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Recent Decisions

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peaceful persuasion and intimidation. The purpose with which picketing is conducted and the result produced by it aid the courts to determine whether the act is lawful or not. Where the purpose is to interfere with the right of the employer to have a free labor market, picketing is unlawful; when the motive is to obtain information as to the number employed and the success of the strike, or to give information, to those employed or those willing to be employed, as to the merits of the strike and to persuade them to join the former employees then picketing is lawful.

Many difficulties arise as what may appear as peaceful persuasion. It may be the intent or the circumstances carry an evil equal to intimidation or coercion. Traces of intimidation may be pointed out in all peaceful persuasion to such an extent that some courts, although the minority, brand all picketing as unlawful and enjoin it. These courts condemn picketing on the grounds that in its very nature it is a pretense for intimidation, that it disrupts free trade, and that when employees, not under contract, leave their employment they have no right to interfere in the slightest degree as to whom fills their place. These courts fail to understand that peaceful picketing is possible and a reality. They disregard the right of employees to form combinations for economic interests,—a right equal to that of employers who combine to further their own economic interest. Such courts deny labor peaceful persuasion and information as a means to enforce their rights. The minority rule seems to turn the right of "probable expectancy," from that of a shield to a sword which the employer can use to thrust at the former employee and cut off his rights.

Daniel Chas. Lencioni.

RECENT DECISIONS

EVIDENCE.—COMPETENCY.—NATURE AND SOURCE OF EVIDENCE.—The case of *New York Life Insurance Company v. Silverstein*, 53 F. (2d) 986, decided by the Circuit Court of Appeals, Eighth District, on December 1, 1931, is interesting for several reasons. In that case Anna Silverstein, the plaintiff, brought an action against the defendant, New York Life Ins. Co., to recover upon an insurance policy issued by the insurance company upon the life of plaintiff's husband, Max. The policy was solicited by Sam Toub, an agent of the defendant, working for its Kansas City Branch office, and was delivered to the insured about March 27, 1927, although it was dated April 1, 1927. The insured died on December 3, 1928. The premiums were payable semi-annually. The plaintiff, over the defendant's objection, was permitted to testify as to a telephone conversation she had with the Kansas City branch office of the defendant pertaining to the payments of the premiums on November 26, 1928. Her testimony was that she found the name and number of the defendants in the telephone directory, and then

she called the number, using a dial telephone. On cross examination her testimony was as follows: "I asked when Mr. Toub would be in and the clerk over the phone said she couldn't tell me. I asked to talk to somebody in regard to the premiums, and a man answered the phone and I said, 'This is Mrs. Silverstein talking, and I want to know if Mr. Silverstein's premium is paid.' He said, 'All right wait a minute.' He then came back and said, 'It is all right.'" She could not identify the voices of the persons with whom she spoke. The issues of fact as tried in the lower court were whether or not the premium which became due September 28, 1928, had been paid so as to prevent the lapse of the policy, or, if not, whether the defendant by its acts was estopped to deny such payment. There was no error in admitting the testimony of the telephone conversation. Judge Gardner so held, and, according to the modern authorities, the holding was proper. Corpus Juris states the law to be as follows: "The rule requiring the identity of the speaker to be established is subject to a well recognized exception to the effect that, where the witness called the office of a party on the telephone, testimony as to a conversation had with a person answering the telephone and purporting to do so on behalf of the party is competent, although the witness did not recognize the voice of the person who spoke and is unable to identify the speaker, for the reason that the one who answers a telephone call from the place of business of the person called for, and undertakes to as his agent, is presumed to have authority to speak for him in respect to the general business there carried on and conducted." EVIDENCE, 22 C. J. 193. *Accord*: *American & British Mf'g. Corp. v. New Idria Quicksilver Mining Co.*, 239 Fed. 509 (1923); *Wolfe et al. v. Missouri Pac. Ry. Co.*, 11 S. W. 49 (Mo. 1889); *Gardner v. Hermann*, 133 N. W. 558 (Minn. 1911); *Star Bottling Co. v. Cleveland Faucet Co.*, 109 S. W. 802 (Mo. 1908); *Gilliland & Gaffney v. Southern Ry. Co.*, 67 S. E. 20 (S. C. 1910); *Kiviniemi v. Hildenbrand*, 221 N. W. 252 (Wis. 1930). In Massachusetts identity must be established. *Morrison v. Tremont Trust Co.*, 252 Mass. 383, 147 N. E. 870 (1925). Massachusetts adheres very strictly to the general rule.

