INDEX

TRANSCRIPT OF PLEADINGS FOR TRIAL.

COMPLAINT.

(Filed April 12, 1929.)

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

CLARENCE L. COLE, *Plaintiff,* v. EMERSON L. RICHARDS, *Defendant.*	Cole and Cole, Attorneys for Plaintiff. Bourgeois & Coulomb, Attorneys for Defendant.

Summons issued April 9, 1929.

The plaintiff, Clarence L. Cole, of the City of Ventnor City, County of Atlantic and State of New Jersey, says that:

1. On and for upwards of forty years before April 2nd, 1929, plaintiff was and had been a citizen of Atlantic County, New Jersey.

2. On, and for several years before said date, the

defendant was and had been a New Jersey State Senator representing said county.

3. On said date on the floor of said Senate, in open session, defendant said, in substance, of and concerning plaintiff, who at the time, was, and now is a member of the bar of said State and pursuing the general practice of law, that he, plaintiff, "forged my (defendant's) name to a paper in the Court of Errors and Appeals and was rebuffed for it."

4. Said statement was repeated by the defendant in public and in the presence of at least one citizen of Atlantic City, in said county on the fourth or fifth of said April.

5. Plaintiff did not at any time forge defendant's name to any paper in the Court of Errors and Appeals.

6. The charge made by defendant against plaintiff was false, known by him to be false when uttered, was uttered maliciously and for the purpose and with the intent to defame the reputation of plaintiff.

7. No one who heard the statement made or read it in the newspapers which published it, believed it to be true, and, therefore, plaintiff has been damaged in his name and reputation to the extent of only six cents, for which amount he prays judgment.

COLE & COLE,
Attorneys of Plaintiff.

ANSWER.

(Filed June 10, 1929.)

Defendant, Emerson L. Richards, answering the complaint of the plaintiff filed herein, says that:

1. Paragraph 1 of the complaint is admitted.

2. Paragraph 2 of the complaint is admitted.

3. Defendant says that he is not called upon either to admit or deny the allegations set forth in the third paragraph of the complaint for the reason that such statements as defendant is alleged to have made were made in the course of a debate on the floor of said Senate, the subject-matter of which was the fitness of the said plaintiff to act as solicitor or attorney for a Joint Committee of the Senate and General Assembly of the State of New Jersey, known as the "Case" and later as the "McAllister" Committee, which Committee was then and there existing, and had been and was authorized and directed to make certain investigations of the affairs of certain municipalities and counties in the State of New Jersey for the purpose of informing the Senate and General Assembly of the conditions in said municipalities and counties in order that the Senate and General Assembly of the State of New Jersey could frame and adopt such legislation as might be necessary in order to correct and prevent such misfeasance, non-feasance and malfeasance as

said Committee might find to exist in the administration of the affairs of such counties and municipalities.

4. Paragraph 4 of the complaint is denied.

5. Paragraph 5 of the complaint is admitted.

6. Paragraph 6 of the complaint is denied.

7. Defendant has no knowledge or information concerning the matters and things set forth in paragraph 7 of the complaint.

First Defense.

Defendant says that such statements as defendant is alleged to have made were made in the course of a debate on the floor of said Senate, the subject-matter of which was the fitness of the said plaintiff to act as solicitor or attorney for a Joint Committee of the Senate and General Assembly of the State of New Jersey, which Committee was then and there existing, and had been and was authorized and directed to make certain investigations of the affairs of certain municipalities and counties in the State of New Jersey for the purpose of informing the Senate and General Assembly of the State of New Jersey of the conditions in said municipalities and counties in order that the Senate and General Assembly of the State of New Jersey could frame and adopt such legislation as might be necessary in order to correct and prevent such misfeasance,

non-feasance and malfeasance as said Committee might find to exist in the administration of the affairs of such counties and municipalities.

BOURGEOIS & COULOMB,
Attorneys of Defendant.

REPLY.

(Filed June 10, 1929.)

Plaintiff joins issue on the third, fourth, sixth and seventh paragraphs in the answer.

AS TO THE FIRST DEFENSE.

Plaintiff denies that the statements ascribed to the defendant were made in the course of a debate on the floor of the Senate; he denies that the subject-matter was the fitness of plaintiff to act as solicitor or attorney for a Joint Committee of the Senate and General Assembly of the State of New Jersey; he denies that said Committee was authorized and directed to make any investigation touching the affairs of Atlantic County.

COLE & COLE,
Attorneys of Plaintiff.

I, the undersigned, clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this nineteenth day of November, A. D. nineteen hundred and thirty.

FRED L. BLOODGOOD,
Clerk.

(Seal)

TESTIMONY.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

CLARENCE L. COLE,
Plaintiff,
v.
EMERSON L. RICHARDS,
Defendant.
Action at Law

Atlantic City, N. J., November 24, 1930.

Before HON. WILLIAM FRANK SOOY, Judge, and a jury.

APPEARANCES:
For plaintiff, LEE F. WASHINGTON, ESQ.
For defendant, GEORGE A. BOURGEOIS, ESQ., of MESSRS. BOURGEOIS & COULOMB.

OPENING TO THE JURY ON BEHALF OF THE PLAINTIFF.

Mr. Washington: May it please your Honor, members of the jury: This is a case that I think I may say from the standpoint of counsel on both sides is an unpleasant case. It is a case that it is a sorry shame we have to have before the Court. The plaintiff, as we shall show you, is a former Judge of this county, having been Common Pleas Judge at one time and at another time a Judge of this very court. The defendant is the Senator from this county.

The complaint setting forth the plaintiff's cause of action is based upon statements which the plaintiff says the defendant made concerning him, the plaintiff. The defendant is claimed to have said of and concerning the plaintiff these words: "He" —the plaintiff—"forged my name to a paper in the Court of Errors and Appeals, and was rebuffed for it."

The suit is brought for the sum of six cents. The plaintiff has brought the suit because it is the only method that he can take to have the defendant establish, if he can, the truth of this alleged statement that the plaintiff forged the defendant's name to a paper in the Court of Errors and Appeals and was rebuffed for it. We are here to give the defendant a chance either to prove that he made no such statements, or if he did make those statements, to give him an opportunity to prove the truth of the statements.

I will not bother reading to you in detail at this time all the various allegations in the pleadings. They will come before you in due course.

OPENING TO THE JURY ON BEHALF OF THE DEFENDANT.

Mr. Bourgeois: May it please your Honor, ladies and gentlemen of the jury: I suppose everybody is sorry that this case is on the list, the lawyers, the Judges, and I presume the jurors. It is one of those matters that has arisen in life that happen without thought and without any opportunity of consideration. For instance, it is not always that people in certain positions, a position of stress, are able to think as clearly and act as collectively as they do when they are sitting at home reading their paper, or in some position where they are calm. For instance, it frequently happens that lawyers in the trial of a cause become excited and they say things to one another sometimes, and at other times about clients, that after they have been said they would do anything in the world if they could recall them. They cannot recall them, but the law protects them from making those statements. The law says a person is privileged, and, therefore, he is not subject to being sued or prosecuted for having said them. They arise frequently in the prosecution of suits where people are intense, excited in the trial of a cause and say things they really would not think of saying in their calmer moments.

