In Coleman v. Roberts, 113 Ala. 329, 21 So. 449 Mr. Justice Brickell observes:

> "The true theory and reason of the doctrine is stated with clearness by Judge Cooley: whenever the state confers judicial powers upon an individual it confers therewith full immunity from private suits. In effect the state says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor, and he may exercise it without fear; that the duties concern individuals but they concern more especially the welfare of the state and the peace and happiness of society; that if he shall fail in a faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed and impeded in the performance of these high functions a dissatisfied individual shall not be suffered to call into question his official actions in a suit for damages. Cooley on Torts 408. There has been, not infrequently, much of objection that the doctrine has a tendency to promote the exercise of judicial power arbitrarily or capriciously, and may shield unscrupulous corrupt men in judicial offices. This may be true to some extent; but if true and individual injury results, it is only an instance of the merger of individual wrong in the higher wrong to the state, and must be redressed by the higher remedies the state can pursue against the unjust judge. Citing Busteed v. Parsons, 54 Ala. 393.

"It is of the greatest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him. Shall be free to act upon his own convictions without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom and would destroy that independence without which no judiciary can either be respectable or useful--- Nor can this exemption of the judges from civil liability be affected by the motives from which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry."

Bradley v. Fisher, 13 Wall 335, 20 L ed 646; Cook v. Bangs, 31 Fed. 640; Yates v. Lansing, 5 Johns 282, affirmed 9 Johns 395 (New York); Lange v. Benedict, 73 NY 12, 29 Am. Rep. 80 (writ of error dismissed 99 U.S. 68, 25 L. ed 469)

In the written opinion of District Judge Palmieri in the case of Fleischer v. A.A.P., Inc., 180 F. Supp. 717, he said that, during the oral argument, counsel for a defendant made the remark that the Court of Appeals, in another aspect of the case, had rebuked plaintiff's counsel. Plaintiff's counsel rose to object and stated that the remark in the Court of Appeals by the judge had been addressed to the plaintiff in the case and not to counsel. The District Judge Palmieri expressed his belief that the Appeals Court had rebuked counsel. Judge Palmieri stated in his opinion in the case: "The opinion---was the opinion of the court and the remark was plainly addressed to counsel and not to plaintiff". He then went on to comment about remarks which were remarked "unworthy" of attorneys.

The offender attorney, one Garfield by name, sued Judge Palmieri for libel by his opinion. The case is reported: Garfield v. Palmieri, 193 F. Supp. 137, in 1961. The Court held the judge was absolutely privileged against civil liability for sending his opinion for publication in the Federal Supplement even if the matter stated in the opinion was false and published maliciously with intent to injure.

The Court observed: "The absolute privilege afforded judges against civil liability for statementsand acts performed in the course of their judicial duties, even if done maliciously and corruptly, is firmly rooted in the common law. See Odgers & Ritson, Odgers on Libel and Slander, pp 191-196 (6th Ed. 1929); Newell, Slander and Libel Pars. 360,360 (4th Ed. 1924) Harper and James "The Law of Torts, Par. 5.22 (1956) and cases cited in these texts."

* * * * "The absolute privilege applies even if it were possible for Garfield to establish his allegations of falsity, malice and intent to do him injury."

Restatement of the Law of Torts Volume 3 Par. 585 - Judicial Officers.

"A judge or other officer performing a judicial function is absolutely privileged to publish false and defamatory matter in the performance of such function if the publication has some relation to the matter before him.

COMMENT:

(a) The privilege of a judge engaged in the performance of his judicial function is absolute. Therefore, the personal ill will of the judge is immaterial. So to, it is immaterial that he know the defamatory matter to be false. The public interest in securing the utmost freedom to those who preside over judicial proceedings or who otherwise perform a judicial function is so important as to preclude enquiry in a civil action into the motives or purpose of such an officer. Abuse of his official position by a judicial officer may subject him to impeachment, recall or removal, but it will not subject him to a civil action for defamation.

* * * *

(c) Judicial function. **** It may be said, however, that to exercise a judicial function, an officer must have at least a colorable jurisdiction over the subject matter before him. It may further be said that while exercising judgment and discretion with respect to litigation, a judge is performing a judicial function; indeed, the primary purpose of the rules stated in this section is to give the official the utmost freedom in so doing.

(d) The judicial function is usually exercised in the course of judicial proceedings, that is, after

the commencement or institution of such proceedings and before the termination thereof. Thus a judge is protected from liability for any statement of fact or comment which has any connection with the matter before him, whether it concerns the conduct of the parties, witnesses, or counsel who are participating in the trial or of a person not so participating. He is also protected from liability for anything said by him in the course of his instruction to the jury and for any memorandum or entry made in his docket and in any order, ruling or decision. It is immaterial whether the judicial proceedings are ex parte, or inter partes or whether they are preliminary, interlocutory or final in character.

(e) Relation of statement to proceedings. It is not necessary that the defamatory matter be relevant or pertinent to any issue before the court in a judicial proceeding. It is necessary only that it have some reference to the judicial function which the judge is performing. The privilege does not protect a judge who makes a personal attack upon the character of another which has no conceivable reference to the performance of the duties of judicial office. However, the protection is not lost by the mere fact that the defamatory publication is an indiscretion or a display of personal antagonism on the part of a judge or that it is not pertinent to the subject of inquiry if it is not altogether disconnected therefrom.

33 Libel and Slander, Par. 146, appears to make a distinction between the absolute privilege of judges, counsel, parties and witnesses recognized by the English law and the privilege as to the parties, counsel and witnesses (as distinguished from the judge) in that, in the United States, as to the absolute privilege of parties, counsel and witnesses, in order to be privileged the statements must be pertinent or relevant to the case, citing in that connection Adams v. Alabama Lime & Stone Corporation, 225 Ala. 174, 142 So. 424.

The leading case is Scott v. Stansfield, LR 3 Exch. 220, 15 Eng. Rul. Cases 42 involving slander for words orally uttered by the judge from the bench.

Kelley, C.B. stated the rule:

> "A series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, established the general proposition that no action will lie against the judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to superior courts but to the court of a coroner and to a court martial which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge but for the benefit of the public whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him and of having the question submitted to a jury whether a matter on which he has commented judicially was or was not relevant to the case before him. Again, if a question arose as to the bona fides of the judge it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus if we were to hold that an action is maintainable against a judge for words spoken by him in his judicial capacity, under such circumstances as those appearing in these pleadings, we would expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his court submitted to their determination. It is

impossible to overestimate the inconvenience of such a result. For these reasons I am most strongly of the opinion that no such action as this can, under any circumstances, be maintainable.

See also Anno: 146 ALR 913

Reller v. Ankeny (160 Nebraska 47, 68 NW R. 2d 686) involved an attorney who sued a judge of the Juvenile Court for alleged defamatory matter and libelous matter stated in the document filed in the matter of a juvenile action pending in the court which was entitled "An Observation and Comment by the Court in Connection with Proceedings to Disqualify the Judge of the Court." The judge announces that on the basis of interviews and observations concerning inaccuracies and untrue statements made by the lawyer in his affidavit his true intent in the proceeding is apparent, that the lawyer has failed to discharge his obligations as a member of the bar and as an officer of the Court.

The Supreme Court of Nebraska first quoted Restatement of the Law of Torts, then cited Bradley v. Fisher, 13 Wall 335, 20 L. ed 646. Next the Court cited Spalding v. Vilas 161 U.S. 483, 40 L. ed 780, Mundy v. McDonald, 216 Mich. 444, 185 NW 877, Nadeau v. Texas Company, 104 Montana 558, 69 P. 2d 586 at 593 and then concluded no cause of action was stated, predicating its decision upon the absolute immunity of judges from actions for defamation in connection with matters coming before them while acting in a judicial capacity.

Mundy v. McDonald (Supreme Court of Michigan) 185 NW 877 was a suit by the mayor of a community who was a candidate for reelection against the defendant who was a judge of the circuit court. At the termination of the proceeding which had been brought by the assistant solicitor the judge announced that the mayor should be tried for having knowledge of the fact that liquor laws were being openly violated, that gambling in various forms was being carried on, houses of prostitution being conducted, etc., but took no action to suppress the violations, that he had known police officers were neglecting duty in enforcement of laws but didn't proceed against them and he had not been vigilant to suppress crimes etc.

The Supreme Court of Michigan after reviewing Spalding v. Vilas, 161 U.S. 483, 40 L. ed 780 and Bradley v. Fisher, 13 Wall 335, 20 L. ed 646 and Lange v. Benedict 73 NY 12 and Valesh v. Prince, 159 NYS 598, said this: "It would seem that these statements were absolutely privileged irrespective even of allegations charging malice, truth or relevancy."

Continuing the Court said: "That defendant acted in a judicial capacity cannot we think be questioned. **** The principle that judges and courts of superior jurisdiction are immune from actions based upon judicial acts may be said to be as old as the beginning of the English common law."In Newell on Slander and Libel (3rd Edition) Section 520, the rule is stated as follows: "In England and generally in the United States the judge of a court has absolute immunity, and no action can be maintained against him, even though it be alleged he spoke maliciously knowing his words to be false and also that his words were irrelevant to the issue before him and wholly unwarranted by the evidence."

The Court then continued citing numerous authorities including our Alabama case of Busteed v. Parsons, 54 Ala. 393.

Under the foregoing authorities it must be held that the composing of and filing in the Clerk's Office of the findings complained of as libelous were judicial acts requiring a decision on the part of the judge as to the proper course to be pursued. To hold that the acts were in excess of jurisdiction and therefore for that reason subject the judge

to private liability is to say that courts and judges must decide questions of jurisdiction at that peril. Such a doctrine would, in large measure, destroy the independence of the judiciary and take away the immunity and privilege considered so essential and necessary to the proper and just administration of law.

In connection with the case of Nedeau v. Texas Company, (Montana) decided at 69 P. 2d 586 the majority of the court affirmed the decision. Concurrently the Chief Justice of the Court published and promulgated a separate opinion finding the defendant and each of the attorneys guilty of contempt arriving out of presentations to the cause in the Supreme Court and the conduct in the course of the litigation and proceeded to attempt to punish for contempt by a fine of $25,000.00 and additional fines of $10,000.00 each oncounsel. In a separate opinion Nedeau v Texas Company, 69 P. 2d 593 the court proceeds to strike the opinion by the Chief Justice from the files, agreeing with counsel for the parties that the opinion was scandalous, scurrilous and defamatory. It seems beyond question that the Chief Justice's opinion applied epithets and adjectives to the defendant and its attorneys whereby they were charged with crimes unprofessional and immoral conduct etc. There is no question but that the matter was scurrilous, scandalous and defamatory.

The court proceeded to first decide "may the movants secure relief under the laws relating to libel?"

The court cites "an unbroken line of judicial decisions by the English and American courts adheres to the rule that no action will lie against the judge for acts done or words spoken in his judicial capacity in a court of justice. Judges when acting in a judicial capacity are absolutely immune from responsibilityfor slander or libel. Newell on Slander and Libel Third Edition Paragraph 517 and 518; Mundy v. McDonald, 185 NW 877, 216 Mich. 444, 9 Columbia Law Review Pages 463 and 600."

The court continues "The reason for this rule of law was very well expressed by the English court in the case of Scott v. Stansfield, 15 Eng. Rul. Cases 42." "This provision of the law is not for the protection or benefit of a malicious or corrupt judge but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

The court proceeded then to quote from the Columbia Law Review Article referred to as to possible relief: "Moreover, underlying

This whole doctrine of absolute immunity is the conception of an alternative remedy. Although the law, for reasons of public policy, denies an action for defamation, the occasion on which immunity applies almost always affords other remedies, which minimize, if indeed they do not always afford adequate relief for, the damage which a person defamed may have sustained. Of course these remedies are not uniformly available in all cases; in some instances they are almost entirely lacking; but it is hardly possible to conceive of a case in which there is no recourse of any kind against abuse. In the case of judicial proceedings, in which the rule of immunity has the widest scope, the underlying idea is that there is a tribunal whose proceeding s are governed by formal methods specially designed for the orderly and efficient performance of the functions of those who participate in them; a tribunal presided over by a judge or judicial officer, specially equipped for his duties by character, learning and experience, who has the power, and presumably the will, to regulate and discipline all those who participate or appear before him. Judicial procedure implied notice to persons in interest, for the right to appear in person and by witnesses in answer to any charges that may have been made and the right to a formal judgment by an impartial court and jury. If a judge forgets his duty and demeans his high office he may be impeached and removed. Jurors, witnesses, counsel and parties litigant who overstep the bounds of decorum may be reprimanded, fined or punished by imprisonment and the defamatory utterance may be expunged from the record. It is true that punishment for contempt is in theory a punishment for an indignity offered to the court rather than reparation to the aggrieved person for the injuries sustained by him. But as a matter of common observation that in the proper exercise of his powers by a judge, the malicious abuse of their functions by parties, witnesses or counsel harms them rather than the object of their malice. Defending counsel may be disbarred and like judges suspended from the exercise of their office. The court then proceeds to strike the opinion of the Chief Justice.

"There are several propositions of law well established by our decisions. The doctrine of immunity of judicial officers is applied (for illustration) where such officer has jurisdiction of the person and of the subject matter, is exempt from civil liability as for false imprisonment so long as he acts within his jurisdiction and in a judicial capacity. Busteed v. Parsons, 54 Ala. 393; suit for malicious prosecution; Irion v. Lewis, 56 Ala. 190 action on official bond of a justice of the peace for refusing an appeal bond; Woodrull v. Stewart, 63 Ala. 206, false arrest; Heard v. Harris, 68 Ala. 43 false imprisonment; Early v. Fitzpatrick, 161 Ala. 171, 49 So. 157, for false imprisonment and malicious prosecution; Broom v. Douglass, 175 Ala. 268, 57 So. 860 for committing to jail in lieu of bond to keep the peace; Blancett v. Wimberly, 16 Ala. Appls. 402, 78 So. 318 - action in excess of jurisdiction by a justice of the peace;

Pickett v. Richardson, 223 Ala. 683, 138 So. 274

In Dawkins v. Rokeby, LR 8 QB 255, affirmed 9 Eng. Rul Cases 39 the Court announced:

> "Whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the bench, whether in the superior courts of law or equity or in county courts or sessions of the peace---is absolutely privileged and cannot be inquired into in an action at law for the defamation."

See also: 9 Columbia Law Review 474: "The immunity of judges is based upon considerations of public policy and is designed to secure the complete freedom of the judiciary to discharge its functions without fear of consequences."

It has been said that "if judges of any court were liable to be called to account for words spoken in judicial capacity "no man but a beggar or a fool would be a judge." c.f. Miller v. Hope, 2 Shaw Sc App. Cases 125 (House of Lords Opinion by Lord Robertson quoting Lord Stair.)

To the same effect as to judicial immunity: Valesch v. Prince, 159 NYS 598, affirmed 224 NY 613, 121 NE 895 (written opinion by a judge of a municipal court held absolutely privileged irrespective of allegations that the utterances were not only false but malicious as well.

See also: Childs v. Voris, 6 Ohio Dec. NP 75 where an attorney brought an action of libel against a judge of the court of common pleas for malicious composition and publication of defamatory language concerning the attorney. It did not appear where or how this language had been published by the judge. The Court however said: For aught that appears it may have been in a written opinion of the court

> deciding a matter submitted to it for decision and announced in open court." Consequently the Court held that "being uttered in the discharge of some judicial act or duty the language was absolutely privileged and the motives with which the language was uttered cannot be inquired into.

To like effect: George Kanpp & Co. v. Campbell, 14 Tex Civil Apls. 199, 36 SW 765, quoted and reaffirmed in Allen v. Earnest, 1912 Tex Civil Apls. 145 SW 1101; also Francis v. Branson, 168 Okla. 24, 31 Pac. (2d) 870.

In Valesh v. Prince, 94 Misc. Reports 479, 159 NYS 598, it was conceded that the statements alleged to be libelous were written by the judge in the exercise of his judicial function. It would seem therefore that these statements were absolutely privileged, irrespective even of allegations charging malice, truth or relevancy. The rule of absolute privilege with respect to judicial officers has its foundation in the earliest principles of the common law. These doctrines were expressed in the case of Yates v. Lansing, 5 Johns 382 (the court then quotes Chancellor Kent)

An examination of the subject matter of the alleged libel showed that matters discussed by defendant were pertinent and material to the action upon which the opinion was written. It is my view that the doctrine of absolute privilege in affording protection to justices of our courts is based upon reason and a sound public policy. It is of supreme importance in the administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his convictions, without intimidation or the fear of being liable to prosecution in a civil action. The demurrer is sustained.

v. *Abbott*, 14 East, 1; *Habhouse's Case*, 3 B. & Ald. 420; *Stockdale* v. *Hansard*, 9 Ad. & Ell. 1; *Sheriff of Middlesex's Case*, 11 Ad. & Ell. 273.

If the contempt is in the face of the Court, no warrant is necessary; an order is sufficient. *Holcomb* v. *Cornish*, 8 Connecticut, 374; *Matter of Percy*, 2 Daly (N. Y. Com. Pl.), 530 (citing *Ex parte Whitechurch*, 1 Atk. 57).

No. 3. — FLOYD *v.* BARKER.

(STAR CHAMBER, 5 Jac. 1.)

No. 4. — SCOTT *v.* STANSFIELD.

(1868.)

RULE.

A Judge of a Court of record is not answerable in a Court of law for anything done or said by him in his judicial capacity, although corruption as well as malice and want of probable cause are alleged against him.

Floyd v. Barker.

12 Co. Rep. 23-26.

Judge. — Not amenable to Proceedings in a Court of Law.

When a grand inquest indicts one of murder or felony: — after the [23] party is acquitted, no writ of conspiracy lies for him against the indictors.

If a witness conspire out of Court, and afterwards swear in the Court, the party acquitted may have a writ of conspiracy against him.

When a party indicted is convicted of felony, upon not guilty pleaded, he shall never have a writ of conspiracy.

Where a party is convicted or attainted of murder or felony, none of the parties to the proceedings are to be drawn in question in the Star Chamber, or elsewhere, for any conspiracy.

Nor in such cases shall a Judge be charged before any other Judge at the suit of the King.

Records are of so high a nature, that for their sublimity they import verity in themselves, and none shall be received to aver anything against the record itself.

In this very term, between Rice ap Evan ap Floyd, and Richard Barker, one of the Justices of the grand sessions in the county of Anglesey, and other defendants: it was resolved by POPHAM and COKE, Chief Justices, the CHIEF BARON, and EGERTON, Lord Chancellor, and all the Court of Star Chamber, that when a grand

inquest indicts one of murder or felony, and after the party is acquitted, yet no conspiracy lies for him who is acquitted, against the indictors, for this that they are returned by the sheriff by process of law to make inquiry of offences upon their oath, and it is for the service of the King and the Commonwealth. And as it is said in the 10 Eliz. 265, they are compellable to serve the law and the Court; and their indictment or verdict is matter of record, and called *veredictum*, and shall not be avoided by surmise or supposal, and no attaint lies. And for this reason they shall not be impeached for any conspiracy or practice before the indictment; for the law will not suppose any unindifferent, when he is sworn to serve the King; and with this agrees the books in 22 Ass. 77, Assise, p. 12; 21 Ed. III. 17; 16 Hen. VI. 19; 47 Ed. III. 17; 27 Hen. VIII. 2; F. N. B. 115 a. But it is otherwise of a witness; for if he conspire out of the Court, and after swear in the Court, his oath shall not excuse his conspiracy before; for he is a private person, produced by the party, and not returned by the sheriff, who is an officer sworn, and the jurors are sworn in Court as indifferent persons: and the law presumes that every juror will be indifferent when he is sworn, nor will the law admit proof against this presumption.

