

8463

No. _____

Supreme Court of Illinois

Jacob Lehning

vs.

Michael Hewett

State of Illinois }
Alexander County }^{vs} Alexander County
Circuit Court November
Term A. D. 1866-

I was before the Honorable Circuit
Court of the County of Alexander and
State of Illinois held at the Court
house in the City of Cairo in said
County and State on Wednesday the
5th day of December A. D. 1866
Present the Honorable William
H. Green Judge of the Third Judicial
Circuit of the State of Illinois; and
presiding and sole Judge of the
Alexander County Circuit Court
holding the same; and at the said
Term of said Court were also
present-

John L. Harman - Clerk
Charles D. Arter Sheriff
and George W. Wall States Atty;

Michael Hewitt }
} Prepasson
} the Case.

Jacob Lehning }
} Do it Remembered
that heretofore to wit on the 10th
day of ~~September~~ A. D. 1866 came
the said Plaintiff by his

Attorneys and sued out of the
Clerks office of said Court
a writ of summons against
the said defendant Jacob Schuing
which said summons is in the
words and figures as follows
to wit;

State of Illinois }
Alexander County }

The People of the
State of Illinois To the Sheriff of
said County Greeting

Do Command you
to summons Jacob Schuing if
he can be found in your County
to be and appear before the Circuit
Court of said County on the first
day of the next Term thereof to
be holden at the Court ^{house} in the
City of Cairo in said County of
Alexander on the 3rd Monday of
November next to answer unto
Michael Hewit in a plea of Trespass on the
Case Damages \$100,000 and have you
then and there this writ with an
Endorsement thereon in what
manner you shall have executed
the same Witness John Hamman

U.S. Stamp \$1.50
J. J. K. Sept 14/66

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Clerk of our said Court and the
seal thereof at the City of Cairo
in the said County this 10th day of
September A.D. 1866

(seal)

John Harmon
Clerk

Which said summons was duly
returned into the Clerk's ^{Office of said court} by the
Sheriff of said Alexander County
with the following endorsement
thereon to wit:

"I have duly served the within
"Summons by reading the same
"to the within named Jacob
"Schuing this 18th day of September
"1866"

C. S. Arter
"Sheriff"

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And afterwards to wit on the 7th day
of November A. D. 1866 the said Plaintiff
filed in the Clerks office of said Court
a Declaration, which reads; and is in
the words and figures following to wit;

Declaration

"State of Illinois" of the November
"Alexander County Term A. D. 1866 of the
"Alexander County Circuit Court"

"Michael Hewitt Plaintiff in this suit by
"Muelkey, Hall & Wheeler his attys complains
"of Jacob Schung, defendant in this suit
"who has been summoned &c of a plea of
"trespass on the case,

"For that whereas the said Plaintiff is a
"good and worthy Citizen of this State and
"from boyhood hitherto hath been of good
"fame and reputation among all his
"neighbours and acquaintances for honesty
"uprightness and integrity and is and ever
"has been free from the commission of
"the Crime of Arson or any other Crime or
"misdemeanor, and was never suspected
"of the commission of the said Crime
"of Arson until after the committing
"of the grievances by the said Defendant

Hereinafter mentioned, and Whereas
heretofore to wit on the 27th day of
June A. D. 1866, a certain house then
and there owned by the said Defendant
and occupied by the said Plaintiff
as tenant of said Defendant situated
on Lat, numbered sixteen in Block
numbered Three in the City of Cairo
County of Alexander and State of Illinois
being numbered in Ohio Street in said
City by some cause and means unknown
to community and the said Plaintiff
caught fire and was partially consumed
and burned, to wit at the County and State
aforesaid. He the said Defendant well
knowing the premises but contriving and
wickedly and maliciously intending to
injure the said Plaintiff in his good
name fame and credit and to bring
him into public scandal infamy and
disgrace and cause it to be suspected
and believed that the said Plaintiff had
unlawfully and feloniously set said house
on fire and had thereby committed the
said crime of arson heretofore to wit
on the day and year aforesaid at the
County and State aforesaid in a certain
conversation and discourse which

"to the said defendant then and there
 "had in the presence and hearing of divers
 "good and worthy Citizens of this State of
 "and concerning the said Plaintiff and
 "of and concerning the burning of said
 "building in the presence and hearing
 "of said last mentioned Citizens falsely
 "and maliciously spoke and published
 "of ~~and~~ concerning the said Plaintiff
 "the several false & scandalous, malicious
 "and defamatory words, following that is
 "to say, "Mike Hewitt (meaning the said
 "Plaintiff) set it (meaning the said House)
 "on fire" "well if he (meaning the said
 "Plaintiff) did not, he (meaning the said Plaintiff)
 "hired some one to do it thereby meaning
 "and intending to impute the Crime
 "of Anson to the said Plaintiff.

