

8574

No. _____

Supreme Court of Illinois

Isaac Fitzgerrall

vs.

Richard Furgeson et al

71641  7

Pleas began and held at the court house in Carle
within and for the County of Clinton and State of Illinois
in the Judicial Circuit of the State of Illinois, before
the Hon. H. H. O'Melveny Judge of said Circuit, James
J. Justice Sheriff and John B. Popper Clerk, of the
March Term of said Court A.D. 1859 began and held
on the 1st Monday in March 1859, when the follow-
ing record was received from Wayne County Illinois
on change of venue from that County, Viz:-
" Pleas had before the Hon Edwin Beecher Judge
of the Circuit Court of the County of Wayne in
the State of Illinois -

Be it remembered that heretofore to wit
on the third day of August 1857 Frances
Smith by her attorneys Haynie and Ball
filed in the office of the Clerk of said
Circuit Court the accompanying process marked
as "A" in the word & figures following to wit:

State of Illinois } Of the October term of the
Wayne County } Wayne Circuit Court 1857

Frances Smith }

vs

Isaac Fitzgerald }

} Case for Slender

Rigden B. Cloern, Clerk of

Sir, you of Frances Smith plaintiff in
the above cause makes you serve these sum-
mons Isaac Fitzgerald the above named
defendant if to be found in your County

to be and appear before the Hon Circuit court
of said county on the first day of the
October Term thereof 1857. to be holden at
Fairfield on the first Monday of said Month
to answer said plaintiff in an action on
the case for slander to her damage as she
says of ten thousand dollars and have you
then there this precept and said summons
August 1st 1857 Haynie & Bell for plff"

and on the day and year last ofore said
the clerk of said court issued the enclosed
summons marked "B" which is in the word
and figures following that is to say -
State of Illinois } Wayne County Sch.
~~Illinois County Sch.~~ } The People of the state of
Illinois to the sheriff of said County - greeting
We command you that you summon Isaac
Fitzgerald if he shall be found in your
County personally to be and appear before
the Circuit Court of said County on the first
day of the next Term thereof to be holden in the
Court house in Fairfield on the first Monday in
the month of October next to answer Frances
Smith in a certain plea of action on the case
To her damage ten thousand dollars, and have you
then and there this writ; and make return thereof
in what manner you execute the same. Witness
R. Bell Clerk of our circuit court at

Fairfield this 3d day of August in the year of
L 1857 our lord one thousand eight hundred
and fifty seven R B Bloomb Clerk
Circuit Court

upon which summons is the officers return
in the word and figures following to wit:-

I have served the within summons on
the within named Isaac Fitzgerald by reading
the within summons to him Augt 5th 1857

In witness whereof
C. L. Carter Sheriff
and afterward to wit. at the October Term of said
Wayne Circuit in the year 1857 the following
order was made by said Court to wit:-

Frances Smith }
vs } Case for slander
Isaac Fitzgerald }

On this first day of the Term
came the defendant and it appearing that no
declaration has been filed herein. It is
ordered by this Court that this cause be continued
at the cost of the plaintiff

and afterward to wit on the 6th day of April
in the year 1858 the said Frances Smith by
her attorneys filed in the Clerks office of
said Circuit Court the enclosed dec-
laration marked "b" which is in the
word and figures following that is to
say -

State of Illinois } Of the Spring Term of the Wayne
 Wayne County } Circuit Court, 1858
 Frances Smith }

vs } Case for Slander
 Isaac Fitzgerald } damages @ \$10,000⁰⁰
 Isaac Fitzgerald the defendant
 in this suit was summoned to answer
 Frances Smith the plaintiff in this suit
 in her plea of trespass on the case, and
 therefore the said plaintiff by Bell & Haynie
 her attorneys complains -

For that whereas the said plaintiff
 now is a good true honest just faithful
 and virtuous citizen of the state of Illinois
 and as such hath always behaved demeaned
 and conducted herself, and until the committing
 of the several grievances by the said defendant
 hereinafter mentioned, was always reputed
 esteemed and accepted by and amongst all
 her neighbors and other good and worthy cit-
 izens of this state, to whom she was in
 any wise known, to be a person of good name
 fame and credit to wit at the County &c of aforesaid,
 and whereas also the said plaintiff hath not
 ever been guilty, nor until the time of the
 speaking and publishing of the several false
 malicious disgraceful and defamatory
 words by the said defendant as hereinafter

Mentioned been suspected to have been guilty of fornication or adultery or of any other crime as hereinafter stated to have been charged upon and imputed to her by the said defendant. By means whereof the said plaintiff had deservedly obtained the good opinion and credit of all her neighbors and other good and worthy citizens of this state to whom she was in any wise known to wit as is aforesaid. Yet the said defendant well knowing the premises, but greatly envying the happy state and condition of the said plaintiff and contriving and wickedly and maliciously intending to injure the said plaintiff in her good name fame and credit and to bring her into public scandal infamy and disgrace with and amongst all her neighbors and other good and worthy citizens of this state and to cause it to be believed and suspected by these neighbors and citizens that she the said plaintiff had been and was guilty of the offense of fornication as hereinafter stated to have been charged upon and imputed to her by said defendant and to subject her to the infamy and disgrace justly visited by civilized refined and virtuous society upon persons guilty