Such a privilege arises in the Legislature. In fact, it is a more pronounced privilege in the Legislature. The privilege that arises in a court of law is a personal privilege. The privilege that arises in the Legislature is a constitutional privilege. It is a privilege that is thrown upon people by the constitution, and it cannot be escaped. A person cannot waive it if he wants to. A man may waive a privilege that is personal to him.

This suit is brought to have Senator Richards respond in damages, not excessive, to be sure, for having made a statement concerning Judge Cole during an argument on a resolution in the Senate. That was on the second of April, 1929. Prior to that time there had been pending in the New Jersey Courts, first in the Court of Chancery and then removed to the Court of Errors and Appeals, a suit of Rosenberg against some person in town, I forget who it was—Max Weinman's Corporation, it was—over a question of rent. In that suit Elmer Brown was solicitor and Senator Richards was of counsel with Elmer Brown. On the other side was John Reed, and Judge Cole was counsel with John Reed, or vice versa. I don't know which it was.

During the progress of that suit it went to the Court of Errors and Appeals, and before a case is on for argument regularly in the Court of Errors and Appeals there must be an answer filed. An answer must be filed by the respondent. In this particular case there probably was anxiety to have the case on early, and neither Mr. Brown nor Senator Richards filed the answer because the time had not yet expired. The other people, being anxious to have the case on at that time, saw to it that an an-

swer was filed. It is a formal matter, as a matter of fact, and yet it has to be done. Who signed it I don't know, and I am not going to attempt to say, but at any rate that case went before the Court and a motion was made to put the case off for the term because the answer had been improperly filed. The irregularity Judge Cole assumed the burden of, as I am told, and the case went off for the term.

Later, in the Senate, while a certain investigating committee was under discussion and a resolution pertaining to it was before the Senate, a resolution, I think, by which one of the Senators sought to have the investigating committee come down to Atlantic County and investigate the affairs in Atlantic County, the question arose about changing their counsel. The counsel of the committee at that time, I think, was a Mr. Watson, and it was suggested by this Senator from the upper part of the State that the matter be referred to somebody down here, two or three names being given, among others, Judge Cole's. Senator Richards on the spur of the moment, being in that debate, it affecting Atlantic County directly, made some statement with reference to this case in the Court of Errors and Appeals, in which it is said he disparaged Judge Cole, and out of that statement, made on the impulse of the moment in the Senate Session, in an argument of the Senators on that question, this statement was made. Judge Cole felt that he had been harmed by it, at least, had been hurt by it, and this suit was instituted.

So far as the statement in the Senate is concerned, the answer is that it was made during a session of the Senate; that it was made while a

matter was under discussion, and it was privileged. Under the Constitution of the State it is privileged, because the constitution says that for any statement made in the Senate, during any session of the Senate, a man shall not be questioned anywhere else. He cannot even be questioned in this court. He cannot be questioned in any court about it, because the Legislature in that respect is supreme.

There are three departments of government. One is the legislative department and the other is the executive, and for that sort of matter the executive department cannot interfere. In this complaint it is also alleged that Senator Richards repeated that statement in Atlantic City. If that were true, of course, he could not claim any privilege from that. He denies ever having repeated the statement any place. The statement was made on the floor of the Senate and has never been repeated by him, either here or there or any place else.

That is the case that comes before you people. In this complaint Judge Cole says that he has been damaged only to the extent of six cents. The amount of money will not make either of them rich, will not make either of them poor.

That is the case you are to decide, whether or not Senator Richards shall pay him the six cents or whether he does not have to pay anything.

CLARENCE L. COLE, sworn.

Direct examination.

By Mr. Washington:

Q. Judge Cole, you are the plaintiff in this case, are you not?

A. Yes.

Q. You are a member of the bar of the State of New Jersey?

A. Yes.

Q. Of how many years standing?

A. Since 1890.

Q. Did you ever hold any public office or position in this county?

Mr. Bourgeois: That is objected to as irrelevant and immaterial.

Mr. Washington: There is an allegation in the particular article that we claim as the basis for damages that the article referred to "Judge Cole." We ask that we have the right to connect the charge with the plaintiff.

The Court: I will permit it.

(Question repeated.)

A. Yes.

Q. What position?

A. Judge of the Court of Common Pleas.

Q. Any other position?

A. Once Circuit Court Judge.

Q. So far as you know, are you the only Judge Cole who has lived in Atlantic County?

A. Yes.

Q. The statement is made in the complaint in this matter that the defendant said that you forged his name to a paper in the Court of Errors and Appeals, and that you were rebuffed for it. Is that statement true or is it false?

A. False.

Q. Did you ever forge the defendant's name to any paper at any time?

A. No.

Q. Were you ever rebuffed by the Court of Errors and Appeals for forging the defendant's name?

A. No.

Q. When was the making of that alleged statement first called to your attention, and how?

A. My present recollection is in the Evening Union of Atlantic City.

Q. Did you buy a copy of that paper?

A. Yes.

Q. Have you preserved it?

A. Yes.

Q. I show you two sections of a newspaper, and ask you if that is the paper which you then purchased?

A. Yes.

Q. Will you please indicate to the Court and jury the portion of that paper in which the statements in question first appeared?

Mr. Bourgeois: I object to that as irrelevant and

immaterial. This suit is not brought for any libel. There is no count about the publishing of it. It is brought for words spoken.

The Court: That is all, as I understand it. What is the purpose?

Mr. Washington: It is preliminary to leading up to an occasion in which we say these words were repeated, not only on the floor of the Senate, but were repeated off the floor, and an occasion when the privilege did not exist.

The Court: Yes, but this does not prove they were the words spoken.

Mr. Washington: We concede that.

The Court: Then what is its materiality?

Mr. Washington: Only for the purpose of leading up to the occasion on which there was an actual repetition, as we claim, of the statements.

The Court: I think you should prove the repetition.

(Exception noted for plaintiff.)

Q. Judge Cole, after the alleged making of these statements was first called to your attention, did you communicate with the defendant in any way?

A. Yes.

Q. In what way?

A. By letter.

Q. Do you have your copy of that letter?

A. Yes, it is among the papers there.

Mr. Washington: Have you it, Mr. Bourgeois?

Mr. Bourgeois: Not with me.

Q. Will you please find, if you can, the copy of the letter which you say you wrote to Senator Richards, and if you have any alleged reply, will you produce that, too?

A. That is the copy and that is the reply.

Q. Did you make any demand on the defendant to produce the original prior to the trial?

A. No.

Mr. Washington: If your Honor please, I call upon the defendant to produce the original of the letter dated April 4th, 1929, signed C. L. Cole, directed to Emerson Richards.

Mr. Bourgeois: I am not objecting to this, because it is a copy. I am going to object to it because it is not material and not relevant, when they are offered.

The Court: The mere fact that there was no demand made you waive?

Mr. Bourgeois: Yes, I object to them because they are self-serving and not relevant. They do not show at all whether the statement was made or was not made.

The Court: Where is their relevancy on the issue we are trying? The statement in the complaint is that on the floor of the Senate a certain thing was said; that thereafter the Senator repeated the statement that he had made on the floor of the Senate. Neither the letter nor the reply seems to me to bear any proof on that issue.