"And for that whereas also afterwards
 "to wit on the day and year aforesaid
 "at the County at and State aforesaid
 "in a certain other discourse which the
 "said Defendant then and there had with
 "and in the presence, and hearing of
 "divers other good and worthy Citizens
 "of this State of and concerning the
 "said Plaintiff and of, and concerning
 "the burning and setting fire

the said House partially burned as aforesaid
 "the said Defendant with the malicious
 "intention as aforesaid, and for the several
 "purposes aforesaid, did then and there
 "falsely and maliciously speak and
 "publish of and concerning the said
 "plaintiff in the presence and hearing
 "of said last mentioned Citizen the
 "following other false, defamatory,
 "and scandalous words to wit "It is my
 "(meaning the said Defendant) opinion the
 "house (meaning the house aforesaid)
 "was set on fire, and that Mike Hewitt
 "(meaning the said ^{Plaintiff} ~~Defendant~~) done it"
 "It is my (meaning the said Defendant) opinion
 "that the house, (meaning the house aforesaid)
 "was set on fire and that Mike Hewitt ~~did~~
 "(meaning the said Plaintiff) dit it" well if
 "he (meaning the said Plaintiff) didnt do it
 "he (meaning the said Plaintiff) hires some
 "one to do it" "I (meaning the said Defendant)
 "believe the place (meaning the said house)
 "was set on fire, and I (meaning the said
 "Defendant) believe Mike Hewitt ~~Mike~~
 "Hewitt (meaning the said Plaintiff)
 "did it" "I (meaning the said Defendant)
 "believe the house, (meaning the house
 "aforesaid) was set on fire" and I

"(meaning the said Defendant) believe
"Mike Hewitt (meaning the said Plaintiff)
"done it thereby meaning and intending
"to impute the crime of arson to the said
"Plaintiff. And for that whereas also
"afterwards to wit on the day and year
"aforesaid, at the County and State aforesaid
"in a certain other discourse which the
"said defendant then and there had with
"and in the presence of, and in the hearing
"of divers other good and worthy Citizens
"of this State of and concerning the said
"Plaintiff, and of and concerning the
"burning and setting fire to said House
"partly burned as aforesaid the said
"Defendant with the malicious intention
"aforesaid aforesaid and for the several
"purposes aforesaid, did then and there
"falsely and maliciously speak and pub-
"lish of and concerning the said Plaintiff
"in the presence and hearing of said last
"mentioned Citizens the following other
"false scandalous and defamatory words
"to wit "He (meaning the said Plaintiff) set the
"house (meaning the house aforesaid) on fire
"for his (meaning the said Plaintiff) Insurance
"He (meaning the said Plaintiff) set the Place
"(meaning the house aforesaid) on fire

for his (meaning the said Plaintiff) Insurance
 "Money" He (meaning the said Plaintiff) set
 the House (meaning the house aforesaid) on
 fire to get his (meaning the said Plaintiff)
 "Insurance money" Well if he (meaning
 the said Plaintiff) did not set the house
 (meaning the house aforesaid) on fire he
 (meaning the said Plaintiff) hired some
 "one to do it" Well if he (meaning the said
 Plaintiff) did not set it (meaning the house
 aforesaid) on fire he (meaning the said
 Plaintiff) hired somebody to do it for him
 (meaning the said Plaintiff) "The Place
 (meaning the house aforesaid) was set on
 fire for the Insurance money, and I (mean-
 ing the said Defendant) believe that Mike
 Hewitt (meaning the said Plaintiff) did
 it" the house (meaning the house
 aforesaid) was set on fire for the Insur-
 -ance money, and Mike Hewitt (mean-
 -ing the Plaintiff) done it thereby mean-
 -ing and intending to impute the crime
 of arson to the said Plaintiff
 "By means of which false & scandalous
 "and malicious words so spoken and
 "published the Plaintiff hath fallen
 "into disgrace, contempt and infamy
 "with many persons with whom

"previously he was in great Esteem all
 "of which is to the damage of said
 "Plaintiff Ten thousand Dollars
 "Wherefore ~~therefore~~ he brings suit &c by"

"Malley, Hall & Wheeler"
 "Plffs Attys."

And afterwards to wit on the 20th
 day of November came into open Court
 the Defendant by D. H. Munn and O'Melroy
 and Houck his Attorneys and filed
 a Demurer herein; which reads and
 is in the words and figures as follows
 to wit:-

Demures "State of Illinois" \ "In the Circuit Court"
 "Alexander County" "November Term 1856"
 "Michael Hewitt

"vs" Case - Slaves
 "Jacob Schuing"

"And now comes the
 "said Defendant and says that the
 "said Plaintiffs Declaration and each
 "Count thereof is not sufficient in
 "Law; and the said defendant points
 "out to the Court here the following Causes
 "of demures. to the second Count to wit
 "So all the words therein represented"

11 "as the belief or opinion of Deft. &
"as stated.