2. It was resolved, that when the party indicted is convict of felony by another jury, upon "not guilty pleaded," there he never shall have a writ of conspiracy, but when the party upon his arraignment is *legitimo modo acquietatus;* but in the case at the bar, the grand jury who indicted one William Price for the murder of Hugh ap William, the jury, who, upon not guilty pleaded, convicted him, were charged in the Star Chamber for conspiracy against him, and indicted and convicted, which manner of complaint was never seen before; for if the party shall not have a conspiracy against the indictors, when the prisoner is acquitted upon his indictment, *a multo fortiori* when he is lawfully convict, he shall not charge neither the grand inquest by whom he was indicted, nor the jury who found him guilty; for the law in such case doth not give any attaint, for this that he was indicted by the oath of twelve men at the least, and found guilty by twelve: and in these cases the King is the sole party to the proceedings against the prisoner.

But on the other side, when a jury hath acquitted a felon [* 24] or traitor against manifest proof, there they * may be charged in the Star Chamber for their partiality in finding

a manifest offender not guilty, *ne maleficia remanerent impunita.* And it will be a cause of infinite vexation and occasion of perjury and smothering of great offences, if such averments and supposals shall be admitted after ordinary and judicial proceeding; and it will be a means *ad deterrendos et detrahendos juratores a servitio Regis.*

3. It was resolved that the said Barker, who was Judge of assise, and gave judgment upon the verdict of death, against the said W. P. and the Sheriff who did execute him according to the said judgment, nor the Justices of Peace who did examine the offender, and the witnesses for proof of the murder before the judgment, were not to be drawn in question in the Star Chamber, for any conspiracy, nor any witness, nor any other person ought to be charged with any conspiracy in the Star Chamber, or elsewhere, when the party indicted is convicted or attaint of murder or felony: and although the offender upon the indictment be acquitted, yet the Judge, be he Judge of assise, or a Justice of Peace, or any other Judge, being Judge by commission and of record, and sworn to do justice, cannot be charged for conspiracy, for that which he did openly in Court as Judge or Justice of Peace: and the law will not admit any proof against this vehement and violent presumption of law, that a Justice sworn to do justice will do injustice; but if he hath conspired before out of Court, this is extrajudicial; but due examination of causes out of Court, and inquiring by testimony, *et similia*, is not any conspiracy, for this he ought to do; but subornation of witnesses, and false and malicious prosecutions, out of Court, to such whom he knows will be indictors, to find any guilty, &c., amounts to an unlawful conspiracy.

And records are of so high a nature, that for their sublimity they import verity in themselves; and none shall be received to aver anything against the record itself; and in this point the law is founded upon great reason; for if the judicial matters of record should be drawn in question, by partial and sinister supposals and averments of offenders, or any on their behalf, there never will be an end of causes: but controversies will be infinite; *et infinitum in jure reprobatur*: and for this it is adjudged in the 47 Ed. III. 15, that a Judge who hath a commission, viz. that is of record, shall not be charged in conspiracy; which is to be understood of what he did in Court, for the reasons and causes aforesaid: and with this agree the books, 21 Ed. IV., 67 and 27 Ass. pl. 12; and the

reason is for this, that though the party is acquitted, yet the accusing stands with the record: and accordingly was the law taken in this case. But in an hundred Court, or other Court which is not of record, there averment may be taken against their proceedings, for that it is no other than matter *in pais*, and not of record; as it appears in the 47 Ed. III. 15. Also one shall never assign for error, against that which the Court doth as Judges; as to say, that the jury gave verdict for the defendant, and the Court did enter it for the plaintiff, or to say that the party who levied the fine was dead before the fine was levied, or such like. *Vide* 1 Hen. VI. 4; 39 Hen. VI. 52; 7 Hen. VII.; 11 Hen. VII. 4, 28; 1 Mar.; Dyer, 89. But in a writ of false judgment, the plaintiff shall have a direct averment against that which the Judges in the inferior Court have done as Judges, *quia recordum non habent*; and with this accords 21 Hen. VI. 34. And as a Judge shall not be drawn in question in the cases aforesaid at the suit of the parties, no more shall he be charged in the said cases before any other Judge at the suit of the King. And for this in the 27 Ass. pl. 18, one was indicted and arraigned at the suit of the King, that as he was a Justice of Oyer and Terminer, where cer-
[* 25] tain persons were indicted * of trespass before him, he made an entry of record, that they were indicted of felony: and it was adjudged that this indictment was against the law, for this that he was a Justice by commission; and that is of record; and this present act shall be to defeat the record, *hoc est*, to aver against that which he did as Judge of record, which cannot be by the law. *Vide* 27 Ass. pl. 23; 2 Rich. III. 9; 28 Ass. pl. 21; 9 Hen. VI. 60. And it was said, that it was the case of one Nudigate, who as a Justice of Peace had recorded a force upon a view, which he did as Judge upon record; and a bill was exhibited against him in this Court, for this, that he had falsely made a record, where indeed there was not any force: and by the opinion of CATLYN and DYER, Chief Justices, it was resolved, that that thing, that a Judge doth as Judge of record, ought not to be drawn in question in this Court.

Note well, that the said matters done at the Bar were not examinable in the Star Chamber; and for this it was ordered and decreed by all the Court, that the said bill without any answer to it, by the said Richard Barker, shall be taken off the file and cancelled, and utterly defaced: and it was agreed, that insomuch as

No. 2. — Floyd v. Barker, 12 Co. Rep. 25, 26.

the Judges of the realm have the administration of justice, under the King, to all his subjects, they ought not to be drawn into question for any supposed corruption, which extends to the annihilating of a record, or of any judicial proceedings before them, or tending to the slander of the justice of the King, which will trench to the scandal of the King himself, except it be before the King himself; for they are only to make an account to God and the King, and not to answer to any suggestion in the Star Chamber; for this would tend to the scandal and subversion of all justice. And those who are the most sincere would not be free from continual calumniations, for which reason the orator said well, *invigilandum est semper, multæ insidiæ sunt bonis.*

And the reason and cause why a Judge, for anything done by him as Judge, by the authority which the King hath committed to him, and as sitting in the seat of the King (concerning his justice) shall not be drawn in question before any other Judge, for any surmise of corruption, except before the King himself, is for this; the King himself is *de jure* to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath.

And forasmuch as this concerns the honour and conscience of the King, there is great reason that the King himself shall take account of it, and no other.

And Thorp's judgment, who was drawn in question for corruption before commissioners, was held against the law, and upon that he was pardoned; and it is contained in the same record, *quod non trahitur in exemplum.* *Vide* the conclusion of the oath of a Judge. *Vide* the Chronicle of Stow, 18 Ed. III. 312.

Note: THOMAS WEYLAND, Chief Justice of the Common Bench, Sir RALPH HENGHAM, Justice of the King's Bench, and the other Justices, were accused of bribery and corruption; and their causes were determined in Parliament, where some were banished, and some were fined and imprisoned.

Vide 2 Ed. III., fol. 27. That the Justices of Trayl-baston (so called for their summary proceeding) were in a manner Justices in Eyre; and their authority was founded upon the Stat. of Ragman, which you may see in the old Magna Charta. *Vide* the form of the commission of the * Trayl-baston, Hollingshead, Charon., fol. 312. And note: it appears by the said [* 26]

precedent and Chronicle, that the King did examine the corruption of his Judges before himself in the Parliament, and not by force of any commission.

Absurdum est affirmare (re judicatâ) credendum esse non judici.

Scott v. Stansfield.

L. R. 3 Ex. 220-225 (s. c. 37 L. J. Ex. 155; 18 L. T. 572; 16 W. R. 911).

Slander. — County Court Judge. — Absolute Privilege.

[220] Plea, to a declaration for slander, that the defendant was a County Court Judge, and the words complained of were spoken by him in his capacity as such Judge, while sitting in his Court, and trying a cause in which the present plaintiff was defendant. Replication, that the said words were spoken falsely and maliciously, and without any reasonable, probable, or justifiable cause, and without any foundation whatever, and not *bonâ fide* in the discharge of the defendant's duty as Judge, and were wholly irrelevant in reference to the matter before him.

Held, that the replication was bad, and the action not maintainable.

Declaration, for that the plaintiff carried on the business of an accountant and scrivener, and the defendant falsely and maliciously, and without reasonable or justifiable cause, and not on any justifiable occasion, spoke and published of the plaintiff, of and concerning him in relation to his said business and the carrying on and conducting thereof, the words following, that is to say: "You," meaning the plaintiff, "are a harpy, preying on the vitals of the poor."

2nd plea: that before and at the time when the alleged grievance was committed, the defendant was the Judge of a certain Court of record, being the County Court of Yorkshire, holden at Huddersfield, and at the time when he did what was complained of, the defendant was sitting in the said Court, and acting in his capacity as such Judge as aforesaid, and was as such Judge hearing and trying a cause in which the now plaintiff was defendant, the hearing and determination of which was within the jurisdiction of the said Court; and during the said trial the now defendant, in his capacity as such Judge, did, as such Judge sitting as aforesaid, speak and publish the said words of which the plaintiff complains which is the supposed grievance above complained of.

Replication to the 2nd plea: that the said words so spoken and published by the defendant as aforesaid were spoken falsely and

maliciously, and without any reasonable, probable, or justifiable cause, and without any foundation whatever, and not *bonâ fide* in discharge of his duty as Judge as aforesaid, and were wholly uncalled for, immaterial, irrelevant, and impertinent, in reference to, * or in respect of, the matters before him, and were [* 221] wholly unwarranted on the said occasion, of all which premises the defendant had notice before and at the time of the committing of the said grievance, and then well knew.

Demurrer and joinder.

Quain, Q. C. (Kemplay with him), in support of the demurrer. The plea and replication taken together raise the question whether the defendant is liable to an action in respect of the words mentioned in the declaration, such words having been spoken by him in his capacity of Judge, but spoken falsely, maliciously, and irrelevantly. There is no authority for the position that an action will lie against a Judge for anything done by him while acting in the exercise of his jurisdiction. The remedy for any official misconduct on the part of the defendant is by application to the Lord Chancellor for his removal. The principle which governs these cases is laid down in the case of *Floyd* v. *Barker*, 12 Co. Rep. 23 (p. 37, *ante*). That principle has been followed in a long series of decisions. See *R.* v. *Skinner*, Lofft, 55; *Miller* v. *Hope*, 2 Shaw Sc. App. Cases, 125; *Jekyll* v. *Sir John Moore*, 2 B. & P. (N. R.) 341; *Revis* v. *Smith*, 18 C. B. 126; *Henderson* v. *Broomhead*, 4 H. & N. 569; *Fray* v. *Blackburn*, 3 B. & S. 576. It is quite clear from these cases that no action will lie against a Judge for a judicial act, though it be alleged to have been done maliciously and corruptly. The true ground of a Judge's exemption from actions is to be found, with a review of the older authorities, in the judgment of Chief Justice KENT, in the case of *Yates* v. *Lansing*, 5 Joh. 282, 9 Joh. 395. In the case of *Thomas* v. *Churton*, 2 B. & S. 475, it was held that a coroner holding an inquest is not liable to an action for words falsely and maliciously spoken by him in his address to the jury; but COCKBURN, Ch. J., there said (2 B. & S., at p. 479): "I am reluctant to decide, and will not do so until the question comes before me, that if a Judge abuses his judicial office by using slanderous words, maliciously and without reasonable and probable cause, he is not to be liable to an action." The present replication is probably founded upon that *dictum*.

No. 4. — Scott v. Stansfield, L. R. 3 Ex. 222, 223.

[* 222] * Manisty, Q. C., *contra*. — The decisions cited are inapplicable to the present case. For it was not alleged in any of those cases that the Judge had said, maliciously and without reasonable cause, what was altogether irrelevant to the matter before him. In Addison on Torts, 2nd ed., p. 547, the law is thus laid down: "A Judge, therefore, is not answerable for slander spoken by him in the exercise of his judicial functions in reference to a matter before him; but if he goes out of his way to make slanderous attacks on the character of private persons in respect of matters not before him, and into which he has no jurisdiction to inquire, he will be responsible, like any other individual, for the consequences." The cases cited in support of that proposition are *Lewis* v. *Levi*, 27 L. J. Q. B. 282, and *MacGregor* v. *Thwaites*, 3 B. & C. 24 (27 R. R. 274); but it must be admitted they do not go far enough to support the plaintiff's contention. It is, however, clear, that the fact of a Judge's having jurisdiction to try a particular case will not justify his going out of his way, and, with reference to a subject wholly irrelevant, making falsely and maliciously slanderous statements affecting private character. It is then just as if he were not acting in his judicial character at all. He cannot abuse his office for the purpose of doing with impunity, under colour of it, that which has no connection with it, and which in a private individual would be actionable. In the case of *Houlden* v. *Smith*, 14 Q. B. 841, it was held that a Judge of a County Court is answerable for an act done by his command, when he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends.

Kelly, C. B. — I am of opinion that our judgment must be for the defendant. The question raised upon this record is whether an action is maintainable against the Judge of a County Court, which is a Court of record, for words spoken by him in his judicial character and in the exercise of his functions as Judge in the Court over which he presides, where such words would as against an ordinary individual constitute a cause of action, and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him. [* 223] The question * arises, perhaps, for the first time with reference to a County Court Judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action

will lie against a Judge for any acts done or words spoken in his judicial capacity in a Court of justice. This doctrine has been applied not only to the superior Courts, but to the Court of a coroner and to a Court martial, which is not a Court of record. It is essential in all Courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a Judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him? Again, if a question arose as to the *bona fides* of the Judge, it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus, if we were to hold that an action is maintainable against a Judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his Court submitted to their determination. It is impossible to overestimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can, under any circumstances, be maintainable.

MARTIN, B. — I am also of the same opinion. It seems to me quite clear that words spoken under the circumstances stated in these pleadings are not the subject of an action of slander. The plea states that the defendant, at the time when he spoke the words complained of, was sitting as the Judge of a Court of record, and spoke them while acting in his capacity of Judge, and trying * a cause within his jurisdiction in which the pres- [* 224] ent plaintiff was defendant. If words spoken under such circumstances were the subject of an action of slander, the most mischievous consequences would ensue; no Judge, as my Lord has pointed out, would then be able freely to administer justice, for if it were alleged, as is the case here, that he spoke falsely and mali-

ciously, and not *bonâ fide* in the discharge of his duty, and that what he said was irrelevant to the matter in hand, a jury would have to determine the question whether what he said in the course of a case which he had jurisdiction to try was or was not said under the circumstances so alleged. What Judge could try a case with any degree of independence if he was to be afterwards subject to have his conduct in the administration of justice commented upon to a jury, and the propriety of it determined by them? It appears to me that the opinion expressed by Chief Justice KENT, in the American case cited, puts this matter upon its proper foundation, and states that which is both sound law and good sense in reference to it. I do not think we are really deciding anything new, for to my mind the decisions of the Court of Queen's Bench have gone the full length of our present decision.

BRAMWELL, B. — I am entirely of the same opinion. I will only quote a remark made by the late LORD CHIEF BARON in the case of *Gelen* v. *Hall*, 2 H. & N., at p. 393. He there says: "The question is not whether a magistrate who, without any evidence, wilfully and maliciously convicts a person brought before him, is liable to an action, but whether a man who has really acted as a Judge shall have the question tried before a jury." There might, first of all, be a question as to what the words uttered really were, for the defendant might get into the box and deny having used the words imputed to him, and the jury might find against him: then it would be a question whether they were spoken *bonâ fide*. That question also would have to be determined by a jury if such an action as the present were maintainable. I think there would be manifest inconvenience in such a state of things.

CHANNELL, B. — I am of the same opinion. If the facts [* 225] alleged * by the replication were true, no doubt there would be misconduct on the part of the defendant. It does not follow from the decision which we now pronounce, that a County Court Judge can so misconduct himself with impunity. If a County Court Judge be guilty of misconduct in the exercise of his office, the LORD CHANCELLOR may, if he think it expedient, remove him from such office; but no action will, in my opinion, lie against him for anything done by him in his judicial capacity. For the benefit of the public and the due administration of justice, the law provides that a Judge is to be so far free and unfettered in the exercise of his office as not to be liable to an action for what he does in the

capacity of Judge, and so placed under restraint in the discharge of his duty.

Judgment for the defendant.

ENGLISH NOTES.

The rule is confirmed by *Anderson* v. *Gorrie* (C. A. 1894), 1895,1 Q. B. 668, 71 L. T. 382. The immunity enjoyed by a Judge may be compared with the similar exemption possessed by advocates. See *Munster* v. *Lamb*, No. 2 of "Counsel," 7 R. C. 714. Where a Judge of an inferior Court acted without jurisdiction, he was held not to be within the protection of the rule. *Houlden* v. *Smith* (1850), 14 Q. B. 841, 19 L. J. Q. B. 170. A similar distinction between an act within or without the jurisdiction of a Judge is established in respect of the old Ecclesiastical Court in *Beaurain* v. *Scott* (1813), 3 Camp. 388, 14 R. R. 759.

Where a Judge is interested in the subject-matter of a dispute, a Court having appellate jurisdiction will set aside his order. *Dimes* v. *Grand Junction Canal Co.* (H. L. 1852), 3 H. L. Cas. 759, 17 Jur. 73; *Reg.* v. *Recorder of Cambridge* (1857), 8 El. & Bl. 637, 27 L. J. M. C. 160, 4 Jur. (N. S.) 334; *Ex parte Medwin* (1853), 1 El. & Bl. 609, 22 L. J. Q. B. 169. It is no objection that a Judge was, prior to his elevation to the bench, engaged in the cause. *Thellusson* v. *Rendlesham* (1858), 7 H. L. Cas. 429, 28 L. J. Ch. 948. The Court, however, in that case approved of the custom, sanctioned by long usage, of a Judge refusing to adjudicate upon a case in which he has been engaged as counsel.

It was pointed out in the notes to *In re Tufnell* and *Grant* v. *Secretary of State for India*, Nos. 8 and 9 of "Crown," 8 R. C. 233, that the position of Judges is assured in a large measure by statute. In Crown Colonies Judges may be removed for misbehaviour or neglect of duty. *Montague* v. *Governor of Van Diemen's Land* (1849), 6 Moo. P. C. 489. Before being removed, he should be given an opportunity of being heard in his defence. *Willis* v. *Gipps* (1846), 5 Moo. P. C. 379. But an informal notice is sufficient, where it appears that the removed Judge has not been prejudiced. *Montague's* case, *supra*.

AMERICAN NOTES.

Mr. Mechem cites the principal cases (Public Officers, sect. 619), with a great number of other cases, and treats the subject exhaustively.

The leading case on this point in this country is *Yates* v. *Lansing*, 5 Johnson (N. Y.), 282, affirmed 9 ibid. 395; 6 Am. Dec. 290. KENT, Ch. J., in the lower Court examined the question with great learning, citing *Floyd* v. *Barker*, and concluding substantially in accordance with the statement in the Rule. The Court said: "Where Courts of special or limited jurisdiction exceed their

powers, the whole proceeding is *coram non judice*, and all concerned in such void proceedings are held to be liable in trespass. (*Case of the Marshalsea*, 10 Co. 65; *Terry* v. *Huntington*, Hardres, 480.) But I believe this doctrine has never been carried so far as to justify a suit against the members of the superior Courts of general jurisdiction, for any act done by them in a judicial capacity. There is no such case or decision that I have met with, and I find the doctrine to be decidedly otherwise." "Whenever we subject the established Courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty." See *Cunningham* v. *Bucklin*, 8 Cowen (N. Y.), 178; 18 Am. Dec. 432, citing *Floyd* v. *Barker*. To the same effect are *Phelps* v. *Sill*, 1 Day (Connecticut), 315; *Bradley* v. *Fisher*, 13 Wallace (U. S. Sup. Ct.), 335, a very masterly treatment of the question; *Morgan* v. *Dudley*, 18 B. Monroe (Kentucky), 693; *Kendall* v. *Stokes*, 3 Howard (U. S. Sup. Ct.), 87; *Briggs* v. *Wardwell*, 10 Massachusetts, 356; *Wall* v. *Trumbull*, 16 Michigan, 228; *Hoggat* v. *Bigley*, 6 Humphrey (Tennessee), 236; *Morrison* v. *McDonald*, 21 Maine, 550; *Carter* v. *Dow*, 16 Wisconsin, 298; *Little* v. *Moore*, 1 Southard (New Jersey Law), 74; *Lange* v. *Benedict*, 73 New York, 12; 29 Am. Rep. 80; *Busteed* v. *Parsons*, 54 Alabama, 393; 25 Am. Rep. 688, citing both principal cases (see a very exhaustive review of English and American decisions, in note, p. 694); *Pratt* v. *Gardner*, 2 Cushing (Mass.), 63; 48 Am. Dec. 652; *Harrison* v. *Redden*, 53 Kansas, 265; *Stone* v. *Graves*, 8 Missouri, 148; 40 Am. Dec. 131; *Terry* v. *Wright*, — Colorado, —; and see as to *quasi* judicial officers, *Stewart* v. *Case*, 53 Minnesota, 62; 39 Am. St. Rep. 574. These cases settle that a Judge of a Court of general and superior jurisdiction can be held liable for his judicial conduct only where there is a clear absence of jurisdiction. Merely exceeding his jurisdiction gives no right of action. The distinction between excess and absence of jurisdiction is clearly marked.