thereof and to set hands offress impoverish and wholly ruin her the said plaintiff heretofore to wit on the first day of May AD 1857 at the County &c aforesaid, in a certain discourse which the said dependant then & there had, and held of and concerning the said plaintiff in the presence and hearing of divers good and worthy citizens of this state, then and there in the presence and hearing of the said last mentioned citizens falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the offense of fornication the false scandalous malicious and defamatory word following, that is to say "Frances Smith (meaning plaintiff) is a God damned whore" "Frances Smith" (meaning plaintiff) "is a God damned whore and I" (meaning dependant) "can prove it" "Frances Smith is a God damned strumpet" "Mrs. Smith (meaning plaintiff) is a God damned whore" "Mrs Smith (meaning plaintiff) is a God damned whore and I can prove it" "Mrs Smith (meaning plaintiff) is a strumpet" "She (meaning the said plaintiff) is a God damned whore" "She (meaning the said plff) is a God damned whore, and I (meaning the said deft) can prove it" (meaning that deft could prove that plff. was a whore) "She (meaning the said plaintiff) is nothing but a God damned strumpet"

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"I'll tell you (meaning that deft would tell the persons present) what she (meaning the plaintiff) is; she (meaning the plaintiff) is a God damned whore." "She (meaning the deft) is a whore" "She (meaning the plaintiff) is a whore and I (meaning the deft) can prove it." "She (meaning the plaintiff) is nothing but a strumpet" "I'll tell you what she (meaning the plaintiff) is; she (meaning the plaintiff) is a whore" thereby then and there meaning that the said plaintiff had been and was guilty of fornication she then and there being an unmarried woman,

2d Count And afterward to wit on the day and year last aforesaid at the county and so forth aforesaid in a certain other discourse which the said defendant then and there had, of and concerning the said plaintiff and of and concerning the said offence in the presence and hearing of divers other good and worthy citizens of this state, the said defendant further contriving and intending as aforesaid, then and there in the presence and hearing of the said last mentioned citizens, falsely and maliciously spoke and published, of and concerning the said plaintiff, and of and concerning the said offence of adultery, the false scandalous malicious and defamatory word following that is to say; - "Frances Smith is a God damned whore," "Frances Smith is a

"God damned whore and I can prove it,"
 "Frances Smith is a God damned strumpet,"
 "Mrs. Smith (meaning plaintiff) is a God damned
 whore," "Mrs Smith (meaning plaintiff) is a
 God damned whore and I can prove it"
 "Mrs Smith is a strumpet," "She (meaning
 the said plaintiff) is a God damned whore"
 "She (meaning the said plaintiff) is nothing but
 a God damned strumpet," "I'll tell you
 (meaning the dependant would tell) what she,
 (meaning the plaintiff) is," "She (meaning the plaintiff)
 is a God damned whore," "She (meaning said plff)
 is a whore" "She (meaning plff) is a whore, and
 I (meaning deft) can prove it," "She (meaning
 plff) is nothing but a strumpet," "I'll tell
 you what she is" (meaning deft would tell what
 plff was) "she is a whore" thereby then and there
 meaning, that the said plaintiff had been and was
 guilty of the offense of adultery; - By means
 of the speaking and publishing of which said
 false scandalous and defamatory words by the
 said dependant as aforesaid, the said plaintiff
 hath been and is greatly injured, in her good
 name fame and credit, by and amongst all her
 neighbors, and brought into public scandal, infamy
 and disgrace with them and other good and worthy
 citizens of this state, insomuch that divers of those
 neighbors and citizens, to whom the innocence and chastity

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of the said plaintiff in the premises were unknown
here, on account of the speaking and publishing of
said false scandalous, malicious and defamatory
word by the said defendant as aforesaid, from thence
hitherto suspected and do suspect, the said plaintiff
to have been and to be a person guilty of the offence
aforesaid, so as aforesaid charged and imputed to
her by the said defendant, and here by means of
the committing of said grievances by said defendant
as aforesaid from thence hitherto wholly refused
and still do refuse, to have any transaction ac-
quaintance or discourse with her the said plaintiff
as they were before used and accustomed to have
and otherwise would have had, and also by means
of the premises the said plaintiff hath been and
is much damnified and injured to wit at &c
aforesaid on &c aforesaid. In the damage of the
said plaintiff of ten thousand dollars and
therefore she brings her suit &c

R. Bell & Haynie, attys for plff.
and afterward to wit at the April Term of said
circuit court in the year 1858, to wit on the 27th
day of April 1858 the said defendant Isaac Fitzgerald
filed in said court his affidavit, showing the in-
solvency of the said plaintiff, & which affidavit is
filed herewith marked "D" and is in the word
and figures following to wit:-

"State of Illinois, } Wayne Circuit Court
Wayne County, } April Term 1858

Isaac Fitzgerald }
 vs } Case for Plaintiff
 Frances Smith }

Isaac Fitzgerald the defendant in the above entitled cause after being duly sworn deposes and says that the plaintiff the above entitled cause is wholly and entirely insolvent, having no property of any kind liable to be taken upon an execution as affiant is informed and verily believes and therefore wholly unable to pay the costs of the above entitled cause should the same be adjudged against her. by reason whereof the officers and witnesses herein will be in danger of losing their legal demand unless the plaintiff herein should be ruled to give security for costs.