"73" "In the third counts to wit: In all the
"words purporting to have been spoken
"as matters of opinion or belief of Deft
2. "Because there is no averment in
"Either Count that the house was
"Insured by any one, or that Deft-
"imputed the burning to Plaintiff
"with the motive of getting the insure
"and because the Declaration is otherwise
"defective &c wherefore &c"

"Law. W. Munn"
"O'Melroy & Houck"
"for Deft"

"previously he was in great Esteem all
"of which is to the damage of said
"Plaintiff Ten thousand Dollars
"Wherefore ~~therefore~~ he brings suit &c by"

"Malley, Hall & Wheeler"
"Plffs Attys"

And afterwards to wit on the 20th
day of November came into open Court
the Defendant by D. H. Munn and O'Melroy
and Houck his Attorneys and filed
a Demurer herein, which reads, and
is in the words and figures as follows
to wit:

Demurer "State of Illinois" "In the Circuit Court
Alexander County" "November Term A.D. 1866"
"Michael Hewitt

"At" Case - Slaves
"Jacob Schuing"

And now comes the
"said Defendant and says that the
"said Plaintiffs Declaration and each
"Count thereof is not sufficient in
"Law; and the said defendant points
"out to the Court here the following Causes
"of demurer. to the second Count to wit
"So all the words therein represented"

11 "as the belief or opinion of Deft. &c
"as stated.

"To the third Counts to wit: To all the
"words purporting to have been spoken
"as matters of opinion or belief of Deft

2. "Because there is no averment in
"Either Count, that the house was
"Insured by any one, or that Deft-
"imputed the burning to Plaintiff
"with the motive of getting the insure
"and because the Declaration is otherwise
"defective &c wherefore &c"

"Law. W. Murray"
"O'Melroy & Howell"
"for Deft"

And afterwards to-wit: on the 27th day of November a. d. 1866 of November Term of said Court the following proceedings were had; and order made by said Court and entered of Record in the following styled cause, to-wit:

Michael Hewitt }
 vs. } Case
 Jacob Lehning }

And now on this day came the parties by their respective Attorneys and this cause came out to be heard upon the Demurrer of the defendant to the plaintiff's declaration filed herein, and was argued by counsel, and the Court being now fully advised in the premises is of opinion, that said Demurrer ought to be and the same is hereby overruled

And afterwards to-wit, on the 30th day of November a. d. 1866 the defendant by his atty filed in the Clerk's office the following plea which read and is in the following words and figures, to-wit:

Plea
 Michael Hewitt } Case - Plaintiff
 vs. }
 Jacob Lehning } And now comes

the said defendant by Munn & O'Mel-
 reny & Houck, his Attorney, and
 defends the wrong and injury when
 he. and says, that he is not guilty
 of the supposed wrongs and grievances
 in manner and form as the said
 plaintiff has in his declaration
 alleged, nor of any or either of them
 and of this he puts himself
 upon the country, &c.

Munn &
 O'Melreney & Houck
 Atty for deft.

did now to wit: on the said 10th day of
 November¹⁸¹⁶ of the November Term 1816
 of said Court the following further proceed-
 ings were had and order made, and entered
 of record in said cause by said court

To wit:

81 "Michael Hewitt }
 "vs" } "Case"
 "Jacob Lehning }

And now on this day
 came again the parties by their
 respective Attorneys and leave is
 given to defendants to plead when-
 upon the defendant by his Attorneys
 filed a Plea of general issue

"issues herein and thereupon to try
 "the said issue came a Jury to
 "wit, A. J. Baumgardner; John Lueban
 "William Lunn; William Redman
 "Wm O Callahan; Frank Bleland
 "William Martain Morris Craue
 "David At Burns and Joseph Able
 "Joshua S Yates & Martin Keating;
 "These good and lawful men of
 "the County; who being duly sworn
 "swelled and sworn according to
 "Law and after having heard the
 "Evidence; arguments of Counsel and
 "received the instructions of the
 "Court retired to consider of their
 "verdict"

And afterwards to wit on the 1st
 day of December A D 1866 at the
 November Term A D 1866 of said Court
 the following further proceedings
 were had and order made and
 Entered of Record in said Cause
 by said Court to wit;

