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CASE NOTES

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CORPORATIONS — Right of Board Chairman to Purchase Corporation's Own Stock Without Authority. — Plaintiff, a stockholder of the Corporation, brought suit for account against chairman of the board of directors who purchased corporation's stock supposedly for its benefit to prevent loss of control to outsiders. Plaintiff also brought suit against the board of directors who ratified the purchase, alleging that such wasteful act was carried out for no proper corporate purpose, and for no other reason than to keep the chairman in control of the corporation's affairs and those subservient to him in office. HELD: Order for the Plaintiff. The transaction complained of was consummated and approved without study as to whether a real threat of injury to the corporation did exist. The business judgement rule may not be relied on to bar plaintiff's attack on the action of which he complains. *Propp v. Sadacca,* 175 A.2d 33 (Del. Ch. 1961).

English common law invalidated a corporation's purchase of its own shares on the ground that it was an indirect method of reducing capital, an evasion of statutory restrictions on such reduction, and thus inconsistent with the privilege of limited liability to creditors. BALLENTINE, CORPORATIONS § 256 (rev. ed. 1946). The Companies Act of 1862, the first "general incorporation statute", upon which the modern corporation law of England rests, did not authorize reduction of capital stock. Levy, *Purchase By An English Company of Its Own Shares,* 79 U. PA. L. REV. 45 (1931). Although the present law permits it under court control, neither the English courts, *Treavor v. Wintworth,* 12 App. Cas. 409 (1887), nor the present English statute, Companies Act of 1918, 11 and 12 Geo. 6, C. 38, 866, provide for the purchase by a corporation of its own shares. This is the minority rule in the United States, *Kieth v. Kilmer,* 261 Fed. 313 (1st Cir. 1920); *Barrett v. Lumber Co.,* 275 Mass. 302, 175 N.E. 765, (1931), and most American jurisdictions follow the so-called Massachusetts rule that absent a statutory restriction a solvent corporation may purchase its own shares if it acts in good faith and without prejudice to the rights of creditors or other shareholders. *Scriggins v. Thomas Dalby Co.,* 290 Mass. 414, 195 N.E. 749 (1935). Although the acquisition by a corporation of its own

stock is rarely an essential corporate function, *Brophy v. Cities Ser. Co.*, 31 Del. Ch. 258, 70 A.2d 5 (1949), a corporation may purchase its own stock if this does not diminish its ability to pay debts or lessen the security of its creditors. *In re International Radiator Co.*, 10 Del. Ch. 358, 92 Atl. 255 (1914); See *Pasotti v. Guardian Corp.*, 18 Del. Ch. 1, 156 Atl. 255 (1931). Like the A.B.C. MODEL BUS. CORP. ACT § 5 and other modern corporation statutes, e.g., N. C. GEN. STATS. § 55-52, N. Y. BUS. CORP. LAW § 513, the SOUTH CAROLINA BUSINESS CORPORATION ACT, of 1962 authorizes a corporation to purchase its own shares, S. C. BUS. CORP. ACT § 5.17, but permits purchase ordinarily only out of earned surplus if either the articles or shareholders authorize it, *Id.* § 5.17 (b), and for certain exceptional purposes, including redemption of redeemable shares, stated capital may be used. It appears that a majority of states in one way or another allow corporations within their jurisdictions to purchase their own shares of stock, subject to various stipulations and limitations. A good rule to follow, incident to a corporation's purchase of its own shares, is the "business judgment rule." Essentially it says that corporate officers must exercise reasonable intelligence and complete good faith, and are not responsible for mere errors of judgment or want of prudence short of clear and gross negligence. *Feilding v. Allen*, 99 F. Supp. 137 (S.D.N.Y. 1951); *Murphy v. Hanlon*, 322 Mass. 683, 79 N.E.2d 292 (1948). The purchase by a corporation of its own capital stock rests entirely within the discretion of the board of directors, and the courts will not interfere unless there is fraud or misconduct, *Bangers Sec. Corp. v. Kresge Dep't Stores, Inc.*, 54 F. Supp. 378 (D. Del. 1944), and in the absence of special circumstances, corporate officers and employees may personally purchase and sell its stock at will and without liability to the corporation, *Brophy v Cities Serv. Co., supra.* In South Carolina, corporate officers stand in a fiduciary relation toward the corporation and its shareholders as far as corporate business is concerned. *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 64 S.E.2d 524 (1951). This rule is now codified in the new corporation law, S. C. BUS. CORP. ACT of 1962 § 8.15. An honest decision by the board of directors to buy out a stockholder who threatens actual harm to the corporation has been sustained, *Kors v. Carey*, 158 A.2d 136, (Del. Ch. 1960); but new shares of corporate stock cannot be issued for improper