Sworn to & subscribed before me this 27th day of April A.D. 1858 P. B. Bloombert Clerk } Isaac Fitzgerald }

and thereupon on the day and year last aforesaid the following order was made by said court to wit:
 "Frances Smith vs Isaac Fitzgerald } Case }

On motion of said defendant it is ordered that said plaintiff be required to give security for costs in this cause by tomorrow morning and afterward on the 30th day of April 1858 the said defendant by his attorney filed his plea in said court which is marked "C" and is in

the word and figures following, to wit:-
 State of Illinois } Wayne Circuit Court
 Wayne County } April Term AD 1858
 Isaac Fitzguald }
 vs } Case for Slander
 Frances Smith }

And the defendant by his attorney comes and defend the wrong &c when &c where &c and for plea says, that true it is, he did speak and publish said word in said declaration of and concerning the said plaintiff in manner and form as alleged, because he says that said word are true, and that the said plaintiff on &c at &c aforesaid was a whore as said defendant charged. Wherefore the said defendant did speak and publish said word as he might lawfully do because the same were true and this the said defendant is ready to verify when &c and where &c therefore &c

Whiting, Beecher & Harrow
 attys. for defendant

and afterward to wit on the first day of May AD 1858 the said plaintiff filed in said court her bond for cost, which bond is herewith marked "F" and is in the word and figures following to wit:-

State of Illinois } Wayne Circuit Court
 Wayne County } April Term AD 1858
 Frances Smith }
 vs } Case for Slander
 Isaac Fitzguald }

We do hereby enter ourselves security for costs in this cause and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or to any of the officers of this court in pursuance of the laws of this state - Dated this 1st day of May AD 1858.

Robert Bell

C. C. Hopkins
 Charles Wth Libbs
 mark

and afterward to wit at the October Term of said Court in the year 1858 the following order was made by said Court to wit: -

" Frances Smith }
 vs } Case for Slander
 Isaac Fitzguald }"

And now at this day being the third day of the term again came the said plaintiff by her attorneys, and it being suggested to the Court that the said plaintiff has intermarried with Richard Ferguson, It is therefore ordered by the Court that the said Richard Ferguson the husband of the said plaintiff be made a party to this suit &c" and at said last term of said Court said plaintiff by her attorneys filed in said Court her replication to said defendants plea which is enclosed and marked "P" and is in the

word and figures following to wit:—
 State of Illinois } October term of the Wayne
 Wayne County } Circuit Court AD 1858
 Frances Smith }
 vs } Case
 Isaac Fitzguald }

And the said plaintiff comes and says that the said defendant at the said time when &c of his own wrong and without the cause by him for his said plea alleged committed the said several grievances spoke the word in the said plea attempted to be justified in manner and form as the said plaintiff hath above in the said declaration complained against the said defendant and this the said plaintiff prays may be inquired of by the country &c

Robinson & Hicks for plff
 and afterward to wit at a special term of said Court began and held at the court house in Fairfield in said Wayne County on the 22d day of November 1858 to wit on the 12th day of said term the said defendant filed his affidavit praying a change of venue in said cause which affidavit is enclosed and marked "H" and is in the word and figures following that is to say:—

" State of Illinois } Wayne Circuit Court
 Wayne County } November Special Term 1858

Frances Smith now Frances Ferguson et al

vs

Isaac Fitzgerald

Case

Isaac Fitzgerald the defendant in the above entitled cause after being duly sworn upon his oath says that he fears that he will not receive a fair and impartial trial of the above entitled cause in the 13th judicial Circuit where the same is now pending for the reason of the prejudice in the mind of the Honorable Edwin Beecher judge of said Circuit against this affiant. That the fact of such prejudice came to the knowledge of affiant since the last term of this court. he therefore prays a change of venue to some Circuit where like causes do not exist

sworn to & subscribed this 4th day of

Dec 1858. R B Bloemink clerk } Isaac Fitzgerald

and afterward on the day and year last aforesaid the following order was made by said Court to wit

Richard & Frances Ferguson

vs

Isaac Fitzgerald

Case

And now on this 13th day of the term came the said defendant by his attorneys and on his motion and affidavit filed herein, praying a change of venue in this case. It is therefore

ordered by the court that the venue in this case be changed to the County of Clinton and that the Clerk of this court make out and transmit to the clerk of the Circuit Court of Clinton County a transcript of the papers and record in said cause according to law—

State of Illinois

Wayne County } } J. Rigdon B. Bloemert

clerk of the Circuit Court in and for said Wayne County do hereby certify that the foregoing papers contain a correct transcript of the record of the foregoing cause and that the accompanying papers marked in red ink A, B, C, D, E, F, G, & H, are all the original papers in said cause as appears from the files of my office

Given under my hand and ^{the} seal of said Court at Fairfield this 15th day of Feb'y 1859. R. B. Bloemert clerk

And afterward to wit at the said March Term of the Clinton Circuit Court 1859 on the 15th day of March 1859 the following order was made by the court in this cause to wit:—

Richard & Francis Ferguson }

vs

Isaac Fitzgerald }

} Case

March 15th And now this day come the

said plaintiffs and said defendant and
 on their motion It is ordered ^{by the court} that this
 case be continued until the next term of this
 court by the consent of the parties hereto.