"Michael Hewitt)
 "Jacob Schung) "Case"
 And now on

"this day came again the parties

by their respective Attorneys and
 thereupon the Jury which having
 been heretofore duly empaneled
 and sworn well and truly to
 try the issue joined between the
 parties returned into the Court the
 following verdict to wit "We the
 Jury find the defendant ~~guilty~~
 guilty and assess the ~~the~~ Plaintiffs
 Damages at (\$900) Nine hundred
 dollars. and there upon came the
 defendant by his Attorneys and
 moves the Court for a new trial ~~therein~~
 which motion was by the Court
 taken under advisement"

And afterwards to wit on the 4th
 day of December A D 1866 there
 was filed in the Clerks office of
 said Court a motion in writing
 for a new trial in said Cause
 which reads; and is in the words
 and figures as follow to wit;
 State of Illinois } In the Circuit Court
 Alexander County } November Term A D
 1866-
 Michael Hewitt } Case - Slander
 Jacob vs Schuing }

And the Defendant^{with} comes by
 "O'Melveny & Hockett & Mann and Pope"
 his Attorneys and moves the Court
 for a new trial in the above
 Cause

- "I" Because the verdict of the Jury is
 "Contrary to the Evidence.
- "II" Because the verdict of the Jury is
 "Excessive in the amount of Damages
 assessed for Plaintiff and Contrary to Law
- "III" Because the Court refused to admit
 "proper Evidence on the part of the
 Defendant.
- "IV" Because the Court gave improper
 "instructions at the instance of the
 Plaintiff.
- "V" Because the verdict is irregular and
 "insufficient in form;
- "VI" Because the defendant has discovered
 "new testimony material to his
 Defense" "O'Melveny & Hockett"
 "Mann and Pope"
 for Deft.

And afterwards to wit on the 5th
 day of December A. D. 1866 at said
 November Term 1866 of said Circuit
 Court the following further proceedings

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were had, and final Order made by
said Court and entered of Record
in said Cause to wit:

"Michael Hewitt vs
"81" "Jacob Schung" Case"

"And now on this
"day came again the parties by their
"respective attorneys and this Cause
"came on to be heard upon the
"motion of the Defendant heretofore
"entered herein for a new trial, which
"was argued by counsel and the
"Court being now fully advised in
"the premises overruled the same,

"It is Therefore Ordered by the
"Court that the Plaintiff have Judg-
"ment against and recover of the
"said Defendant the sum of Nine
"hundred Dollars \$900.00 his Damages
"aforesaid, in form aforesaid assessed
"and also all his costs and charges
"herein Expended taxed to \$
"Whereupon came the Defendant (Schung)
"and prayed an appeal to the supreme
"Court, the cause is allowed by
"the Court upon the Defendant entering

"into Bond as provided by Law within
 "Thirty days from this date in the
 "Sum of Two thousand Dollars \$2000
 "with Fredolin Dross as his security."

And afterwards to wit; on the
 "11th day of December A. D. 1866- the
 Defendant filed in the Clerk's office
 of said said Court; a Bond which
 which is in the words & figures as
 follows to wit;

Bond

"Know all men by these presents
 "that we Jacob Schung and Fredolin
 Dross of the County of Alexander and
 "State of Illinois are held and firmly
 "Bound unto the Michael Hewitt in
 "the penal sum of Two thousand Dollars
 (\$2000-) lawful money of the United
 "States for the payment of which
 "well and truly to be made we bind
 "ourselves, our heirs Executors and
 "administrators jointly severally and
 "firmly by these presents. Witness our
 "hands and seals this Eleventh day of
 "December A. D. 1866- The Condition
 "of the above obligation is such that
 "Whereas the said Michael Hewitt,
 Plaintiff did on the 30th day of

of December November A D 1866
 in the Circuit Court of the County
 of Alexander in said State of Illinois
 at the November Term A D 1866 thereof
 recover a Judgment against the
 above bounden Jacob Schung
 defendant in an action of Tauder
 for the Sum of nine hundred dollars
 and cost of suit, from which
 Judgment the said Jacob Schung
 has taken an appeal to the Supreme
 Court of the State of Illinois, now,
 if the above bounden Jacob Schung
 shall duly prosecute his appeal
 & shall pay said Judgment costs
 and interest & damages in case
 the said judgment shall be affirmed
 then the above bounden obligation
 to be null and void otherwise to
 remain in full force and effect

"Approved Dec 11th 1866" Jacob Schung *Seal*
 "John Harman"
 "Clerk" Fredolin Gross *Seal*

And afterwards to wit on the 31st
 day of May A D 1867 the Defend-
 -ant filed in the Clerk office
 of said Court a Bill of exceptions

which Bill of exceptions is in the
 words and figures as fallows to wit;

"Fals of Illinois"	}	"Foremer Term Oct 1866"
"Alexander County"		"Alexander Circuit Court"
"Michael Hewitt"	}	"Plaintiff"
"Jacob Schung"		"Bill of Exceptions"

