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of form and parol evidence. The courts have not explicitly delimited this narrow exception, but it appears that there must be a writing signed by the party who alleges that the contract is invalid for lack of form; and that the non-signing party must have manifested his assent to the contract by unequivocal acts. As long as the application of this doctrine is confined to situations like *Alley*, no danger of fraud is likely, and the possible harsh results which would result from rigid enforcement of formalities are averted. Given this consistent approach by Louisiana courts, it is expected that this concept will be applied in future cases.

William A. Jones, Jr.

THE LIMITS OF "PUBLIC INTEREST"

Plaintiff sued for allegedly defamatory statements published by defendant in a magazine article on electronic eavesdropping. The article stated that plaintiff had persuaded a detective previously hired by her husband to "sell out" and work for her in connection with her ensuing divorce action. Defendant urged that the *New York Times v. Sullivan*¹ doctrine denied recovery to a "public official" or a "public figure" for a defamatory statement concerning them unless it was made "with knowledge that it was false or with reckless disregard of whether the statement was false or not."² The trial court found the doctrine inapplicable because plaintiff was neither a "public official" nor a "public figure." The Fifth Circuit Court of Appeals reversed and held the *New York Times* doctrine applied to defamatory statements concerning private individuals involved in matters "of public or general interest."³ *Firestone v. Time, Inc.*, 460 F.2d 712 (5th Cir. 1972).

At common law, defamation is a false statement of fact which tends to hold a person up to "public contempt, ridicule, or shame."⁴ In order to establish a prima facie case, the plaintiff

1. 376 U.S. 254 (1964).

2. *Id.* at 280.

3. *Rosenbloom v. Metromedia*, 403 U.S. 29, 31-32 (1971).

4. *Triggs v. Sun Printing & Publ. Ass'n*, 179 N.Y. 144, 154, 71 N.E. 739, 742 (1904); see also *Sydney v. MacFadden Newspaper Publ. Corp.*, 242 N.Y. 208, 151 N.E. 209 (1926); *Bennet v. Commercial Advertiser Ass'n*, 230 N.Y. 125, 129 N.E. 343 (1920). The same concept is worded somewhat differently in RESTATEMENT OF TORTS § 559 (1938): "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

does not have to prove falsity, he need only prove that the statement was published and that it tends to hold him up to "hatred, contempt, or ridicule."⁵ Once the plaintiff has met this burden, the only defense, other than truth, available is that the publication was made on a privileged occasion.⁶

The privilege urged by the defendant in *Firestone* originated with the group privilege.⁷ Courts have long recognized the interest of a group in freely discussing matters concerning it even though the statements made might be defamatory of a member of the group, or of one standing in some relation to it.⁸ Traditionally, this privilege has been limited to relatively small groups.⁹ However, the privilege was extended by the Supreme Court in *New York Times v. Sullivan*.¹⁰ The court held that the first amendment prohibited recovery by a "public official" for a defamatory statement relating to his official conduct unless he

5. RESTATEMENT OF TORTS § 613 (1938):
"BURDEN OF PROOF"

- (1) In an action for defamation the plaintiff has the burden of proving, when the issue is properly raised,
- (a) the defamatory character of the communication,
 - (b) its publication by the defendant,
 - (c) its application to the plaintiff,
 - (d) the recipient's understanding of its defamatory meaning,
 - (e) the recipient's understanding of it as intended to be applied to the plaintiff,
 - (f) special harm resulting to the plaintiff from its publication,
 - (g) abuse of a conditionally privileged occasion.
- (2) In an action for defamation the defendant has the burden of proving, when the issue is properly raised,
- (a) the truth of the defamatory communication,
 - (b) the privileged character of the occasion on which it was published,
 - (c) the character of the subject matter of defamatory comment as of public concern."

6. *Id.*

7. There are two types of privilege: absolute (RESTATEMENT OF TORTS §§ 583-92 (1938)), and qualified (RESTATEMENT OF TORTS §§ 593-612 (1938)). Absolute privilege encompasses statements made by judges, legislators, and other officials in the performance of their duties. In addition, truth has been called an absolute privilege, but, in reality, it is an absence of defamation (RESTATEMENT OF TORTS § 582 (1938)). The qualified privileges are (1) the defense of one's self or property; (2) the defense of someone else's person or property; and (3) the group privilege. Also, "fair comment" has often been considered a qualified privilege, but actually it is an absence of defamation rather than a privilege because it is a stated opinion based upon truth.

8. W. PROSSER, TORTS § 115 (4th ed. 1971). See also *O'Connor v. Sill*, 60 Mich. 175, 27 N.W. 13, rehearing denied, 28 N.W. 162 (1886) (educational group); *Clark v. McBaine*, 299 Mo. 77, 252 S.W. 428 (1923); *Mick v. American Dental Ass'n*, 49 N.J. Super. 262, 139 A.2d 570 (1958) (professional group); *Stewart v. Ging*, 64 N.M. 270, 327 P.2d 333 (1958) (religious group).

9. W. PROSSER, TORTS § 115 (4th ed. 1971).

10. 376 U.S. 254 (1964).

proved that the statement was made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." It appeared that the decision was merely an extension of the group privilege to the political community. However, it soon became apparent that the case produced more far-reaching results. In *Curtis Publishing Co. v. Butts*¹² and *Associated Press v. Walker*,¹³ the court extended the *New York Times* test to defamatory statements concerning "public figures." In these cases, the athletic director of a large university, and a retired army general were found to be "public figures" within the *New York Times* test.