Mr. Washington: The purpose of it is this: The plaintiff claims that those statements were not only false, but that they were maliciously false, they were made for the purpose of injuring the plaintiff, and there was no truth whatsoever in those articles. We claim that there was a repetition of those statements after the publication in the newspaper. We offer that letter and the copy for the purpose of showing the attitude of the defendant himself towards the plaintiff.

The Court: If the words were actually spoken in the Senate in a debate can you call the defendant to question even though he may have acted maliciously at that time?

Mr. Washington: There is a question as to that.

The Court: Of course, if afterwards he may have repeated the statements, they are actionable per se, aren't they?

Mr. Washington: Yes, sir.

The Court: And you are not asking for punitive damages at all?

Mr. Washington: No, sir.

The Court: You are simply cumbering the record with something that does not, it seems to me, aid the jury in determining whether or not these words were spoken, and whether or not they were true. If they were spoken out of the Senate and if they were not true, then the jury would be justified in finding a verdict for six cents, irrespective of any malicious intent or otherwise, because the law would presume there was not.

Mr. Washington: The contention of the plaintiff is that those statements were made, as I say, aside from the statements in question; that they were also repeated afterwards. Whether or not that is a fact, whether they were repeated afterwards we feel can better be considered if your Honor will also allow before the jury the attitude of the defendant himself toward the plaintiff and with respect to the making of the statements. For that purpose we offer them.

The Court: Better mark these for identification. I refuse the offer at the present time.

(Exception noted for plaintiff.)

(The papers were marked P1 for identification and P2 for identification.)

Q. Judge Cole, did you on any occasion after the making of these alleged statements was called to

your attention, talk to the defendant himself concerning them?

A. No.

Q. Did you write any letters to the defendant or receive any letters from the defendant touching this question, aside from the ones I have attempted to have admitted in evidence?

A. I don't recall any.

(No cross-examination.)

ROBERT JOHNSTON, sworn.

Direct examination.

By Mr. Washington:

Q. Mr. Johnston, where do you reside?

A. 14 North Plaza Place, Atlantic City.

Q. How long have you resided in Atlantic City?

A. Fifty-nine years.

Q. Do you know the plaintiff, Clarence L. Cole?

A. Yes.

Q. How long have you known him?

A. Forty years.

Q. Do you know the defendant, Emerson L. Richards?

A. Yes, sir.

Q. How long have you known Mr. Richards?

A. Since he was ten years old. I don't know how old he is now.

Q. Mr. Johnston, did you on April 2nd and April

3rd, 1929, hold any official position in the New Jersey State Senate?

A. I was secretary.

Q. Was Senator Richards then a member of the New Jersey State Senate?

A. Then, and is.

Q. Did you on April 2nd, 1929, or April 3rd, 1929, hear Senator Richards make any statements concerning the plaintiff, Clarence L. Cole?

Mr. Bourgeois: I object.

The Court: I presume it is confined to the New Jersey Senate?

Mr. Washington: I can't say yet.

The Court: Then I will permit him to answer yes or no.

(The question was repeated.)

A. Yes.

Q. What did you hear the defendant say, if anything, concerning the plaintiff?

Mr. Bourgeois: I object. The complaint alleges that this statement was made on the floor of the Senate during a session of the Senate. That pleading is binding upon the plaintiff, and if that statement was made on the floor of the Senate during a session of the Senate, it cannot be inquired of here what was said or what was done, certainly not what was said, because the subject of what was said be-

comes immaterial under the constitutional provision.

The Court: That would not be privileged unless it was said in a speech or debate.

Mr. Bourgeois: That on the face of it might be so, but the cases do not hold that. A United States case holds that anything that is said there, whether it is a speech or a debate does not make any difference, if it is said on the floor of the Senate during a session of the Senate, it makes no difference, it is privileged.

The Court: I am going to sustain the objection to that question, not because it may not ultimately be permitted, but because it seems to me that first we should have when it was made, where it was made, and under what circumstances it was made, because in your complaint you say on the floor of the Senate, I think.

Mr. Washington: We say the statement was repeated in public in the presence of at least one person in the County of Atlantic on the fourth of April.

The Court: Is the purpose to prove by this witness that the defendant said something about the plaintiff other than on the floor of the Senate?

Mr. Washington: If your Honor please, I am not in a position to say without examining the defendant whether or not there was a repetition of the statements other than on the floor of the Senate.

We contend that the question of whether or not there is a privilege here is a question which your Honor will have to determine after the proof is in and not before the evidence is admitted.

The Court: I will permit the question, allow the defendant an exception, subject to its being stricken later on in the trial.

(Exception noted for defendant.)

(The question was repeated as follows: "What did you hear the defendant say, if anything, concerning the plaintiff?")

A. Well, Senator Simpson of Hudson County and Senator Richards of Atlantic County were in a debate or argument relative to the conduct of affairs in Atlantic City, and Simpson during the course of his argument stated that no real attempt had been made to correct the conditions, and that the proper kind of investigators had not been used or employed, and suggested the names of Judge Cole and Charlie Moore and probably another name, but those two were mentioned, anyhow.

Mr. Bourgeois: I want to ask him one question before this proceeds.

The Court: I will let him answer the question.

A. Senator Richards a few moments later, in his reply to the Senator from Hudson, stated that he was probably not aware of the fact ——

Mr. Bourgeois: Your Honor, I object and ask it be stricken out because it has gone to the point now where it appears it was a discussion in the Senate, on the floor of the Senate, not pertaining to anything on the outside.

The Court: I am going to permit the rest of it and allow you an exception and rule on the whole question when the question is answered.

(Exception noted for defendant.)

A. Senator Richards stated that Simpson was probably not aware that Judge Cole was—had signed some papers in the higher courts, I don't know just what court it was, or whether it was mentioned which court it was, that constituted a forgery, and that he had been criticized or rebuked or something of that character, I don't just remember the exact words, for that action. That was about the real—well, the res gestae of the speech or argument.

Q. Mr. Johnston, did you hear ——

Mr. Bourgeois: Now, I move to strike that out.

The Court: Wait until he finishes the question.

Mr. Washington: It is preliminary to the question of whether or not there was any repetition of those statements by Richards to Johnston on any other occasion and off the floor of the Senate.

The Court: Of course, your question is all right.

Mr. Washington: They will have to stand together.

The Court: I do not see why they will have to stand together at all. Whether or not there was a repetition of those statements would not be a competent question. The question is whether or not at some other time and place than in the Senate and in debate he heard the Senator say anything against the Judge.

Mr. Washington: Isn't it relevant to this complaint for us to prove by this witness, if we can, that those same statements were repeated?

The Court: By asking him the question, certainly, but not by asking him to draw a conclusion. This testimony, standing as it does, does not help you in your next question. However, I am not going to rule on it yet.

Q. Did you hear Senator Richards or Mr. Richards repeat those statements concerning Judge Cole on any other occasion?

A. No, sir.

Q. That is the only occasion on which you ever heard them made?

A. Yes, sir.

Q. Did you ever discuss with Mr. Richards on any other occasion the truth of any of those statements?

A. Our discussions were not frequent.

Mr. Washington: Cross-examine.

Mr. Bourgeois: I renew my motion to strike that out.

The Court: I will not strike it at this time. I will hold it until we get down to the crucial question.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Johnston, you were secretary of the Senate at that time?