Do it Remembered that on the trial
 of this Cause before the Honorable
 William A Green Judge and
 a Jury, the Plaintiff to prove the
 issue on his part introduced
 Rodney C. Cully who testified to
 the speaking of one set of the words
 as alledged in the Plaintiffs
 declaration to wit "Ho" (meaning
 the said Plaintiff) set the House (meaning
 the House aforesaid) on fire for his
 (meaning the said Plaintiff) insurance
 at the time and place therein
 mentioned and that he spoke
 the words as laid in declaration
 on different occasions He also
 proved that the building burnt was
 kept by the Plaintiff as a Saloon and
 Gawbling House

On Cross Examination Defendant
 asked said Witness the following questions

"to wit; do you know whether in this community
" (said) after the burning of the house alluded
" to & before the speaking of the words the
" Plaintiff was generally suspected of the
" setting the house on fire."

" To which the Plaintiff objected &
" which objection was sustained by
" the Court. To which judgment of
" the Court the in sustaining objections
" of Plaintiff, defendant at the time
" Excepted. - That the Plaintiff by
" direct witnesses proved all the other
" material allegations in his declara-
" - tion is admitted by the defendant
" by which witness and others called
" by the def^t the fact was also
" Established That Plaintiff kept a
" Bar and billiard saloon & that in
" the part of a ~~the~~ building occupied
" by him he had a room which he
" kept for gambling. This was all
" the material Evidence.

" And afterwards in the progress
" of said Cause the Court at
" the instance of the Plaintiff
" gave to the Jury the following
" instructions

" Instructions on behalf of the
" Plaintiff to wit

The Court instructs the Jury
 "that if Plaintiff has proved any
 "one set of words mentioned in the
 "Declaration then under the pleadings
 "in this case you must find for the
 "Plaintiff" Given.

"That where a Witness swears pos-
 "itively to the speaking of a certain
 "set of words or any material
 "facts and such testimony is
 "reasonable in itself, and such
 "Witness is not impeached by
 "other Witnesses or any of the modes
 "of impeachment known to the
 "law the Jury have no right to
 "disregard the testimony of such
 "Witness" Given

The Court further instructs
 "the Jury that what business the
 "Defendant follows whether he
 "gambles or keeps a gambling house
 "has nothing to do with the issue
 "in this cause, under the pleadings
 "as they stand" Given

"The Court instructs the Jury that in
 "fixing the damages if they shall
 "find the defendant guilty. You
 "may take into consideration
 "other declarations and conversations
 "of the defendant imputing the
 "burning of the House in question
 "to Plaintiff if such conversations
 "and declarations have been proved

"Also Given.
 "The Court instructs the Jury
 "that in fixing the damages if they
 "find the defendant guilty they
 "may take into consideration the
 "presummary condition of Defendant

"Given
 "That if the Plaintiff has proved
 "the words mentioned in the decla-
 "ration or any set of them the
 "law presumes that the Plaintiff
 "has been damaged ~~and~~ and it
 "requires no proof on his part to
 "show that he has been damaged
 "In such case you should find
 "the defendant guilty & assess such
 "damages as seem to you just & proper
 "under the evidence
 "Given

The Court also gave at the instance of the Defendant the following instructions

Instruction on behalf of Deft to wit:

"If the Jury from the whole of the
 "Evidences all considered are not
 "satisfied that the Plaintiff has
 "proved the exact words substantially
 "or if they believe that by the Plt's
 "own proof there is a conflict
 "which renders in their belief as
 "uncertain that you are unable
 "to say what the real words were
 "then you should find the Deft
 "not guilty" Given

"Unless you believe from all the
 "Evidences weighed together that
 "Deft used the words as alleged
 "in the Plt's declaration you
 "should find the Deft not guilty
 "Given"

"The Court further instructs the
 "Jury that they have a right to
 "consider all the proof and if they
 "believe the words to be proved then
 "they have a right to consider

"the time & place of the speaking
"of the words and ability of the
"party ^{to} and all the facts proved;
"and give such amount under
"all the circumstances as in Your
"opinion shall be just - "Given"
"And prays that this his bill of
"Exceptions may be signed and
"sealed" William N. Green ^(Seal)
"Judge"

State of Illinois 3rd 20
Alexander County 3rd
I, John Harmon
Clerk of the Circuit Court within
and for said County do hereby
Certify that the within and forego
ing is a true correct and perfect
record Transcript of the record
of the proceeding had and orders
and Judgment made by said
Circuit Court and Entered of Record
in the aforesaid Cause as taken
and truly copied by me from
the Records of said Court and from
the original papers filed in said
Cause all of which said Records
and papers are now remaining

on file in my office.

