

exercise of his judgment. The matter to which his immunity does not extend must be so palpably wanting in relation to the subject-matter of the controversy that its irrelevance and impropriety are plainly apparent. Advocacy implies argument. A wide latitude is necessarily allowed in the interest of truth and justice, for no counsel could perform his duty if he were personally responsible for the force of his deductions or inferences and the strength of his expression. That they are extreme or only specious or colourable, is not the test, but whether they are pertinent. This is but the principle of free speech in the administration of justice. It protects persons defamed by providing redress for accusations without foundation in fact, and it protects the advocate by assuring to him the play of his reason within the facts. The advocate does not speak mindful of another day when he will be called upon to justify his inferences as if they had been charged as facts, or to vindicate his conclusions by the axioms of logic. His conclusions may be lame and impotent, his inferences far-fetched and feeble, but so long as they can possibly be deemed to be pertinent they are not actionable.

It does not necessarily follow, however, that every publication in judicial proceedings which is irrelevant to the issue is actionable. Such a publication, although not absolutely protected, may nevertheless be the subject of conditional immunity under the ordinary doctrine of interest or duty upon which conditional immunity is based. The question of malice then becomes the controlling factor. But the inference of malice is not drawn, as a matter of law, because the publication on such an occasion was irrelevant; it must affirmatively appear that it was also malicious. In other words, a publication in the course of a judicial proceeding, if relevant, will not support an action for defamation; nor when irrelevant, if the speaker or writer believed that it was relevant, and had reasonable grounds for so believing. The same rule applies to publications not made "in office," and, presumably, to publications made in the course of judicial proceedings where the court was without jurisdiction.

When the facts are not in dispute, relevancy, like the privilege, is