A. Yes, sir.

Q. And at that particular time there was a resolution before the Senate, wasn't there, that was being discussed?

A. Yes.

Q. Have you that resolution with you?

A. No, sir.

Q. Can you tell me the purport of the resolution?

A. No, I couldn't, and when I said yes to a resolution, I probably should withdraw that. I think it was probably a question of privilege on the part of Senator Simpson that started the debate. I am not sure that there was a resolution on the desk. There might have been. I am not clear on that.

Q. Wasn't there either a motion or a resolution that Mr. Watson should be superseded as attorney for a certain committee and these people you have mentioned, or one of them, put in his place to make the investigations down here?

A. There might have been some discussion along that line.

Q. Either on a motion or a resolution?

A. I don't know that there was a resolution on the desk.

Q. It was either a resolution or a motion that they were speaking of at that time?

A. Probably a question of privilege on the part of Mr. Simpson during the discussion of which several names were mentioned.

Mr. Bourgeois: Now, I move that that testimony be stricken out as being excluded under the constitutional provision.

The Court: I will hold the ruling until later in the trial.

(Exception noted for defendant.)

EMERSON L. RICHARDS, sworn.

Direct examination.

By Mr. Washington:

Q. Mr. Richards, you are the defendant in this matter, are you not?

A. Yes.

Q. The plaintiff has alleged that on April 2nd, on the floor of the New Jersey Senate, you said in substance concerning the plaintiff that "He," the plaintiff, "forged my name to a paper in the Court of

Errors and Appeals and was rebuffed for it." Did you ever make such a statement?

Mr. Bourgeois: I object. That is one of the things the constitution says cannot be done. He cannot be questioned. They are questioning him, and I object, because the answer is irrelevant and immaterial and because it is contrary to the constitutional provision, and this Court has no right to require him to testify to anything that happened on the floor of the Senate while it was in session.

The Court: How have I the right to compel him to answer when the constitution says he shall not have to answer or shall not be called into question?

Mr. Washington: The question there is, as we contend, open with respect to the question of malice, and we are offering it as a foundation of such a claim, and on that ground.

The Court: I will sustain the objection.

(Exception noted for plaintiff.)

(No cross-examination.)

ROBERT PLAGER, sworn.

Direct examination.

By Mr. Washington:

Q. Mr. Plager, you are acquainted with Clarence L. Cole, the plaintiff in this case, are you not?

A. I am.

Q. You are acquainted with Emerson L. Richards, the defendant?

A. I am.

Q. Did you on any occasion talk to the defendant concerning an alleged statement, or statement alleged to have been made by him, charging that the plaintiff had forged his name to a paper in the Court of Errors and Appeals and was rebuffed for it?

A. I did.

Q. On what occasion did you talk to the defendant and where?

A. I think it was the fourth of April, 1929. There was a statement came down from Trenton—I attended that legislative session, but I didn't hear the statement on the floor of the Legislature. An Associated Press story came down to the effect ——

Mr. Bourgeois: I object.

The Court: Yes. An Associated Press story came, and as a result you did what?

A. I was assigned to get hold of Senator Richards and see ——

The Court: Did you get hold of him?

A. I did.

Q. Where was the discussion between the two of you?

A. I met Senator Richards up at City Hall. He was just coming down the steps. I think it was two days later. I asked him regarding this statement which he was alleged to have made on the floor of the Legislature. He was very reluctant to discuss it at first, and I pressed him as to what cases he referred to, and he told me, he says, "Why, don't the office—why don't you go up to Trenton and look over the records of the Court of Errors and Appeals? You will readily find out what case I referred to." I kept pressing him, and he finally told me it was Rosengard v. The American Hotel and Gardens Company, in reference to a landlord and tenant suit. I just used that stuff, what evidence he gave me, and I phoned it in the office, told them just what the circumstances of the case were.

By Mr. Washington:

Q. Did the defendant when you talked to him state that the plaintiff had ——

Mr. Bourgeois: I object. That is leading.

The Court: I suppose so, but I don't know what

it is going to be. He may get away from that. It sounds as though it was going to be leading.

Mr. Washington: I will withdraw that question.

Q. As nearly as you can recall, what did you say to Senator Richards on that occasion and what did Senator Richards say to you? Give us the substance of what was said by both.

A. I said to the Senator, "I think that is a kind of rash statement you made on the floor of the Legislature regarding Judge Cole," see, and he smiled, and then I pressed him, I asked him what case it was he referred to in which "He is alleged to have forged your name or you are alleged to have forged his name to the papers in the Court of Errors and Appeals," and then he told me why don't we go up to Trenton to look the papers up ourselves. I kept pressing him and then he told me what the case was that he referred to.

Q. Did he say to you on that occasion and in that conversation that Judge Cole had forged his name to a paper ——

Mr. Bourgeois: I object.

Q. ——in the Court of Errors and Appeals and that he was rebuffed for it?

Mr. Bourgeois: That is leading.

The Court: It is very leading.

Mr. Bourgeois: The witness has twice told what did take place.

The Court: I sustain the objection.

(Exception noted for plaintiff.)

Q. What was your occupation when you saw the defendant?

A. Reporter for the Press-Union.

Q. Did you explain to the defendant the purpose of your coming to see him?

A. I did.

Q. Did he understand that you were a newspaper reporter?

A. Yes, sir.

Q. Did he understand that you were going to use what he said for the purpose of a newspaper article?

A. I surmise he did. He told me to have the office check up on it.

Q. You say you did tell him why you had come to see him?

A. Yes.

Q. Did you have a copy of a newspaper article with you when you went to see him?

A. No, I don't think I did. I don't remember it.

Q. Did you have any writings with you when you went to see him, that is, any articles already written, I mean, that you showed to him?

A. No, I just mentioned the case offhanded.

Q. You say he gave you the name of a particular case?

A. After I pressed him a while.

Q. What was the name of the case?

A. Rosegard v. The American Hotels and Gardens Company.

Q. Did he give you the names of any counsel that could give you further information?

A. I think he mentioned Elmer Brown's name. I am not sure.

Q. Do you recall any other names?

A. No, I can't recall any other names.

Q. Did you subsequently go to see Elmer Brown?

A. No.

Q. Did you publish or turn over for publication any articles touching those charges?

Mr. Bourgeois: It is irrelevant and immaterial.

(The question was withdrawn.)

(No cross-examination.)

PLAINTIFF RESTS.

Mr. Bourgeois: I now move to strike out the testimony of Mr. Johnston touching what was said on the floor of the Senate.

The Court: Can you cite any reason why it should not be stricken?

Mr. Washington: Only this, if your Honor please. There is proof in this case that the defendant, aside from that occasion when those statements were made on the floor of the Senate, repeated

them to a newspaper man that he knew was going to spread that data in the public press. He knew he was a reporter when he talked to him. He not only repeated the statements, but he gave the reporter the name of a particular, specific case which he told him to check up. We are raising the question that privilege does not extend, insofar as statements are made in debate, for the purpose of maliciously injuring another.

The Court: It seems to me, insofar as Mr. Johnston is concerned, there is a privilege guaranteed by the constitution that would prevent the repetition by Mr. Johnston of the remarks made by either Simpson or Richards in pursuance of the debate they were then engaged in. I will grant the motion to strike it out and instruct the jury that it is not to be considered, and grant you an exception.