Before a telephone conversation is admitted as testimony the parties must be identified if the conversations are between individuals. In *Stewart v. Fisher*, 89 S. E. 1052, 18 Ga. App. 519 (1916), the court held that evidence of a telephone conversation between the plaintiff's administratrix and the defendant which contained an admission by the defendant as to the correctness of the plaintiff's demand and a promise to pay the demand is inadmissible where the plaintiff admitted she did not recognize the defendant's voice. *Meyer Milling Co. v. Strohfeld*, 20 S. W. (2d) 963 (Mo. 1929), held that before a telephone conversation is admissible there must be some identification of the party with whom the conversation is held. *Accord*: *Dorchester Trust Co. v. Casey*, 176 N. E. 178 (Mass. 1929); *Chicago Smelting & Refining Corp. v. Sullivan*, 246 Ill. App. 538 (1928); *A. T. Stearns Lumber Co. v. Howlett*, 157 N. E. 82 (Mass. 1927); *Miller v. Kelly*, 215 Mich. 254, 183 N. W. 717 (1921). The case of *Googson v. Adams Grocery Co.*, 123 S. E. 748, 32 Ga. App. 419 (1924), held that in admitting testimony as to a telephone conversation with defendant, there was no error where witness testified that he held several conversations with the defendant and recognized her voice. Proof of identity is usually established by the recognition of the voice, although many circumstances that may establish the identification may be introduced to prove whom the speaker was.

The courts that permit witnesses to testifiy to telephone conversations without establishing the identity of the person to whom they were talking do so under the following reasoning: Where one installs a telephone in his home or

place of business he invites the people to use it for the purpose of calling him through that means. Telephones, like the telegraph, are being used to transmit messages. When anyone answers the telephone besides the person who installed the phone the courts say that they are using the phone as his agents. Modern conditions require that business under some instances be carried on by telephone, and unless the courts permit telephonic conversations grave injustices would follow. The courts are very careful on admitting such testimony. Where there are conversations among private individuals, as contrasted with business houses, the courts in most jurisdictions reject such evidence. A very interesting case is the *Jamaica Pond Garage v. Woodside Motor Livery,* 236 Mass. 541, 128 N. E. 881 (1920). That case held that in an action by a garage for motor vehicle hire, wherein an agent for the garage testified that, in talking over the telephone with the defendant's representative, $4 an hour was stipulated between them, while the defendant's representative testified to $3.50 an hour, a witness, having testified he was present when the plaintiff's representative said he was telephoning to the defendant, was properly permitted to testify that he heard the plaintiff's representative say into the telephone "$4 an hour is all right," the evidence not being hearsay. *Sawyer v. Eaton,* 293 Fed. 898 (1923), held that "testimony of a witness as to one side of a telephone conversation, shown to be between the parties, is admissible." *G. W. McNear, Inc. v. American & British Mf'g. Co.,* 44 R. I. 190, 115 Atl. 709 (1922), also supports that view.

However, in *Gubelman v. Ands Koch, Inc.,* 138 N. E. 81, 234 N. Y. 425 (1923), the court took a contrary view, holding that on the question of a broker's authority, the testimony of a witness, who heard the broker tell the defendant's president over the telephone that he made a purchase of German marks and asked him to confirm it, was not admissible where there was no evidence of what the defendant's president said in reply and no other evidence of the conversation of which such testimony could be corroborative.