It is probable that our Courts apply this principle only where the Judge had jurisdiction of person and subject-matter, and do not excuse him where he was destitute of jurisdiction, although they excuse him for mistake in the course of or excess of jurisdiction. *Bradley* v. *Fisher*, *supra*; *Lange* v. *Benedict*, *supra*. They even excuse for a mistake in holding that the facts of a given case invest him with jurisdiction, if he has jurisdiction of that class of cases: *Busteed* v. *Parsons*, *supra*; and for mere excess of jurisdiction where he has jurisdiction.

The most interesting recent examination of the question is in *Lange* v. *Benedict*, *supra*. Lange was convicted, in the United States District Court, before Judge BENEDICT, of an offence for which the Court had authority to punish by fine *or* imprisonment. The Court imposed both. The defendant paid his fine, and sued out *habeas corpus*, returnable at the same term, and on the return the Court vacated that sentence and resentenced him to imprisonment alone, and he was thereupon committed for five days. On subsequent proceedings the United States Supreme Court adjudged the second sentence

void and discharged him. (*Ex parte Lange*, 18 Wallace, 163.) The New York Court of Appeals held that the Judge was not civilly liable in damages for that act in excess of jurisdiction, citing *Floyd* v. *Barker*, and observing: "He was, in fact, sitting in the place of justice; he was at the very time of the act a Court; he was bound by his duty to the public and to the plaintiff to pass as such, upon the question growing out of the facts presented to him, and as a Court to adjudge whether a case had arisen in which it was the demand of the law, that on the vacating of the unlawful and erroneous sentence or judgment of the Court, another sentence or judgment could be pronounced upon the plaintiff. So to adjudge was a judicial act, done as a Judge, as a Court, though the adjudication was erroneous, and the act based upon it was without authority and void. Where jurisdiction over the subject is invested by law in the Judge, or in the Court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other involved in the case; although upon the correctness of his determination in those particulars the validity of his judgment may depend. *Ackerly* v. *Parkinson*, *supra*. For such an act, a person acting as Judge therein is not liable to civil or criminal action. The power to decide protects, though the decision be erroneous. See *Garnett* v. *Ferrand*, 6 B. & C. 611." The "brief" of the plaintiff's counsel in this case (William Henry Amoux, of New York) formed a volume of several hundred pages, and constitutes one of the most learned and important treatises on jurisdiction ever published. The titles of the cases cited alone cover nine pages of the official report.

In *Bradley* v. *Fisher*, *supra*, Mr. Justice FIELD observed: "The plea . . . sets up that the order for the entry of which the suit was brought was a judicial act, done by the defendant as the presiding Justice of a Court of general criminal jurisdiction. If such were the character of the act and the jurisdiction of the Court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequence it may have proved to the defendant. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehensions of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the Judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English Judge (Justice MAYNE, in *Taafe* v. *Donnes*, 3 Moore P. C. 41, note), it would establish the weakness of judicial authority in a degrading responsibility.

"The principle therefore which exempts Judges of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English Courts for many centuries, and has never been denied, that we are aware of, in the Courts of this country. It has, as Chancellor

KENT observes (*Yates* v. *Lansing*, 5 Johnson, 291), 'a deep root in the common law.'

"Nor can this exemption of the Judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry." (Quoting from *Floyd* v. *Barker*): "The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior Courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those Courts, in which there is great conflict in the evidence and great doubt as to the law which govern their decision. It is this class of cases which impose upon the Judge the severest labor, and often create in his mind a painful sense of his responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the Judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the Judge. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human character this is hardly a subject of wonder. If civil actions could be maintained in such cases against the Judges, because the losing party should see fit to allege in his complaint that the acts of the Judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a Judge would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

"If upon such allegations a Judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the Judge before whom he might be summoned by the losing party — and that Judge perhaps one of an inferior jurisdiction — that he had decided as he did with judicial integrity; and the second Judge would be subjected to a similar burden, as he in his turn might also be held amenable to the losing party." (Citing *Pratt* v. *Gardner*, 2 Cushing (Mass.), 63; 48 Am. Dec. 652; *Fray* v. *Blackburn*, 3 Best & Smith, 576.)

"In this country the Judges of the superior Courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with

which they are clothed as ministers of justice they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to account by impeachment, and suspended or removed from office. In some States they may be thus suspended or removed without impeachment, by a vote of the two Houses of the Legislature." (Two Justices dissented, on the ground that a Judge is civilly liable if he acts maliciously or corruptly.)

Very similar expressions were used by Chief Justice SHAW, in *Pratt* v. *Gardner, supra;* and in *Phelps* v. *Sill, supra*, the Court said: "If by any mistake in the exercise of his office, a Judge should injure an individual, hard would be his condition if he were to be responsible therefor in damages. The rules and principles which govern in the exercise of judicial power are not in all cases obvious: they are often complex, and appear under different aspects to different persons. No man would accept the office of Judge, if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigations with every man whom his decisions might offend. It is therefore a settled principle that however erroneous his judgment may be, either by positive acts, neglect, or refusal to do certain acts, or however injurious to suitors, a Judge is never liable in any civil action for damages arising from his mistake."

A Judge is not liable in damages for disbarring an attorney. *Manning* v. *French*, 149 Massachusetts, 391; 4 Lawyers' Rep. Annotated, 330.

A mayor, sitting as Judge in the mayor's Court, and ordering the arrest of a person for contempt, is not civilly answerable, although he acted erroneously and maliciously. *Scott* v. *Fishblate*, 117 North Carolina, 265. "But for the government, of which he is a part, there would be no law, nor would there be any Courts to right public wrongs, none to which the citizen (the plaintiff) could appeal to have his private rights declared and enforced. But for the law, and the Courts to declare and enforce the law, the plaintiff would be without remedy for any grievance, and the law of course might prevail. To have this legal protection, it is necessary to have Courts, — Judges, justices of the peace, including the mayors of towns and cities. And it is the experience and wisdom of our country that these Courts cannot exist, or at least cannot discharge their judicial functions, unless they are made free from pecuniary liability while so acting. This does not protect them from impeachment, nor from indictment for misconduct, fraud, or corruption in office, because these are public wrongs committed against the government, whose servants they are."

But if a Judge of a Court of inferior or limited jurisdiction assumes jurisdiction where he has none, or acts without jurisdiction of person or matter, he is liable to an action of damages. *Yates* v. *Lansing, supra; Phelps* v. *Sill, supra; Palmer* v. *Carroll*, 24 New Hampshire, 314; *Craig* v. *Burnett*, 32 Alabama, 728; *Clarke* v. *May*, 2 Gray (Mass.), 410; 61 Am. Dec. 470; *Piper* v. *Pearson*, 2 Gray, 120; 61 Am. Dec. 438; *Waterville* v. *Barton*, 64 Maine, 321; *Hendrick* v. *Whittemore*, 105 Massachusetts, 23; *Morrill* v. *Thurston*, 46 Vermont, 732; *Vaughn* v. *Congdon*, 56 Vermont, 611; 48 Am. Rep. 758; and a long citation of cases in Mr. Mechem's treatise, sect. 630, p. 413. This principle has been so strictly adjudged that an inferior magis-

trate, acting in good faith under a statute afterwards pronounced unconstitutional, has been held in damages. *Kelly* v. *Bemis*, 4 Gray (Mass.), 83; 64 Am. Dec. 50; *Ely* v. *Thompson*, 3 A. K. Marshall (Kentucky), 70. But this doctrine is criticised in *Henke* v. *McCord*, 55 Iowa, 378, and there seems a disposition in recent times to relax this severity, and to excuse the officer, where he has jurisdiction of the class of cases in question, but errs in holding that he has acquired jurisdiction of the person. As, for example, it has been held that a magistrate is not liable for error in holding that a complaint or affidavit is sufficient to confer jurisdiction: *Bocock* v. *Cochran*, 32 Hun (N. Y. Sup. Ct.), 521; *Clark* v. *Spicer*, 6 Kansas, 440; and color of authority has been held to acquit him of liability: *Grove* v. *Van Duyn*, 44 New Jersey Law, 654; 42 Am. Rep. 648, note; *Henke* v. *McCord*, 55 Iowa, 378; *Savacol* v. *Boughton*, 5 Wendell, 170; 21 Am. Dec. 181. Mr. Mechem very wisely says on this point: "Under the strict rule above referred to, as will be seen from the case cited in the note, it is held that the Justice or other inferior magistrate is liable for a jurisdiction wrongfully assumed, or proceeding without jurisdiction, even though he was called upon to decide whether the preliminary facts, complaint, or affidavit were sufficient to confer jurisdiction, and acted in good faith in deciding that they were. The doctrine has however met with much forcible and reasonable dissent in recent times. There are undoubtedly cases in which the rule stated is properly applicable, as where jurisdiction is assumed or exercised without even the color of authority, or beyond limits which are clearly and unambiguously defined, or in the face of express statutory prohibitions. But where, on the other hand, the officer has jurisdiction of the subject-matter, *i. e.* of that class of cases, but the question of jurisdiction in that particular case depends upon some question for judicial determination, as upon the validity or proper construction of a doubtful statute, or upon technical legal sufficiency of the averments of a preliminary complaint or affidavit, or the existence of jurisdictional facts, — questions upon which he is bound to decide, and questions, too, upon which, as is often the case, the learned Judges of the Courts of last resort are unable to agree, — it certainly seems not only impolitic, but a violation of the well-established principle governing the liability of judicial officers, to hold the inferior officer liable, at any rate where he has acted in good faith and with an honest endeavor to do the right." (Pub. Off., sect. 652.)

A justice of the peace is not personally liable for excluding spectators from the Court room on a trial before him, where he had no authority so to act. *Williamson* v. *Lacy*, 86 Maine, 80; 25 Lawyers' Rep. Annotated, 506.

A Judge of an inferior Court, with jurisdiction of the subject, but failing to acquire jurisdiction of the person, is not civilly liable in damages for his official act, unless wilful or corrupt. *McCall* v. *Cohen*, 16 South Carolina, 445; 42 Am. Rep. 641. But otherwise if he entertains jurisdiction of an offence obviously barred by the Statute of Limitations. *Vaughn* v. *Congdon*, 56 Vermont, 111; 48 Am. Rep. 758. Or issues a search-warrant without the observance of the preliminary requisites. *Grumon* v. *Raymond*, 1 Connecticut, 40; 6 Am. Dec. 200; *Flack* v. *Harrington*, Breese (Illinois), 213; 12 Am.

Dec. 170. A justice of the peace is not liable for erroneously refusing to grant an appeal. *Jordan* v. *Hanson*, 49 New Hampshire, 199; 6 Am. Rep. 508. Nor for mere error of judgment in proceedings regularly before him. *Reid* v. *Hood*, 2 Nott & McCord (So. Car.), 168; 10 Am. Dec. 582. Nor for erroneously holding a defendant to trial for an offence of which he had jurisdiction, but where the defendant was entitled to and offered bail. *Austin* v. *Vrooman*, 128 New York, 229; 14 Lawyers' Rep. Annotated, 138. And is protected in the exercise of acts in good faith in excess of his jurisdiction. *Adkins* v. *Brewer*, 3 Cowen (N. Y.), 206; 15 Am. Dec. 264; *Thompson* v. *Jackson*, 93 Iowa, 376; 37 Lawyers' Rep. Annotated, 92. Of the last decision the editor of the Lawyers' Rep. Annotated says: "The above case is in line with the trend of judicial thought in its disposition to break down the distinction as to the liability of inferior and superior Judges for acts done in excess of jurisdiction. But there is grave doubt as to the correctness of the decision. Judges, whether of superior or inferior jurisdiction, are not exempt from liability for their acts if they act entirely without jurisdiction." That is true; but "without" is not equivalent to "in excess of." If a Judge has jurisdiction of the person and of the class of cases in question, he does not act "without" jurisdiction, although he acts in excess of jurisdiction. The inception of jurisdiction is sufficient for superior Judges. But the relaxation as to liability for merely excessive acts of inferior Judges is recently noticeable, as the editor points out. It was formerly held pretty generally that acts of an inferior magistrate in excess of his jurisdiction rendered him civilly liable in damages. *Kelly* v. *Rembert*, Harper (So. Car.), 65; 18 Am. Dec. 643.

In *Donovan* v. *Harrison*, a very recent New Hampshire case (not yet officially reported), it was said, sustaining the principle of *Ashby* v. *White*, Ld. Raym. 938; 1 E. R. C. 521: "The principle that no civil action lies against a judicial officer for neglect or breach of official duty (*Anderson* v. *Gorrie* (1895), 1 Q. B. 668; *Fray* v. *Blackburn*, 3 B. & S. 576) does not apply to a supervisor who acts from wilful, corrupt, and malicious motives (*Waldron* v. *Berry*, 51 New Hampshire, 136), as the reason for exempting Judges from civil actions does not apply to officers who decide questions not between individuals but between individuals and the public, and the duties of a supervisor are ministerial as well as judicial. *Lincoln* v. *Hapgood*, 11 Mass. 350; *Spear* v. *Cummings*, 23 Pick. 224." The case last cited decided the novel principle (by SHAW, Ch. J.) that the teacher of a town school is not liable to any action by a parent for refusing to instruct his children. All the American cases sustain the distinction between judicial and ministerial action, and give a private action for misconduct in the latter.

In *Lander* v. *Seaver*, 32 Vermont, 114; 76 Am. Dec. 156, the claim was made that a school teacher acts in a judicial capacity, and therefore is not liable for error of judgment in inflicting corporeal punishment; but this was disapproved by the Court.

of the vendor of a slave, made several months before the sale, not explanatory of his possession or title, and not made in the presence of the purchaser, are not competent evidence against the purchaser.

[Cited in Murphy v. Butler, 75 Ala. 382.]

[See 20 Cent. Dig. Evidence, § 841.]

Appeal from the Circuit Court of Mobile.
Tried before the Hon. C. W. Rapier.

This action was brought by John Bridges, against John H. Garner, to recover damages for an alleged trespass, which consisted in causing the levy of an attachment against one John L. Bridges, who was a son of the plaintiff, to be made on a slave which the plaintiff claimed under a purchase from said John L. Bridges prior to the levy of the attachment. The defendant pleaded the general issue, "in short by consent, with leave to give any special matter in evidence;" and issue was joined on that plea. The plaintiff's bill of sale for the slave was dated the 11th April, 1859, and contained a warranty of title. The defendant sought to impeach the validity of the purchase by the plaintiff, on the ground of fraud; and, for that purpose, adduced evidence showing that John L. Bridges resided in Mississippi, and was

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largely indebted, if *not insolvent; and that the slave was sent to Mobile for sale, within five or six days after the plaintiff's purchase, and was there seized under the defendant's attachment. It was shown, also, that John L. Bridges was the head of a family; and the plaintiff was allowed to read in evidence, against the defendant's objection, the statute of Mississippi which exempts one slave from sale under legal process against the head of a family; to which ruling of the court the defendant reserved an exception. The defendant took the depositions of one P. M. Gaddis, from whom John L. Bridges bought the slave, and of one Henry Collier, who was present at the sale; each of whom testified to declarations made by said John L. Bridges after his purchase, and while he had possession of the slave, to the effect that he intended to exchange the boy for a negro woman for the use of his family. The court suppressed these declarations, on the plaintiff's objection, on the ground that they were not competent evidence against him; to which ruling, also, the defendant excepted. The deposition of John L. Bridges was taken by the plaintiff, for the purpose of proving his purchase of the slave, and the execution of the bill of sale to him. The defendant objected to the competency of the witness, on the ground of interest, and reserved an exception to the overruling of his objection.

The several rulings of the court on the evidence, to which, as above stated, exceptions were reserved by the defendant, are now assigned as error.

Jno. L. Smith, for appellant.
Jno. T. Taylor, contra.

R. W. WALKER, J.—As the vendor was examined as a witness for his vendee, it is plain that he must have known of the existence of the suit. But it is not shown that he was formally and seasonably informed by the vendee of the pendency of the suit, and required to defend it. To say the least, it admits of question, whether the ven-

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*dor's mere knowledge of the existence of the suit will suffice to make the judgment evidence against him, in favor of his vendee, of the facts on which it is founded.—3 Phill. Ev. (C. & H.'s Notes, 2d Ed.) 816–17, 982–4; 1 Greenl. Ev. §§ 394, 397, (note 2,) 404; 2 Smith's Leading Cases, 684. However that may be, it is certain that, unless rendered otherwise by statute, the vendor in this case is a competent witness for his vendee, because his interest is equally balanced.—Zackowski v. Jones, 20 Ala. 189; Holman v. Arnett, 4 Port. 63; 2 Phill. Ev. (C. & H.'s Notes, 2d ed.) 120–2, 126–9; 3 ib. 1543–4; 1 Greenl. Ev. §§ 420, 398, note (3.) It is equally certain, that the Code has not made him incompetent. Section 2302 was not designed to increase, but to diminish the number of incompetent witnesses. It simply destroys the common-law objection on the ground of interest, except in cases where the verdict and judgment would be evidence for the witness in another suit. The witness, to be incompetent, must still be interested; and he is not interested, in the legal sense of that term, even though the verdict and judgment would be evidence for him in another suit, if he is equally interested on both sides of the cause.—See Rupert v. Elston's Ex'r, 35 Ala. 86.

2. The law of Mississippi was admissible in evidence, for the purpose of repelling the idea of fraud in the sale.

3. The declarations of John L. Bridges were properly excluded. They were made three months before the sale to the plaintiff, when the latter was not present, and were not explanatory of the vendor's possession or title.

Judgment affirmed.

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*LAWSON v. HICKS.

ACTION FOR DEFAMATION.

1. *When action lies for words used in judicial proceeding.*—Words, spoken or written, in the course of a judicial proceeding, by the court, the parties, or the counsel, if relevant, will not support an action for defamation; nor when irrelevant, if the speaker or writer believed that they were relevant, and had reasonable or probable cause so to believe; nor in any case, without proof of actual malice.

[See 32 Cent. Dig. Libel and Slander, § 117.]

2. *Averment of want of probable cause.*—An averment that the alleged defamatory words were irrelevant, and were used "without justifiable cause or excuse," is not equivalent to an

allegation of the want of probable or reasonable cause.

[See 32 Cent. Dig. Libel and Slander, § 198.]

3. *What is available defense under general issue.*—Where the alleged defamatory words were contained in cross-interrogatories propounded to a witness in a former suit between the parties, it is a good defense under the general issue, that the defendant propounded the interrogatories for the purpose of laying a predicate to impeach the witness, and honestly believed that he had the right so to do.