(Exception noted for plaintiff.)

(The following motion was made in Chambers.)

MOTION FOR NON-SUIT.

Mr. Bourgeois: I move for a non-suit. There is no proof whatsoever of the allegation that is alleged in the complaint. Insofar as the first part of the complaint is concerned, the case is out under the constitutional privilege.

The Court: I have already ruled that out.

Mr. Bourgeois: There is no proof whatsoever before this Court that Senator Richards said anywhere outside of the Senate those words that have been alleged in this complaint, that is, that Judge Cole had forged his name to a paper in the Court of Error and Appeals. In slander cases the allegation has to be proved verbatim, and there is not any proof here at all.

Mr. Cole: The defendant said to Mr. Plager after being asked what case he referred to, "Why don't you go look up the records of the Court of Errors and Appeals?" and he told him the case. I say that is a square question for the jury as to whether Richards did not thereby repeat what he said in the Senate. That is a jury question. It may not be strong, it may not be weighty, but I think it is there as a question of fact.

The Court: But by doing what you are now arguing, you are charging him with having uttered the slanderous words by reason of his failure in having denied them when the words or something of that character were repeated to him, and you are charging him by reason of his failure to reply when the very question which was raised by Plager was an entirely different situation than you charge in the complaint, because Plager did not know whether or not he had charged you with doing it or the other fellow with doing it, as it was put to Richards. I cannot see how it would be at all proper under the pleadings in this case for me to submit

to the jury whether or not, under the conversation with Plager, Richards said that you forged his name to a paper in the Court of Errors and Appeals and were rebuffed for it.

Mr. Cole: At this juncture I want to move that the ruling you made striking Johnston's testimony be stricken, and that that testimony be allowed to stand, not to commit the defendant to what he said on the floor of the Senate, in view of his pleading constitutional privilege, but with a view of being taken in connection with what happened between Plager and him. The jury would have the benefit of what was said there to determine, assuming the Court should finally say it is a jury question, as to whether what Mr. Richards did say was not a repetition of what he said on the floor of the Senate.

The Court: No, I don't think it should stand for that purpose. In the first place, if Richards is protected by the constitution, we had no right to receive the testimony at all. We did receive it, and received it for one purpose only, so that at the end of the case I could determine whether or not it should be stricken or not stricken. If it was proper to strike it, it was proper to strike it originally, and you cannot have the benefit of its staying in merely because I postponed my ruling. If my ruling had been announced at the time the question was propounded, there never would have been an answer, and that should have been done, as I see it, and I do not, therefore, have a right to consider it in for another purpose.

Mr. Washington: Your Honor will allow us an exception to that?

The Court: Yes.

(Exception noted for plaintiff.)

The Court: I will hold that there is no jury question, and grant a non-suit.

(Exception noted for plaintiff.)

POSTEA.

(Filed Nov. 26, 1930.)

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

CLARENCE L. COLE,
Plaintiff,
v.
EMERSON L. RICHARDS,
Defendant.

Action at Law.
Postea.

This cause came on to be heard in the Atlantic County Circuit on the 24th day of November, 1930, before his Honor, W. Frank Sooy, and a jury, and the plaintiff having submitted his evidence, and the Court being of the opinion that it was not sufficient to prove the allegations set forth in the complaint, ordered that judgment of non-suit be entered against the plaintiff.

W. F. SOOY,
Circuit Court Judge.

A true copy.
FRED L. BLOODGOOD,
Clerk.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

EMERSON L. RICHARDS,
Defendant,
ads.
CLARENCE L. COLE,
Plaintiff.

Action at Law.
On Postea.

It is ordered that judgment of non-suit be and hereby is entered in favor of defendant and against the plaintiff with costs to be taxed *nisi.*

Entered: November 26, 1930.

On motion of
BOURGEOIS & COULOMB,
Attys.

Costs $

A true copy.
FRED L. BLOODGOOD,
Clerk.

JUDGMENT.

NEW JERSEY SUPREME COURT.

10

CLARENCE L. COLE, *Plaintiff*, v. EMERSON L. RICHARDS, *Defendant*.	Action at Law. On Postea. Judgt. of Non-suit. Bourgeois & Coulomb, Attorneys.

20

Costs $.....

Judgment entered this twenty-sixth day of November, A. D. nineteen hundred and thirty, in favor of defendant and against the plaintiff for the sum of ..... costs.

WM. S. GUMMERE,
C. J.

A true copy.
FRED L. BLOODGOOD,
Clerk.

30

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

CLARENCE L. COLE, *Plaintiff,* v. EMERSON L. RICHARDS, *Defendant.*	Action at Law. Notice of Appeal.

To George A. Bourgeois, Esq., of Bourgeois & Coulomb, Attorney for Defendant:

Take notice that the plaintiff appeals from the whole of the judgment entered in this cause to the New Jersey Court of Errors and Appeals, on the following ground:

1. It was error for the Court to have non-suited the plaintiff, there being sufficient evidence to go to the jury.

COLE & COLE,
Attorneys of Appellant.

I. F. Huntzinger Co., *Appellate Printers,* Camden, N. J.

New Jersey Court of Errors and Appeals

CLARENCE L. COLE,
Plaintiff-Appellant,

v.

EMERSON L. RICHARDS,
Defendant-Respondent.

On Appeal from New Jersey Supreme Court.

APPELLANT'S BRIEF.

STATEMENT.

This is an action alleging slander. In substance the complaint is that on the 2nd day of April, 1929, defendant, while a member of the Senate and on its floor, said of and concerning the plaintiff, "that he (plaintiff) 'forged my (defendant's) name to a paper in the Court of Errors and Appeals and was rebuffed for it.' "

Paragraph 5 of the complaint says:

"5. Plaintiff did not at any time forge defen-

dant's name to any paper in the Court of Errors and Appeals."

The answer admits this.

Paragraph 6 of the complaint says:

"6. The charge made by defendant against plaintiff was false, known by him to be false when uttered, was uttered maliciously and for the purpose and with the intent to defame the reputation of plaintiff."

This is denied.

The defense invokes the constitutional privilege of members of the Senate and General Assembly which says:

"And for any speech or debate in either house they (members) shall not be questioned in any other place."

Paragraph 4 of the complaint says:

"4. Said statement was repeated by the defendant in public and in the presence of at least one citizen of Atlantic City, in said county on the fourth or fifth of said April."

This is denied.

Plaintiff was non-suited and from the judgment entered thereon this appeal is taken.

ARGUMENT.

I.

THE NON-SUIT WAS ERRONEOUS.

Taken literally, the language of the constitutional privilege invoked is broad enough to exempt the defendant from liability for what he said, and indeed would permit him to say anything concerning anybody if at the time it is said it was in the course of a debate.

We find no decision in New Jersey which has constructed this language and it may be because it is too plain to admit of construction.

Whether what he is alleged to have said was made in the course of a debate was a question for decision by the Court, or one for determination by the jury, is for the decision of this Court. The record shows what occurred. We would not care to dignify the occurrence by denominating what was said by the defendant as a speech or debate. At the best, we think that was a question for the jury and not one for judicial determination.

