

Argued by
LOUIS PHILLIPS.

New York Supreme Court.

APPELLATE DIVISION—THIRD DEPARTMENT.

MINERVA BROWN,
Plaintiff-Respondent,

—against—

PARAMOUNT PUBLIX CORPORATION,
Defendant-Appellant.

APPELLANT'S REPLY BRIEF.

POINT I.

Respondent neither describes nor identifies the alleged libelous matter upon which this action is predicated.

Respondent's position in her brief is that she does not rely upon the dialogue used in appellant's motion picture photoplay to establish libel, but upon the picture itself.

This is shown by the following in respondent's brief at page 12:

“In the case at bar, the plaintiff does not rely upon the dialogue which is interspersed only occasionally, and which can

be artfully handled by the producer so as to avoid libel to prove the case, but the picture itself is depended upon."

While it is not true that dialogue is used "only occasionally" in the picture, but on the contrary is used throughout just as in a stage play, with all the vital attributes thereof, the respondent's claim that the picture is libelous makes it essential that either the libelous picture be annexed or at least that respondent adequately describe and identify the scenes and incidents in the picture which it is claimed are libelous. The complaint does neither, and pleads only inferences and innuendo. Her complaint is therefore defective as has been argued in appellant's main brief under the authorities there cited.

Respondent takes the same position in her brief as she did in the court below, namely, that the appellant's picture shown to the court below does not contain all of the matter originally exhibited, but that parts thereof have been removed. She states at page 17 of her brief:

"It is unfortunate that portions of a film can be cut out without interfering with the continuity, making it very difficult of detection. The question has already arisen as to whether later copies of the film contained all of the matter as originally exhibited. It would appear, therefore, that what actually was presented in the original production properly becomes a question of fact."

The respondent by her own statement invokes upon herself the unavoidable requirement of accurately identifying the alleged defamatory por-

trayal in the appellant's motion picture. Allegations which are merely inferences couched in general terms are insufficient to inform the appellant what portions of the motion picture have originally injured the respondent. For respondent to contend that "portions of a film can be cut out" and that "what actually was presented in the original production properly becomes a question of fact" places upon her the responsibility of presenting to the court a concise statement of facts clearly revealing the defamation. To do otherwise would deprive the court of its sole means of determining whether the appellant has libeled the respondent, and whether the complaint set forth a cause of action for libel.

Since the respondent declares that the motion picture in its present state may be unlike the motion picture containing the alleged libelous matter it becomes vital to the respondent's cause to definitely fix and point out that which has allegedly injured her.

POINT II.

The case of *Merle v. Sociological Research Film Corporation* cited by the respondent is distinguishable from the case at bar and the case of *Callahan v. Israels* cited by the respondent is inapplicable to the case at bar.

Respondent relies upon the case of *Merle v. Sociological Research Film Corporation*, 166 App. Div. 376, and the case of *Callahan v. Israels*, 140 Misc. 295, because these cases, respondent contends, involve libels committed by the use of pictures.

The case of *Callahan v. Israels, supra*, is not at all in point for a picture was not involved therein, but rather a book entitled "Rebecca the Wise", written by one Joseph Israels II and published by Doubleday, Doran & Co., Inc., a co-defendant in said action. The court points this out in the following:

"The 'third' paragraph sets forth the facts relied on to show the application of the defamatory matter to plaintiff. The 'fourth' paragraph alleges the statements which plaintiff asserts constitute the libel. The libelous matter complained of was published concerning plaintiff by and through the representation of plaintiff in the character '*Ralph Halloran*' in defendants' book." (Italics ours.)

To make certain of this, counsel for appellant examined the complaint and discovered that paragraph "Fourth" thereof contains approximately fifty-five (55) passages pleading in *haec verba* the libelous matter in the book. The first of such passages set forth in the complaint is as follows:

"She * * * applied herself to Ralph, the nice enough boy from the Sun whom she had first run into on the 'Alastaire Kidnapping' when the reporters had had to camp for so many weary hours in front of the fashionable East Seventy-Fourth Street apartment where the girl lived" (p. 164 of the book).