purposes, such as to maintain control of a corporation, *Kingston v. Home Life Ins. Co.*, 11 Del. ch. 258, 101 Atl. 898 (1917). *But cf. Standard Int'l. Corp. v. McDonald Printing Co., Inc.*, 159 N.E.2d 822 (1959). Each case of breach of fiduciary duty by directors to a corporation or its shareholders must be decided on its own facts. *Kors v. Carey, supra.* This rule has been followed by the courts in the jurisdiction of the principal case and is seemingly directly applicable to it.

It would appear that the Court in the instant case reached an equitable conclusion. If corporations are allowed to deal in their own shares for the purpose of advancing the general well-being of the enterprise, then it is not unreasonable that such activity be restricted to certain well-defined regulations, either as set forth by the corporation's by-laws or by state statute. Since directors and officers occupy positions of trust within the corporation, they should not be allowed to shield their activity on behalf of the corporation from shareholders or creditors by simply asserting that a particular decision has been reached in accordance with sound business principles. It would seem that the so-called "business judgment rule" should not be a complete defense for a director or other corporate office holder against a creditor or aggrieved stockholder, who, for an apparently valid reason, demands an accounting. Since a stockholder may be indeed prejudiced by the corporation's purchase of its own shares, even though manifestly made in good faith, it is by no means an immoderate practice to allow an accounting, especially when the suit is brought to prevent what appears to be an obvious danger to the corporation.

W. RICHARD JAMES

CRIMINAL LAW — Fair Trial — Photography in Courtroom. — Defendant, an eighteen-year-old Negro man, was indicted for the crime of assault with intent to ravish, the alleged victim being a young white woman about twenty-one years of age. During proceedings trial judge permitted photographers and newsreel men to take pictures in the courtroom in the presence of the jury. The defendant was convicted and a subsequent motion for a new trial was made, heard and refused. Thereafter, defendant was sentenced to death. On

appeal, HELD: Reversed and remanded for a new trial. The Supreme Court ruled that the trial judge committed error in permitting photographs to be taken in connection with the trial of the case. *State v. Sharpe,* 239 S.C. 164, 122 S.E.2d 622 (1961).

A universally recognized principle of law is that a defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. And no conviction can stand nor can anyone be deprived of life or liberty, no matter how overwhelming the evidence of guilt, if he is denied any element of due process of law. *Coplon v. United States,* 191 F.2d 749 (D.C. Cir. 1951). The concept of fair trial has been guaranteed specifically by the Sixth Amendment of the United States Constitution and by implication through judicial interpretation of the due process clauses of the Fifth and Fourteenth Amendments. *Baker v. Hudspeth,* 129 F.2d 779 (10th Cir. 1942), *cert. denied,* 317 U.S. 681, 87 L.Ed. 546 (1942). A fair trial means a trial before an impartial judge, an honest jury, and in an atmosphere of judicial calm, *State v. Gossett,* 117 S.C. 76, 108 S.E. 290 (1921); *State v. Carter,* 233 N.C. 581, 65 S.E.2d 9 (1951), and the denial of such a trial amounts to a denial of due process of law. *Powell v. Ala.,* 287 U.S. 45, 77 L.Ed. 158 (1932); *Helton v. Commonwealth,* 256 S.W.2d 14 (Ky. 1953). The court must determine the manner in which justice shall be administered with dignity and decorum so as to insure a fair and impartial trial without interference or distraction such as to impair ascertainment of truth. *In re Hearings Concerning Canon* 35, 296 P.2d 465 (Colo. 1956); Douglas, *The Public Trial and the Free Press,* 46 A.B.A.J. 840 (1960); *State v. Weldon,* 91 S.C. 29, 74 S.E. 43, (1911). The constitutional right of the accused is a privilege intended for his benefit. It does not entitle the press or the public to take advantage of his involuntary exposure at the bar of justice to employ photographic means of picturing his plight in the toils of law. *Ex parte Sturm,* 152 Md. 114, 136 A. 312, (1927). In the exercise of guarantying this privilege to the accused, the courts may prevent conduct of the press which threatens the orderly conduct of the trial, and preventing courtroom photography falls within the scope of this power. *Canons of Judicial Ethics of Am. Bar Ass'n,* Canon 35, 17 P.S. Art. 61-65 (1937); FED. R. CRIM. P. 53; *Bisignano v. Municipal Court of*

