co.*, 45 Hun 120)."

It will also be noted that section 337 of the C. P. A.<sup>19</sup> explicitly stated that it did not apply to a libel contained in the head-note.

The New York Legislature recently amended the aforementioned statute,<sup>20</sup> extending the privileges of newspapers in actions for libel so that now it reads as follows:

<sup>13</sup> *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401 (1st Dept., 1903); *Williams v. N. Y. Herald Co.*, 165 App. Div. 529, 150 N. Y. Supp. 838 (1st Dept., 1914).

<sup>14</sup> *Lundin v. Post Pub. Co.*, 217 Mass. 213, 104 N. E. 480 (1914); *Meeker v. Post Print. & Pub. Co.*, 55 Colo. 355, 135 Pac. 457 (1913); *Byers v. Meridian Printing Co.*, 84 Ohio St. 408, 95 N. E. 917 (1911); *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731 (1888); 27 Col. L. Rev. (1927) at 225; *Burdick*, *supra* Note 5 at 391; *Newell*, *supra* Note 8 at 412.

<sup>15</sup> *Pound, J.*, in *Campbell v. N. Y. Eve. Post*, *supra* Note 12 at 328. (Italics ours.)

<sup>16</sup> *Newell*, *supra* Note 8 at 500; *Breslin case*, *supra* Note 11.

<sup>17</sup> *D'Auxy v. The Starr Co.*, 31 Misc. 388, 64 N. Y. Supp. 283 (1900); see Statute of 1854, *supra* Note 7.

<sup>18</sup> 32 App. Div. 585 at 590, 52 N. Y. Supp. 1120 at 1123 (4th Dept., 1898) (Italics ours). Also *Campbell v. New York Eve. Post*, *supra* Note 12 at 328.

<sup>19</sup> *Supra* Note 7.

<sup>20</sup> Ch. 619, Laws of 1930, in effect Sept. 1, 1930.

“An action, civil or criminal, cannot be maintained against a reporter, editor, publisher or proprietor of a newspaper, for the publication therein of a fair and true report of any judicial, legislative or other public and official proceedings, or for any heading of the report which is a fair and true head-note of the article published.

This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of the public and official proceedings which was not a part thereof.”

Several significant changes are to be noted in the amended statute. Of considerable moment is the elimination of the consideration of the malice that may have motivated the newspaper in making the report. In actions instituted against newspapers, under the old statute, there were two distinct questions to be answered by the jury: 1. Was the report fair and accurate? 2. Was the report, though fair and accurate, published maliciously?

Before it could render a verdict for the plaintiff, the jury was constrained to answer both questions in the affirmative. Today, however, it is a complete defense to prove that the publication complained of is a fair and true report of a judicial or legislative proceeding.

The Legislature also designedly extended the cloak of privilege to cover fair and true head-notes of the article published.

Newspaper publishers and reporters now enjoy what is tantamount to virtual immunity from civil liability when they publish a fair and true report of a judicial or legislative proceeding.<sup>21</sup> This is consistent with the trend of the decisions of our courts. If the proceedings in legislative bodies, and in courts of justice are ever to be subjected to the wholesome scrutiny of a reading public, then no one need have occasion to cavil with the granting of these privileges to newspaper publishers and reporters.

We need have no apprehension that the privilege thus accorded will lead to utter disregard for the personal security of the individual by the press. We may assume, and fairly so, that judicial interpretations of *fair* and *true* reports will temper the use of the privilege and keep it within the bounds of common sense and justice.

FRANK COMPOSTO.

RECEIVERS PENDENTE LITE IN FORECLOSURE ACTIONS.—A receiver *pendente lite* is an officer appointed by the court to take over the possession of property, and to receive the rents and profits pending the suit. His possession is that of the court, for he is

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<sup>21</sup> The Legislature failed to make similar changes in sec. 1345 of the Penal Law, the corresponding criminal statute.