In Testimony whereof
I have hereunto set my
hand and affixed my
official seal at office
in Cairo this 31st day
of May A D 1867
John A Harman
Clerk
By John Brown
Deputy

Errors:

And now comes the said plaintiff in
Error and says that there are manifest
errors in the within record. And for assignment

of Error ^{in this behalf} says

I. The verdict of the jury is against the
evidence

II. The verdict of ^{the} jury is excessive & the
amount of damages assessed for plaintiff
and contrary to law.

III. The Court improper instructions at the
instance of the plaintiff.

IV. Because the Court gave improper in-
structions at the instance of the plaintiff.

Wherefore &c.

J. McHenry & Stouck
for Plaintiff in Error.

In Sup. Court June 21st 1867

Jacob Leung
vs
M. Hermit

And the said Michael Hermit Appellee
comes & says that there is no error
either in the Record & Proceedings aforesaid
in manner & form as above
aforesaid And that he prays
that the said judgment may be
affirmed and that his costs may
be adjudged him &c

Mulvey Wallace & Wheeler
Attys for Appellee

48 Record in
Case of

Hermit

vs
Leung

48



Filed June 5. 1867.

M. L. ...

paid by ...

Clarks East - paid

~~Lehning~~

~~Henrich~~

2

Lamence J.

This was an action for slander to which the defendant pleaded the general issue only. On the trial the court gave the jury this instruction.

"The court instructs the jury that what business the plaintiff follows, whether he gambles or keeps a gambling house, has nothing to do with the issue in this cause, under the pleadings as they now stand."

The giving of this instruction is assigned as error. The instruction, as worded, is certainly unobjectionable. The only issue raised by the plea was whether the defendant had really spoken the words charged, and with this issue, as stated in the instruction, the occupation of the defendant had clearly nothing to do. *B*

It is further urged that the court erred in not permitting the defendants counsel to ask a witness whether, after the burning of the house, and before the speaking of the words, the plaintiff was generally suspected of setting his house on fire. The slander charged in the declaration was that the defendant had falsely stated ~~that~~ the plaintiff had set his house on fire in order to get the insurance. That ~~this~~ ^{a similar} question was inadmissible, ~~it~~ was held by this court in Young v. Burnett & Scam, 47. It is suggested that this question is so framed that as to exclude the hypothesis that the supposed ~~slanderous~~ suspicion in the community was created by the slander for which the suit was brought, and therefore that it cannot be said the defendant was seeking to ~~defend~~ protect himself against the consequences of his slander by putting in evidence a report created by that very slander. Yet the report may have been caused by similar words spoken by him at some time prior to the

speaking which the plaintiff happened
 to be able to prove. To permit this
 question, even in the form adopted
 in the present case, would open
 a dangerous ~~door~~ means of securing
 impunity in a failing character.

Judgment affirmed.

Sibning 16
" 48
Henitt

June 5, 1867

Opium

Lawrence

O. R.

42
6
432
20
8640

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

June Term, A. D. 1867.

JACOB LEHNING, Appellant, }
vs. } Appeal from Alexander.
MICHAEL HEWETT, Appellee. }

BRIEF OF COUNSEL FOR APPELLEE.

There are three points made by Appellant's Counsel to which we will refer in their order :

I.

The instruction particularly excepted to is as follows : "The Court further instructs the Jury that what business the plaintiff follows, whether he gambles or keeps a gambling house, has nothing to do with the issue in this cause, under the pleadings as they now stand."

We insist that this instruction was intended by the Court and could have had no other purpose or effect than to simply call the attention of the Jury to the real issue they were required to determine.

The Plaintiff had charged the Defendant with speaking certain slanderous words. The Defendant, by his plea of not guilty—being the only plea in the case—simply denied the speaking of the words. The question for the Jury to determine then was, whether the words in question were spoken by the Defendant or not. Now whether the Defendant was a gambler or kept a gambling house could not have thrown any light on the issue the one way or the other—did not tend to prove it or disprove it—and so the Court by this instruction told the Jury.

It had no reference to the question of damages and could not, in our judgment, have misled the Jury on that subject. Under the general issue the Defendant had the right to attack the general character of the Plaintiff, but for the reason which must be obvious to the Court and every one this course was not even attempted. While we admit the right to attack the general character of the Plaintiff in an action for slander we deny the right to show specific acts of bad conduct. See 1st Green. sec. 55. Why under the issue in the case the defendant below would not have been permitted to prove, in mitigation of damages, the truth of the very charge itself. How then can it be insisted with any semblance of plausibility, much less reason or authority, that he should be permitted to show that Plaintiff had committed or was in the habit of committing the crime of gambling or keeping a gaming house, or some other offence known to the criminal code!

