TORTS—DEFAMATION—PRIVILEGED COMMUNICATIONS.—Plaintiff brought an action in trespass in the nature of libel against the executors of an estate to recover damages as a result of a paragraph in decedent's will referring to her, while omitting mention of her name, as being illegitimate. Testator had from time to time over a period of twenty-seven years fought the plaintiff in court. Trial court entered a judgment for the defendant, nothwithstanding a verdict in the trial for the plaintiff for $150,000. *Held*, judgment for the defendant sustained on the ground that the action of the testator in putting into his will the particular language he used was a privileged one. *Nagle v. Nagle et al.* (Pa. 1934) 175 Atl. 487.

In rendering its opinion there seems to have been confusion in the court's mind between absolute and qualified privilege. In the dicta the court attempts to extend the doctrine of absolute privilege in court proceedings to the publication of a will. The court sees no reason why the decision in *Kemper v. Fort* (1907) 219 Pa. 85, 67 Atl. 991, cannot be extended to the present case; there it was held that where an executor of an estate, in an answer to a petition, asserted the illegitimacy of the plaintiff, such an assertion was absolutely privileged where pertinent.

The prevailing American view with regard to absolute privilege is that defamatory words, to avail themselves of this defense, must be relevant or pertinent. *Bussewitz v. Wisconsin Teachers' Association* (1925) 188 Wis. 121; 205 N. W. 808. *Hardtner v. Salloum* (1927) 148 Miss. 346 114 So. 621. A minority of the American states follow the English rule that defamatory statements, under appropriate circumstances, may be absolutely privileged even if not relevant or material. *Munster v. Lamb* (1883) 11 Q. B. D. 588, 49 L. T. 252; *Sebree v. Thompson* (1907) 126 Ky. 223, 103 S. W. 374; *Hunckel v. Voneiff* (1888) 69 Md. 179, 14 Atl. 500. These rulings are based on the general ground of public policy and are strictly limited to three classes of communications: (1) Proceedings of legislative bodies; (2) Judicial proceedings; (3) Communications by military or naval officers or in official proceedings authorized by law. *Hale v. Lea Co.* (1923) 191 Cal. 202, 215 Pac. 500; *Raymond v. Croll* (1925) 233 Mich. 268, 206 N. W. 556. Pleadings are included under the second class of statements which are absolutely privileged when relevant or pertinent. *McGhee v. Insurance Co. of North America* (C. C. A. La. 1902) 112 F. 853; *Abbott v. National Bank* (1899) 220 Wash. 552, 56 Pac. 376. The tendency of the courts has been to restrict the rule of absolute privilege rather than to extend it. *Pecue v. West* (1922) 233 N. Y. 316, 135 N. W. 515.

The logic behind the court's extension of the rule of absolute privilege in the instant case is in the reasoning that the publication of a will "is closely analagous to a plaintiff's statement in a civil action in the respect that it is the beginning of a judicial proceeding." The probate of a will is publication of libel contained therein. *Harris v. Nashville Trust Co.* (1914) 128 Tenn. 573, 162 S. W. 584; *Gallagher's Estate* (1900) 10 Pa. Dist. 733; contra, *Hendricks v. Citizens and Southern National Bank* (1931) 176 Ga. 692, 168 S. E. 313. But the reasoning in the case and the decision itself do not support the court's statements as to absolute privilege. The court justifies the libel in the will not only on the ground that it is pertinent,

which would measure up to the requirements of absolute privilege, but also on the ground that there is "no apparent purpose to injure." Here the court is clearly talking of qualified privilege, where it is necessary to disprove malice. *Friedell v. Blakely Printing Co.* (1925) 163 Minn. 226, 203 N. W. 974.

Authorities referred to by the instant cases support only qualified privilege. There are few cases referring to wills in particular as privileged documents. Appellate court in *Hendricks v. Vitizens and Southern National Bank,* above, held that statements of the testator unnecessarily intimating that plaintiff was illegitimate were not privileged. There is no reason why libellous statements in a will, when falling within the limits of qualified privilege, should not be defensible on this ground. Statements are qualifiedly privileged when made in good faith upon any subject matter in which the party communicating has an interest or duty and the party communicated to has a like interest or duty or when made for the protection of private interests. *Wise v. Brotherhood of Locomotive Fireman and Engineers* (C. C. A. Iowa 1918) 252 F. 961; *Alexander v. Vann* (1920) 180 N. C. 187, 104 S. E. 360; *Berry v. City of New York Insurance Co.* (1923) 210 Ala. 369, 98 So. 290; Newell on Slander and Libel, (4th Ed. 1924) p. 415. The facts in the present case clearly fall under this interpretation. But extending the defense of absolute privilege to them would open wide the doors for future extensions to all documents which will eventually figure in a court proceeding. The court, in introducing this subject is only confusing further the law of qualified privilege which was sufficiently confused before. The decision in *Nagle v. Nagle* is undoubtedly good law, but the dicta are superfluous and perplexing.

J. H. W. '37.

TRIAL—INSTRUCTIONS—DUTY TO REQUEST—The judge permitted a personal injury case to go to the jury after the plaintiff had failed to submit any instruction other than one on the measure of damages. The defendant objected and on appeal urged this to be error. *Held,* that it is within the "inherent power and duty of the court to see to it that the jury be informed as to the law of the case. Where prejudice results to the losing party by reason of the court's failure so to do, and the appellant properly saves the point, the judgment should be reversed and remanded. The defendant, however, was not prejudiced in this case. *Dorman v. East St. Louis R. R. Co.* (Mo. 1934) 75 S. W. (2) 854.

The instant case changes a rule of appellate practice which for years had been firmly established in Missouri, one which has had an interesting history. The early pronouncements of the Supreme Court were to the effect that it is the duty of the court to instruct the jury on all principles of law applicable to the facts in evidence. To refuse to do so was error. *McKnight and Bradley v. Wells* (1821) 1 Mo. 13; *Coleman v. Roberts* (1821) 1 Mo. 97. This rule persisted until in *Drury and Wiseman v. White* (1847) 10 Mo. 224 the court in considering a case submitted to the jury without instructions, held that it was too late to contend on appeal that the jury