Whether in the circumstances the constitutional privilege existed so as to be a question for the Court's determination or one for a jury, we are in doubt. As already stated, we find no case in New Jersey on the subject, but concede that the weight of authority seems to be that if the defendant was engaged in a speech or debate, that the privilege is absolute. The only text we have been able to

find which seems to run counter thereto is in 17 *Ruling Case Law at page* 331. We quote:

> "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 occurrence before the question can be determined, and that even a member of the Legislature cannot take advantage of his official position to give expression to private slanders against others. In accordance with this principle, it has been held that a member of a city council, during a session thereof, is not privileged to call another city officer 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. Moreover, there are decisions which hold that where the privilege attaching to legislative proceedings is abused for malicious purposes, such misconduct is actionable."

There are foot note cases cited in support of this text.

In the instant case, the record demonstrates that the charge was false, and as already stated, the answer admits it. That the charge was slanderous is manifest. That it was maliciously stated is equally manifest, and certainly most favorably to the defendant would have been a question for the decision of

the jury. Paragraph 3 of the answer attempts to set up a defense by saying that the subject-matter of the alleged debate was the fitness of the plaintiff to act as solicitor or attorney for a joint committee of the Senate, &c. This we submit, is an inaccurate statement. The record shows that another senator voluntarily named the plaintiff as one to act, when the false and malicious statement concerning him was made by the defendant. It reeks with evidence of an attempt on the part of the defendant to square accounts by making a false and malicious statement of and concerning the plaintiff, or at least the jury may have so found, while hiding himself behind his supposed constitutional privilege.

II.

IF THE PRIVILEGE EXISTED IN ITS INCEPTION IT WAS LOST BY THE DEFENDANT REPEATING THE CHARGE OUTSIDE OF THE SENATE.

On this phase it is respectfully submitted that there was a jury question. If it was repeated outside of the Senate floor, then defendant was clearly guilty of slander, at least, the jury might have so found. The learned trial Court decided that the evidence did not warrant sending the case to the jury on this phase, and granted a non-suit, to which exception was duly taken.

It may be conceded for the moment that there is no evidence that the defendant expressly repeated the false statement; that by the clearest implication

he did repeat it was certainly a question for the jury. The proofs strongly tended to show that it was repeated to Robert Plager, a reporter on the Evening Union of Atlantic City.

After stating a meeting with the defendant and a discussion between them, he testified at page 29:

> "A. I met Senator Richards up at City Hall. He was just coming down the steps. I think it was two days later. I asked him regarding this statement which he was alleged to have made on the floor of the Legislature. He was very reluctant to discuss it at first, and I pressed him as to what cases he referred to, and he told me, he says, 'Why don't the office—why don't you go up to Trenton and look over the records of the Court of Errors and Appeals? You will readily find out what case I referred to.' I kept pressing him, and he finally told me it was Rosengard v. The American Hotel and Gardens Company, in reference to a landlord and tenant suit. I just used that stuff, what evidence he gave me, and I phoned it in the office, told them just what the circumstances of the case were."

From this we have the defendant reluctantly but after being pressed, telling a reporter that he should go to Trenton, examine the records of the Court of Errors and Appeals and find out what case he referred to.

This statement unmet shows that he, defendant, was referring to the records of the Court of Errors and Appeals to ascertain to what case he referred when he said that the plaintiff had forged his name in a case in the Court of Errors and Appeals and

was rebuffed for it. This is the clear implication, and the jury might well have so found.

At page 30 there is this:

> "Q. As nearly as you can recall, what did you say to Senator Richards on that occasion and what did Senator Richards say to you? Give us the substance of what was said by both.
>
> A. I said to the Senator, 'I think that is a kind of rash statement you made on the floor of the Legislature regarding Judge Cole,' see, and he smiled, and then I pressed him, I asked him what case it was he referred to in which 'He is alleged to have forged your name or you are alleged to have forged his name to the papers in the Court of Errors and Appeals,' and then he told me why don't we go up to Trenton to look the papers up ourselves. I kept pressing him and then he told me what the case was that he referred to."

Here we have a statement by the witness which in substance states what is alleged to have been said by the defendant, and which by the testimony of witness, Johnston, is proved to have been said, and which the defendant did not deny, but said, "Why don't we go up to Trenton to look the papers up ourselves," and after being pressed he told the witness what the case was to which he referred.

Then, at page 31, there follows a statement showing that the defendant knew that he was talking to a reporter of the Press-Union and then this question:

> "Q. Did he understand that you were a newspaper reporter?

A. Yes, sir.

Q. Did he understand that you were going to use what he said for the purpose of a newspaper article?

A. I surmise he did. He told me to have the office check up on it.

Q. You say you did tell him why you had come to see him?

A. Yes."

III.

IT WAS ERROR TO STRIKE THE TESTIMONY OF ROBERT JOHNSTON.

Mr. Johnston was clerk of the Senate at the time the remarks were made. Independent of the question of absolute privilege it was certainly proper to prove that the statement was made if for no other purpose than to lay a foundation to prove it was repeated either expressly or by implication. That it was made in the Senate is established by the proofs; that it was false is admitted by the answer; that they were repeated in substance outside of the Senate was clearly implied. It will be noted that in the talk between the reporter and the defendant, which is not denied, the defendant did not deny the statement attributed to him, but in the clearest sort of a way independent of repeating the words, repeated them by implication by informing the reporter where he might go to find verification for his statement, which statement the reporter called his attention to by saying to him that it was rather

a rash one to make, which the defendant did not deny. We contend that it is obvious that the defendant was willing, to say the least, that the reporter should believe that the statement was made, that it was true, and this its verification might be found in the records of the Court of Errors and Appeals. Knowing that he was a newspaper man and that what he, defendant, said might be published, he did nothing to discourage the reporter from publishing the statement, but in the end seemed content that it might be done. This adds to the maliciousness of the initial statement and plainly places the defendant in a position where he was denuded of his constitutional privilege but hoped to be able to retain it without actually repeating the words he uttered which were both false and malicious in character.

The direction of a non-suit was error.

Respectfully submitted,

LEE F. WASHINGTON,
Of Counsel for Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CLARENCE L. COLE,
Plaintiff-Appellant,

v.

EMERSON L. RICHARDS,
Defendant-Respondent.

ON APPEAL.

BRIEF OF DEFENDANT-RESPONDENT.

This suit grew out of an alleged slander of plaintiff-appellant by defendant-respondent, for words alleged to have been spoken on the floor of the New Jersey Senate, on April 2nd, 1929, and alleged to have been afterwards repeated in Atlantic City.

This action of slander was instituted, and brought on for trial in the New Jersey Supreme Court, Atlantic County Circuit, on November 24th, 1930.

The complaint contained seven paragraphs, the first alleging plaintiff's citizenship, which was ad-

mitted; the second alleging that the defendant for a number of years had been a member of the New Jersey Senate, representing Atlantic County, which was likewise admitted; the third was in the following language:

> "3. On said date, on the floor of said Senate, in open session, defendant said, in substance, of and concerning plaintiff, who at the time, was, and now is a member of the bar of said State and pursuing the general practice of law, that he, plaintiff, 'forged my (defendant's) name to a paper in the Court of Errors and Appeals and was rebuffed for it.' "

Defendant answered that he was not called upon to either admit or deny the allegation set forth, for the reason that the statements were made during the course of a debate in the Senate, while the same was in session, &c. The fourth paragraph alleged that the defendant repeated the words to at least one citizen in Atlantic City. This was denied. The fifth paragraph alleged that the plaintiff did not forge defendant's name to any paper in the Court of Errors and Appeals, which the answer admitted. The sixth paragraph alleged that the charge made by defendant against plaintiff was false, known to be false, and uttered maliciously, which the answer denied. The seventh paragraph was in the following language:

> "7. No one who heard the statement made or read it in the newspapers which published it, believed it to be true, and, therefore, plaintiff has

been damaged in his name and reputation to the extent of only six cents, for which amount he prays judgment."