Andrew J. Kata.

EXPLOSIVES.—ABSOLUTE LIABILITY.—In the case of *Exner v. Sherman Power Const. Co.,* 54 Fed. (2d) 510 (1931), an action in tort, brought by Delia H. Exner to recover damages to her person, property, and business which were caused by the explosion of dynamite kept by the defendant company in connection with work upon a hydroelectric development at Bellows Falls, Vermont, in which it was engaged. The defendant kept dynamite in a small hut on the westerly bank of the Connecticut River, located conveniently to its work. This hut was approximately 936 feet from the dwelling of the plaintiff, in which they rented rooms and apartments and carried on a restaurant and lunch-room. The dynamite hut was located close to a thickly settled part of Bellows Falls, and within fifty rods of five dwelling houses, a hotel, several factories, and business buildings belonging to persons other than the plaintiff. There was evidence that Mrs. Exner, the plaintiff, who was in bed in her house at the time of the explosion, was thrown out of bed and received injuries, that her house was so badly shattered as to require extensive repairs, and that her business was damaged. There was also uncontradicted evidence that at the time of the explosion the defendant had stored in the hut approximately 1,000 pounds of dynamite. There is a statute of Vermont (REV. LAWS 1880, § 4323), the consideration of which is involved in this case, which reads as follows: *"Keeping Explosives.* A person who keeps or suffers to be kept upon premises owned or occupied by him, within fifty rods of an inhabited building of another person, more than fifty pounds of gunpowder or nitro-glycerine at one time, or more

than one pound, unless contained in sound canisters of tin or other metal, or a package containing more than fifty pounds of dynamite, shall be fined twenty-five dollars, and twenty-five dollars additional for each day that it is so kept after notice from an inhabitant of such town to remove same." The first count of the plaintiff's declaration alleged a violation of the above quoted statute, and upon the case as submitted to the jury it must be determined whether under section 4323, or under the common law, the defendant became liable, irrespective of any fault, for the damage arising from the explosion. The defendant was *held* not to be liable to the plaintiff for a violation of the statute because they were not within the prescribed fifty rods provided for. The well known rule was invoked that only members of a class to be benefited can invoke a civil remedy by reason of a statute.

The question remains therefore whether there was an absolute liability for the damage caused by the explosion at common law? The earlier form of action such as trespass and trespass *quare clausum fregit* allowed recovery for a direct invasion of person or property without regard to fault. The doctrine of absolute liability for the creation and harboring of things inherently dangerous was first laid down in the English courts in the case of *Rylands v. Fletcher,* L. R. 3 H. L. 330 (1865). In this case the defendant constructed a reservoir on his lands and directly above some old mine shafts which were connected with mines under the land of the plaintiff, who was an adjoining land-owner. The defendant was unaware of the existence of the mine shafts, and was not shown to have been negligent in the construction of the reservoir. The reservoir bursted, entered the mine shafts, and damaged the adjoining mines and property. The defendant, however, was held liable for the damages, and Justice Blackburn, in delivering the opinion, said: "The person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all damages which is the natural consequence of its escape."

The doctrine laid down in *Rylands v. Fletcher* was first adopted in the American courts by Massachusetts, followed by Minnesota, Ohio, Missouri, West Virginia, and Texas. *Shipley v. Fifty Associates,* 106 Mass. 194 (1871); *Chahill v. Eastmen,* 18 Minn. 292 (1872); *Defiance Water Co. v. Olinger,* 54 Ohio St. 532 (1896); *French v. Center Creek Powder Mfg. Co.,* 173 Mo. App. 220, 158 S. W. 723 (1911); *Weaver Mercantile Co. v. Thurmond,* 68 W. Va. 530, 70 S. E. 126 (1911); *Texas & P. Ry. Co. v. Frazier,* 182 S. W. 161 (Tex. 1916).