Des Moines, 237 Iowa 895, 23 N.W.2d 523 (1946); *cert. denied,* 330 U.S. 818, 91 L.Ed. 1270 (1946). Even if cameras are hidden, still the psychological effect of having cameras present would nonetheless be distracting, and result in the degeneration of dignity and decorum to the point of causing loss of respect for law, order, and the courts. *In re Mack,* 386 Pa. 251, 126 A.2d 679 (1956). If the dominant right to maintain order and decorum should yield to an asserted privilege of the press, the authority and dignity of the courts would be seriously impaired. *Tribune Review Publishing Co. v. Thomas,* 153 F. Supp. 486 (W. D. Pa. 1957); *aff'd,* 254 F.2d 883 (3rd Cir. 1958). The leading case of *State v. Clifford,* 162 Ohio St. 370, 123 N.E.2d 8 (1954); *cert. denied,* 349 U.S. 929, 99 L.Ed. 1259 (1955), summed up the press-judiciary dispute when it declared that a court in enforcing reasonable courtroom decorum is preserving the constitutional and unalienable right of a litigant to a fair trial, and in preserving such right the court does not interfere with the freedom of the press.

The judicial mockeries brought about by highly publicized trials in the early part of this century emphasized the need to curtail the infringements exercised by the press in the courtroom. The first concrete manifestation of desire to abate these detrimental activities was in the form of a resolution adopted by the American Bar Association in 1932 which sought to place a complete ban on press coverage, condemning it as a breach of decorum in judicial proceedings and as an interference with the administration of justice. The celebrated and highly publicized Lindbergh Trial, *State v. Hauptmann,* 115 N.J.L. 412, 180 A. 809 (1935), subsequently led to the adoption in 1937 of Canon 35 which asserted that extensive press activity degrades the court in general and that the taking of photographs in the courtroom distracts the witnesses as well as the actual parties and the jury from the requisite attention to the proceedings. The Bar summed up the need for such limitations in commenting that the restrictions posed by Canon 35 were for the protection of the constitutionally provided rights of the accused and for the promotion of the orderly and expeditious administration of justice. Since that time, Rule 53 of the Federal Rules of Criminal Procedure has been passed, relating to the same preventive power of the court, which added momentum in the field and has led many states to pass legislative enactments relating to this point.

In many instances the wording was practically identical to Canon 35 and Rule 53. The decision of the court in the instant case falls directly within the principle generally proposed prohibiting photography in the courtroom. There is a public need to protect the innocent, and a constitutional provision protects the guilty from a conviction which lacks the element of fairness in any respect. The taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof introduces extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial. Indeed, any continuation of the assumption of right by the press to photograph in the courtroom while holding the freedom of the press as a shield, may prove an opening wedge to a gradual deterioration of the judicial process. The Supreme Court's decision and opinion in the present case indicate that it feels the accused's right to a fair trial is being encroached upon by members of the press in an attempt to sell newspapers. Photography in the courtroom tends to bring undue attention to sensationalism to the eyes of the jury and otherwise to deny the accused a fair and impartial trial in a calm and judicial atmosphere. Likewise, if retrial becomes necessary, wide-spread photographs of the first trial might render it impossible to obtain an impartial jury. It therefore becomes imperative that some step be taken to prevent these injustices from occurring and ever reaching the appellate court in the first place. It is submitted that South Carolina needs a statutory provision similar to those passed recently in many other states and advocated by Canon 35 and Rule 53. The result of such legislative enactments would be the reduction of appeals on the error in point and an overall lessening of periodic tension between the courts and the press. In so acting, the legislative body would be doing its share in assuring all accused persons their constitutionally provided fair day in court.