4. *Error without injury in sustaining demurrer to special plea.*—The sustaining of a demurrer to a good special plea, when the defendant had the benefit of the same defense under the general issue, is error without injury.

[Cited in Steadman v. Steadman, 41 Ala. 479; Hays v. Myrick, 47 Ala. 343.]

[See 3 Cent. Dig. Appeal and Error, § 4094.]

5. *Proof of relevancy.*—The mere fact that a deposition, taken on interrogatories and cross-interrogatories, was read in evidence on the trial, does not justify the conclusion, as matter of law, that the cross-interrogatories called for relevant matter.

[See 32 Cent. Dig. Libel and Slander, § 341.]

6. *Proof of publication.*—The fact that the cross-interrogatories to a witness, which contained the alleged defamatory words, signed by the defendant, and in his handwriting, were found in the clerk's office, tends to show a publication by him, and may go to the jury as evidence of publication.

[See 32 Cent. Dig. Libel and Slander, § 295.]

7. *Relevancy of evidence to impeach witness, and disproof declaration of party.* Where a witness testifies to a declaration made by a party in conversation with him, the party cannot be allowed, for the purpose of impeaching the witness, and rebutting his testimony, to prove by another witness, who had known him intimately for a number of years, that he had never made any such declaration to him.

[See 20 Cent. Dig. Evidence, § 437.]

Appeal from the Circuit Court of Macon.
Tried before the Hon. Nat. Cook.

This action was brought by Henry H. Hicks, against John R. Lawson, to recover

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damages for defamatory words *written and published by the defendant, of and concerning the plaintiff, in filing cross-interrogatories to one Lamb, whose deposition was taken by the plaintiff in a former action of trespass instituted by him against the defendant. All the alleged defamatory words were contained in the sixth cross-interrogatory, which was as follows: "If, in answer to the direct interrogatories, you should state that you heard defendant say anything about Hicks, or upon the subject of Hicks, state fully, and whether defendant said anything about the hog that Hicks was found in possession of, belonging to the defendant, and, when he was caught with the hog, pretended that he had bought the hog of Thomas Hazard; but that Hazard, unlike the negro for the sake of the credubility (?) of his young mistress, refused to take it upon himself. If any thing on the subject of Hicks, state whether defendant said any thing about the cotton that Cary said Hicks stole, or about the charge of theft by Cook against Hicks; anything about the money belonging to Dr. Battle, which Hicks tried to hold in his weasel, under the pretense that it was burned in his house by the Indians; but that Dr. Battle, never dreaming that Hicks was so indifferent about money as to leave it purposely in his house to be burned by the Indians, made Hicks fork it over; anything about Hicks being shot at by the Indians about the same time, and the ball passing so close to his mouth that it knocked out two of his front teeth, and that he placed them back with his fingers, and they grew fast again; anything about Hicks having worn some of Allen Ashburn's old clothes, (an old deceased character, having ———, or something worse, having taken the clothes for Ashburn's board, and having subsequently sworn upon the stand, in the town of Tuskegee, in one of the courts of justice that he never charged anything for board, but that Ashburn and Cox had complimented him with a little something. (Wonder if that 'little something' was old clothes?) Anything about Hicks having attempted to assassinate defendant, at defendant's own house, in the night-time, by trying to shoot defendant through the window while he was lying on his bed; anything about the Evans' having said that Hicks,

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about the time of his early settlement in Macon county, murdered one of his negroes, after taking him out of jail, before he got him home; anything about the Indians that Hicks boasted of having charged his horse on, and sinking him in a mud-hole; anything about what some of Hicks' neighbors say about the miraculous disappearance of a little boy that was living with Hicks, by the name of Fair, after some difficulty between the lad and Hicks, and that nothing had ever since been seen or heard of the lad, except that some persons found his hat in Conoeah swamp; anything about Hicks mounting the gate-post and crowing every time he heard one of Parson Moulton's Shanghai chickens crow; anything about Blackman having said, that Hicks told him, on the way from Tuskegee that he would whip defendant, if he had not a wife, before he left town that day. Keep the peace, and declare fully."

The amended complaint was in the following words: "Plaintiff claims of defendant the sum of twenty thousand dollars, as damages for falsely and maliciously publishing of and concerning him, the said plaintiff, in some cross-interrogatories filed by said defendant, in his own hand-writing, in a case pending in the circuit court of Macon county, in which the said plaintiff in this suit was plaintiff, and the said defendant was defendant, to one J. K. Lamb, a witness to whom interrogatories had been filed by

the said plaintiff, among other false matters, the following false, scandalous, and defamatory matter, with the intent to defame the said plaintiff; that it to say, the said defendant, in crossing the said interrogatories to the said witness Lamb, did falsely, maliciously, and with the intent to defame the said plaintiff, write and publish to the said witness, J. K. Lamb, among other matter, the false, scandalous, malicious, and defamatory words following," &c., setting out the italicized portions of the interrogatory above copied. "And the said plaintiff avers, that by asking the said questions of the said witness, and by writing down and publishing the same, the said defendant meant and intended falsely and maliciously to charge the said plaintiff with the several crimes therein named or indicated, and to hold

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plaintiff up *to scandal and disgrace and was so understood; and the said plaintiff further avers, that said matters above alleged are false and defamatory, and were wholly irrelevant and improper, impertinent and immaterial to the issue joined between the parties to said suit, and were improper, false, and malicious, and were inserted, written, and put in said cross-interrogatories without justifiable cause or excuse, and with the intent on the part of said defendant to defame the said plaintiff."

The defendant demurred to the amended complaint, and assigned as grounds of demurrer "all the causes of demurrer which could be specifically assigned thereto, and to each count thereof." The court overruled the demurrer, and held the complaint sufficient; and the defendant then filed the following special pleas:

"1. Actio non, because he says that the said several matters stated and set forth in the several counts in said comp'aint, are parts of one and the same paper writing, and none other, and that the said paper writing consisted of cross-interrogatories propounded to one J. K. Lamb, as a witness, in a cause then pending in the circuit court of Macon county, between the said Henry H. Hicks as plaintiff, and this defendant as defendant; to which said witness the plaintiff had propounded interrogatories in chief, and filed the same in said circuit court, according to the regular practice of said court, to take the deposition of said witness, to be used as evidence in said cause then pending in said court, (of which cause said court had full and ample jurisdiction,) and caused notice of the filing of said interrogatories to be served on this defendant, who appeared in person in said cause, and defended himself; and that this defendant, in the regular course of practice in said court, as a means of testing the memory of said witness, and as a predicate for laying a foundation to impeach him, and for the further purpose of disproving malice on the part of this defendant, by proof of his making no allusion to the various reports and circumstances inquired about in the said several cross-interrogatories, and honestly

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and in good faith *believing that he had the right to file and exhibit said cross-interrogatories, propounded said cross-interrogatories to said witness, and filed the same with the papers of said cause, to accompany the interrogatories in chief, with the commission, to take the deposition of said witness; which said cross-interrogatories did accompany said interrogatories in chief and said commission, and were propounded to the said witness; and the same, with the answers thereto of said witness, as well as the answers to the interrogatories in chief, were returned to said circuit court by the commissioner in said commission named, and the same were read and used as evidence on the trial of said cause, in the regular course of the legal proceedings; and this defendant avers, that he did not otherwise, in any manner whatever, utter or publish the supposed matter stated in said several counts to be libelous; and this he is ready to verify," &c.

"2. Actio non, because he says that the said several matters stated and set forth in plaintiff's said complaint as libelous, are parts of one entire paper writing, being cross-interrogatories propounded to one J. K. Lamb, a witness examined by the said plaintiff in a cause then pending in said circuit court of Macon county, wherein said plaintiff was plaintiff, and this defendant was defendant, and of which cause said court had full and legal jurisdiction; which paper writing was filed in said cause, and comprised a part of the regular proceedings in said cause, and was filed in the regular course of practice and judicial proceedings in said cause, and the same was not otherwise composed or published by this defendant in any manner whatever; and this defendant avers, that the deposition of said witness, taken in answer to said interrogatories and cross-interrogatories, was read and used on the trial of said cause, and formed a part of the regular judicial proceedings in said cause; and this he is ready to verify," &c.

"3. Actio non, because he says, that the said several matters set forth in plaintiff's complaint as libelous, grew out of, and formed a part of a regular judicial proceeding,

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in a *certain cause then pending in said circuit court of Macon county, wherein said Hicks was plaintiff, and this defendant was defendant; and the said matters in said several counts charged as libelous, were not otherwise composed or published; and this the said defendant is ready to verify," &c.

The court sustained a demurrer to each of these pleas, and issue was then joined on the plea of not guilty. On the trial, as appears from the bill of exceptions, the plaintiff read in evidence the record of the suit in

which Lamb's deposition was taken, "and proved, that he filed direct interrogatories to said Lamb, as a witness for him in said cause, and served them on the defendant: and that a short time thereafter, in March, 1856, a set of cross-interrogatories to said witness was found in the office of the circuit clerk, with the name of the defendant signed to them; but there was no other evidence that the defendant placed them there, or that the cross-interrogatories, or the name signed to them, was in the handwriting of the defendant; and the only evidence of the publication of said cross-interrogatories was as above set forth." The defendant objected to the reading of the cross-interrogatories as evidence; but the court overruled his objection, and allowed them to be read to the jury; to which the defendant reserved an exception. In the further progress of the trial, the defendant introduced one Ramsey as a witness, "who testified, that in the latter part of 1854, while he and Hicks were trading in horses, Hicks told him that he and others had shot at Lawson's house at night. To rebut this evidence, and to impeach the credit of said Ramsey, plaintiff offered to prove, by a witness named Thompson, that they had been intimate with each other for fifteen years, and that plaintiff had never told him that he had shot at Lawson's house." The court admitted this evidence, against the defendant's objection, and the defendant excepted.

The rulings of the court on the pleadings and evidence, as above stated, with other matters, are now assigned as error.

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*W. P. Chilton, and S. F. Rice, for appellant.

Gunn & Strange, contra.

A. J. WALKER, C. J.—Words, calumnious in their nature, may be deprived of their actionable quality by the occasion of their utterance or publication. When this is the case, they are called in the law of defamation privileged communications. These communications are either absolutely or conditionally privileged. When they are absolutely privileged, the law affords conclusive and indisputable immunity from suit. When they are conditionally privileged, the law simply withdraws the legal inference of malice, and gives a protection upon the condition, that actual malice, or express malice, or malice in fact, (as the same idea is variously phrased,) is not shown. The distinction between the two classes is, that the protection of the former class is not at all dependant upon their bona fides; while the latter is merely freed from the legal imputation of malice, and becomes actionable only by virtue of the existence of express malice.—Cooke on Defamation, 28, 31, 60; Starkie on Slander, 229, 292. This latter class comprehends all those cases, "where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even that of another, called upon him to perform."—Starkie on Slander, 292; Cooke on Defamation, 31; Toogood v. Spyring, 1 Cr., M. & Ros. 181; Easley v. Moss, 9 Ala. 266; Stallings v. Newman, 26 Ala. 300 [62 Am. Dec. 723].

To the catalogue of absolutely privileged communications belong all words spoken or written by the court, the parties, or the counsel, in the due course of judicial proceedings, which may be relevant. The relevancy, or pertinency, of the calumnious matter is indispensible to its perfect and absolute freedom from all actionable quality; and being relevant, it can give rise to no civil responsibility, no matter how great the malignity or malice from which it may have originated. Some obscure expressions

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may *be found in the English Reports, from which ingenuity might extort an argument, that communications in the course of judicial proceedings were absolutely privileged, so far as a subsequent action might be concerned, without regard to their pertinency. As an example of such expressions, we may instance the following remark of Lord Mansfield: "There can be no scandal, if the allegation is material; and if it is not, the court before whom the indignity is committed, by immaterial scandal, may order satisfaction, and expunge it out of the record, if it be upon record."—Astley v. Young, 2 Burr. 807. See, also, the remarks of Chancellor Walworth upon several cases, in Hastings v. Lusk, 22 Wend. 410 [34 Am. Dec. 330]. We apprehend, that the remark quoted, if defensible at all in its full extent, was intended merely to suggest a large authority in the court before which the scandal was committed, and not to deny that irrelevant words, uttered with actual malice, might become the basis of a subsequent action.

The law designs, in the adoption of the principle above stated, to relieve those participating in the proceedings of courts of justice from the restraint which might result from the apprehension of lawsuits. The accomplishment of that object does not require that the privilege of absolute exemption should be extended further than to relevant communications. A further extension would license malignity to pervert judicial proceedings to the accomplishment of its wicked purposes. The avoidance of such a consequence is scarcely less important than the guarding of the unembarrassed freedom of judicial investigation. Accordingly, we find numerous and conclusive authorities, which, in the clearest manner, put the qualification, that only those communications, occurring in the course of judicial

proceedings, are absolutely privileged, which are relevant.—Brook v. Montague, 2 Cro. Jac. 90; Hodgson v. Scarlet, 1 B. & Al. 232; Flint v. Pike, 4 B. & C. 473, 481; Mower v. Watson, 11 Vt. 536 [34 Am. Dec. 704]; Suydam v. Moffat, 1 Sandf. 459; Warner v. Paine, 2 Sandf. 195; Lea v. White, 4

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Sneed, 111; Ring v. Wheeler, 7 Cow. 725; Gilbert v. People, 1 Denio, 41 [43 Am. Dec. 646]; Garr v. Selden, 4 N. Y. 91; Fairman v. Ives, 5 B. & Ald. 642.

If the communications be irrelevant, they do not necessarily become actionable. They must be malicious, as well as irrelevant. Because they were uttered in the course of judicial proceedings, the law does not draw the inference of malice from their injurious character, but requires from the complaining party proof of actual malice. The line which separates relevancy from irrelevancy to a legal controversy, is often extremely shadowy and indistinct; and the position of the counsel or parties, conducting a cause, would be full of peril, if the imputation of legal malice was incurred whenever, from ignorance of law, or frailty of judgment, criminatory remarks of an irrelevant character might be made. The communications of counsel and parties, made in the due course of a judicial proceeding, are, therefore, not only absolutely privileged when relevant, but can not constitute a cause of action, although irrelevant, unless they are in fact malicious.

Malice is usually inferred by law from the defamatory matter itself; and, when so inferred, it is denominated legal malice, in contra-distinction to malice in fact. Where this legal inference of malice is drawn, the absence of express malice is no justification, although it is to be considered in mitigation.—Cooke on Defamation, 28; Starkie on Slander, 213, 216, 456, m. p. 217, 218; Shelton v. Simmons, 12 Ala. 466; Curtis v. Mussey, 6 Gray, 272. The inference of malice is not drawn as a matter of law, when the words are spoken or written, by parties or counsel, in the due course of judicial proceedings, although they may be irrelevant; and the plaintiff is compelled to base his recovery upon the existence of malice in fact. The question of malice becomes purely an inquiry for the jury; and they may consider the character and quality of the words, in determining the question of malice. The intrinsic effect of the words would argue to the jury the existence of express malice, with a force which would be increased by the obviousness of their ir-

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relevancy, and the grossness of the *calumny, and might be lessened or destroyed by the ignorance of the defendant, or other pertinent circumstances. The entire question of malice is an inquiry of fact to be determined by the jury, upon all the evidence pertinent in the light of their reason; and they must give to the intrinsic force of the words themselves such weight upon the point at issue as it may seem to them to merit, when considered in connection with the other evidence.

For the purpose of supporting and illustrating our views, as to the principles which must govern when irrelevant expressions are used in the course of judicial proceedings, we proceed to note the positions of some legal authorities upon the subject. The words "relevancy or pertinency," in this class of cases, seem to be sometimes used by English authors indiscriminately with the phrase "probable or reasonable cause"; and Cooke, in his most excellent work on Defamation, (page 60,) says: "The pertinency of the matter to the occasion is, it is submitted, that which is meant by probable cause." Starkie, in his work on Slander, (p. 286,) doubts whether a recovery can be had against an advocate, for words spoken by him in a judicial controversy, and concludes that, at all events, such recovery can only be had in a special action, alleging express malice and the want of probable cause.—See, also, Cooke on Def. 62; 1 Amer. Leading Cases, 185; Fairman v. Ives, 5 B. & Al. 642; Hodgson v. Scarlet, 1 Ib. 232. Holroyd, J., announcing his opinion in the case of Flint v. Pike, (4 B. & Cr. 481,) says: "And if a counsel, in the course of a cause, utter observations injurious to individuals, and not relevant to the matter in issue, it seems to me that he would not therefore be responsible to the party injured, in a common action for slander, but that it would be necessary to sue him in a special action on the case; in which it must be alleged in the declaration, and proved at the trial, that the matter was spoken maliciously, and without reasonable cause." The learned judge furthermore assimilates such an action to a suit for malicious prosecution, in which it is necessary to aver want of probable cause and malice.—Long v. Rodgers, 10 Ala. 321; Ewing v. Sanford, 10 Ala. 605.

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*In the case of Mower v. Watson, (11 Vt. 536 [34 Am. Dec. 704]) the court thus sums its conclusions on this subject from an elaborate examination of the authorities. "If any one considers himself aggrieved, in order to sustain an action of slander, he must first show that the words spoken were not pertinent to the matter then in progress, and that they were spoken maliciously and with a view to defame him." There are several decisions in the New York Reports to the same effect. Contenting ourselves with referring to the rest, we extract from Suydam v. Moffat, (1 Sandf. 459) the following statement of the law in reference to irrelevant matter published in a judicial proceeding: "Though the words in the declaration were not published on an occasion which forms an effectu-

al shield to the defendant, whatever his motives may have been in using them; yet, in cases of this kind, the law does not impute malice to a party, from the mere fact of his having published the words. The jury must be satisfied that there was actual malice on the part of the defendant, and that they were published for the mere purpose of defaming the plaintiff."—Warner v. Paine, 2 Sandf. 195; Garr v. Selden, 4 N. Y. 91; Ring v. Wheeler, 7 Cow. 725; Gilbert v. People, 1 Denio, 41 [43 Am. Dec. 646]; Hastings v. Lusk, supra; also, Lea v. White, 4 Sneed, 111.

We think it is also a correct proposition in law, that a party or his representative is not amenable to an action, where, although the matter stated was impertinent, he believed that it was relevant, and had reasonable or probable cause so to believe. Cooke, in his work on Defamation, (p. 62,) to which we have heretofore referred, says: "It seems that the parties, or their representatives, are entitled to state anything, which, although not strictly relevant, may be fairly supposed by them to weigh with the court." In the case of Lea v. White (supra) the matter alleged to be libellous consisted of a return to a writ of habeas corpus; and the court thus states the question, upon which the case turned, and the decision of the question: "Could the defendant have reasonably supposed it neces-

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sary to his defense to return on the writ of habeas corpus the alleged libellous matter? We think that he might have reasonably supposed that the statement would have exerted an influence on the mind of the court; and this being so, he had a right to introduce it, and rely upon it in his defense." In Hastings v. Lusk and Suydam v. Moffat (supra) the position is distinctly taken, that if the defendant honestly supposed the declarations to have been relevant to the proceeding, he is shielded from action. Chief-Justice Tilghman expressed the same idea, by saying that, "if a man should abuse his privilege, and designedly wander from the point in question, and maliciously heap slander upon his adversary, he would not say that he was not responsible in an action at law."—McMillan v. Birch, 1 Bin. 178 [2 Am. Dec. 426]; Ring v. Wheeler, supra.

Lest the generality of the expressions quoted should mislead, we close our observations upon this point by remarking, that the defendant is not absolutely shielded by the single fact of his believing the matter to be relevant; but, to entitle him to be thus shielded, there must be also reasonable or probable cause for so believing. In the absence of reasonable or probable cause, his belief of the relevancy would be a matter of fact to be weighed by the jury in determining the question of malice. The grossness or obviousness of the irrelevancy is a matter to be weighed by the jury in determining the question of reasonable or probable cause, in like manner as in determining the question of malice. We deem it proper further to distinctly announce, as another result of our investigations, that words spoken in the course of judicial proceedings, although irrelevant, are not actionable, unless it affirmatively appears that they were malicious, and without reasonable or probable cause.