The contrary rule has been adopted in the following states: New York, New Jersey, Pennsylvania, California, and Kentucky. *Lossee v. Buchanan,* 51 N. Y. 476 (1873); *Marshall v. Joseph Welwood & M. Garside,* 38 N. J. L. 339 (1876); *Pennsylvania Coal Co. v. Sanderson,* 113 Penn. St. 126, 6 Atl. 453 (1886); *Judson v. Giant Powder Co.,* 107 Calif. R. 549, 40 Pac. 1020 (1895); *City of Owensboro v. Knox's Adm.,* 116 Ky. 451 (1903).

Although the rule as laid down in *Rylands v. Fletcher* has not been followed in America to the full extent of all its implications, yet in the so-called "blasting" cases an absolute liability, without regard to fault has been uniformly imposed by the American courts whenever there has been an actual invasion of property by rock or debris. In *Hay v. The Cohoes Co.,* 2 N. Y. 159, 51 Am. Dec. 279 (1848), the court said: "The right of the owner of lands to the enjoyment thereof is qualified by the rights of others. Thus, he may pursue any lawful trade, but he cannot create a nuisance to the premises of another. So he may dig a canal, but in so doing he has no right to blast rocks so as to cast them upon the premises of another." In *Green et ux v. General Petroleum Corp.,* 270 Pac. 952 (Cal. 1928), the defendant had been drilling for oil within 200 feet of plaintiff's home. There was evidence tending to prove that the defendant had been in the exercise of due care in the operations, but due to a sudden and unexpected blow out of

the oil, the derrick was wrecked and oil poured upon the property of the plaintiff until it varied in depth from four to seven inches. The court seems to base its ruling on moral conception, saying that since it was the defendant's operations that led to the damage, although he was without fault, he should, "in all fairness," compensate the plaintiff for his damages. See also: *Adams v. Sengel,* 177 Ky. 809, 197 S. W. 974 (1917); *G. B. & L. Ry. Co. v. Eagles,* 9 Colo. 544, 13 P. 696 (1887); *Tiffin v. McCormack,* 34 Ohio St. 638, 32 Am. Rep. 408 (1878); *Gossett v. So. Ry. Co.,* 115 Tenn. 376, 89 S. W. 737 (1905); *Wells v. Knight,* 32 R. I. 432, 80 Atl. 16 (1911); *Patrick v. Smith,* 75 Wash. 407, 134 Pac. 1076 (1913); *Ex parte Birmingham Realty Co.,* 183 Ala. 444, 63 So. 67 (1913).

In some jurisdictions the rule of absolute liability for direct injury from blasting has been applied, not only to damage to property, but to the person. In one Indiana case where a person, in quarrying stone, near a public highway, by a blast of gunpowder threw fragments of stone against a traveler passing on said highway, whereby he was injured, the court held that although the act which caused the injury was lawful, the recovery of damages for the injury could not be defeated by the fact that there was no negligence on the part of the person who did said act. *Wright v. Compton,* 53 Ind. 337 (1876). *Accord: Louisville & N. R. Co. v. Smith's Adm'r.,* 203 Ky. 513 (1923); *Sullivan v. Dunham,* 161 N. Y. 290, 55 N. E. 923 (1900).

Some courts have distinguished between liability for a common-law trespass, occasioned by blasting, which projects rocks or debris upon the property or the person of the plaintiff, and liability for so-called consequential damages arising from concussion, and have denied liability for the latter where the blasting itself was conducted at a lawful time and place and with due care. In *Booth v. Rome, W. & O. T. R. Co.,* 35 N. E. (N. Y. 1893), the court held that where a railroad company which having to do blasting on its own land in order to lay its tracks, exercises due care in doing it, and uses charges of no greater force than are necessary for the purpose, is not liable for injury to adjoining property arising merely from the incidental jarring. The aforesaid rule, which is the minority holding, has also been adopted in the following cases: *Rafferty v. Davis,* 260 Pa. 563, 103 Atl. 951 (1918); *Simon v. Henry,* 62 N. J. Law, 486, 41 Atl. 692 (1898); *Bessemer, etc., Co. v. Doak,* 152 Ala. 166, 44 So. 627 (1907); *Rost v. Union Pac. Ry. Co.,* 95 Kan. 713, 149 Pac. 679 (1915); *Gilson v. Womack,* 218 Ky. 626, 291 S. W. 1021 (1927).