TERRY M. BROOKS

LABOR LAW — State Court Jurisdiction Under the Labor Management Relations Act. — Following the expiration of a collective bargaining agreement and negotiations toward a new contract, a stipulation was entered into by the employer

and union continuing in effect most provisions of the old contract, but allowing certain wage increases and holiday changes. Although the employer had announced it would put the changes in effect, it later refused to sign a proposed new agreement with the "stipulation" embodied therein and notified its employees that it would return to the old rates. The change was based upon the allegation that the employer's bargaining representatives had acted without authority in negotiation of the new agreement. The union recovered damages for violation of the collective bargaining agreement in the Superior Court of Massachusetts and the Supreme Judicial Court affirmed, overruling the employer's claim that Section 301(a) of the Labor Management Relations Act gave the federal courts exclusive jurisdiction of these suits. The employer appeals. HELD: Affirmed. The purpose of conferring jurisdiction upon federal district courts was simply to supplement the jurisdiction of the state courts over labor contracts. *Dowd Box Co. v. Courtney*, 7 L. Ed. 2d 483 (1962).

An employee was discharged after he drove a fork lift truck off a loading platform and the union protested his discharge. Even though the employer claimed the employee had been discharged for unsatisfactory work, the union called a strike which had an eight-day duration. After the strike was over, the issue was submitted to arbitration as provided in the collective bargaining agreement. The Board of Arbitration ruled that the discharge was justified and that the employee was not entitled to reinstatement. The employer sought damages in the Washington courts under the Labor Management Relations Act for losses caused by the strike, on the ground that by calling the strike and not submitting the issue to arbitration the union violated the collective bargaining agreement. A verdict for the employer was affirmed by Department Number One of the Supreme Court of Washington, that court holding that Section 301(a) of the Labor Management Relations Act did not preempt state jurisdiction or limit the substantive law to be applied, and expressly applied state law. The union appeals. HELD: Affirmed. While the state court has jurisdiction under the act, federal law should have been applied. The law applied is in accord with the federal law, so no reversal is necessary. *Local 174 Teamsters Union v. Lucas Flour Co.*, 7 L. Ed.2d 593 (1962).

It has long been established that the National Labor Relations Act, 61 Stat. 136 et. seq. (1947), 29 USC § 141, et. seq. (1958), confers exclusive jurisdiction upon the National Labor Relations Board over cases involving unfair labor practices, *Myers v. Bethlehem Shipbldg. Corp.*, 303 U.S. 41, 82 L.Ed. 638 (1938); and federal courts may not redress by injunction or otherwise the unfair labor practices defined in the act. *Amazon Mill Co. v. Textile Workers*, 167 F.2d 183 (4th Cir. 1948). Controversies subject to the jurisdiction of the National Labor Relations Board are also withdrawn from the state courts, *Garner v. Teamsters, Local 776*, 346 U.S. 485, 98 L.Ed. 228 (1953); and they are barred from enjoining picketing, *San Diego Bldg. Council v. Garmon*, 359 U.S. 236, 3 L.Ed. 2d 775 (1959); except where warranted for protection of the public safety. *Garner v. Teamsters, Local 776, supra.* State courts may still, however, employ their traditional equity powers to require adherence to collective bargaining agreements. *General Bldg. Contractors v. Local 542*, 370 Pa. 73, 87 A.2d 250, 32 A.L.R.2d 822 (1952). This power is not altered by Section 301(a) of the Labor Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C., § 185(a) (1958), since it applies only to suits for damages and not to those for injunctive relief. *Philadelphia Marine Ass'n. v. International Longshoremen Local 1291*, 382 Pa. 326, 115 A.2d 733 (1955). Also, the granting of exclusive rights to the NLRB to grant injunctions in collective bargaining cases does not preclude the courts from enforcing substantive contract rights, even though the violation of the contract is also an unfair labor practice. *Textile Workers v. Arista Mills Co.*, 193 F.2d 529 (4th Cir. 1951). The validity of an arbitration award may likewise be determined by the state courts, and federal courts will not enjoin its enforcement. *Ryan Aeronautical Co. v. UAW, Local 506*, 179 F. Supp. 1 (S.D. Cal. 1959).