Defendant answered that he had no knowledge or information concerning those matters.

The pertinent testimony offered in proof of paragraph 3 of the complaint is found on p. 20, at l. 5, and is as follows:

"Q. Was Senator Richards then a member of the New Jersey State Senate?

A. Then, and is.

Q. Did you on April 2nd, 1929, or April 3rd, 1929, hear Senator Richards make any statements concerning the plaintiff, Clarence L. Cole?"

* * * * * * *

"A. Yes.

Q. What did you hear the defendant say, if anything, concerning the plaintiff?"

This question was answered on p. 22, at l. 18, as follows:

"A. Well, Senator Simpson of Hudson County and Senator Richards of Atlantic County were in a debate or argument relative to the conduct of affairs in Atlantic City, and Simpson during the course of his argument stated that no real attempt had been made to correct the conditions, and that the proper kind of investigators had not been used or employed, and suggested the names of Judge Cole and

Charlie Moore and probably another name, but those two were mentioned, anyhow."

On p. 23, at l. 14, Mr. Johnston further testified as follows:

"A. Senator Richards stated that Simpson was probably not aware that Judge Cole was—had signed some papers in the higher courts, I don't know just what court it was, or whether it was mentioned which court it was, that constituted a forgery, and that he had been criticised or rebuked or something of that character, I don't just remember the exact words, for that action. That was about the real—well, the *res gestae* of the speech or argument."

On cross-examination, on p. 25, l. 15, he further testified as follows:

"Q. Mr. Johnston, you were secretary of the Senate at that time?

A. Yes, sir.

Q. And at that particular time there was a resolution before the Senate, wasn't there, that was being discussed?

A. Yes.

Q. Have you that resolution with you?

A. No, sir.

Q. Can you tell the purport of the resolution?

A. No, I couldn't, and when I said yes to a resolution, I probably should withdraw that. I think it was probably a question of privilege on the part of Senator Simpson that started the

> debate. I am not sure that there was a resolution on the desk. There might have been. I am not clear on that."

This testimony is the only proof of what took place in the New Jersey Senate, and it is submitted that when that proof was completed, the New Jersey Supreme Court lost jurisdiction of the matter, and could enter no judgment in the case, except judgment of non-suit.

The language of the New Jersey Constitution, Article IV, Section IV, Paragraph VIII, touching the privilege of members, is as follows:

> "Members of the Senate and General Assembly shall in all cases * * * and for any speech or debate in either house they shall not be questioned in any other place."

Similar to the privilege of the United States Senators and Congressmen found in Article I, Section VI, of the United States Constitution, touching the privilege of its members is:

> "Senators and Representatives * * * for any speech or debate in either house shall not be questioned in any other place."

So, the language in the two Constitutions is precisely the same.

In the case of *Kilbourn v. Thompson* (103 U. S. 168—26 L. Ed. 377), at p. 390, the Court said:

> "The House of Representatives is *not* an

ordinary tribunal. The defendants set up the protection of the Constitution, under which they do business as part of the Congress of the United States. That Constitution declares that the Senators and Representatives 'Shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.'

Is what the defendants did in the matter in hand covered by this provision? Is a resolution offered by a member, speech or debate, within the meaning of the clause? Does its protection extend to the report which they made to the House, of Kilbourn's delinquency? To the expression of opinion that he was in contempt of the authority of the House? To their vote in favor of the resolution under which he was imprisoned? If these questions be answered in the affirmative, they cannot be brought in question for their action in a court of justice or in any other place."

It was held that they were within the protection of the Constitution. Again, at p. 391, the Supreme Court said:

"The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise

both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member, to the prejudice of any other person or hazardous to the public peace, that member enjoys complete impunity. For every paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a court of justice."

The complaint fails to show any right of plaintiff to prosecute this suit in the New Jersey Supreme Court. Paragraph 2 alleged that the defendant was a State Senator, and paragraph 3 alleged that on the floor of the Senate, in open session, "defendant *said,*" which shows that it was a speech, and the complaint bringing the matter within the jurisdiction of the New Jersey Senate, by virtue of the Constitutional privilege, the New Jersey Supreme Court had no jurisdiction over the matter. In other words, as soon as it appears before the State Court that the occurrence took place in a speech or debate in a session of the Legislature, the Court is without jurisdiction, as it matters not what that speech or debate was about. *Cochran v. Couzens* (12 Fed.—2d ser.—785).

I am not overlooking the case of *Coffin v. Coffin*

(4 Mass. 1), but the language of the Massachusetts privilege is different from the language of the privilege under the New Jersey State Constitution, as it does not apply to the members of each house separately; nor am I overlooking the fact that such a ruling may deprive a citizen of a right to redress his wrong before a State House. Such right, however, is reserved to him, in manner stated by Chief Justice Parsons, in the case of *Coffin v. Coffin* (ibid), However, in the case at hand, the trial Judge admitted testimony of what took place in the Senate, and from the testimony of plaintiff's witness, Johnston, it conclusively appeared that the statement was made during a debate in the New Jersey Senate, touching a matter then before it, while the Senate was in session; and under the case of *Kilbourn v. Thompson* (ibid), and the case of *Cochran v. Couzens* (ibid), as well as under the case of *Coffin v. Coffin* (ibid), the non-suit was properly entered.

Notwithstanding plaintiff's reference to the text found in 17 Ruling Case Law, 331, the cases cited in the footnotes, to which he refers, are, first, the case of *McGaw v. Hamilton* (Pennsylvania—39 Atl. 4), in which it was found that the language used was not used with reference to any speech or matter then pending before the body. The second case was the case of *Callahan v. Ingram* (122 Mo. 355—43 Am. St. Rep. 583). We do not have access to the language of the constitutional privilege in Missouri, but this case arose out of a statement made by a member of a City Council. It was held that:

> "In an action of slander, the question of whether the occasion on which the words were

> spoken were 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."

It would seem as if that decision supports the action of the Judge in granting the non-suit in this suit. The third case was the case of *Commonwealth v. Blanding* (3 Pick.—Mass.—304—15 Am. Dec., 214), and was a case where it was admitted that a statement was, at the request of the defendant inserted in a public newspaper, and has no bearing upon the question now before the Court.

The second reason urged is that the Court erred in granting a non-suit as to the 4th statement or cause of action mentioned in the complaint, to wit:

> "Said statement was repeated by the defendant in public and in the presence of at least one citizen of Atlantic City, in said county on the fourth or fifth of said April."

The testimony touching this point is the testimony of Robert Plager (p. 28, l. 15), and is as follows:

> "Q. Did you on any occasion talk to the defendant concerning an alleged statement, or statement alleged to have been made by him, charging that the plaintiff had forged his name to a paper in the Court of Errors and Appeals and was rebuffed for it?
>
> A. I did.