And afterward to wit at the August
 term of the Clinton Circuit Court 1859
 the following order was made to wit

Francis & Richard Ferguson

vs

Oliver Fitzgerald

} Case

And now this day
 it is ordered by the court that this
 cause be continued

And afterward to wit at the March Term of the
 Clinton Circuit Court A.D. 1860 began and held at the court
 house in the town of Earllyle in and for said County on
 the 1st Monday in the Month of March the following proceed-
 ings were had in this case to wit orders made

Richard Ferguson and

Frances Ferguson his wife

vs

Isaac Fitzgerald

} Case, for slander

Monday 12th March. And now this
 day come the said plaintiffs and said defendant, and
 and the securities for cost on the cost bond filed in
 this case move the court to release them from further
 liability in this behalf which motion is overruled
 by the court. The said securities then enter their motion

to release the securities for cost in this cause, which motion is overruled by the court. Then come the plaintiffs by their counsel and move the court to suppress the deposition of John C Gush. ~~From~~ offered in this cause by the defendant which motion is allowed by the court and said deposition is ordered to be suppressed ^{the notice to take} which deposition so suppressed as aforesaid is in the word and figures following that is to say: -

Frances Ferguson and Richard Ferguson

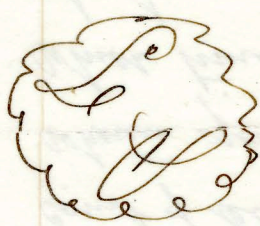
You are hereby notified that I shall proceed by myself or my attorney at the office of Rigdon B. Ellocumb Clerk of the Circuit Court of Wayne County in the town of Fairfield County of Wayne and State of Illinois on the 18th day of February A.D. 1860 to take the deposition of John C Gush a resident of Wayne County Illinois which deposition is to be commenced at 11 o'clock in the morning and continue from day to day until the same is taken which deposition when taken to be read in evidence in a cause pending in the Circuit Court of Clinton County Illinois by change of venue wherein you are plaintiffs and I am defendant which time and place you can attend if you think proper - Fairfield 21st January A.D. 1860

Isaac Fitzgerald by
J. E. Whiting his attorney
upon which notice is endorsed the following to wit: -

"State of Illinois }
Wayne County } } Oath. Candle being duly sworn

upon his oath says that on the 4th day of Feby 1860
affiant read the within notice to Richard Furguson
and that on the 4th day of Feby 1860 affiant read
said notice to said Frances Furguson

Sham Candler S. W. C.



In witness whereof I R. B. Stocumb clerk of the
circuit court in and for Wayne County Ill^o do
have hereunto set my hand and official seal
at Fairfield this 4th day of Feby 1860

R. B. Stocumb clerk

and said deposition so suppressed as aforesaid
is in the word and figures following to wit:—

"The deposition of John B. Gash of the county of
Wayne and state of Illinois a witness produced
and sworn and examined before R. B. Stocumb
clerk of the circuit court in and for said county
and state on the 18th day of February 1860 at his
office in Fairfield to be read as evidence on
the trial of a certain suit at common law now
pending and undetermined in the circuit court
of Marion county state of Illinois wherein
Frances Furguson and Richard Furguson are
plaintiffs and Isaac Fitzgerald is defendant
on the part and behalf of said defendant, the
said John B. Gash being first duly sworn
according to law deposes and sett in answer
to the several interrogatories hereto annexed on the
part of said defendant as follows, Viz:—

Question 1.

Do you know the parties plaintiffs and defendant on the title of these interrogatories named or either of them and how long have you known them respectively?

Answer

I have partially known the plaintiff five or six years, and have known the deft thirty years

Question 2.

Had you a conversation at any time with the plaintiffs, if so when and where?

Answer

About four years ago I made a contract with Mr Smith the husband at that time of the plaintiff and under that contract they dealt in my store - Smith failed in part to comply with the contract, and I had concluded to stop them from dealing further, and afterward Mrs Smith, now Mrs Ferguson came into the store to get some articles, I told her that Smith had disappointed me, and that I would not credit him further - She then stated that if I would let her have the articles she would pay me herself. - I then asked her how she could pay me, she replied she would pay me some way to my satisfaction - I then asked her if she would sleep with me, she answered that she would at some time - ^{At this time} My wife came to the back door and I motioned to Mrs Smith to go out and she done so.

Question 3.

Do you know any other matter or thing that may tend to the benefit and advantage of the defendant in this cause, if so declare the same as fully as if you had been there - unto particularly interrogated?

Answer

I do not -

— Cross interrogatories by plaintiff —

Question 1 Was the plaintiff in your store before or after the time you spoke of?

Answer She was frequently before that time in my store, but have no recollection of seeing her there afterward

Question 2 Who was present at the time you had the conversation with her?

Answer No person.

Question 3 Did she get any good at that time?

Answer She did not.

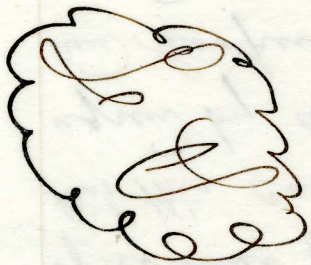
Question 4 Did you have a conversation with Stephen J. Hicks in Fairfield during the April circuit court 1859 in which you in substance said that all you could say against this plaintiff was that she came to your store and wanted to buy some good, that you told her that you could not credit her husband, she replied that she would pay for the good herself, you then asked her how she would pay, you then asked her if she would allow you to live with her if you would let her have the good, and that she then said she would pay for them in that way if she could find no other?