(2.) Guided by the principles which we have stated, we decide, that the plaintiff's amended complaint would be good, and that the demurrer to it would be properly overruled, if it contained the averment of a want of reasonable or probable cause. It avers the

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want of "justifiable cause "or excuse." This averment is not equivalent to that which the law requires.

(3-4.) The defendant's first special plea was also a valid defense to the action; but we would not reverse for the error of sustaining a demurrer to it, as the defense it sets forth was available under the general issue.—Hastings v. Lusk, supra; Suydam v. Moffat, supra; 1 Saunders on Pl. & Ev. 801; Starkie on Slander, 455; Cooke on Def. 107.

(5.) The defendant's second special plea was bad. It proceeds upon the erroneous supposition, that the mere reading of cross interrogatories and the answers to them in evidence is proof, in a subsequent cause between the same parties, that they were relevant. Whatever might be the effect of a decision that they were relevant, a legal conclusion of relevancy cannot be drawn from the mere fact of reading in evidence.

The third special plea was bad, as is apparent from a comparison of it with the principles hereinbefore laid down.

(6.) The fact that the cross-interrogatories, signed by the defendant, and in his handwriting, were found in the clerk's office, was evidence so conducing to show a publication, that the court might with propriety admit them in evidence, and leave the question of publication to the jury.

(7.) The defendant having proved by a witness a declaration of the plaintiff, to rebut this evidence, and to impeach the defendant's witness, the plaintiff was permitted to prove, by another witness, that he had been intimate with the plaintiff for fifteen years, and had never been told any such thing by him. In admitting this evidence, the court erred. It has been decided in this State that, "when the situation of a witness is such that, if a fact had existed, he would probably have known it, his want of knowledge is some evidence, though slight, that it did not exist." Blakey's Heirs v. Blakey's Ex'x, 33 Ala. 611. The reason of this principle does not sustain the ruling of the court below, in permitting a witness to state, in general terms, that he had not at any time heard the party utter a declaration proved by another witness.

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The general rule, to which the point *presented is no exception, is, that a party cannot make evidence for himself, either by his conduct or declarations. Chaney v. State, 31 Ala. 342; Bradford v. Edwards, 32 Ala. 628.

As the judgment of the court below must be reversed for reasons already stated, and the principles we have laid down cover the real and important questions of the case, we decline to further swell this opinion.

Reversed and remanded.

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38 Ala. 292.

BARRON, MEADE & CO. v. PAULLING.

BILL IN EQUITY BY ASSIGNEE FOR REDEMPTION.

1. *Rents and profits.*—In taking an account of the mortgage debt, between the mortgagees and an assignee of the equity of redemption, the former are chargeable only with the amount of rents actually received by them, unless they have been guilty of fraud or willful neglect; and where rents are received by one of the mortgagees individually, under a judgment in his favor against the assignee, the amount so received by him must be credited on the mortgage debt, unless it is shown to have been received by him by virtue of a right independent of the mortgage.

[Cited in Dozier v. Mitchell, 65 Ala. 519; Butts v. Broughton, 72 Ala. 299; Gresham v. Ware, 79 Ala. 199; American Freehold Land Mortgage Co. v. Pollard, 132 Ala. 162, 32 South. 630.]

[See 35 Cent. Dig. Mortgages, §§ 1776, 1779.]

2. *Conclusiveness of judgment.*—A judgment in an action of trespass to try titles, which recites that the defendant has voluntarily abandoned the possession of the land, with all claim of title thereto; that the plaintiff has taken possession; and that thereupon came a jury, who assessed the plaintiff's damages; and by which it is considered by the court, that the plaintiff recover of the defendant the damages so assessed,—does not preclude the defendant, in a subsequent chancery suit to redeem the land, instituted by him as an assignee of the equity of redemption, from insisting that the recovery was based on a mortgage to a partnership, of which the plaintiff was a member, and that the mortgagees are therefore chargeable with the amount received by the plaintiff under the judgment.

[See 30 Cent. Dig. Judgment, § 1823.]

3. *Costs at law, and attorney's fees.*—The mortgagees are not chargeable with the amount of costs incurred and paid by the assignee in an unsuccessful attempt to defend the possession at law, or to resist the collection of rents and profits; nor can they charge the assignee with their own attorney's fees.

[Cited in Adams v. Sayre, 76 Ala. 520.]

[See 35 Cent. Dig. Mortgages, § 1776.]

4. *Statutory penalties accountable for as*

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rents and profits.—The mortgagee *having recovered a judgment against the assignee of the equity of redemption, in a statutory action of debt, for cutting timber on the mortgaged lands, the assignee is entitled to have the amount paid by him under the judgment credited on the mortgage debt, and to have the judgment perpetually enjoined on discharging the mortgage debt.

[See 35 Cent. Dig. Mortgages, § 503.]

5. *Conclusiveness of judgment by consent.*—Where the plaintiff consents of record, on motion for a new trial by the defendant, that the verdict may be reduced to a specified sum, for which a judgment is thereupon rendered in his favor; and the judgment further recites, "that this agreement between the parties is made and entered into as a compromise and final settlement of the matters and things in controversy in this suit."—the defendant is not thereby precluded, in a subsequent chancery suit, instituted by him as an assignee of the equity of redemption, against the plaintiff as mortgagee, from insisting that the amount paid by him under the judgment shall be credited on the mortgage debt.

[See 30 Cent. Dig. Judgment, § 1163.]

Appeal from the Chancery Court of Marengo.

Heard before the Hon. James B. Clark.

The material facts of this case, stated in the order of their occurrence, are these: In August, 1846, one James McNaughten executed a mortgage, by which he conveyed a tract of land to Barron, Meade & Co., to secure the payment of a promissory note therein described, and which contained a power of sale in the event of the non-payment of the note on or before the 1st January, 1847. The land was sold by the sheriff, on the first Monday in January, 1849, under a venditioni exponas issued from the circuit court, which was founded on the levy of sundry executions on judgments rendered by a justice of the peace; at which sale, Lucien Meade, one of the partners composing the firm of Barron, Meade & Co., became the purchaser, and received the sheriff's deed. In May, 1851, Meade instituted an action of trespass to try titles, against Wm. K. Paulling, to recover the possession of the land, with damages for its detention; and in May, 1853, recovered a judgment, of which the following is a copy:

"This day came the parties, by their attorneys; and it appearing to the satisfaction of the court, that the defendant has voluntarily abandoned the possession of, and all claim of title to the premises sued for, and

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that the said *plaintiff has taken possession thereof; thereupon came a jury," &c., "who, being duly elected," &c., "well and truly to assess the plaintiff's damages for the detention of the premises and the trespass thereon, upon their oaths do say, that they assess plaintiff's damages at the sum of two hundred dollars. It is therefore considered by the court, that the plaintiff recover of the defendant the said sum of two hundred dollars, his damages assessed by the jury as aforesaid, and also his costs of suit."

In the spring of 1851, (the precise time is not shown by the record,) Meade instituted an action at law against Paulling, to recover the statutory penalty for cutting down trees on the mortgaged land; and the declaration also contained a count for money had and

482, 122 So. 843; Evans v. Wilhite, 167 Ala. 587, 52 So. 845; Hurt v. Knox, 220 Ala. 448, 126 So. 110.

[5] That statute merely furnishes a cumulative remedy, and the failure to invoke it is not fatal to a suit in equity. Choctaw Bank v. Dearman, 223 Ala. 344, 134 So. 648; Ala. Chem. Co. v. Hall, 212 Ala. 8, 101 So. 456, and authorities last above cited.

[6] But, when defendant has knowledge of the judgment within thirty days after its rendition, and within the term of the court when it was rendered, though no service was had on him, and he fails to exercise the right to secure the plenary power of the court when he could have done so by reasonable effort, it is negligence which will defeat a proceeding in equity for the purpose of vacating such judgment for lack of service. Barton v. Barton Mfg. Co., supra; Roulding Sons Co. v. Stevens Electric Co., 32 Ala. 39, 9 So. 362; Hendley v. Chalifert, 189 Ala. 258, 65 So. 993; Nat. F. Co. v. Hinson, 103 Ala. 582, 15 So. 854.

The bill alleges that defendant (complainant in chancery) made his motion in due time, but did not have it considered or continued by order made within the time in which the court must act. It therefore shows a want of diligence by complainant, fatal to relief. The demurrer presents the question, and the decree overruling it must be reversed.

Reversed and remanded.

ANDERSON, C. J., and GARDNER and BOULDIN, JJ., concur.

On Rehearing.

PER CURIAM.

Application for rehearing overruled.

All the Justices concur, except KNIGHT, J., not sitting.

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235 Ala 179

ADAMS v. ALABAMA LIME & STONE CORPORATION et al.

6 Div. 962.

Supreme Court of Alabama.
March 31, 1938.

Rehearing Denied June 9, 1938.

1. Libel and slander ⇐38(1).

Defamatory words used by parties, counsel, or witnesses in judicial proceeding, to be absolutely privileged, must be relevant to inquiry.

2. Libel and slander ⇐123(8).

Relevancy of defamatory words in judicial proceeding is for court to decide; all doubts being resolved in favor of relevancy.

3. Libel and slander ⇐60.

Libel complaint, based upon allegedly libelous averments in bill, but not showing purpose or prayer of bill, *held* demurrable since not enabling court to positively determine relevancy of averments.

4. Libel and slander ⇐60.

General expression in libel complaint, by way of mere conclusion, that allegedly libelous averments in bill were irrelevant, where reasonable inference was that averments set out were relevant, *held* insufficient against demurrer directly taking the point.

5. Libel and slander ⇐38(3).

In libel action, based on allegedly libelous averments in complaint, allegations that defendants knew they had no action, and publication was for malicious purpose of injuring plaintiff *held* not to show actionable libel because not impairing defendants' absolute privilege.

Averments to effect that defendants knew they had no cause of action, and that the publication was with such knowledge and for malicious purpose of injuring plaintiff were construable merely as charging an evil intent and a bad motive in bringing an unwarranted action, but averments did not in any way impair the absolute privilege attaching to all relevant words, spoken or written by the court, the parties, or the counsel in due course of judicial proceedings.

6. Libel and slander ⇐38.

Averment that allegedly libelous matter contained in complaint was published by defendants to persons other than officers and officials of court *held* not to show abuse of defendants' absolute privilege.

Averment that the libelous matter was published by defendants to persons other than the officers and officials of the court wherein bill of complaint was filed did not show an abuse of defendants' absolute privilege, since the only publication for which the defendants were responsible, was a result only of the natural consequence of filing the proceedings in a proper court, where they were open to public inspection.

Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge.

Action for libel by John H. Adams against the Alabama Lime & Stone Corporation, E. T. Schuler, R. N. Molbourough, and Horace

Wilkinson. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

See, also, 222 Ala. 538, 133 So. 580.

W. A. Denson, of Birmingham, for appellant.

Horace C. Wilkinson, pro se., of Birmingham, for appellees.

GARDNER, J.

The action is libel. Though only partially exhibited in the complaint, it appears that the language of which complaint is here made consisted of averments in a bill of complaint filed in equity by defendant to this cause against the present plaintiff, and, while the purpose of the bill is not stated in the present complaint, and the prayer for relief is omitted as a part of the exhibit, yet it is reasonably inferable from the averments that are exhibited that they are appropriate and relevant in any equity proceeding, wherein an equitable set-off is sought to be established.

Based upon the broad principle of public policy, the English courts, deeming the absolute freedom of litigants, counsel, witnesses, and all others required to speak or write in the cause of a judicial proceeding as of paramount importance, do not admit that any liability can exist to a civil action to words, whether spoken or written, in the cause and as a part of such a proceeding. It is a rule of absolute privilege without regard to the pertinency or relevancy of the language used.

[1] But in the American courts, by the decided weight of authority, it is held that, in order that defamatory words used by the parties, counsel, or witnesses in a judicial proceeding be absolutely privileged, they must be relevant to the subject of inquiry. 36 Corpus Juris, 1251; 17 R. C. L. 335; note, 123 Am. St. Rep. 632, 633; Russewitz v. Wis. Teachers' Ass'n, 188 Wis. 121, 205 N. W. 808, 42 A. L. R. 873, and note; Hardtner v. Salloum, 148 Miss. 346, 114 So. 621; Myers v. Hodges, 53 Fla. 197, 44 So. 357; Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 25 N. E. 1048, 1049, 11 L. R. A. 753. The Court of Appeals of New York in the case last cited, has well and concisely stated the American rule and the underlying principle, in the following language:

"There is another class of privileged communications where the privilege is absolute. They are defined in Hastings v. Lusk, 22 Wend. [N. Y.] 410 [34 Am. Dec. 330]. In this class are included slanderous statements made by parties, counsel, or witnesses in the course of judicial proceedings, and are libelous charges in pleadings, affidavits, or other papers used in the course of the prosecution or defense of an action. In questions falling within this absolute privilege the question of malice has no place. However malicious the intent, or however false the charge may have been, the law, from considerations of public policy, and to secure the unembarrassed and efficient administration of justice, denies to the defamed party any remedy through an action for libel or slander. This privilege, however, is not a license which protects every slanderous publication or statement made in the course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation, or, at least, it does not protect slanderous imputations plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant."

This court, in its early history, adopted the rule as above announced, and in harmony with the weight of authority in America. Lawson v. Hicks, 38 Ala. 279, 81 Am. Dec. 49. Speaking to this question, the court in this case said:

"Words, calumnious in their nature, may be deprived of their actionable quality by the occasion of their utterance or publication. When this is the case, they are called in the law of defamation privileged communications. These communications are either absolutely or conditionally privileged. When they are absolutely privileged, the law affords conclusive and indisputable immunity from suit.

* * *

"To the catalogue of absolutely privileged communications belong all words spoken or written by the court, the parties, or the counsel, in the due course of judicial proceedings, which may be relevant. The relevancy, or pertinency, of the calumnious matter is indispensible to its perfect and absolute freedom from all actionable quality; and being relevant, it can give rise to no civil responsibility, no matter how great the malignity or malice from which it may have originated."

[2] The opinion further proceeds to hold that, although the language may be irrelevant, there would still be no liability if the party believed it was relevant, and had reasonable or probable cause to so believe; or, to state it differently, the words used would not be actionable, though irrelevant, unless it affirmatively appears that they were malicious and without reasonable or probable cause. But, with that feature of the discussion, we are not here concerned. Upon the question of relevancy, that is a matter for the determination of the court, and the adjudicated cases have established a liberal view in the interpretation of the language used, and all doubts are resolved in favor of its relevancy or pertinency. 36 Corpus Juris, 1252; 17 R. C. L. 336.

Illustrative of the liberal interpretation of pleading involving the question of relevancy is the decision of the Minnesota court in Burgess v. Turie & Co., 155 Minn. 479, 193

N. W. 945 (noted in Bussewitz v. Wis. Teachers' Ass'n, supra), where the following rule was stated: "Was the allegation so palpably wanting in relation to the subject matter of the controversy that no reasonable man could doubt its irrelevancy and impropriety?"

And in 17 R. C. L. 336, is the following: "In order that matter alleged in a pleading may be privileged, it need not be in every case material to the issue presented in the pleadings. It must, however, be legitimately related thereto, or so pertinent to the subject of the controversy that it may become the subject of inquiry in the course of the trial." When the matter pleaded is relevant, then, as said by the Idaho court in Carpenter v. Grimes Pass Placer Mining Co., 19 Idaho, 384, 114 P. 42, 46: "The question of intent cannot be inquired into or become an issue where the party had a lawful right to plead the matter either as a part of his cause of action or defense."

Upon the questions herein discussed, the authorities are not in entire harmony (17 R. C. L. 334), and the case of Randall v. Hamilton, 45 La. Ann. 1184, 14 So. 75, 22 L. R. A. 649 (cited by appellant), is from the Louisiana court, which is understood to hold a contrary view. Note, 123 Am. St. Rep. 652. We have stated, however, the majority view, with which this court is in accord.

[3, 4] The complaint contains quotations from some three or four paragraphs of the bill in equity with no averment of the purpose of the bill, nor reference to the prayer thereof. With this limited view the court is not enabled to determine with positiveness the question of relevancy. But this was a matter resting upon the plaintiff, and, as previously noted, sufficient averments appear to make it reasonably inferable that this language used was relevant and pertinent to a bill seeking the establishment of an equitable set-off. Clearly, therefore, in such a state of the pleading, a mere general expression in the complaint of irrelevancy, by way of a mere conclusion, will not suffice as against the demurrer directly taking the point.

[5] The averments of count 6, to which, on application for rehearing, particular attention is directed, to the effect that defendants knew they had no cause of action and the publication was with such knowledge and for the malicious purpose of injuring the plaintiff, are to be construed merely as charging an evil intent and a bad motive in bringing an unwarranted action, and which, if admitted to inquiry, would render nugatory the absolute privilege granted to a judicial proceeding (36 Corpus Juris, 1253, 1254, and note; Runge v. Franklin, 72 Tex. 585, 10 S. W. 721, 3 L. R. A. 417, 13 Am. St. Rep. 833) and destroy the distinction between a qualified (36 Corpus Juris, 1241) and an absolute privilege (36 Corpus Juris, 1250). The case of Runge v. Franklin, supra, is directly in point.

The cases of White v. Nichols, 3 How. 266, 11 L. Ed. 591, and Dupont Eng. Co. v. N. R. Pub. Co. (D. C.) 13 F.(2d) 186, 198, cited by appellant, did not involve the question of absolute privilege but of a qualified privilege only, though containing expressions unnecessary to a decision, tending in support of appellant's insistence. And while the White Case, supra, was cited with apparent approval in Nalle v. Oyster, 230 U. S. 165, 33 S. Ct. 1043, 57 L. Ed. 1439, yet the holding of the court as to the sufficiency of the pleas to the second count appears to sustain the view of absolute privilege as to judicial proceedings. But a discussion of these and other authorities is unnecessary in view of the holding of this court in Lawson v. Hicks, supra, more than half a century ago, adhering to the principle of absolute privilege, with the limitation of relevancy above noted, which ruling has remained to the present time undisturbed either by judicial decision or legislative enactment.

If, therefore, the rule of absolute privilege is to be adhered to, the above-noted averments do not suffice to state an actionable libel.

[6] As to the averments of publication count 6 charges that the libelous matter was "published by each and every one of said defendants to persons other than the officers and officials of said court wherein said bill of complaint was filed." The authorities recognize there may be an abuse of such privilege and that an action may lie if publication is had on a nonprivileged occasion. 36 Corpus Juris, 1231. But the foregoing averments do not suffice to show an abuse of the privilege, as for aught appearing the only publication for which the defendants were responsible was a result only of the natural consequence of filing the proceedings in a proper court, open of course to public inspection.

In our consideration of the case we have conceded, without deciding, the libelous character of the language used, as it is unnecessary under the conclusion reached to determine that question.

It results that in our opinion the rulings of the court below were free from error, and the judgment will accordingly be here affirmed.

Affirmed.

ANDERSON, C. J., and BOULDIN and FOSTER, JJ., concur.

SIMPSON, J. The appellant was convicted of the crime of murder in the second degree.

[1] There was no error in the action of the court in sustaining the motion to strike the first plea in abatement. Said plea is unintelligible in that it states that the judge "did not draw the grand jury * * * before the last term of the present term of the circuit court adjourned."

In addition, section 15 of the jury act 1909 (page 310) expressly provides for drawing juries at times subsequent to the adjournment of the previous term, and section 29 (page 317) declares expressly that the provisions in regard to drawing, etc., of jurors are merely directory and that "no objection can be taken to any venire of jurors except for fraud in drawing or summoning the jurors."