Some federal decisions have indicated that § 301 might give federal district courts exclusive jurisdiction of actions for damages for breach of collective bargaining agreements, *International Plainfield Motor Co. v. Local No. 343*, 123 F. Supp. 683 (D. N.J. 1954); one court taking the position that the inclusion of the phrase "and in any other court having jurisdiction of the parties" in § 303(b) and its absence in § 301 made federal jurisdiction under § 301 exclusive. *Association of Westinghouse Employees v. Westinghouse Elec. Corp.*, 210

F.2d 623 (3rd Cir. 1954), *aff'd* 348 US 437, 99 L.Ed. 510 (1955). The Labor Management Relations Act definitely does not preclude a state court from entertaining a common law tort action for damages predicated upon an unfair labor practice. *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 98 L.Ed. 1025 (1954). Federal district courts have recognized jurisdiction in the state courts for violation of employer-union agreements by refusing to take them when removal was attempted, *Associated Tel. Co. v. Communication Workers*, 114 F. Supp. 334 (S.D. Cal. 1953); and by remanding them to the state courts on request of one of the parties. *Castle & Cook Terminals v. Local 137, Int'l Longshoremen*, 110 F. Supp. 247 (D. Hawaii 1953). State law may be applied by federal courts in the exercise of their jurisdiction under § 301(a) if it will effectuate the federal policy, and it will be absorbed as a part of federal law, *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 1 L.Ed. 2d 972 (1957); and concurrent jurisdiction in the state courts will be allowed in the absence of "compelling Congressional direction" where the regulated conduct is of local responsibility. *San Diego Bldg. Council v. Garmon, supra.* The concurrent jurisdiction established by the principal cases is not a novel feature in our federal system, and has been recognized where federal courts were empowered to issue writs of habeas corpus, *Robb v. Connolly*, 111 U.S. 624, 28 L.Ed. 542 (1884); to hear suits in which a bankrupt or his assignee is a party, *Claflin v. Houseman*, 93 U.S. 130, 23 L.Ed. 833 (1876); to try actions under the Merchant Marine Act, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 87 L.Ed. 239 (1942); and to hear negligence suits under federal statute making the initial common carrier liable for negligence of a connecting carrier. *Missouri ex rel St. Louis, B. & M. Ry. Co. v. Taylor*, 226 U.S. 200, 69 L.Ed. 247 (1924). Congress may make federal jurisdiction exclusive, but in the absence of such express or implied intention, state courts have concurrent jurisdiction when competent within their own constitutions. *Clafilin v. Houseman, supra.*

Since Congress apparently considers the state courts competent to decide federal law in cases involving less than the minimum amount of money required under 28 U.S.C. § 1331, they should be allowed to exercise concurrent jurisdiction with the federal district courts in matters so predominantly local in nature as a simple breach of contract. A collective

bargaining contract varies in no substantial way from simple everyday business dealings, except that it may contain terms requiring some expertise for their complete understanding. The essentials of a proper contract, if present in the collective bargaining agreement, are discernible by a diligent state tribunal even if they are hidden by a maze of labor terms. This is all that the courts need determine. Determining whether or not the parties have breached their agreement is not a peculiarly federal function unless made so by Congress. Congress has not gone this far, and while they expressly granted concurrent state jurisdiction under § 303(b), this casts no light upon the subject of state jurisdiction under § 301(a). *General Elec. v. UAW*, 108 N.E.2d 211 (Ohio Ct. App. 1952). The state courts in the exercise of the concurrent jurisdiction established by the first noted case should not be restricted to the application of federal law as the second case holds. Such a restriction is unnecessary, especially since the existing body of federal contract law is in general accord with most state law in that field. The restriction is unrealistic because, as in the noted case, a decision expressly made under state law will almost always have to be affirmed as being in accord with the general federal principles. Federal courts will unavoidably rely on some state law in deciding cases under this act, and to say the state courts may not do the same is to place restrictions upon them which are not placed upon the federal courts. The federal courts will be engaged in bringing state law into the federal fold and branding it federal law, but the state courts will be restricted to that created by this rustling and cannot apply that which created it. Has it been forgotten that water is purest at the spring?

C. JOSEPH ROOF

TORTS — Libel and Slander — Attorney's Absolute Privilege Inapplicable to Statement Given Newspaper. — The defendant, an attorney representing an accused Negro rapist, reported to the local newspaper the Negro's assertion that the white married victim (plaintiff in the present case) had submitted willingly to his advances. The state's attorney had furnished the newspaper with a report of the Negro's confession, and defendant insisted that his client's defense be published in the same article. Plaintiff thereupon sued the

attorney for slander. Defendant answered that the statement was qualifiedly privileged, as he was acting in good faith to protect his client from a possible lynching, and asserted that, in any event, he enjoyed an attorney's absolute privilege for statement made in the course of a judicial proceeding. Judgment was entered on a directed verdict for the defendant. On appeal, HELD: Reversed. The statement was not qualifiedly privileged because published to persons who had no interest corresponding to defendant's duty to protect his client, and not absolutely privileged because not "in the course of a judicial proceeding." *Kennedy v. Cannon,* 182 A.2d 54 (Md. Ct. of App. 1962).