The contrary and majority rule, as given by the court in *Colton v. Onderdonk,* 69 Cal. 155, 10 Pac. 395 (1886), is that where one who owns a lot, situated in a large city, and adjoining the dwelling of another, and uses large quantites of gunpowder to blast out rock on his lot is responsible for the damage done to such dwelling as the natural and proximate result of his blasting, such blasting being taken as an unreasonable, unusual, and unnatural use of his own property; and he cannot excuse himself from liability for such use of his property by showing any degree of care or skill. *Accord: Fitzsimons & Connell Co. v. Braun,* 199 Ill. 390, 65 N. E. 249 (1902); *Watson v. Mississippi R. Power Co.,* 174 Iowa 23, 156 N. W. 188 (1916); *Patrick v. Smith,* 75 Wash. 407, 134 Pac. 1076 (1913); *Louden v. City of Cincinnati,* 90 Ohio St. 144, 106 N. E. 970 (1914); *Longtin v. Persell,* 30 Mont. 306, 76 Pac. 699 (1904); *Feinberg v. Wisconsin Granite Co.,* 54 S. D. 643, 224 N. W. 184 (1929); *McKenna v. Pacific Electric Ry. Co.,* 104 Cal. 155, 286 Pac. 445 (1930); *Hickey v. McCabe & Bihler,* 30 R. I. 346, 75 Atl. 404 (1910).

The court in principal case adopted the majority holding, saying that the distinction, between the case where there was direct injury by the casting of stones and debris, and where the injury was caused by concussion, was merely based on historical differences between the actions of trespass and case and is without logical basis.

Thomas E. Reed.

INTOXICATING LIQUORS.—OFFENSES.—LIQUORS PROHIBITED.—The case of *United States v. Brunett et al.*, 53 Fed. (2d) 219 (Mo. 1931), is noteworthy, particularly so at a time like the present when speculation is rife as to which beverages fall under the restrictions of the National Prohibition Act, and those beverages which, according to this law, are not illegal. The defendants, Ukiah Grape Products Co., and A. E. Brunett, its sales manager, were indicted and convicted for wilfully and knowingly violating Section 30, Title 27, U. S. C. A., which provides that "It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor." The government introduced evidence tending to show the intent and design of the defendants in connection with its organization and purpose. Salesmen hired by the defendants, testified that they were told the defendant company was engaged in selling a product which was "not grape juice but an unfermented wine"; that the grape syrup which entered the product was shipped from California to New York, that it was then held in defendant company's factory until orders were received; that when the orders were received, it was mixed with a form of sugar water and various flavors, and classified under the names of well known wines, as Port, Muscatel, Burgundy, Sherry, etc. The salesmen were told that the product when received by the purchaser would not yet have developed an alcoholic content, or not more than one-half of one per cent of alcohol by volume. They were further told to instruct purchasers as to what they should do with the product when it had been delivered. The purchaser was to be told that, having received the product shipped to him, he should place it in a dry, warm room with a temperature of 80 degrees; that it would always be shipped in a keg. This keg should be raised a few inches from the floor and kept upright; he should so manipulate the bung that gasses might escape; that the keg should thus remain for three weeks or longer, until fermentation ceases; then the contents should be siphoned and filtered into glass containers for clarification. The finished product would be an excellent, high-grade wine containing from 12% to 18% alcohol by volume. An advertising letter was also introduced in evidence. An excerpt from it read: ". . .we have been of untold aid to the enforcement of the law, by making the bootlegger's business unprofitable, and by enabling the American public to purchase a pure, wholesome product legally, at low prices, instead of buying unwholesome, impure products illegally from liquor peddlers at exorbitant prices." The retail price of this product was $5 per gallon. The defense was to the effect that the law and its restrictions did not apply to a person manufacturing non-intoxicating cider and fruit juices exclusively for use in his home. This contention failed completely, however, when it was shown that the "fruit juice" or grape juice was already manufactured before it came into the defendant's possession, and by specially treating this grape juice the defendants performed one step or operation toward the manufacture of liquor intoxicating in fact.