The plea does not raise the point that the jury was not drawn "in the presence of the officers designated by law." Code, § 7572.

[2] There was no error in overruling the motion to quash the indictment. The fact that the name of M. E. Reeves appeared in the indorsement *under* the words, "Foreman of grand jury," in place of *over* said words, did not affect the validity of his indorsement. The record shows that said M. E. Reeves had been by the court appointed foreman of the grand jury.

[3] The fact that two persons summoned as regular jurors were excused from serving on the regular panel did not render the placing of their names upon the special venire illegal.

[4] There was no error in excluding the testimony as to the deceased's shooting craps in the house of witness 30 minutes before the shooting occurred, the testimony not being relevant and not part of the res gestæ.

[5] The defendant having been placed upon the stand, and having testified as a witness, was subject to impeachment by proof of bad character, just as any other witness would be (Mitchell v. State, 148 Ala. 618, 42 South. 1014), consequently there was no error in allowing the witness to testify that defendant's general character was bad.

[6] There was no error in overruling the motion to exclude the statement by the witness Tidwell that Bud Parris and John Parris were drinking shortly after the killing, as they had both detailed circumstances in regard to the killing, and the facts mentioned were proper to be considered by the jury in determining whether said witnesses were in a condition to remember accurately what transpired.

[7] Charges A, B, and C, given on request by the state, were properly given. Pitts v. State, 140 Ala. 70, 77, 83, 37 South. 101; Jones v. State, 79 Ala. 23, 25; Mose v. State, 36 Ala. 211, 231; Owens v. State, 52 Ala. 400, 405.

[8] Charge 27, requested by the defendant, was properly refused as it ignores the questions as to whether the defendant was without fault in bringing on the difficulty, also as to whether the defendant's mind was impressed that he was in imminent danger, also as to whether he could retreat without increasing his danger.

[9] Charge 30 requested by the defendant, was properly refused. It singled out a part of the evidence, and was otherwise faulty.

[10] Charge 31 is elliptical and argumentative, and was properly refused.

[11] Charge 33 is unintelligible and elliptical, besides being argumentative, and was properly refused.

[12] Charge 36 ignored the duty to retreat, and also the question as to whether the defendant was, in fact, impressed that he was in imminent danger, and was properly refused.

[13] Charge 38 is argumentative, and was properly refused.

The judgment of the court is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

(175 Ala. ...)

BROOM v. DOUGLASS et al.

(Supreme Court of Alabama. Feb. 15, 1912.)

1. JUDGES (§ 36*)—LIABILITIES FOR OFFICIAL ACTS.

The judge of a court of general jurisdiction is not liable for any judicial act in excess of his jurisdiction which involves an affirmative decision of the fact of jurisdiction, though the decision is erroneous, and though he acts maliciously, provided there is not a clear absence of all jurisdiction.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 165-173, 178, 179; Dec. Dig. § 36.*]

2. JUDGES (§ 36*)—CIVIL LIABILITY.

A judge of a court of limited jurisdiction is civilly liable when he acts without a general jurisdiction of the subject-matter, though his act involves a decision, made in good faith, that he has such jurisdiction.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 165-173, 178, 179; Dec. Dig. § 36.*]

3. JUDGES (§ 36*)—CIVIL LIABILITY.

A judge of an inferior court who acts fully within his jurisdiction of the subject-matter, and who has acquired jurisdiction of the person in the particular case, is not civilly liable, though he acts maliciously and corruptly.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 165-173, 178, 179; Dec. Dig. § 36.*]

4. JUDGES (§ 36*)—CIVIL LIABILITY.

A judge of an inferior court who acts judicially as to a subject-matter of which he has a general jurisdiction, but in the particular case has not acquired jurisdiction of the person affected, is not civilly liable where the act involves an affirmative decision that he has jurisdiction of the person and authority to proceed, provided a colorable case has been presented to him calling for the exercise of judgment, and he has determined, in good faith,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that the case calls for the exercise of general jurisdiction.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 165–173, 178, 179; Dec. Dig. § 36.*]

5. COURTS (§ 2*)—JURISDICTION—"EXCESS OF JURISDICTION."

"Excess of jurisdiction," as distinguished from absence of jurisdiction, means that an act, though within the general power of the judge, is not authorized and is void, with respect to the particular case, because the conditions which alone authorize the exercise of his general power in the case are wanting.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1; Dec. Dig. § 2.*]

6. COURTS (§ 2*)—JURISDICTION—"COLORABLE CAUSE"—"COLORABLE INVOCATION OF JURISDICTION."

A "colorable cause" or a "colorable invocation of jurisdiction," as applied to the jurisdiction of an inferior court, means that some person apparently qualified to do so has appeared before the judge and made complaint under oath, stating some fact which may, with other facts unstated, constitute a criminal offense, or stating some fact which bears some general similitude to a fact designated by law as an offense, calling on the judge to pass on the sufficiency of the affidavit to elicit the process issued.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1; Dec. Dig. § 2.*]

7. JUDGES (§ 36*)—CIVIL LIABILITY—QUESTION FOR THE COURT.

Whether a judge of an inferior court had colorable cause for acting, so as to be relieved from civil liability, is a question of law.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 165–173, 178, 179; Dec. Dig. § 36.*]

8. JUDGES (§ 36*)—CIVIL LIABILITY—QUESTION FOR JURY.

The question of good faith, malice, or corruption on the part of a judge of an inferior court having only colorable cause for acting is ordinarily for the jury in determining the question of his civil liability.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 165–173, 178, 179; Dec. Dig. § 36.*]

9. FALSE IMPRISONMENT (§ 7*) — CIVIL LIABILITY—JURISDICTION.

A justice of the peace who, in good faith, issues a warrant for the arrest of accused on an affidavit of a third person, averring that accused threatened to trespass on and occupy land described, of which affiant has been in possession under claim of ownership, and who, in good faith, commits accused, after hearing, to jail, unless he gives bond to keep the peace, acts judicially, and is not civilly liable, though the affidavit is wholly insufficient to charge any criminal offense.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5–61, 79; Dec. Dig. § 7.*]

10. FALSE IMPRISONMENT (§ 22*)—CIVIL LIABILITY—BURDEN OF PROOF.

One suing a justice of the peace for damages for issuing a warrant on an affidavit wholly insufficient to charge any criminal offense has the burden of proving want of good faith.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 98, 99; Dec. Dig. § 22.*]

Mayfield, J., dissenting.

Appeal from Circuit Court, Morgan County; E. W. Speake, Judge.

Action by Henry Broom against W. H. Douglass and another. From a judgment for defendants, plaintiff appeals. Affirmed, and application for rehearing overruled.

Kyle & Hutson, for appellant. Wert & Lynne and Callahan & Harris, for appellees.

SOMERVILLE, J. Appellant sued appellee in trespass for a false imprisonment, done under color of appellee's official authority as a justice of the peace.

Defendant's plea No. 2 set up an alleged justification, and showed that one Johnson appeared before him (defendant) while he was acting as a justice of the peace, and made affidavit "that Henry Broom [the plaintiff here] has threatened to trespass upon and occupy a certain parcel of land situated in this county, and known as the Dick Mitchell or Dick Bouldin place, which affiant has the last two or three years been in possession under claim of ownership;" that on this affidavit the justice issued a warrant of arrest for said Broom; that Broom was arrested on this warrant and brought before the justice; that on the hearing of the cause the justice adjudged that said Broom should be committed to the county jail for 12 months, unless he gave a bond to keep the peace; and that in doing these things he (defendant) was acting judicially. Plaintiff demurred to this plea on the grounds substantially (1) that the affidavit conferred on the justice no jurisdiction to issue the warrant; and (2) that the affidavit did not charge that any criminal offense had been committed or threatened. The trial court overruled the demurrer, and this action is assigned as error.

Conceding, as we must, that the affidavit shown did not charge that Broom had threatened, or was about to commit, "an offense on the person or property of another," the threat shown being, if executed, only a civil wrong, and that the warrant of arrest was for this reason void, the question to be determined is: Is a judge of inferior and limited jurisdiction liable in trespass when, acting within his general jurisdiction of the subject-matter, but without conformity to the preliminary requirements which alone give him jurisdiction of the person and authorize him to proceed to exercise his general jurisdiction in the particular case, he issues process actually void, under which such person is unlawfully taken and restrained of his liberty? The answer, we think, will depend upon a consideration to be stated hereafter.

The general question above mooted has been the subject of much discussion by courts and text-writers, and the books exhibit great diversity of opinion as to its proper solution. It involves and draws into sharp

Jaggard on Torts, 122. And there can be no doubt, we think, but that the distinction is sufficiently emphasized and public policy fully subserved by the requirement of good faith, without malice or corruption, with at least a colorable invocation of the judicial function in the particular case.

Our views upon this subject are so fully and satisfactorily stated by Beasley, C. J., in Grove v. Van Duyn, 44 N. J. Law, 654, 43 Am. Rep. 412, that we adopt his language as a part of this opinion. He said, in part:

"It is said everywhere in the text-books and decisions that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his action within the bounds of his jurisdiction, and jurisdiction has been defined to be 'the authority of law to act officially in the particular matter at hand.' Cooley on Torts, 417. But these maxims, although true in a general way, are not sufficiently broad to embrace the principle of immunity that appertains to a court or judge exercising a general authority. Their defect is that they leave out of the account all those cases in which the officer in the discharge of his public duty is bound to decide whether or not the particular case, under the circumstances as presented to him, is within his jurisdiction, and he falls into error in arriving at his conclusion. In such instance, the judge, in point of fact and law, has no jurisdiction, according to the definition just given, over 'the particular matter in hand,' and yet, in my opinion, very plainly he is not responsible for the results that wait upon his mistake. And it is upon this precise point that we find confusion in the decisions. There are certainly cases which hold that if a magistrate, in the regular discharge of his functions, causes an arrest to be made under his warrant on a complaint which does not contain the charge of a crime cognizable by him he is answerable in an action for the injury that has ensued. But I think these cases are deflections from the correct rule; they make no allowance for matters of doubt and difficulty. If the facts presented for the decision of the justice are of uncertain signification with respect to their legal effect, and he decides one way, and exercises a cognizance over the case, if the superior court, in which the question arises in a suit against the justice differs with him on this close legal question, is he open, by reason of his error, to an attack by action? If the officer's exemption from liability is to depend on the question whether he had jurisdiction over the particular case, it is clear that such officer is often liable under such conditions, because the higher court, in deciding a doubtful point of law, may have declared that some element was wanting in the complaint which was essential to bring this case within the judicial competency of the magistrate. But there are many decisions which, perhaps, without defining any very clear rule on the subject, have maintained that the judicial officer was not liable under such conditions. The very copious brief of the counsel of the defendants abounds in such illustrations. * * *

"These decisions, in my estimation, stand upon a proper footing, and many others of the same kind might be referred to; but such course is not called for, as it must be admitted that there is much contrariety of results in this field, and the references above given are amply sufficient as illustrations for my present purposes. The assertion, I think, may be safely made that the great weight of judicial opinion is in opposition to the theory that if a judge, as a matter of law and fact, has not jurisdiction over the particular case that thereby, in all cases, he incurs the liability to be sued by any one injuriously affected by his assumption of cognizance over it. The doctrine that an officer having general powers of judicature must, at his peril, pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance, is as unreasonable as it is impolitic. Such a regulation would be applicable alike to all courts and to all judicial officers acting under a general authority, and it would thus involve in its liabilities all tribunals, except those of last resort. It would also subject to suit persons participating in the execution of orders and judgments rendered in the absence of a real ground of jurisdiction. By force of such a rule, if the Supreme Court of this state, upon a writ being served in a certain manner, should declare that it acquired jurisdiction over the defendant, and judgment should be entered by default against him, and if, upon error brought, this court should reverse such judgment on the ground that the service of the writ in question did not give the inferior court jurisdiction in the case, no reason can be assigned why the justices of the Supreme Court should not be liable to suit for any injurious consequences to the defendant proceeding from their judgment. As I have said in my judgment, the jurisdictional test of the measure of judicial responsibility must be rejected.

"Nevertheless it must be conceded that it is also plain that in many cases a transgression of the boundaries of his jurisdiction by a judge will impose upon him a liability to an action in favor of the person who has been injured by such excess. If a magistrate should, of his own motion, without oath or complaint being made to him, on mere hearsay, issue a warrant and cause an arrest for an alleged larceny, it cannot be doubted that the person so illegally imprisoned could seek redress by a suit against such officer. It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offenses; for the conclusive reply would be that this particular case was

not, by any form of proceeding, put under his authority.

"From these legal conditions of the subject, my inference is that the true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers is that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put at *least colorably* under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically willful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression.

"The application of the above-stated rule to this case must obviously result in a judgment affirming the decision of the circuit judge. There was a complaint, under oath, before this justice, presenting for his consideration a set of facts to which it became his duty to apply the law. The essential things there stated were that the plaintiff, in combination with two other persons, entered upon certain lands, and 'with force and arms did unlawfully carry away about four hundred bundles of cornstalks, of the value,' etc., and were engaged in carrying other cornstalks from said lands. By a statute of this state (Rev. p. 244, § 99), it is declared to be an indictable offense 'if any person shall willfully, unlawfully and maliciously' set fire to or burn, *carry off*, or destroy any barrack, cock, crib, rick or stack of hay, corn, wheat, rye, barley, oats, or grain of any kind, or any trees, herbage, growing grass, hay or other vegetables, etc. Now, although the misconduct described in the complaint is not the misconduct described in this act, nevertheless the question of their identity was *colorably* before the magistrate, and it was his duty to decide it; and under the rule above formulated he is not answerable to the person injured for his erroneous application of the law to the case that was before him."

[5] By "excess of jurisdiction," as distinguished from the entire absence of jurisdiction, we understand and mean that the act, though within the general power of the judge, is not authorized, and therefore void, with respect to the particular case, because the conditions which alone authorize the exercise of his general power in that particular case are wanting; and hence the judicial power is not in fact lawfully invoked.

[6] By a "colorable cause," or a "colorable invocation of jurisdiction," as applied to cases like the instant one, we understand and mean that some person, apparently qualified to do so, has appeared before the justice and made complaint under oath and in writing, stating at least some fact or facts which enter into and may, under some condition, or in co-operation with some other unstated fact or facts, constitute a criminal offense, or stating some fact or facts which bear some general similitude to a fact or facts designated by law as constituting an offense; in either case, calling upon the justice to pass upon their sufficiency to elicit the process issued.

[7, 8] A less general definition is not practicable, even were it expedient, and what we have said will serve to illustrate the general scope of this requirement. Whether it is met is, of course, a question of law for the court; while the issue of good faith, malice, or corruption is ordinarily for the jury to determine. We have examined all the decisions of this court upon the general question under consideration, and, with a single exception, find none in conflict with the rule we now adopt.

In Duckworth v. Johnston, 7 Ala. 581, the warrant was held void, because the affidavit charged no offense. The justice was not sued, and the only conclusion was that the *officer* who executed it, and the *party* who caused it to be issued, were liable in trespass. To the same effect, is Crumpton v. Newman, 12 Ala. 199, 46 Am. Dec. 251.

In Sasnatt v. Weathers, 21 Ala. 674, the suit was in trespass against the justice and the constable. The justice had rendered a judgment for costs against the plaintiff in preliminary proceedings for a felony, which he had absolutely no authority to do in any phase of the case. On this void judgment, he issued an execution—a purely *ministerial* act. The writ was held void, and the justice was held liable for issuing it and the constable for executing it. The question of liability for *judicial* action was not presented.

In Withers v. Covles, 36 Ala. 329, the mayor of Mobile was held liable for trespass to a slave whom he had imprisoned under an ordinance "for the punishment of vagrants and disorderly persons", this court holding that the ordinance was applicable only to *free* persons, and not to *slaves*, although the word "persons" sometimes included slaves. Inasmuch as the magistrate was called upon to construe the ordinance as to its proper application to persons, and his decision of the question was a judicial act with a *col-*

orable foundation, we think the conclusion that he was liable for his erroneous construction of the language of the ordinance was not justified on principle, and is not supported by any authority. We are therefore unwilling to follow this decision.

In Craig v. Burnett, 32 Ala. 728, the members of the town council of Calaba were ex officio justices of the peace. Sitting as a *town council*, and *not as magistrates*, they convicted the plaintiff of an offense within their jurisdiction as magistrates, and ordered him to be imprisoned in default of payment of the fine. This judgment was, of course, fundamentally void, as was also the town clerk's warrant of arrest. Under this pseudo-judgment the mayor committed plaintiff to the custody of the town marshal, and he sued mayor, clerk, and marshal for the false imprisonment. There was here no judicial action, and liability attached as a matter of course. Comment is unnecessary; but the language of the opinion by Walker, J., is worthy of notice: "If it appeared that the fact, upon which the jurisdiction of the council over the matter of the imprisonment depended was *judicially* considered and adjudged by the council, then the defendants would not be liable for their mere error of judgment. Every judicial tribunal, invested with authority to be exercised in a certain contingency, has authority to inquire and ascertain whether the contingency has occurred. *Where jurisdiction depends upon the existence of a preliminary fact, there is authority to decide whether that fact exists.* A court is entitled to as full protection against an error of judgment in reference to the existence of the jurisdictional fact as in reference to the merits of the suit." (Italics ours.) It will be noted, also, that no distinction is recognized between superior and inferior judges. The loose, if not inaccurate, treatment of this subject in some of the early cases is well illustrated by the citation of this case in support of the conclusion reached in Withers v. Coyles, supra, with which it is evidently wholly inconsistent.

In Woodall v. McMillan, 38 Ala. 622, the action was trespass for a false imprisonment against the prosecutor for causing a justice of the peace to issue a warrant of arrest for plaintiff on an affidavit charging him with the commission of the crime of perjury at Huntsville, in a *neighboring county*. There being no jurisdiction of the *subject-matter*, the warrant was held void, and the prosecutor held liable. It would seem that the justice also would have been liable under the rule we announce.

In Heard v. Harris, 68 Ala. 43, the principle of the rule was expressly left undecided; Brickell, C. J., saying: "Whether it be true or not the personal protection the maxim [of judicial exemption] affords is confined, when the authority of an inferior jurisdictional officer, like a justice of the peace, is drawn in question, to matters within their jurisdiction, or whether he is entitled to protection because he may have erroneously adjudged he had jurisdiction, and whether, at his peril, he adjudges that question, we do not consider."

In McLendon v. A. F. L. M. Co., 139 Ala. 518, 24 South. 721, a justice of the peace was held liable for falsely certifying an acknowledgment to a deed; the grantor not having made the acknowledgment, nor even appeared before the justice for the purpose. Although the certificate of acknowledgment is, under our decisions, a judicial act, it is manifest that it was here without any *color of authority*, and there was nothing to challenge his judicial action. Indeed, it was prima facie malicious or corrupt.

In Crosthwait v. Pitts, 139 Ala. 421, 36 South. 83, the same conclusion, on the same facts, is reaffirmed.

In the recent case of Earp v. Stephens, 1 Ala. App. 447, 55 South. 270, a justice of the peace was held liable for issuing a writ of attachment against property *without either affidavit or bond*. Here there was nothing to provoke inquiry, and not even a colorable appeal to the authority exercised. The ruling is explained by Walker, P. J., in perfect accord with the instant case; for he says: "It is not to be supposed that the Legislature intended that the official should have the power to direct such a summary seizure of property without even a colorable attempt to require an observance of the precautions prescribed to prevent the issuance of the writ in cases in which the law did not authorize it, and to provide the prescribed means of indemnity for an abuse of the extraordinary process."