Answer I had a conversation with Col. Hicks but do not recollect the time or place, in which conversation I told him that Mrs Smith came to my store, and wanted to buy good, I told her that her husband had treated me badly, that I would not credit him any further, she then said that if I would let her have them, she would

pay for them herself. I asked how. She said she would pay me until I was satisfied. I then asked her if she would let me sleep with her. She replied that she would at some time, at which time my wife came to the back door and Mrs Smith left. This in substance is all the conversation had with Cal. Hicks on the subject -

John C. Gash

State of Illinois }
Wayne County p } I hereby certify that the
above deposition of John C. Gash was sworn
to and signed by the deponent before me, and
that said deposition was taken by me at my
office in Fairfield in the said County of
Wayne on the 18th day of February A.D. 1860
between the hours of 11 o'clock A.M. and 4 o'clock
P.M. of said day



Given under my hand and seal
Official at Fairfield this 18th day of Feb'y
1860 R. B. Hoarub
Clerk W. Co. Cir. Ct.

and then come the said deponent March 13th 1860 and
files in said Court his affidavit for the continuance
of this cause which affidavit is in the word and
figures following that is to say: -

" State of Illinois } Of the Clinton Circuit Court
Clinton County p } March Term A.D. 1860

Francis Smith

vs

Isaac Fitzgerald

Case for slander
Change of venue from Wayne Co.

Isaac Fitzgerald defendant in this case being duly sworn deposes and saith that Charles Beecher attorney for defendant, and John Cooper of Counsel for the plaintiff both assured defendant that this case would not be tried, that it was agreed by and between said Isaac Fitzgerald and Cooper of Counsel for plaintiff and also agreed to by the securities on the bond of plff for costs that said cause would be dismissed, each party paying their own costs, and affiant states that under this understanding and by the advise of the said John Cooper and Charles Beecher aforesaid affiant failed to have his witnesses here at this Court to make good his defense in his pleadings herein set up, that this was done in order to save further cost and in good faith, this affiant fully relying that the cause would be ~~dismissed~~ disposed of as above, caused his witnesses to remain at home believing the case would be adjusted as above, Affiant says he has been here present at two former terms of this Court fully prepared with witnesses whose evidence when taken affiant is informed and fully believes will fully sustain the issue on his part and that if this Court will in ~~its~~ the exercise of a sound discretion continue this

Cause till Friday next at the opening of court he will procure his witnesses and be ready for trial then. As a further reason for this time affiant says he came here fully expecting to meet Judge Edwin Beecher who is fully conversant with affiant's case and his defense and expected to have his advice in the premises or that of some one of his counsel heretofore employed in his case, but on reaching this he find that neither of his counsel are here, nor is Judge Beecher & he is entirely taken by surprise and cannot safely go to trial unless time be given him as aforesaid, that this affidavit is not made for delay but to enable him to get his witnesses before this Court who are residents of Wayne & White Counties, and said witnesses are Samuel Bates of White County and John Gash and Charles Hawkins of Wayne County and further affiant saith not.

Shown to & subscribed before me this 13th
day of March 1860

W. B. R. J. or L. R.

Osace Fitzgibbon

and on said affidavit as above set forth the said defendant moves the Court to continue this cause till Friday next, and it appearing to the Court, by the admission of the parties & the Clerk that this cause was set for trial ^{on this day} by the agreement of the parties hereto, at the last term of this Court it is ordered by the Court that the motion for a continuance be overruled, (to which ruling

the defendant (excepted) — And afterward to wit on
 the day and year last aforesaid comes the said
 defendant and moves the Court for leave to
 withdraw defendants plea of justification
 heretofore filed in this case, which motion
 is overruled by the Court. And then come the
 parties and this cause being called for trial
 the issues are ordered to be tried by a jury, ~~and~~
~~thereupon came the jurors of the jury, and the~~
~~parties and their proofs and after having~~
~~heard the evidence of the parties and~~
~~the arguments of Counsel retire to consider~~
~~of their verdict~~ And afterward to wit on the
 day and year last aforesaid came as well the
 parties aforesaid as also a jury, and the parties
 having put themselves upon the country for trial
 and thereupon came the parties by their attorneys &
 thereupon came a jury to wit: — George Vernon,
 Daniel Loscy, William West, Samuel Hull,
 Levi Edmond, Abram Gooding, Henry R. Pickering,
 Steeley Meckel, Alexander Smith, Peter Hughes,
 William Wier and A. W. Danperthy, who being
 impanelled and sworn to try the issue joined,
 after hearing the evidence of the parties and the
 arguments of Counsel, retired to consider of their
 verdict, and after considering of the same, returned
 into Court their verdict in the words and
 figures following to wit: —

We the jury find the issue for the plaintiff and assess their
 damages at five thousand dollars, Whereupon
 the defendant moved the court for a new trial
 and it is ordered by the court that the motion
 be overruled, (to which order the defendant excepted)
 Whereupon the defendant prays an appeal to the
 Supreme Court of the State of Illinois, and
 it is ordered by the court that the appeal be
 granted on the defendant excenting bond in the
 sum of seven thousand dollars with security to
 be approved by the Clerk of this Court conditioned
 that he will prosecute his appeal with effect &
 without delay and pay whatever costs &c It
 is further ordered by the court that bills of excep-
 tions be presented before the close of the next ^{month} term
 of the Marion C. Licien's Court, and be made
 a part of the record as of this term &c

And afterwards, the following Bill of exceptions, was filed in said cause, viz:

"State of Illinois, Clinton county. } Clinton circuit court. March Term 1860.