Judge Otis, of the United States District Court, for the Western District of Missouri, found as a matter of fact that this concentrate made by the defendants contained no alcohol at the time of sale, but that in connection with the sale instructions were given to the purchaser as to what he should do with the product in order to allow the processes of nature to so operate as to change the liquor into an intoxicating beverage. The defendants were found guilty. The court further found as a matter of law, that a grape juice concentrate is a "preparation," "compound," or "substance" within the Prohibition statute, and any liquid containing body, seeds and evaporated juice of grapes, with sugar, water, and other ingredients is not "grape juice" within the statute authorizing

persons to manufacture non-intoxicating fruit juices for use in their homes. As a final proposition, the court held that any act in producing wine is a part of "manufacture" within the statute.

The Pennsylvania Statute on Intoxicating Liquors (PA. STAT. SUPP. 1928, § 14089a-3), passed in pursuance of the power granted by the 18th Amendment to the Federal Constitution, provides that it shall not be unlawful to manufacture non-intoxicating cider and fruit juices exclusively for use in the private dwelling. This statute is typical of most state legislation on the legality of fruit juices used for beverage purposes. In California, in the recent case of *People v. Sinicrope,* 288 Pac. 61 (App. Dept. Superior Ct., Los Angeles County, Cal., 1930), the court held that liquid made by adding water to jelly-like syrup is not within the exception in respect to manufacturing non-intoxicating cider and fruit juices. This same court interpreted the word "juice," as used in the National Prohibition Act, Title 2, § 29 (27 U. S. C. A. § 46), to mean "sap obtained by expression."

From the principal case it will be seen that the construction placed on the National Prohibition Act by Federal Courts is in accord with the construction placed upon that act by the state courts in reference to the question of fruit juices being intoxicating. Also, it is in accord with the construction placed by state courts upon state statutes passed in pursuance of the power granted by the 18th Amendment to the Federal Constitution.

F. X. Kopinski.

UTTERANCES IN LEGISLATIVE PROCEEDINGS.—ABSOLUTE PRIVILEGE.—Plaintiff sues defendant, a United States Senator from the state of Michigan, for a slander alleged to have been committed during a speech from the floor of the Senate, in which the defendant referred to a proposal made by the plaintiff to the defendant that he would be able to secure information, for a high fee, regarding taxes that were levied by the federal government on a sale of stocks made by the defendant. The plaintiff contended that inasmuch as the speech made by the defendant was unofficial and not in the discharge of official duties it would not be privileged within Art. 1, Sec. 6, of the United States Constitution. Judgment was given for the defendant. *Held,* that the averment that the words were spoken "unofficially and not in discharge of his official duties as a Senator" is a mere conclusion and entirely qualified by the averment that they were uttered in the course of speech. Furthermore, there was an existing absolute privilege granted by the Constitution, *supra,* to words uttered in the Senate chambers. *Cochran v. Couzens,* 42 Fed. (2d) 783 (1930).