It is true that the court, in the case of *Callahan v. Israels, supra*, states:

"The defamation is accomplished under the literary forms of a work of fiction.

The theory of the complaint is that the libel consisted of a skillfully painted picture. The background was made up of many allusions, not in and of themselves libelous, to incidents, circumstances and facts in the life and associations of plaintiff and his wife."

While the court in that case referred to a "skillfully painted picture", it did not use these words literally. It used them metaphorically, describing rather a picture in the mind's eye, created by the author's choice of language in establishing the character that he intended to portray.

Therefore, it is clear, from the allegations of the complaint in that case, that the libelous matter was clearly set out in the complaint and that no picture was at all involved. That case is therefore wholly inapplicable, but illustrates that the libelous language must be set out in the complaint as it was there.

The case of *Merle v. Sociological Research Film Corporation, supra*, is distinguishable on the following grounds:

1. The complaint in that case clearly, graphically and in detail described the picture in such a way as to charge the plaintiff with conducting an establishment in which cadets or white slave traffickers operated and that plaintiff had knowledge or notice of this condition, that he participated therein or at least acquiesced in or countenanced the same.

The complaint actually described with precision the action of the photoplay charging the plaintiff with being connected with the white slave

traffic and running an establishment in which white slave traffickers plied their trade.

Justice Lehman, in recognizing and stressing the necessity and importance of describing the picture in the complaint, stated at page 379:

“Whether the picture used in this case does charge the plaintiff personally with any wrongdoing must be determined *from the description of the picture itself*, and though upon this motion the description of the picture must be taken as true, the reasonable inferences which can be drawn from that picture cannot be extended by innuendo.” (Italics ours.)

In the case at bar the scenes and incidents of the photoplay are not set forth in the complaint, but only the bare inferences of the pleader.

2. So far as appears from the opinion of Justice Lehman the point raised by the appellant in the case at bar was not before the court in that case. The question as to the sufficiency of the complaint was not directed to the pleading of the libel by description of the photoplay, but rather to the question as to whether the alleged libel directed against the plaintiff's business was also a libel against the plaintiff personally.

The court held that the libel alleged injured plaintiff and was a libel against him personally as well as against his business.

3. The *Merle* case was decided in 1915 when talking motion pictures were unknown. It was a silent photoplay and could only be incorporated into the complaint either by physical annexation

of the pictures themselves or by accurate description of what was depicted by them. The plaintiff chose the latter method, by describing scenes portrayed.

In the case at bar we have neither description of the photoplay nor physical annexation of the pictures themselves.

As has already been stated, the photoplay "AN AMERICAN TRAGEDY" was a talking motion picture with dialogue used throughout and not merely interspersed, as claimed by the respondent. If any of the Justices of this court had previously seen this picture exhibited, they probably would remember that there was dialogue throughout the picture. Therefore, respondent's claim that the picture and not the dialogue is libelous is preposterous because the action of the characters follows the things they talk about and they do the things they say. They live the spoken parts that they play. Their actions and appearances are vitalized by their spoken words.

Therefore, the admission by respondent that the language is not libelous is the clearest indication that the picture itself contains nothing libelous and the assertion that it is libelous is made in the hope that this mere assertion will save a dismissal of the complaint.

If respondent would be compelled, as she should be, to describe the picture should she claim that to be libelous rather than the dialogue, then the description itself would show that there was nothing libelous therein.

The appellant repeats the request made in its brief that this court permit this picture to be exhibited for the benefit of this court, so that it may see for itself how utterly baseless is the claim that "AN AMERICAN TRAGEDY" contains anything libelous to the plaintiff. It will also clearly

show how utterly baseless is respondent's claim that portions of the photoplay may have been removed since the public exhibition thereof, for the undisturbed continuity of the scenes and action of the photoplay will be apparent upon viewing it.

Respectfully submitted,

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LOUIS PHILLIPS,
Of Counsel.