Q. On what occasion did you talk to the defendant and where?

A. I think it was the fourth of April, 1929. There was a statement came down from Trenton—I attended that legislative session, but I didn't hear the statement on the floor of the Legislature. An Asssociated Press story came down to the effect ——"

Further, on p. 29, l. 10, he testified:

"A. I met Senator Richards up at City Hall. He was just coming down the steps. I think it was two days later. I asked him regarding this statement which he was alleged to have made on the floor of the Legislature. He was very reluctant to discuss it at first, and I pressed him as to what cases he referred to, and he told me, he says, 'Why, don't the office,—why don't you go up to Trenton and look over the records of the Court of Errors and Appeals? You will readily find out what case I referred to.' I kept pressing him, and he finally told me it was Rosengard v. The American Hotel and Gardens Company, in reference to a landlord and tenant suit. I just used that stuff, what evidence he gave me, and I phoned it in the office, told them just what the circumstances of the case were."

On p. 30, l. 12, he testified:

"A. I said to the Senator, 'I think that is a kind of rash statement you made on the floor of the Legislature regarding Judge Cole,' see, and he smiled, and then I pressed him, I asked him

what case it was he referred to in which 'he is alleged to have forged your name or you are alleged to have forged his name to the papers in the Court of Errors and Appeals,' and then he told me why don't we go up to Trenton to look the papers up ourselves. I kept pressing him and then he told me what the case was that he referred to."

This testimony, the trial Judge held not to support the complaint in the cause, the complaint being that Senator Richards, the defendant-respondent, had repeated to one Atlantic City citizen the statement that Judge Cole, the plaintiff-appellant, had forged defendant-respondent's name to a paper in the Court of Errors and Appeals. Plaintiff-appellant does not contend that this is direct evidence in proof of the charge, but that the jury might draw inferences of guilt from it.

The testimony touching this matter is contained in two paragraphs, the first was:

"I asked him regarding this statement which he was alleged to have made on the floor of the Legislature."

It did not appear what the statement was. The answer was:

"Why don't you go up to Trenton and look over the records of the Court of Errors and Appeals?"

"And finally he told me the case was Rosengard v. The American Hotel and Gardens Company."

It is submitted that there is nothing in that testimony which would justify a jury in finding that the undisclosed statement was a charge of forgery; and the Judge properly ruled in holding that it was not sufficient to go to the jury.

The second paragraph was:

> "I think that is a kind of rash statement you made on the floor of the Legislature regarding Judge Cole."

and then follows an inquiry of the name of the case in which it was alleged that he (defendant-respondent, Senator Richards), had forged Judge Cole's name, or Judge Cole (plaintiff-appellant) had forged his (Senator Richards') name; and the answer by the defendant-respondent to that inquiry was:

> "Why don't we go up to Trenton and look up the papers ourselves?"

with no answer to it, whatever, touching the question of forgery.

It is submitted that there was no basis in this testimony from which a jury could legitimately infer that defendant-respondent (Senator Richards) had stated to witness, Plager, that plaintiff-appellant (Judge Cole) had forged his, defendant-respondent's, name to a paper in the Court of Errors and Appeals.

The third point raised by the plaintiff-appellant is that the Court erred in striking out the testimony

of Robert Johnston, not because it could not be gone into under the constitutional privilege, but because plaintiff-appellant asserts it was evidence from which the jury might, in connection with witness Plager's evidence, draw an inference of guilt against defendant-respondent. But, if this contention is true, then a member of the Senate is not protected as to statements made during a debate in the Senate, and the constitutional privilege is defeated.

It is submitted that the constitutional privilege cannot be thus circumvented, but that that privilege is absolute, and if a person desires to prosecute a Senator for a statement alleged to have been made in the Senate and repeated outside of the Senate, his proof of the latter must come entirely from the circumstances occurring outside of the Senate, and he cannot lawfully offer evidence of anything that happened in the Senate. In other words, repeating a slander outside of the Senate is a separate and distinct cause of action.

There is a further reason why this non-suit should not be disturbed. It is submitted that the jurisdiction of courts of law, is the redress of injury. If there has been no injury, the Court has no jurisdiction, and a suit at law cannot be maintained. Injury may be to a person's liberty, life or property, and one species of property is reputation. In a slander suit, the injury is to the reputation. In the case at hand, plaintiff-appellant alleges in paragraph 7 of the complaint that:

> "No one who heard the statement made or read it in the newspapers which published it, believed it to be true, and, therefore, plaintiff has been damaged in his name and reputation to the extent of only six cents."

Without this affirmative allegation, the law would have inferred that someone did or might have believed it, and, therefore, plaintiff-appellant had suffered some injury; but admission in the complaint that "nobody who heard or read the statement believed it to be true," plaintiff-appellant admits he suffered no injury, because a person's reputation is injured only when someone believes a false statement made against him, and against this admission the Court cannot infer injury; and if there was no injury, there can be no recovery, because a recovery is allowed by Courts as compensation for injury inflicted. *Warwick v. Hutchinson* (45 N. J. L. 61-65); *Church v. Railroad Co.* (66 N. J. L. 218-226); *Titus v. Cairo, &c.* (46 N. J. L. 393-425); *Oaks v. Public Service Co.* (81 N. J. L. 661-662). In the case of *City v. Carpenter* (Wisconsin—8 L. R. A. 812), the ruling is:

> "It is a maxim of the law, that wrong without damage or damage without wrong, does not constitute a cause of private action."

But, passing that point, still the non-suit should not be disturbed, because the Court will not grant a new trial where the verdict is for nominal dam-

ages, only, even though there was error in the judgment entered. In the case of *Hyatt v. Wood* (3 N. Y. Common Law Reports, 289), the Court said:

> "If this had been an action *quare clausum fregit,* in which the right to the freehold came in the question, there might be some reason for granting a new trial. But for an assault, by which the party has sustained little or no injury, there seems to be no sufficient ground for the Court to interfere. It has frequently been decided in this court, that in cases where the damages are trifling, a new trial will not be granted after a verdict for the defendant, merely to give the plaintiff an opportunity to recover nominal damages, and when no end of justice is to be attained by it, though there may have been a misdirection of the Judge. The principle stated by the Judge in this case was incorrect; but the action is of too little importance to grant a new trial merely for that reason."

And, again, in the case of *Checkley v. Illinois Cent. R. R.* (100 N. E. 942), the Supreme Court of Illinois, at p. 945, said:

> "While we are inclined to agree with appellant that the unauthorized entry of appellee's servants upon the demised premises was a technical trespass entitling appellant to nominal damages, still this Court will never reverse a judgment and award a new trial merely for the purpose of enabling a party to recover nominal damages. The maxim, '*De minimis non curat*

> *lex,'* will apply, and the judgment will be affirmed."

And, in the case of *McConihe v. New York, &c., R. R. Co.* (20 N. Y. 495—75 Am. Dec. 420), the Court said:

> "Maxim, *De minimis non curat lex,* is properly applied so as to authorize the affirmance of a judgment for defendant, where the judgment should have been for plaintiff, if the latter's only advantage would be to recover nominal damages."

It is respectfully submitted that the judgment of the Court should be affirmed.

BOURGEOIS & COULOMB,
Attorneys of Defendant-Respondent.