[9] Applying, now, the rule of liability above stated to the facts of the present case, we are of the opinion that the affidavit made before the defendant as a justice of the peace, though wholly insufficient to charge any criminal offense, or to justify the issuance of the warrant of arrest, nevertheless was clearly an attempt to charge a threatened criminal trespass on affiant's land. And, stating facts which were elements of that offense, and of legal significance and value in its proof, a colorable case was presented which fairly invoked the justice's judgment as to their sufficiency for the purpose intended. The issuance of the warrant was therefore a judicial act, involving his inquiry and affirmative conclusion as to his power and authority to do so, for which he cannot be held liable, if he acted in good faith. It follows that the special plea stated a good defense to the complaint as framed, and the demurrers were properly overruled.

[10] The question of good faith on the part of the defendant is not directly presented here by the pleadings; but we deem it necessary to any clear apprehension of the rule of nonliability to state, also, its

essential limitations. And in this connection it is to be noted that, since the law will always prima facie impute good faith to judicial action, the burden is upon the plaintiff, in a case like this, to both allege and prove the want of it.

Application for rehearing overruled.

DOWDELL, C. J., and SIMPSON, ANDERSON, and SAYRE, JJ., concur. McCLELLAN, J., concurs in the conclusion.

MAYFIELD, J. (dissenting). On rehearing, the majority decline to change the decision, but do change the opinion. To this changed opinion, I propose to reply.

This opinion, by my Brother SOMERVILLE, will be a splendid one when a case arises to which it can apply. It is not applicable to the case at bar, but is applicable to cases like those of Grove v. Van Duyn, 44 N. J. Law, 654, 43 Am. Rep. 412, and Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646. I fully concur with Brother SOMERVILLE that these are leading American cases, and among the best considered, by the ablest judges, as to the civil liability of inferior judges as for their judicial actions. There is not a sentence, a line, a word, in the opinions of those two cases in which I do not concur; nor do I think that there was error in the conclusion or decision of either.

The radical and controlling difference between these cases and the one under consideration is that the former were actions which sought to hold a judge of an inferior court liable for erroneous judicial actions; while this action seeks to hold the judge liable for a void and unauthorized ministerial act. If this had been an action for "an erroneous or corrupt exercise by the justice of the jurisdiction the law confers," then the opinion of the majority would be applicable, and sufficient answer to the contentions of appellant; but the fact remains unanswered, and this record, and the statutes, and the decisions of this and other courts, declare that it is not such a case, and must be distinguished from such.

This distinction is clearly pointed out by Brickell, J., in the case of Kelly v. Moore, 51 Ala. 364, 365. It is there made clear that actions like that there under consideration (which was exactly like this) were brought under the statute, not for a corrupt or erroneous exercise of jurisdiction conferred by law, but for an abuse of the authority of the office, in acts done "under color of office." In the case stated, Brickell, J., treating of the wrong complained of, says: "'Under color of his office,' he arrests and imprisons the plaintiff. This was a misdemeanor at common law, and a tort for which an action could have been maintained against the justice. The sureties on his official bond would not, at common law, have been liable for this tort. The malfeasance of their principal, of which misfeasance could not also be predicated, was not within the scope of their obligation. Governor v. Hancock, 2 Ala. 728; McElhaney v. Gilleland, 30 Ala. 183. This was deemed a defect in the common law, and to cure it the statute now extends the liability of sureties on official bonds to injuries from wrongful acts done by the officer under color of his office, as well as to the nonperformance or negligent performance of official duty. R. C. § 169."

The gravamen of the complaint in this case, to quote exactly, is as follows: "The said Douglass did, under color of his office as such justice of the peace, cause the plaintiff to be illegally arrested, by which he was deprived of his liberty for a long time," etc. No complaint whatever is made of any judicial action on the part of the justice, whether erroneous or corrupt. It is a ministerial act, done under color of office, of which complaint is made; and for such the statute makes the justice and his official bondsman liable.

It is true that the justice and the surety attempted to defend against this action by pleading that the acts of the justice were "judicial," and that therefore neither he nor the surety was liable civilly for damages consequent upon such acts. But the trouble as to this plea was that it set out the warrant issued by the justice, and under which the plaintiff was arrested and imprisoned, which warrant, as Brother SOMERVILLE very correctly holds, was void on its face. In issuing this warrant, the justice no more acted judicially than did the constable who executed it; both were equally ministerial acts, and the two officers are equally liable as for arrests made under the writ, if in fact and in law it is absolutely void.

A justice of the peace, in both civil and criminal proceedings before him, acts both judicially and ministerially; and as for his judicial acts, if within his jurisdiction or "colorably so," as stated by Justices Brickell and SOMERVILLE, he is not civilly liable, though the acts are both erroneous and corrupt; but as for his ministerial acts which are void and wholly unwarranted by law, he is civilly and personally liable, was so under the English common law, is so under all American common law, and, together with his official bondsmen, is in this state made liable by statute. 51 Ala. 365, 366.

A justice, in criminal proceedings, in hearing complaints, taking affidavits, examining witnesses to determine whether or not any offense has been committed, and if so, what offense, and who is probably guilty thereof, acts judicially, just as he does, on the hearing or the trial, when the accused is brought before him; and if the justice errs in such matters he is not civilly liable to any party injured by reason of his error, as long as he acts within his jurisdiction as justice. But when he undertakes the issuing of a warrant

_____Div. No._____ CERTIFICATE OF APPEAL. (Civil Cases,)

No. 5202

Baldwin County, Circuit Court.

REUBEN F. McKINLEY
Plaintiff.
vs.

BOWEN SIMMONS
Defendant.

I, Alice J. Duck Clerk of Circuit Court, of Baldwin County, Alabama, hereby certify that in the cause of Reuben F. McKinley plaintiff, vs. Bowen Simmons defendant, which was tried and determined in this Court on the 27th day of August 1962, in which there was a judgment ~~for~~ Sustaining Defendant's Demurrer ~~Dollars~~, in favor of the ~~plaintiff~~ Defendant, (~~confession~~ judgment ~~for defendant~~) the Plaintiff on the 4th day of September 1962, took an appeal to the Supreme Court of Alabama to be holden of and for said State.

I further certify that Reuben F. McKinley filed security for cost of appeal, to the Supreme Court, on the 4th day of ~~Mx~~ Sept. 1962, and that Reuben F. McKinley, Mrs. Lucy Belle Stanton, and Mrs. Eugenia Barnes, _____, are sureties on the appeal bond.

I further certify that notice of the said appeal was on the _____ day of _____ 19___, served on Vincent Kilborn, as attorney of record for said appellee, and that the amount sued for was Two Hundred Fifty Thousand Dollars. (Or certain lands) (Or personal property.)

Witness my hand and the seal of this Court, this the 5th day of September 1962.

Alice J. Duck
Clerk of the Circuit Court of
Baldwin County, Alabama.

ROBERTS & SON, BIRMINGHAM

Telephone MU 4-2585
P. O. Box 24

Law Offices
James W. Kelly

The Avon Building
Geneva, Alabama

AUGUST 14, 1962

MRS. ALICE J. DUCK
CLERK, CIRCUIT COURT
BALDWIN COUNTY,
BAY MINETTE, ALABAMA

RE: REUBEN F. MCKINLEY
VS. BOWEN SIMMONS
CASE NO. 5202
CIRCUIT COURT AT LAW

DEAR MRS. DUCK:

I ENCLOSE HEREIN THE ORIGINAL OF MOTION TO STRIKE AND DEMURRERS THAT I DESIRE TO BE FILED IN THE ABOVE STYLED CAUSE.

I WOULD GREATLY APPRECIATE YOUR ADVISING ME OF THE DATE OR DATES THAT SAID MOTION OR DEMURRERS WILL BE CONSIDERED BY YOUR CIRCUIT COURT.

THANKING YOU AND WITH KINDEST REGARDS, I REMAIN

VERY TRULY YOURS,

James W. Kelly

JAMES W. KELLY

JWK/GHD

ENCL: MOTION TO STRIKE
DEMURRERS

CITATION OF APPEAL — Baldwin Times - 200-3-62

THE STATE OF ALABAMA
Baldwin County - Circuit Court

TO ANY SHERIFF OF THE STATE OF ALABAMA — GREETING:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the 27th day of August, 1962 Monday, 196x, in a certain cause in said Court wherein Reuben F. McKinley Plaintiff, and Bowen Simmons Defendant, a judgement was rendered against said Reuben F. McKinley to reverse which Judgment, the said Reuben F. McKinley applied for and obtained from this office an APPEAL, returnable to the Supreme next Term of our Supreme Court of the State of Alabama, to be held at Montgomery, on the day of , 196 next, and the necessary bond having been given by the said Reuben F. McKinley with Lucy Belle Stanton & Mrs. Eugenia Barnes, sureties,

Now, You Are Hereby Commanded, without delay, to cite the said Bowen Simmons or Vincent Kilborn, attorney, to appear at the next Term of our said Supreme Court, to defend against the said Appeal, if they think proper.

Witness, ALICE J. DUCK, Clerk of the Circuit Court of said County, this 4th day of August, A. D., 1962.

Attest:

Alice J. Duck, Clerk.

M.5208

CIRCUIT COURT
Baldwin County, Alabama

Reuben F. McKinley

Vs. } Citation in Appeal

Bowen Simmons

RECEIVED
SEP 7 1962
SHERIFF'S OFFICE

Issued .... day of ...., 196......,

21 Sept

To be served on
Hon. Vincent Kilborn
Mobile, Ala.

1st Mobile Bank Bldg.

EXECUTED
This 21 day of Sept, 1962
by serving a copy of the within on
Vincent Kilborn
RAY D. BRIDGES, Sheriff
By C. Villar D.S.

REUBEN F. MCKINLEY	)	
Plaintiff	)	IN THE CIRCUIT COURT
vs.	)	OF
BOWEN SIMMONS	)	BALDWIN COUNTY, ALABAMA
Defendant	)	

ADDITIONAL GROUNDS OF DEMURRER

Comes the defendant in the above entitled cause and, in addition to the grounds of demurrer heretofore addressed and assigned to the complaint, now assigns the following separate, several and additional grounds of demurrer, viz:

A) The same states no cause of action against the defendant.

B) For that it affirmatively appears that the same count seeks to complain of an alleged slander for words spoken, and an alleged libel for words uttered and written in a decree, in one and the same count.

C) For that it is impossible to determine from the count whether (a) plaintiff complains of an error of law in making an adjudication alleged of insanity without proper inquisition of lunacy proceedings, which error is alleged as unlawful, malicious or wilful and without jurisdiction or authority, or (b) whether plaintiff complains of an alleged slander uttered in the course of the proceedings referred to.

D) Said count is so vague, indefinite and uncertain as to what the plaintiff complains of, whether for slanders, or libels in the course of suit, or for errors of law maliciously and wilfully made in the course of suit, and defendant is unable to ascertain therefrom what he is called upon to defend.

E) For that as a matter of law all words spoken or written by the Court in the due course of judicial proceedings which are relevant thereto are ipso facto privileged communications and not actionable and for aught that appears the words uttered or the decree signed containing the matter complained of by the plaintiff were words uttered or a decree signed relevant to the judicial proceeding then being tried.

F) For it is not alleged that the matter uttered was uttered in circumstances which were not those making the same a privileged communication in the course of judicial proceedings.

G) For that it affirmatively appears from said count that on the occasion complained of the defendant was acting as judge in and for a court of general jurisdiction, namely the Circuit Court of Baldwin County, Alabama in the trial of a cause, the nature of which was within the jurisdiction of the Court and which was pending therein and as a matter of law the defendant is immune from liability for and on account of the matters and things complained of concerning his judicial conduct at such time and place.

H) For that as a matter of law the judge of a court of general jurisdiction such as the Circuit Court of Baldwin County, Alabama, is not liable for any judicial act in excess of his jurisdiction which involves an affirmative decision that he in fact has jurisdiction even though he acts maliciously or corruptly.

I) For that it affirmatively appears that the defendant on the occasion complained of while doing or performing the acts and things uttered or performed, acted as a judge of a court of

general jurisdiction in a cause over which he had jurisdiction and as a matter of law the defendant is immune from liability for and on account of such acts complained of.

JAMES W. KELLEY
Geneva, Alabama

ALBRITTONS & RANKIN
Andalusia, Alabama

KILBORN, DARBY & KILBORN
Mobile, Alabama

FOR DEFENDANT

VINCENT F. KILBORN
Mobile, Alabama

ON ORAL ARGUMENT

REUBEN F. MCKINLEY	)	
Plaintiff	)	IN THE CIRCUIT COURT
vs.	)	OF
BOWEN SIMMONS	)	BALDWIN COUNTY, ALABAMA
Defendant	)	

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H) For that as a matter of law the judge of a court of general jurisdiction such as the Circuit Court of Baldwin County, Alabama, is not liable for any judicial act in excess of his jurisdiction which involves an affirmative decision that he in fact has jurisdiction even though he acts maliciously or corruptly.

I) For that it affirmatively appears that the defendant on the occasion complained of while doing or performing the acts and things uttered or performed, acted as a judge of a court of

general jurisdiction in a cause over which he had jurisdiction and as a matter of law the defendant is immune from liability for and on account of such acts complained of.

JAMES W. KELLEY
Geneva, Alabama

ALBRITTONS & RANKIN
Andalusia, Alabama

KILBORN, DARBY & KILBORN
Mobile, Alabama

FOR DEFENDANT

VINCENT F. KILBORN
Mobile, Alabama

ON ORAL ARGUMENT

FILED
AUG 27 1962
ALICE J. DUCK, CLERK
REGISTER

REUBEN F. McKINLEY	*	IN THE CIRCUIT COURT OF
PLAINTIFF	*	BALDWIN COUNTY, ALABAMA
VS	*	AT LAW
BOWEN SIMMONS	*	
DEFENDANT	*	CASE No. 5202

MOTION TO STRIKE

COMES NOW THE DEFENDANT, BY AND THROUGH HIS UNDERSIGNED ATTORNEY, AND MOVES THIS HONORABLE COURT TO STRIKE FROM THE COMPLAINT HERETOFORE FILED IN THIS CAUSE THE FOLLOWING: "THUS DESTROYING THE PLAINTIFF, AN ATTORNEY AT LAW, IN HIS PROFESSION AND REPUTATION, CAUSING HIM GREAT EMBARASSMENT AND HUMILIATION, OSTRACISM AND MENTAL PAIN, CAUSING A PRESUMPTION AGAINST HIM THAT HE IS INSANE THAT HE CAN NEVER LIVE DOWN, AS WELL AS GREAT WORRY, GRIEF AND ANGUISH," AND AS GROUNDS THEREFORE ASSIGNS, SEPARATELY AND SEVERALLY, THE FOLLOWING:

I

SAID ALLEGATIONS CONSTITUTE CONCLUSIONS OF THE PLEADER MERELY, AND THE SAME ARE IRRELEVENT.

II

SAID ALLEGATIONS ARE IRRELEVENT.

III

SAID ALLEGATIONS ARE FRIVOLOUS.

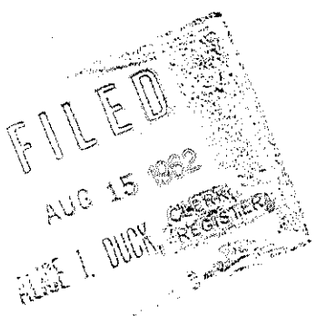
James W. Kelly
ATTORNEY FOR DEFENDANT

STATE OF ALABAMA
GENEVA COUNTY

I, JAMES W. KELLY, ATTORNEY OF RECORD FOR DEFENDANT, DO HEREBY CERTIFY THAT I HAVE, THIS DATE, MAILED A COPY OF THE FOREGOING MOTION TO STRIKE TO REUBEN F. McKINLEY, PLAINTIFF IN THE ABOVE CAUSE AND ATTORNEY FOR PLAINTIFF, HIMSELF, AT HIS CORRECT ADDRESS, BAY MINETTE, BALDWIN COUNTY, ALABAMA, POSTAGE PREPAID.

DONE AND DATED ON THIS THE 14TH DAY OF AUGUST, 1962.

James W. Kelly
ATTORNEY FOR DEFENDANT



State of Alabama
County of Baldwin

To any Sheriff of the State of Alabama:

You are hereby commanded to summon Bowen Simmons to appear and plead, answer or demur within thirty days, to the Bill of Complaint filed in the Circuit Court of Baldwin County, Alabama by Reuben F. McKinley as Plaintiff and against Bowen Simmons as Defendant.

Witness my hand, this 16 day of July, 1962.

Alice J. Duck
Clerk

Reuben F. McKinley
Plaintiff

Vs

Bowen Simmons
Defendant

In the Circuit Court of
Baldwin County, Alabama
At Law. No. ____

The Plaintiff claims of the Defendant Two Hundred Fifty Thousand Dollars as damages, for that on to wit January 22, 1962, in the Circuit Court of Baldwin County, Alabama, in Equity, the Defendant while acting as Judge in the Divorce Case of McKinley Vs McKinley No. 5670, did unlawfully, maliciously and willfully, without any jurisdiction or authority to do so whatsoever, while on the Bench with a room full of spectators in the court, declare the Plaintiff to be Insane, without an Inquisition of Lunacy as required by law, or recognizing that the Probate Judge is the only person who can declare a person insane, after the proper process of law being followed. The Defendant did sign a decree in said cause to the ff effect that the Plaintiff was insane and as a Court Reporter was taking down said testimony, all of this went into a permanent record, thus destroying the Plaintiff, an Attorney at Law, in his profession and reputation, causing him great embarassment and humiliation, ostracism and mental pain, causing a presumption against him that he is insane that he can never live down, as well as great worry, grief and anguish, all to the damage of the Plaintiff as aforesaid.

Reuben F. McKinley, Plaintiff.

Plaintiff demands a trial by jury.

Reuben F. McKinley, Plaintiff

FILED
JUL 16 1962
ALICE J. DUCK, CLERK
REGISTER

Enf. 7-30-62

In N York Circuit

7105202

Reuben F. McKinley
Plaintiff
Vs
Bowen Simmons
Defendant

Summons and Complaint

FILED
JUL 16 1962
ALICE J. DUSK, CLERK
REGISTER

7-16-62

Executed the within
S & C
by serving a copy thereof on
B. O. Simmons as
This 30 day of July 1962
M. C. Mulgrew Sheriff
H. L. Sisk D.S.
Covington County, Alabama.

30 miles

REUBEN F. MCKINLEY	)	
Plaintiff	)	IN THE CIRCUIT COURT
vs.	)	OF
BOWEN SIMMONS	)	BALDWIN COUNTY, ALABAMA
Defendant	)	

ADDITIONAL GROUNDS OF DEMURRER

Comes the defendant in the above entitled cause and, in addition to the grounds of demurrer heretofore addressed and assigned to the complaint, now assigns the following separate, several and additional grounds of demurrer, viz:

A) The same states no cause of action against the defendant.

B) For that it affirmatively appears that the same count seeks to complain of an alleged slander for words spoken, and an alleged libel for words uttered and written in a decree, in one and the same count.

C) For that it is impossible to determine from the count whether (a) plaintiff complains of an error of law in making an adjudication alleged of insanity without proper inquisition of lunacy proceedings, which error is alleged as unlawful, malicious or wilful and without jurisdiction or authority, or (b) whether plaintiff complains of an alleged slander uttered in the course of the proceedings referred to.

D) Said count is so vague, indefinite and uncertain as to what the plaintiff complains of, whether for slanders, or libels in the course of suit, or for errors of law maliciously and wilfully made in the course of suit, and defendant is unable to ascertain therefrom what he is called upon to defend.

E) For that as a matter of law all words spoken or written by the Court in the due course of judicial proceedings which are relevant thereto are ipso facto privileged communications and not actionable and for aught that appears the words uttered or the decree signed containing the matter complained of by the plaintiff were words uttered or a decree signed relevant to the judicial proceeding then being tried.

F) For it is not alleged that the matter uttered was uttered in circumstances which were not those making the same a privileged communication in the course of judicial proceedings.