In accord with this case it is a rule of general application in this country that libelous or slanderous matter published in the due course of legislative and judicial proceedings is absolutely privileged and will not support an action although made maliciously and with knowledge of its falsity, if pertinent or relevant to the issues in litigation or matter under inquiry. *Peterson v. Steenerson,* 113 Minn. 87, 129 N. W. 147, 31 L. R. A., (N. S.) 674 (1910); *Sheppard v. Bryant,* 191 Mass. 591, 78 N. E. 394 (1906); 6 Am. & Eng. Cas. 802; 25 Cyc. 376.

In many of the states absolute privilege is guaranteed by their respective constitutions. See: CONST. MASS., Pt. 1, Art. 21; CONST. N. J., Art. 4, § 4, Par. 8; CONST. N. Y., Art. 3, § 12; CONST. U. S., Art. 1, § 6. Also see BILL OF RIGHTS, WM. & MARY, SESS. 2, c. 2. (English St. upon which most of the articles of the constitutions of the states, which grant immunity from libel proceedings, are based.) It has been held that these constitutional guarantees should be construed liberally so that their full design may be answered, extending them to every act resulting from the nature of the member's office and done in the

execution of it, and exempting him from liability for everything said or done by him as a member of the legislature, whether according to the rules of the house or not. Hence such member is not liable for words uttered in the execution of his official duty even when he has spoken maliciously. This class of absolutely privileged communications has been limited practically to legislative and judicial proceedings. An illustration of how the courts interpret the constitutional guaranty of immunity can be found in the case of *Coffin v. Coffin,* 4 Mass. 1, 3 Am. Dec. 189 (1808), where the Supreme Judicial Court of Massachusetts was called upon to point out the meaning of Pt. 1, Art. 21 of the Constitution of that state, which reads as follows: "The freedom of deliberation, speech and debate in either house of the legislature is essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." Parsons, C. J., in defining this article of the constitution, said: "I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative in the exercise of the function of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representative chambers... He cannot be exercising the functions of his office as a member of the body unless the body be in existence. The house must be in session to enable him to claim the privilege; and it is in session notwithstanding occasional adjournments for short intervals for the convenience of its members. If a member, therefore, be out of the chamber, sitting in a committee, executing the commission of the house, it appears to me that such member is within the reason of this article, and ought to be considered within the privilege .... When a representative is not acting as a member of the house, he is not entitled to any privilege above his fellow citizens." *Coffin v. Coffin, supra,* is one of the leading cases and has been followed and cited in many of the courts of this country.

However, in some jurisdictions, certain limitations to the absolute character of the privilege attaching in the case of legislative proceedings have been recognized. Thus, it has been held not enough that the slanderous words complained of were uttered in a legislative hall, but that further reference must be had to the circumstances and to the occasion of the particular occurence before the question can be determined, and that even a member cannot take advantage of his official position to give expression to private slanders against others. *McGaw v. Hamilton,* 184 Pa. 108, 63 Am. St. Rep. 786 (1898). In the latter case the court held as follows: "The utterance of the defendant being foreign to any matter pending in the council, nor was the justice of the claim at issue; it should be left to the jury to determine whether the utterance was malicious, wanton and designed to injure the plaintiff under the color of a privileged communication." In accordance with this principle it has been held that a member of the city council, during a session thereof, is not privileged to call another city official a "thief" although the term is intended to apply to his official conduct, if there is no inquiry pending or proposed as to such conduct. *Callahan v. Ingram,* 122 Mo. 355, 43 Am. St. Rep. 583 (1894). Furthermore, even though the utterance was made during the regular proceedings, if it proved to be false and malicious it was no longer privileged. *Burch v. Bernard,* 120 N. W. 33, (Minn. 1909). The question as to whether the occasion on which the words were spoken was such as to make the communication one of privilege is always a question of law for the court, when there is no dispute as to the circumstances under which it was made. *Callahan v. Ingram, supra.* But in all these cases just considered although the privilege is referred to as one being absolute *with limitations,* that very fact makes them, properly speaking, qualified privileges.