The right of free speech is in some cases allowed to prevail over the right to reputation, in apparent derogation of the theoretical competency of the law to afford a remedy for every wrong. Veeder, *Absolute Immunity in Defamation: Judicial Proceedings,* 9 COLUM. L. REV. 463 (1909). On the ground of public policy, the law recognizes certain communications as privileged, and, as such, not within the rules imposing liability for defamation. 33 AM. JUR. *Libel and Slander* § 124 (1938). A qualified privilege is established if the facts, although untrue, were published on a lawful occasion, without malice, with a justifiable purpose, and with a reasonable belief in their truth. *Chagnon v. Union Leader Corp.,* 103 N.H. 426, 174 A.2d 825 (1961); RESTATEMENT, TORTS § 593 (1938). On the other hand, if an absolute privilege be established, proof of neither malice nor want of probable truth will impair the defense. PROSSER, TORTS § 95 (2nd ed. 1955); 1 HARPER & JAMES, TORTS § 5.21 (1956). Such a broad immunity is granted not so much for the protection of individuals, as in the case of a qualified privilege, but rather for protection of the public's interest in unhampered expression under certain circumstances. Veeder, *op. cit. supra* at 463. This is usually limited to statements arising in legislative, judicial, and some executive proceedings. *Fulton v. Atlantic Coast Line R. Co.,* 220 S.C. 287, 67 S.E. 2d 425 (1951); 33 AM. JUR., *supra* § 125.

English common law jurists early recognized that an efficient juridical system requires free disclosure of facts without fear of a subsequent defamation suit. *Brook v. Montague,* Cro. Jac. 90, 79 Eng. Rep. 77 (1605); *Seaman v. Netherclift,* 2 C.P.D. 53, 46 L.J.CP. 128 (1876). "Neither party, witness,

counsel, jury or judge," said Lord Mansfield, "can be put to answer civilly or criminally for words spoken in offices." *King v. Skinner,* Loff 55, 98 Eng. Rep. 529, 530 (1772). The judicial immunity afforded in England today is considerably broader than that in this country; the British rule gives complete protection if the statement arise in the course of a judicial proceeding and has any reasonable relation to it, although quite irrelevant to any issue involved. *Munster v. Lamb,* 11 Q.B.D. 588 (1883); PROSSER, *op. cit. supra.* It is a fair statement of the general American rule that any statement uttered by a judge, juror, litigant, attorney or witness enjoys an absolute privilege if it arises in the course of a judicial proceeding and is relevant thereto. *Borg v. Boas,* 231 F.2d 788 (1956); 53 C.J.S. *Libel and Slander* § 104 (1948). "Relevant" does not refer to the technical rule of evidence; normally all that is required is that the party have an honest belief in the statement's relevancy. *Bleeker v. Drury,* 149 F.2d 770 (2d Cir. 1945); *Johnston v. Dover,* 201 Ark. 175, 143 S.W. 2d 1112 (1940). Ordinarily all doubt is resolved in favor of the defamer. *Bleeker v. Drury, supra; Feldman v. Bernham,* 179 N.Y.S. 2d 881 (1958). Whether a given statement "arises within the course of a judicial proceeding" is often a nice point. The minority view is that it must occur after the beginning of the proceeding proper and before it end. *Kruse v. Rabe,* 80 N.J.L. 378, 79 A. 316 (1910); see also PROSSER, *op. cit. supra* at 610. The Restatment, however, extends the attorney's privilege to communications *"preliminary* to a proposed litigation," 3 RESTATEMENT, TORTS § 586 (1938), but the comments under that same section and the cases limit such preliminary communications to pre-trial conferences with clients, witnesses, or expert consultants. Many courts require that the communication be necessary for the coming litigation. *Robinson v. Home Fire Ins. Co.,* 244 Iowa 1084, 49 N.W. 2d 521 (1951), *Rodgers v. Wise,* 193 S.C. 5, 7 S.E. 2d 517 (1940). But it must be shown that the statement was made to one actually *involved,* or about to be involved, in the proceeding. *Washer v. Bank of America Ass'n,* 21 Cal. 2d 822, 136 P.2d 297 (1943); *Kennedy v. Cannon, supra.* Thus an attorney who spoke disparagingly of the opposing counsel after the trial was outside privilege. *Viosca v. Langfried,* 140 La. 609, 73 So. 698 (1916). Also a libelous statement given to a newspaper by an attorney "to prevent the spread of an 'un-