G) For that it affirmatively appears from said count that on the occasion complained of the defendant was acting as judge in and for a court of general jurisdiction, namely the Circuit Court of Baldwin County, Alabama in the trial of a cause, the nature of which was within the jurisdiction of the Court and which was pending therein and as a matter of law the defendant is immune from liability for and on account of the matters and things complained of concerning his judicial conduct at such time and place.

H) For that as a matter of law the judge of a court of general jurisdiction such as the Circuit Court of Baldwin County, Alabama, is not liable for any judicial act in excess of his jurisdiction which involves an affirmative decision that he in fact has jurisdiction even though he acts maliciously or corruptly.

I) For that it affirmatively appears that the defendant on the occasion complained of while doing or performing the acts and things uttered or performed, acted as a judge of a court of

general jurisdiction in a cause over which he had jurisdiction and as a matter of law the defendant is immune from liability for and on account of such acts complained of.

JAMES W. KELLEY
Geneva, Alabama

ALBRITTONS & RANKIN
Andalusia, Alabama

KILBORN, DARBY & KILBORN
Mobile, Alabama

FOR DEFENDANT

VINCENT F. KILBORN
Mobile, Alabama

ON ORAL ARGUMENT

Reuben F. McKinley
Plaintiff

Vs

Bowen Simmons
Defendant

In the Circuit Court of
Baldwin County, Alabama
At Law. No. 5202

Now comes the Plaintiff and gives notice of appeal to the Supreme Court of Alabama, from an Adverse decision of the Baldwin County Circuit Court sustaining Defendant's demurrers to the Complaint filed by the Plaintiff, on to wit August 27, 1962.

Reuben F. McKinley
Plaintiff

We, the undersigned, hereby announce ourselves as Sureties for costs of the appeal of the above styled cause to the Supreme Court.

Reuben F. McKinley Attorney
Bay Minette Ala.
Mrs Lucy Belle Stanton
Rt 1 Box 104 J. Perdido Ala
Mrs Eugenia Barnes
Rt 1 Box 1087 Perdido Ala.

FILED
SEP 4-1962
ALICE J. DUCK, CLERK
REGISTER

REUBEN F. McKINLEY	*	IN THE CIRCUIT COURT OF
PLAINTIFF	*	BALDWIN COUNTY, ALABAMA
VS	*	AT LAW
BOWEN SIMMONS	*	
		CASE No. 5202
DEFENDANT	*	

COMES NOW THE DEFENDANT, BY AND THROUGH HIS UNDERSIGNED ATTORNEY, AND NOT WAIVING THE MOTION TO STRIKE HERETOFORE FILED IN THIS CAUSE BUT ON THE CONTRARY, INSISTING THEREUPON, DOES HEREBY DEMUR TO THE COMPLAINT HERETOFORE FILED IN THIS CAUSE, AND AS GROUNDS THEREFORE DOES ASSIGN, SEPARATELY AND SEVERALLY, THE FOLLOWING:

I

SAID COMPLAINT FAILS TO STATE A CAUSE OF ACTION.

II

IT AFFIRMATIVELY APPEARS FROM THE ALLEGATIONS OF SAID COMPLAINT, THAT ON THE OCCASION COMPLAINED OF BY THE PLAINTIFF, THE DEFENDANT WAS ACTING IN A JUDICIAL CAPACITY.

III

IT AFFIRMATIVELY APPEARS FROM THE ALLEGATIONS OF SAID COMPLAINT, THAT ON THE OCCASION COMPLAINED OF, THE DEFENDANT WAS ACTING IN A JUDICIAL CAPACITY AND IS IMMUNE, AS A MATTER OF LAW, FROM CIVIL LIABILITY.

IV

FOR THAT IT AFFIRMATIVELY APPEARS FROM THE ALLEGATIONS OF SAID COMPLAINT, THAT THE DEFENDANT, ON THE OCCASION COMPLAINED OF, WAS IMMUNE FROM CIVIL LIABILITY UNDER THE LAWS OF THE STATE OF ALABAMA.

V

FOR THAT IT AFFIRMATIVELY APPEARS FROM THE ALLEGATIONS OF SAID COMPLAINT THAT THE DEFENDANT, ON THE OCCASION COMPLAINED OF, WAS ACTING AS A JUDGE OF A COURT OF GENERAL JURISDICTION AND THAT THE ACTS COMPLAINED OF CONSTITUTED A JUDICIAL ACT WHICH INVOLVED AN AFFIRMATIVE DECISION ON

BEHALF OF THE DEFENDANT IN SAID POSITION AS JUDGE OF A COURT OF GENERAL JURISDICTION AND AS SUCH, DEFENDANT WAS IMMUNE FROM LIABILITY THEREFORE UNDER THE LAWS OF THE STATE OF ALABAMA.

VI

FOR IT AFFIRMATIVELY APPEARS FROM THE ALLEGATIONS OF SAID COMPLAINT THAT THE DEFENDANT, ON THE OCCASION COMPLAINED OF, WAS ACTING IN THE CAPACITY OF A JUDGE OF A COURT OF GENERAL JURISDICTION AND THAT THE ACTS COMPLAINED OF INVOLVED A DECISION OF DEFENDANT IN SAID CAPACITY AND AS SUCH, THE DEFENDANT IS IMMUNE FROM DAMAGES OR LIABILITY UNDER THE LAWS OF THE STATE OF ALABAMA.

VII

SAID COMPLAINT DOES NOT SUFFICIENTLY ADVISE THE DEFENDANT OF THAT WHICH HE IS CALLED UPON TO DEFEND.

VIII

FOR THAT THE ALLEGATIONS OF SAID COMPLAINT CONSTITUTE CONCLUSIONS OF THE PLEADER MERELY, AND ARE INSUFFICIENT TO STATE A CAUSE OF ACTION AGAINST THIS DEFENDANT.

IX

FOR THAT THE ALLEGATIONS, "WITHOUT ANY JURISDICTION OR AUTHORITY TO DO SO WHATSOEVER, WHILE ON THE BENCH WITH THE ROOM FULL OF SPECTATORS IN THE COURT, DECLARED THE PLAINTIFF TO BE INSANE, WITHOUT AN INQUISITION OF LUNACY AS REQUIRED BY LAW, OR RECOGNIZING THAT THE PROBATE JUDGE IS THE ONLY PERSON WHO CAN DECLARE A PERSON INSANE, AFTER THE PROPER PROCESS OF LAW BEING FOLLOWED." IS BUT A CONCLUSION OF THE PLEADER MERELY AND IS INSUFFICIENT FOR A BASIS OF A LEGAL CAUSE OF ACTION AGAINST THIS DEFENDANT.

X

FOR THAT THE ELEMENT OF DAMAGES ARE NOT SUFFICIENTLY SET FORTH AS WOULD WARRANT THE FINDING OF A JUDGMENT AGAINST THIS DEFENDANT.

XI

FOR THAT THE ELEMENT OF DAMAGES ARE NOT SUFFICIENTLY SET FORTH TO PROPERLY ADVISE THIS DEFENDANT OF THAT FOR WHICH HE IS CALLED UPON TO DEFEND.

XII

FOR THAT THE ALLEGATION, "THE DEFENDANT DID SIGN A DECREE IN SAID CAUSE TO THE EFFECT THAT THE PLAINTIFF WAS INSANE AND AS A COURT REPORTER WAS TAKING DOWN SAID TESTIMONY, ALL OF THIS WENT INTO A PERMANENT RECORD," IS BUT A CONCLUSION OF THE PLEADER AND IS NO BASIS FOR A CAUSE OF ACTION AGAINST THIS DEFENDANT.

XIII

FOR THAT IT AFFIRMATIVELY APPEARS THAT THE PLAINTIFF FAILED TO ATTACH A COPY OF ANY ALLEDGED DECREE AS BEING SIGNED BY DEFENDANT.

XIV

FOR THAT THERE IS A FAILURE TO ALLEDGE THAT THE CONTENDED STATEMENTS MADE BY DEFENDANT ON THE OCCASION COMPLAINED OF WERE FALSE.

XV

FOR AUGHT THAT APPEARS, THE CONTENDED STATEMENTS MADE BY THE DEFENDANT ON THE OCCASION COMPLAINED OF WERE TRUE AND CORRECT.

XVI

FOR THERE IS A FAILURE TO SET FORTH THE CONTENDED STATEMENTS BY DEFENDANT WITH SUFFICIENT CERTAINTY AS TO ADVISE THE DEFENDANT OF THAT FOR WHICH HE IS CALLED UPON TO DEFEND.

XVII

FOR THAT THERE IS A FAILURE TO SET FORTH THE ALLEGATIONS OF THE ALLEDGED DECREE AS ALLEGEDLY SIGNED BY DEFENDANT ON THE OCCASION COMPLAINED OF.

XVIII

FOR THAT THERE IS A FAILURE TO SET FORTH ANY PART OF ANY DECREE SIGNED BY DEFENDANT AS CONSTITUTING A BASIS FOR A CAUSE OF ACTION AGAINST DEFENDANT.

XIX

FOR THERE IS A FAILURE TO ALLEDGE THAT THE DECREE, PURPORTEDLY SIGNED BY DEFENDANT IN SAID CAUSE, HAS BEEN PUBLISHED.

XX

FOR AUGHT THAT APPEARS THE DECREE, AS SIGNED BY THE DEFENDANT, HAS NOT BEEN PUBLISHED.

XXI

FOR THAT IT AFFIRMATIVELY APPEARS FROM THE ALLEGATIONS OF SAID COMPLAINT, THAT THE DEFENDANT WAS IMMUNE FROM LIABILITY OR DAMAGES FOR HIS CONDUCT ON THE OCCASION COMPLAINED OF.

XXII

THE FACTS SET FORTH IN SAID COMPLAINT SHOW, CONCLUSIVELY, THAT DEFENDANT, ON THE OCCASION COMPLAINED OF, WAS ACTING IN A JUDICIAL CAPACITY THAT WAS CLOTHED WITH IMMUNITY FROM CIVIL LIABILITY FOR AND ON ACCOUNT OF THE ACTS COMPLAINED OF.

XXIII

FOR THAT IT AFFIRMATIVELY APPEARS FROM THE ALLEGATIONS OF SAID COMPLAINT, THAT THE ACTS OF THE DEFENDANT, ON THE OCCASION COMPLAINED OF, CONSTITUTED DECISIONS WITHIN THE AUTHORITY OF THE DEFENDANT OVER WHICH HE HAD JURISDICTION AT THE TIME AND SUCH ACTS WERE JUDICIAL ACTS AND DEFENDANT WAS IMMUNE FROM CIVIL LIABILITY FROM ANY RESULTS CAUSED THEREBY.

XXIV

FOR THAT THERE IS A FAILURE TO ALLEDGE THAT DEFENDANT WAS NOT ACTING IN A JUDICIAL CAPACITY ON THE OCCASION

COMPLAINED OF.

James W. Kelly
ATTORNEY FOR DEFENDANT

STATE OF ALABAMA
GENEVA COUNTY

I, JAMES W. KELLY, ATTORNEY OF RECORD FOR DEFENDANT, DO HEREBY CERTIFY THAT I HAVE, THIS DATE, MAILED A COPY OF THE FOREGOING DEMURRERS TO REUBEN F. MCKINLEY, PLAINTIFF IN THE ABOVE CAUSE AND ATTORNEY FOR PLAINTIFF, AT HIS CORRECT ADDRESS, BAY MINETTE, BALDWIN COUNTY, ALABAMA, POSTAGE PREPAID.

DONE AND DATED ON THIS THE 14TH DAY OF AUGUST, 1962.

James W. Kelly
ATTORNEY FOR DEFENDANT

FILED
AUG 15 1962
ALICE L. DUCK, CLERK
REGISTER

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1962-63

1 Div. 96

Reuben F. McKinley

v.

Bowen Simmons

Appeal from Baldwin Circuit Court

GOODWYN, JUSTICE.

Appeal by plaintiff below from judgment of non-suit rendered after defendant's demurrer to the complaint was sustained.

The complaint consists of one count, as follows:

"The Plaintiff claims of the Defendant

Two Hundred Fifty Thousand Dollars as damages

for that on to wit January 22, 1962, in the Circuit Court of Baldwin County, Alabama, in Equity, the Defendant while acting as Judge in the Divorce Case of McKinley vs: McKinley No. 5670, did unlawfully, maliciously and willfully, without any jurisdiction or authority to do so whatsoever, while on the Bench with a room full of spectators in the Court, declare the Plaintiff to be Insane, without an Inquisition of Lunacy as required by law, or recognizing that the Probate Judge is the only person who can declare a person insane, after the proper process of law being followed. The Defendant did sign a decree in said cause to the effect that the Plaintiff was insane and as a Court Reporter was taking down said testimony, all of this went into a permanent record, thus destroying the Plaintiff, an Attorney at Law, in his profession and reputation, causing him great embarrassment and humiliation, ostracism and mental pain, causing a presumption against him that he is insane that he can never live down, as well as great worry, grief, and anguish, all to the damage of the Plaintiff as aforesaid."

The only question presented is whether there was error in sustaining the demurrer.

The demurrer, containing 33 grounds, was sustained generally, without any particular ground or grounds being specified as the basis for such ruling. Accordingly, if any ground was good, the demurrer was properly sustained. National Park Bank v. Louisville & N. R. Co., 199 Ala. 192(1), 195, 74 So. 69; Louisville & N. R. Co. v. Wilson, 162 Ala. 588(11), 602, 50 So. 188; Opelika Montgomery Fair Co. v. Wright, 36 Ala. App. 1(1), 4, 52 So. 2d 404.

It might well be that the complaint is defective in more than one respect, as pointed out by the several grounds of demurrer here insisted upon by the defendant-appellee. However, we find it necessary to consider only those grounds going to the basic issue presented, that is, the question of defendant's immunity from civil liability.

In aid of a better understanding of the case, we note that the parties' briefs clearly show that plaintiff was a party to the divorce suit and was acting therein as his own counsel; that defendant's actions, of which complaint is made, were in connection with defendant's decision that plaintiff could not adequately look after his own interests in said divorce suit, and that a guardian ad litem should be appointed to represent him.

Construing the complaint most strongly against the plaintiff (on being tested by demurrer), it clearly appears

that the defendant, in making the alleged statement concerning the plaintiff, and in rendering the alleged decree, was acting in a judicial capacity as a judge of a court of general jurisdiction in a cause over which he had jurisdiction. Accordingly, the defendant cannot be held liable in a civil suit for any damages which might flow from such acts, assuming, but without in any way deciding, that such acts were of a libelous or slanderous nature. See: Pickett v. Richardson, 223 Ala. 683, 684-685; Broom v. Douglass, 175 Ala. 268, 273, 57 So. 860, 44 L.R.A.(N.S.) 164, Ann. Cas. 1914C, 1155; Coleman v. Roberts, 113 Ala. 323, 21 So. 449, 36 L.R.A. 84, 59 Am. St. Rep. 111; Busteed v. Parsons, 54 Ala. 393, 399-402, 25 Am. Rep. 688; Duffin v. Summerville, 9 Ala. App. 573, 578-579, 63 So. 816, cert. den. 187 Ala. 403, 66 So. 779; 33 Am. Jur., Libel and Slander, § 177, pp. 170-171; 30A Am. Jur., Judges, § 73, p. 42; 53 C.J.S., Libel and Slander, § 104d.(3), pp. 177-178; Restatement of the Law of Torts, Vol. 3, § 585, p. 225; Anno: 42 A.L.R. 2d 825, 146 A.L.R. 913, 20 A.L.R. 407; 9 Columbia L. Rev., p. 463, "Absolute Immunity In Defamation: Judicial Proceedings."

The immunity of judges is based upon considerations of public policy and is designed to secure the complete freedom of the judiciary to discharge its functions without fear of consequences. The reason for the rule is thus stated in Duffin v. Summerville, supra, viz:

" * * * This policy of granting immunity to judicial officers from private action for judicial acts is, as has been often declared, grounded in an aim to secure the independence of judicial thought and action, for, if they might be subjected to suit, and thereby harassed, by every losing litigant who might see fit to question their motives their freedom of thought would be shackled by a constant fear, from which even the honest and innocent would not be exempt. The law, therefore, wisely reserves to society at large, as embodied and represented in the state--the government itself, in theory impartial--the right to question the motives of a judicial officer for judicial acts, and this only in solemn form by impeachment proceedings, or by an indictment for misconduct in office."

In Coleman v. Roberts, supra, Chief Justice Brickell had this to say concerning the rule of immunity, viz:

"The doctrine has become so firmly settled, as to have passed into a truism, that an action will not lie against a judicial officer, the highest or lowest, keeping within the sphere of his jurisdiction,

by one supposing himself aggrieved by his judicial action. (Citations omitted) Averments of malice, or of corruption in the exercise of jurisdiction, or of authority, work no change in the operatinn of the principle. 'Malice and error combined, nor either separately, will furnish a private cause of action against a judge.' (Citations omitted) The true theory and reason of the doctrine, is stated with clearness by Judge Cooley: 'Whenever the State confers judicial powers upon an individual, it confers therewith full immunity from private suits. In effect, the State says to the officer, that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the State, and the peace and happiness of society; that if he shall fail in a faithful discharge of them, he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high

> functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages.'-- Cooley on Torts, 408. There has been, not infrequently, much of objection, that the doctrine has a tendency to promote the exercise of judicial power arbitrarily or capriciously; and may shield unscrupulous, corrupt men in judicial offices. This may be true to some extent, but if true and individual injury results, it is only an instance of the merger of individual wrong in the higher wrong to the State, and must be redressed by the higher remedies the State can pursue against the unjust judge.
>
> * * * "

The demurrer to the complaint having been properly sustained, it follows that the judgment of non-suit appealed from is due to be affirmed.

Affirmed.

Livingston, C. J., Lawson and Coleman, JJ., concur.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1st Div., No. 96,

Reuben F. McKinley, *Appellant*

vs.

Bowen Simmons, *Appellee,*

From Baldwin *Circuit Court.*

The State of Alabama,
City and County of Montgomery,

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to seven *inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.*

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama,

this January 10, 1963

J. Render Thomas

Clerk of the Supreme Court of Alabama

THE SUPREME COURT OF ALABAMA

October Term, 1962-63

1st *Div., No.* 96

Reuben F. McKinley

Appellant,

vs.

Bowen Simmons

Appellee.

From Baldwin Circuit Court.
No. 5202

COPY OF OPINION

BROWN PRINTING CO., MONTGOMERY 1962

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 19 62-63

To the Clerk *of the* Circuit *Court,*

Baldwin *County—Greeting:*

Whereas, the Record and Proceedings of the Circuit *Court* _____ *of said county, in a certain cause lately pending in said Court between*

Reuben F. McKinley, *Appellant*,

and

Bowen Simmons, *Appellee*,

wherein by said Court it was considered adversely to said appellant, were brought before our Supreme Court, by appeal taken, pursuant to law, on behalf of said appellant:

NOW, IT IS HEREBY CERTIFIED, That it was thereupon considered, ordered, and adjudged by our Supreme Court, on the 10th *day of* January, *19* 63, *that said* judgment *of said* Circuit *Court be in all things affirmed, and that it was further considered, ordered, and adjudged that the appellant* ~~and~~ Reuben F. McKinley, and Mrs. Lucy Belle Stanton and Mrs. Eugenia Barnes, sureties on the appeal bond, pay

the costs accruing on said appeal in this Court and in the Court below, for which costs let execution issue.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, at the Judicial Department Building, this the 10th *day of* January, *19* 63

J. Render Thomas

Clerk of the Supreme Court of Alabama.

THE SUPREME COURT OF ALABAMA

October Term, 19 62-63

1 Div., No. 96

Reuben F. McKinley

Appellant,

vs.

Bowen Simmons

Appellee.

From Baldwin Circuit *Court.*
No. 5202

CERTIFICATE OF AFFIRMANCE

The State of Alabama, } *Filed*
County. }

FILED
JAN
CLERK

this day of DUCK, 19

BROWN PRINTING CO., MONTGOMERY 1959