Richard Ferguson }
Francis Ferguson }

vs.

Trespass on the case.

Isaac Fitzgerald }

Be it remembered that on the 14th day of March A. D. 1860, the said defendant filed

in said cause and presented to the court the following affidavit, to wit: State of Illinois, Clinton County, Ill. Clinton Circuit, &c. Francis Smith vs. Isaac Fitzgerald. } In case for slander. Charge from Wayne Co. Isaac Fitzgerald defendant in this cause being duly sworn deposes and saith that Charles Beecher atty for Def. and John Cooper of Counsel for Plff, both assured defendant that this cause would not be tried, that it was agreed by and between said Isaac Fitzgerald and Cooper of Counsel for plaintiff and also agreed to by the securities on the bond of plff, for costs that said cause would be dismissed, each party paying his own costs; and affiant states that under this understanding and by the advice of said John Cooper and Charles Beecher aforesaid affiant failed to have his witnesses here at this court to make good his defense in his pleadings herein set up - that this was done in order to save further costs and in good faith this affiant

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fully relying that this cause would be disposed of
as above, caused his witnesses to remain at home
believing the cause would be adjested as above,
affiant says he has been here present at two former
terms of this court fully prepared with witnesses
whose evidence when taken affiant is informed
and fully believes will fully sustain the issue
on his part and if this court will in the exercise of a
sound discretion continue this cause till Friday
next at the opening of court he will procure his
witnesses and be ready for trial then: As a
further reason for this time affiant says he
came here fully expecting to meet Judge Beecher
who is fully conversant with affiant's cause
and his defence, and expected to have his
advice in the premises, or that some one of his
counsel heretofore employed in his cause, but on
reaching this he finds that neither of his
counsel are here, nor is Judge Beecher. he is
entirely taken by surprise and cannot safely
go to trial unless time be given him as aforesaid
that to enable him to get his witnesses before this
court, who are residents of Wayne & White Counties
and said witnesses are Samuel Bates of White
Co. and John C. Gault & Charles Hawkins of Wayne
County and further affiant prays that
Matters subscribed before me this
13th day of March 1860. } Isaac Fitzgerald
John B. Roper Clerk, }

And thereupon the said defendant moved the court to continue this cause until Friday next the 16th day of said month of March at the opening of court in the morning. Which motion the court overruled. The said defendant then entered his motion for leave to withdraw his plea filed in this cause, which motion the court also overruled.

The said Plaintiff then moved the court to amend the judge's Docket by changing the style of the cause from Francis Smith to Richard Ferguson and Francis Ferguson which motion was allowed by the court.

Thereupon a jury was called and the cause submitted to them without any evidence being offered by either party; and after argument of counsel the court gave the following instruction on behalf of the plaintiff, to wit; That the plea of justification admits the speaking and publishing the words charged in the declaration; and if the jury believe that the defendants interposed said plea with a view of injuring the plaintiff, or without any expectation of sustaining it by proof, the jury may properly consider the plea as a reiteration of the slander and on ground for enhancing the damages.

That in actions for slander the jury are to determine from all the circumstances what

damages ought to be given could they are not con-
fined to mere pecuniary loss or injury, but may
give damages by way of punishment for the wrong.
And thereupon after retirement the jury returned
a verdict in favor of the Plaintiff for the sum of
Five thousand Dollars. Whereupon the said de-
fendants entered a motion for a new trial
which motion was overruled by the court.

To which several opinions of the court in
overruling said motion for a continuance by
the defendant - in overruling the motion to
withdraw the plea of said defendant - in
allowing said docket to be amended - in
giving said instructions to the jury, and in
overruling said motion for a new trial, the
said defendant by his counsel at the times
when said several decisions were made, then
and then excepted, and pray that this his
bill of exceptions may be signed and sealed
by the court and made part of the record herein
which is done at Salem in time and in
strict accordance with the order made in this
cause at Clinton Co.

H. K. S. O'Melvey (Seal)
Judge of the Judicial Circuit Court,
Cl.

I John B Roper clerk of the Circuit
Court in and for the County of Clinton and
State of Illinois certify that the above
is a true copy of the record ^{& papers} in the
above case as appears by the record &
files in my said office

In witness whereof I have
herewith ~~set~~ my hand and
affixed the seal of said Court
at Carleton this 7th day of
November A.D. 1860

John B Roper Clerk

Isaac Fitzgerald

vs.

Richard Ferguson &
Francis Ferguson

Erin T. Cleaton,

And the said plaintiff
in Error now assigns the following errors in the
foregoing record and proceedings viz:

- 1st The Court erred in overruling plaintiffs
motion to continue the case.
- 2^d The court erred in refusing to allow the plaintiff
to withdraw his plea.
- 3^d The Court erred in the instructions given per plff. below.
- 4th The Court erred in overruling the motion for a new trial.
Whiting, Hanna, & C. A. Beecher.
for Plff. in error.

And the said defendants in error come and
say there is no error in the said record.

S. G. Hicks Atty
pro decto in
error

~~F. J. ...~~

F. J. ...

Read

F. J. ...

Filed Nov. 13. 1860.