Again : It is admitted by the records that the slanderous words were proved by a number of witnesses and were repeated by Defendant below on various occasions. The cause of action is clearly confessed. Conceding, then, that the Court erred both as to instructions and exclusion of testimony, as contended for in Plaintiff's brief, still the verdict was right so far as finding for the Plaintiff is concerned. The only thing about which there can be any question is the amount of damages as fixed by their verdict.

And how can this Court say that the damages are excessive? It has not before it *all* the evidence that went to the Jury. The bill of exceptions does not purport to contain all the evidence, as, in point of fact, it does not. The evidences of malice and aggravation connected with the speaking of the words are withheld from the view of the Court. While in point of fact, the Defendant is a man of extensive means, this Court cannot tell whether he is a pauper or a millionaire. Supposing him to be worth a hundred thousand dollars and that the words were maliciously and corruptly spoken, would not the damages be very small? And since the Court has not before it all the facts as proved upon the trial, will it not *presume* that such a state of facts was proven as to warrant and justify the verdict? We are satisfied from repeated and uniform adjudications upon this point the Court will so presume. See Rowan vs. Dosh, 4th scam, 460; Buckmaster vs. Cool, 12 Ills., 74; McCormick vs. Gray, 16th Ills., 628; Rogers vs. Hall, 3d scam., 5; Reed vs. Phillips, 4th scam., 39, and Granjang vs. Merkle, 22d Ills. 250.

Finally to repeat what we have already in substance said, the right of the Plaintiff below to recover is confessed. The slanderous words admitted to have been proved beyond all question, stand out in bold relief, without a single mitigating circumstance connected with their speaking. And since this Court has not before it all the evidence, it cannot tell how malignant, provoking and outrageous the conduct of the Plaintiff may have been, and for this reason we insist that this Court must presume that the circumstances as proven warranted the finding of the Jury and the Judge in overruling the motion for a new trial.

MULKEY, WALL & WHEELER,
For Defendant in Error.

Leising
vs

Hewitt

Pl of appellee

Term A. D. 1863

FIRST CLERK DIVISION

Supreme Court of the State of Illinois

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

June Term, A. D. 1867.

Jacob Lehning, Plaintiff in Error,
vs
Michael Hewitt, Defendant in Error.

} Error to Alexander.

Page 123

450789

Summons.

Declaration.

Contains three counts, and is in usual form, and charges the slanderous words in different forms, one set of which is as follows :

He (meaning the plaintiff) set the house (meaning the house aforesaid) on fire for his (meaning the said plaintiff) insurance.

10 11 12

Demurrer—overruled.

13

General issue.

14

Trial on the 30th day of November, by a jury, before the Hon. W. H. Green, Judge.

25

The plaintiff to prove the issues on his part, introduced Rodney C. Culley, who testified to the speaking of one set of the words as alleged in the plaintiffs declaration, to wit: "He (meaning the said plaintiff) set the house [meaning the house aforesaid] on fire for his [meaning the said plaintiff] insurance," at the time and place therein mentioned; and that he spoke the words in said declaration on different occasions. He also proved, that the building burnt was kept by the plaintiff as a saloon and gambling house.

21

On *cross examination* defendant asked witness the following question, to wit: "Do you know whether in this community [Cairo] after the burning of the house alluded to and before the speaking of the words the plaintiff was generally suspected of setting the house on fire?"

This question was objected to and objection sustained and the ruling excepted to by defendant.

That plaintiff by divers other witnesses proved all the other material allegations in his declaration is admitted by the defendant, by which witnesses and others called by the defendant, the fact also was established that the plaintiff kept a bar and saloon, and that in a part of the building he kept a room for gambling. This was all the material evidence; and thereupon the court gave the following instructions for plaintiff, to which defendant by his counsel at the time excepted.

22

The Court instructs the jury, that if the plaintiff has proved any one set of words mentioned in the declaration then under the pleadings in this case, you must find for the plaintiff.—Given.

That where a witness swears positively to the speaking of a certain set of words, or any material facts, and such testimony is reasonable in itself, and such witness is not impeached by other witnesses, or any of the words of impeachment known to the law, the jury have no right to disregard the testimony of such witness.—Given.

The Court further instructs the the jury that what business the *Plaintiff* follows, whether he gambles or keeps a gambling house, has nothing to do with the issue in this cause, under the pleadings as they now stand.—Given.

The Court instructs the jury that in fixing the damages if they should find the defendant guilty, you may take into consideration other declarations and conversations of the defendant imputing the burning of the house in question to plaintiff if such conversations, and declarations have been proved.—Given.

23

The Court also instructs the jury that in fixing the damages, if they find the defendant guilty they may take into consideration the pecuniary condition of defendant.—Given.

That if the plaintiff has proved the words mentioned in the declaration, or any set of them, the law presumes that the plaintiff has been damaged, and it requires no proof on his part to show that he has been damaged, and in such case, you should find the defendant guilty; and assess such damages as seems to you just and proper, under the evidence.—Given.