founded rumor' " was found unprivileged. *Jacobs v. Herlands*, 17 N.Y.S. 2d 711 (1940). "An attorney who wishes to litigate his case in the press will do so at his own risk." *Kennedy v. Cannon, supra.*

The trial court instructed for the defendant, apparently feeling that his action was qualifiedly privileged, since the prosecuting attorney had published a statement damaging to the defendant's client. The Court of Appeals dismissed this notion rather summarily, holding that the statement was published to one who had no interest corresponding to the defendant's duty to protect his client. The major portion of the opinion was spent on a discussion of the defense of absolute privilege, which was not nearly so tenable as that of the qualified privilege found by the court below. The trial court, possibly impressed with the clear and present danger facing the defendant's client, and the responsibility that immediately arose, found a duty to speak, and apparently a corresponding right to hear and re-publish. The appellate court, in discussing the possible lynching, suggested to the defendant that he should have moved for a change of venue, or examined the jurors on their *voir dire* — both of which, by the time of their usefulness, would have been like closing the proverbial barn door. The absolute privilege, in this period which is seeing various tort immunities crumble at their foundations, has expanded only within a limited sphere, and never reached the proportion considered by the appellate court in the principal case. The opinion would have been much more edifying, and more closely related to the findings in the court below, had the Court of Appeals given a complete discussion of the qualified privilege claim, which had—or should have had—a greater chance of success. The qualified privilege was apparently the first, and most persuading, line of defense in the lower court.

MICHAEL W. TIGHE

UNEMPLOYMENT COMPENSATION — Availability for Suitable Work — Refusal of Work on Sabbath for Religious Reasons. — For thirty-five years plaintiff worked for defendant's cotton mill. Plaintiff was and had since 1957 been a conscientious member of the Seventh Day Adventist religion, the tenets of which church require its members to abstain

from labor of any kind from sundown Friday until sundown Saturday. Since the end of World War Two and until June 6, 1959, Saturday work had been optional at defendant's mills. Since her conversion to the Seventh Day Adventist religion, and prior to Friday, June 5, 1959, plaintiff had neither chosen nor been required to work on Saturday. On that date plaintiff was notified that thereafter all employees would be required to work on Saturdays. She refused to report for work the next six Saturdays and was discharged for her refusal to do so. The Court of Common Pleas affirmed the full Commission's decision in favor of the defendant and on appeal to the Supreme Court of South Carolina, HELD: Affirmed, plaintiff, by restricting her availability for employment to those hours not in conflict with her religion, was not "available for work" and thereby disqualified herself from receiving benefits. *Sherbert v. Verner*, __ S.C. __, 125 S.E.2d 737 (1962).

The unemployment compensation laws were designed to relieve the economic pressures and strife which result when workers become unemployed through no fault of their own. *Judson Mills v. South Carolina Employment Security Comm'n*, 204 S.C. 37, 28 S.E.2d 535 (1944); *Unemployment Compensation Comm'n v. Tomko* 192 Va. 463 65 S.E.2d 524 (1951). Generally, the unemployment compensation laws provide that claimants must accept suitable work and that one of the criteria for determining what work is suitable will be the degree of risk to a claimant's health, safety, or morals. ALTMAN, AVAILABILITY FOR WORK 283 (1950); Menard, *Refusal of Suitable Work*, 55 YALE L. J. 134 (1945). A worker must be ready, willing, and able to accept suitable employment. *Schettino v. Administrator*, 138 Conn. 253, 83 A.2d 217 (1951); *Hunter v. Miller*, 148 Neb. 402, 27 N.W.2d 638 (1947). The South Carolina statute provides that an unemployed insured worker shall be eligible to receive benefits if he or she is able to work and is available for work. CODE OF LAWS OF SOUTH CAROLINA § 68-113 (1952). An insured worker may become ineligible for work if he fails, without good cause either to apply for available suitable work or to accept available suitable work. CODE OF LAWS OF SOUTH CAROLINA § 68-114 (1952). The degree of risk to the health, safety, and morals of the worker shall be considered in determining suitability of employment. CODE OF LAWS OF SOUTH CAROLINA § 68-114 (3) (a) (1952). To be available for work, a worker must be genuinely