A. Schmitt Clerk

Paid by Judge Buckley \$5.70

In the supreme court of the state of Illinois
First Grand division at Mount Vernon
November Term A.D. 1860,

Isaac Fitzgerald

vs.

Richard Ferguson }
Francis Ferguson } (vs. to Clinton)

Abstract, and brief of depts.

On the subject of continuance

I refer the court to the case of Dunlop, vs.
Davis, 5th Gilman, 84 to 88, —
Bailey vs. Hardy, 12th Ill. 459 — Ault vs.
Rawson, 14th Ill. 490 & 491.

I hold that the court has a sound discretion in
reference to allowing a dept. to withdraw a
plea after issue joined, & if it would operate
to the prejudice of the adverse party, he is justified
in refusing it to be withdrawn 3rd session
15 to 17.

When a Lawyer is employed he takes upon
himself the responsibility of prosecuting or
defending the rights and interests of his client
And he is not authorized to consent to the
entry of a Judgment against his client
without his consent, 1st session on
123, 124, in this case Fitzgerald

sets out in his affidavit, for the continuance
on page 26 & 27 of the records, that Charles
Beecher, for deft & John Cooper of counsel
for pty, both assured deft, that this cause
would not be tried, that it was agreed by
and between said Isaac Fitzgerald and
Cooper of counsel for pty, And also agreed
to by the securities on the bond of pty for costs
that said cause would be discontinued. Each party
paying his own costs, He did not set out
in his affidavit, that it was done by the consent of
the pty, or her counsel, that had charge of her
case, & who was on the record as her counsel
I would particularly call the attention of the
court, to the affidavit, above referred to.

I deem it unnecessary, to make any reference
to the instructions, or overruling the motion for
a new trial, as I hold the instruction to be
the law & the motion for a new trial to be
subject to the sound discretion of the court

S. G. Hicks Atty
for deft in error

This case was commenced in August 1837 by Robert Bell & J. H. Maynard. They filed the declaration for the April Term of the Wayne Circuit Court 1838

Page 9, & at said April Term 1838, deft filed his Affidavit to rule her to surety for cost. Court entered the Rule

P. 10 - The Rule was complied with on the 30 day of the sd April Term

P. 11 deft filed his Plea of Justification

12 Her Intermarriage with Ferguson was suggested & by order of party

13. Replication filed by pty Atty. - Robinson & Hicks

13.14 At a special term of the Wayne Circuit Court in November 1838

on the 12th day of the term the deft filed his Affidavit praying for a change of venue, which was

15 granted & order to Clinton County March 13th 1839 the case was continued

10 also at the August term 1839

21. March 13th 1860. deft filed his Affidavit

22 for a continuance & moved for a

23. continuance, which motion was overruled by the court

And on said Affidavit as above set forth the sd deft moves the court

23. To continue the cause til Friday
next, And it appearing to the court
by the Admission of the parties
pty & depts. That this cause was
set for trial for this day by the
agreement of the parties, hereto.
at the last term of this court
it is ordered by the court that the
motion for a continuance be
Overruled. (To which Ruling
the depts. excepted.)

depts then moved to withdraw his
plea of Justification, there was
no other plea on file;

Court overruled sd motion.

26. depts then filed his Affidavit
setting out that Charles Becker
Atty for depts. & John Cooper
of Counsel for pty, both Asswd
depts that this cause would not
be tried. That it was agreed by
& between, said Isaac Fitzgerald
& Cooper of Counsel for pty & also
agreed to by the securities on the bond
of pty for costs, that sd cause would
be dismissed. Each party paying his
own costs. And Affiant states that

that under this understanding & by the
Advice of said John Cooper & Charles
Beecher of one said. Affiant failed to
have his witness here at this court
to make good his defence, in
his plea, being set up.

27. That this was done in order to
save costs & in good faith this
Affiant fully relying that this cause
would be dismissed, as above
cause his witnesses to remain
at home, believing the cause would
be adjourned as above

I here call the attention of the court to the
time this case has been pending
that the charge of venue was taken
by deft & sent to a remote county
passing directly by solemn in
Marion County, evidently for the
purpose of wearing out ptty & get-
ting her securities to withdraw from
her case. It is easy for the court
to see how it is that the case has
been on hand so long, while it
does not appear of record it
never the less was true. It was
because the circuit court was

so much crowded with business
that the case could not be reached
And that was the reason that this
case was set for a certain day of
the second week of the Clinton Circuit
Court, & owing to the prep of
business, the court evidently saw
if the case was postponed it would not
be reached again,

Deft knew of this day he was there
he left his witnesses at home if any
he had, & came there for the purpose
of having the suit dismissed
over the head of the pty & he there
with his counsel who had
charge of the case & who was
ready on his part part to go to
trial,

He says that his Atty Charles Beach
& himself & the securities on his cost
bond, & John Cooper of counsel for pty
had all agreed that the case
was to be dismissed &c.

No doubt it would have been very
agreeable to him but, it would not
have been so agreeable to the pty, who was
travelling to & from court to vindicate
her character.

The whole case can be thus summed
up, that he knew all about the trial

own place. but he neglects to be
ready on matters he never intended
to be ready. if he omits to do
his duty by preparing for trial
he must abide by the consequence
he cannot take advantage of
his own lateness.