Further extension was seen in *Rosenbloom v. Metromedia*,¹⁴ wherein the court held the test applicable to defamatory statements about private individuals relating to their involvement in events of "public or general interest."¹⁵ There a private individual sued a radio station that had broadcast several stories concerning his arrest for selling obscene materials and his attempt to have the police enjoined from interfering in his business. The Supreme Court held that the sale of obscene literature was a matter of "public interest" and that the *New York Times* test did apply. The court stated that "the determinant whether the first amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern. . . ."¹⁶ However, the court left for future determination exactly what would be considered "of public interest."

The court in *Firestone* followed *Rosenbloom* and found electronic eavesdropping to be a matter of public interest. Thus, after the *Rosenbloom* and *Firestone* decisions the question remains as to the limits of what may constitute "public interest." Inasmuch as the court in *Rosenbloom* borrowed that term from the right of privacy, an analysis of this tort action can perhaps offer some clues as to the scope of "public interest."¹⁷

11. *Id.* at 280.

12. 388 U.S. 130 (1967).

13. *Id.*

14. 403 U.S. 29 (1971).

15. *Id.* at 31.

16. *Id.* at 44.

17. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The court in *Rosenbloom* explained in a footnote that this article provided the source for the term. 403 U.S. at 31 n.2.

The right of privacy is the youngest of tort actions, coming into existence in the 1890's.¹⁸ It seeks to protect the interest one has in being let alone and in not having his private affairs exposed to public view.¹⁹ Unlike defamation, proof of falsity is not a requisite to recovery for an invasion of the right of privacy, and truth is not a defense. The only defense is to urge that the facts were not private, but were matters of public interest.²⁰ It was not a simple matter of determining wherein the public interest lay. The courts had to determine the extent to which the public would benefit from the publication of certain facts; then they had to balance that benefit against the interest of the individual in keeping the facts from the public. The determination in each case was greatly affected by current notions of decent society. These notions served as a guide in determining those matters that were considered more intimate than others. The more private or intimate the facts were, the greater the public benefit had to be in order to make disclosure permissible. In some cases the individual interest was found to be greater than public interest: using the maiden name of a reformed prostitute in a motion picture dealing with her past;²¹ publishing that a person owes money;²² publishing an x-ray of a woman's pelvic region in a medical journal;²³ showing "before and after" pictures of a physical infirmity;²⁴ and showing a motion picture of a caesarian birth.²⁵ Conversely, in other cases it was found that the public interest outweighed individual interest: publishing the subsequent history of a child prodigy;²⁶ publishing a factually correct account of the murder of a woman's husband;²⁷

18. It is generally conceded that the right of privacy had its beginning with an 1890 article, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

19. RESTATEMENT OF TORTS § 867 (1938): "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."

20. Prosser divides the law of privacy into four separate torts: (1) appropriation, (2) intrusion, (3) public disclosure of private facts, and (4) false light. W. PROSSER, TORTS § 117 (4th ed. 1971). Only public disclosure of private facts is pertinent to this discussion.

21. *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

22. *Santeisteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962); *Trammell v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941).

23. *Banks v. King Features Syndicate*, 30 F. Supp. 352 (S.D. N.Y. 1939).

24. *Griffin v. Medical Soc'y*, 11 N.Y.S.2d 109 (Sup. Ct. 1939).

25. *Feeney v. Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1920).

26. *Sidis v. F-R Publ. Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

27. *Jenkins v. Dell Publ. Co.*, 251 F.2d 447 (3d Cir. 1958).

disclosing the name of a boy declared delinquent for sexually assaulting his sister, where he had only one sister;²⁸ publishing that a twelve-year-old had given birth to a child;²⁹ and publishing a picture of the mutilated body of plaintiff's daughter after an automobile accident.³⁰

This type of balancing certainly appears workable because it is flexible enough to change as the notions of society in which it operates change. It seems doubtful, however, that the balance to be struck by the court in the future will be the same as that developed in past privacy casts.³¹ As evidenced by *Rosenbloom* and *Firestone*, much more weight is now being placed on the right of the public to be informed rather than on the individual's right of privacy. So far this new balance has arisen only in instances of defamation by mass media and there are a few indications, at present, as to whether it will be applied to defamation by private individuals.

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28. *Hubbard v. Journal Publ. Co.*, 69 N.M. 473, 368 P.2d 147 (1962).

29. *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956).

30. *Kelly v. Post Publ. Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951).

31. Further, it is doubtful that this same balance will be struck in future privacy cases, as implied in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). A magazine article concerning a play which portrayed a family held hostage by escaped convicts stated that the play was based entirely on an actual experience of a certain family. The convicts who had held them captive had treated them well, while the play, on the other hand, portrayed the convicts as vicious and abusive. Neither the play nor the article presented the family in a defamatory manner, but actually characterized them as heroes. The Hill family sued the magazine for an invasion of privacy based on NEW YORK CIVIL RIGHTS LAW §§ 50-51 (McKinney 1948). This statute protects people from the unauthorized use of their names or pictures by others for commercial purposes. The statute is a hybrid between the law of privacy and defamation in that it does not require that the publication be defamatory, but that it be false. The Court held that the incident was a matter of public interest and applied the *New York Times* test. However, because of the peculiar provisions of the statute, it cannot be said that this case entirely disposes of the question of whether the *New York Times* test will be applied to true privacy cases in the future.