attached to the labor market. *Schettino v. Administrator, supra; Roukey v. Riley,* 96 N.H. 351, 77 A.2d 30 (1950). Restrictions of availability for personal reasons are not generally allowed. *Hartsville Cotton Mill v. South Carolina Employment Security Comm'n,* 224 S.C. 407, 79 S.E.2d 381 (1953); *Judson Mills v. South Carolina Employment Security Comm'n, supra.* The general rule is that an unemployed worker must be ready, willing, and able to accept any work for which he has no good reason to refuse. *Garcia v. California Employment Stabilization Comm'n* 71 Cal.App.2d 107, 161 P.2d 972 (1945); *Hegadone v. Kirkpatrick,* 66 Idaho 55, 154 P.2d 181 (1944). It has been held that a worker must be available at all times of the day or night and on any day of the week. *Ford Motor Co. v. Appeal Board,* 316 Mich. 468, 25 N.W.2d 586 (1947). This rule has been repudiated. *In Re Miller* 243 N.C. 509, 91 S.E.2d 241 (1956). A worker who was available for the normal work period which was customary of the type of employment was held to be available. *Swanson v. Minneapolis-Honeywell Regulator Co.,* 240 Minn. 449, 61 N.W.2d 526 (1953). A frequently used rule is that the worker must be available for the work which he has been doing. *Tung-Sol Elec. v. Board of Review,* 35 N.J. Super. 397, 114 A.2d 285 (App. Div. 1955); *Judson Mills v. South Carolina Employment Security Comm'n, supra.* Where a Jewish worker restricted his availability to those days and hours which would not interfere with his Sabbath, the court denied benefits on the ground that the plaintiff was not available where he voluntarily chose a religion and a trade or occupation in conflict with each other. At that time, there was no provision in the applicable statute which required that the plaintiff's morals be considered in determining suitability. *Kut v. Albers Super Mkt.,* 146 Ohio 522, 66 N.E.2d 643, *appeal dismissed,* 329 U.S. 669, 91 L.Ed. 590. In a later case from the same jurisdiction it was held, after enactment of a "moral suitability" amendment, that where a claimant's conscientious adherence to the tenets of the Seventh Day Adventist religion required her to limit her availability, conflicting employment would not be suitable. *Tary v. Board of Review, Unemployment Compensation,* 161 Ohio 251, 119 N.E. 2d 56 (1954). Similar decisions have been reached in Michigan and North Carolina. *Swenson v. Michigan Unemployment Security Comm'n,* 340 Mich. 430, 65 N.W.2d 709 (1954); *In Re Miller, supra.*

The Court, in the instant case, was faced with the interpretation of a statute requiring that consideration be given to the risk of the employment to the claimant's morals in determining whether the employment would be suitable. The statute is silent as to what constitutes moral risk. One of the basic problems which the court was forced to resolve was whether suitablility was to be determined on the basis of the nature of the work or on the individual claimant's moral standards. The better view, under the South Carolina law, is that the character of the employment should be decisive. The Claimant here had worked for thirty-five years in an industry in which Saturday work was generally required. The claimant's change of religion was a personal change, the nature of which made Saturday work objectionable to her. In *Judson Mills, supra,* a mother was held to be unavailable when a personal change of situation made it necessary for her to limit her availability in order to care for her children. Surely, if a mother were to be required to accept employment and leave her children unattended, this would involve a risk to her morals. Nonetheless, the court held that the change which brought about her unemployment was a personal change, and compensation was denied. The present claimant's change of religion was no less a personal change. The *Tary Case,* the *Swenson Case,* and *In Re Miller, supra,* all urged by the plaintiff as controlling, reached their decision on the basis of the risk to the individual South Carolina Court of problems it is facing today. There claimant's morals. Under the controlling South Carolina decisions the court correctly decided that in view of the purpose for which the unemployment compensation laws were passed, that the plaintiff shoud be denied compensation.

DAVID Y. MONTEITH, III