S. Hills for
deft in error

Fitzgerald
no

Ferguson

Account of
deft. Counsel

In the Supreme Court of the State of Illinois.
FIRST GRAND DIVISION, AT MOUNT VERNON.

NOVEMBER TERM, A. D., 1860.

ISAAC FITZGERREL
vs.
RICHARD FURGESON
AND FRANCES FURGESON, } Error to Clinton.

ABSTRACT AND BRIEF FOR PLAINTIFF.

1] This was an action for slander commenced by defendant in error in Wayne county, and taken by change of venue to Clinton county.

Defendant filed a plea of justification, which was the only plea filed.

26] At the March Term, 1860, defendant below filed an affidavit alleging that it was agreed by one of the counsel for plaintiff below and defendant that this cause should

27] be dismissed, each party to pay their own cost—that he had in Wayne and White counties witnesses by whom he could fully sustain his defence; that, relying on

28] such agreement, he had not procured the attendance of such witnesses at this term, and therefore moved the Court to continue the case until the third day thereafter, when he would procure the attendance of his witnesses and be ready for trial—which motion the Court overruled.

The plaintiff in error then moved the Court for leave to withdraw his plea filed in this cause, which the Court overruled.

A Jury was then empaneled and the case submitted without any other evidence than that contained in the pleadings, and the Jury found a verdict for plaintiffs below for \$5,000.

The Court gave, at the request of defendant in error, the following instruction: "In actions for slander the Jury are to determine from all the circumstances what damages ought to be given, and they are not confined to mere pecuniary loss or injury, but may give damages by way of punishment for the wrong."

After the return of the verdict the defendant below entered a motion for a new trial, which the Court overruled. To which several opinions of the Court the plaintiff in error at the time they were rendered excepted.

The following errors are assigned by plaintiff:

1. The Court erred in overruling the motion for continuance.
2. The Court erred in overruling the motion to withdraw the plea.
3. The Court erred in giving the instruction for plaintiff below.
4. The Court erred in overruling the motion for a new trial.

BRIEF FOR PLAINTIFF IN ERROR.

We think the affidavit of plaintiff shows a state of facts which ought to have continued the case until a subsequent day of the term. If such a practice is tolerated, a plaintiff may induce a defendant not to attend trial, or, as in this case, go without his witnesses, and thus, through such fraudulent act, obtain an advantage which neither law nor justice would give him. Will this court sanction such a practice?

The second assignment of error is certainly well taken. In *Ayres vs Kelley* 11 Ill. Rep. 17, the Court says: "The plaintiff has an unqualified right to dismiss his whole case or any substantive cause of action stated in his declaration. The rights of the parties should be reciprocal. The defendant should be permitted to abandon his whole defence or any distinct part of it. This is a matter of course. The Court has no discretion over it." This case is conclusive on the second assignment of error.

The instruction given to plaintiff below, we think may have mislead the jury. It assumes that a wrong had been committed, when that should have been left to the jury. Under all these circumstances a new trial ought to have been awarded by the Court.

WHITING, HANNA, AND C. A. BEECHER, for Plaintiff.

In the Supreme Court of the State of Illinois.
FIRST GRAND DIVISION, AT MOUNT VERNON.

NOVEMBER TERM, A. D., 1860.

ISAAC FITZGERREL
vs.
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WHITING, HANNA, AND C. A. BEECHER, for Plaintiff.

out of no desire on his part to
hinder and delay the trial.

The ruling of the
Circuit Court sanctions the
practice of a fraud by the Def. in
error upon the Plff in error
through his Counsel, which the
Court will not, for a moment
tolerate.

The discretion to be used
by the Circuit Court, in refusing
to allow a continuance, must
be a sound discretion; but when
it is otherwise, the Court will readily
interpose its corrective power.

And in the second place, the Court
erred in refusing to allow the Plff in
error, to withdraw his plea. The Plff
has the right to narrow the issues
by striking from his declaration one
or more Counts, or dismiss his
whole cause of action; The rights
of the parties should be reciprocal.
The Def. should be allowed to abandon
his whole defense, or any distinct part
of it. This is a matter of course,
The Court has no discretion over it
See *Agnes vs Kelly*, 11 Ill. R. p 17 -

complained by the Plff in error with
Assignment of errors, very probably
misled the jury, by assuming in
effect, that in all actions of slander
the Defendant is guilty of a wrong
or in other words that the institution
of a suit for slander, establishes
upon the Defendant guilt of the Comm-
ission of a wrong, without proof.
This instruction is equivalent to
the Circuit Judge telling the jury
that a wrong has been Comm-
itted by the Plff in error upon the
Defendant in error. And for this
reason is wrong, as this in
all cases is a question for the
jury to determine

Supreme Court - 31
1st Grand Jurors
Nov. Term 1860

Isaac Fitzgerald
Petitioner

vs -

Richard Ferguson et al

Argument of
the Petitioner

Filed Nov. 16. 1860.
N. Johnston Clerk

In the Supreme Court of the State of Illinois.
FIRST GRAND DIVISION, AT MOUNT VERNON.

NOVEMBER TERM, A. D., 1860.

ISAAC FITZGERREL
vs.
RICHARD FURGESON
AND FRANCES FURGESON, } Error to Clinton.

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WHITING, HANNA, AND C. A. BEECHER, for Plaintiff.

No 31

Nov. Term 1860.

Fitzgerald

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Ferguson et al

Ernst & Clinton

Rev. P. Remond

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