INSTRUCTION ON BEHALF OF THE DEFENDANT.

24

If the jury from the whole of the evidence all considered, are not satisfied that the plaintiff has proved the exact words substantially, or, if they believe, that by the plaintiffs own proof, there is a conflict which renders it in their belief so uncertain that you are unable to say what the real words were, then you should find the defendant not guilty.—Given.

Unless you believe from all evidence weighed together that defendant used the words as alleged in the plaintiff's declaration, you should find the defendant not guilty.—Given.

15

Verdict for Plaintiff for \$900.

16

Motion for new trial. Motion overruled.

18

Bond.

D. W. MUNN and O'MELVENY & HOUCK,

For Plaintiff in Error.

ERRORS:

- I. The verdict of the Jury is contrary to the evidence.
 - II. The verdict of the Jury is excessive.
 - III. The Court erred in refusing proper evidence on the part of the defendant.
 - IV. The Court gave improper instructions for the plaintiff.
-

Brief of Counsel for Defendants.

I. The Court below substantially instructed the jury, that they were not to take the fact, that the plaintiff was a gambler and kept a gambling house into consideration in finding a verdict. This we hold to be manifestly erroneous. An action of slander is, in its essence, an action to vindicate character. If the occupation of the plaintiff is such as no man of high and moral character would follow, and if, in fact, he daily, either directly or indirectly, violates, or causes to be violated, the criminal law of this State, surely the jury has a right to consider such facts in finding their verdict. In *Wheeler vs. Shields*, 2 Scam. 350, this Court says that the general good character might be introduced to increase the damages, and certainly the occupation of plaintiff, showing bad character, may be likewise introduced in mitigation of damages.

II. The Court erred in excluding the question of defendant's counsel, because it tended to disprove malice. While it may be true, that it would be unjust to allow the defendant to take advantage of a slanderous report put in circulation by him, yet the question asked in this case is so framed that it absolutely excludes this inference. We are aware that the case of *Young vs. Bennett*, 4 Scam. 47, may be cited as opposed to this position, but we think that the case cannot be so construed. The weight of authority in that case even as cited by SCATES and TREAT, Justices, seems to incline against the opinion of the majority of the Court.

III. But the damages the jury gave the plaintiff are enormous, when we consider, that his business and occupation was that of an habitual law-breaker, and that his character—if, indeed, such an individual have any—could hardly have been seriously injured.

D. W. MUNN and O'MELVENY & HOUCK,
Attorneys for Plaintiff in Error.

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Hewitt

Error to Alexander

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Albert

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Filed June 5th 1867
Wm Johnston C^l

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

June Term, A. D. 1867.

JACOB LEHNING, Appellant, }
vs. } Appeal from Alexander.
MICHAEL HEWETT, Appellee. }

BRIEF OF COUNSEL FOR APPELLEE.

There are three points made by Appellant's Counsel to which we will refer in their order :

I.

The instruction particularly excepted to is as follows : "The Court further instructs the Jury that what business the plaintiff follows, whether he gambles or keeps a gambling house, has nothing to do with the issue in this cause, under the pleadings as they now stand."

We insist that this instruction was intended by the Court and could have had no other purpose or effect than to simply call the attention of the Jury to the real issue they were required to determine.

The Plaintiff had charged the Defendant with speaking certain slanderous words. The Defendant, by his plea of not guilty—being the only plea in the case—simply denied the speaking of the words. The question for the Jury to determine then was, whether the words in question were spoken by the Defendant or not. Now whether the Defendant was a gambler or kept a gambling house could not have thrown any light on the issue the one way or the other—did not tend to prove it or disprove it—and so the Court by this instruction told the Jury.

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MULKEY, WALL & WHEELER,
For Defendant in Error.

Lehman
vs

Hewett

Pl of Appeal



Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

June Term, A. D. 1867.

Jacob Lehning, Plaintiff in Error,
vs
Michael Hewitt, Defendant in Error.

} Error to Alexander.

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INSTRUCTION ON BEHALF OF THE DEFENDANT.

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Motion for new trial. Motion overruled.

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Bond.

D. W. MUNN and O'MELVENY & HOUCK,

For Plaintiff in Error.

ERRORS:

- I. The verdict of the Jury is contrary to the evidence.
 - II. The verdict of the Jury is excessive.
 - III. The Court erred in refusing proper evidence on the part of the defendant.
 - IV. The Court gave improper instructions for the plaintiff.
-

Brief of Counsel for Defendants.

I. The Court below substantially instructed the jury, that they were not to take the fact, that the plaintiff was a gambler and kept a gambling house into consideration in finding a verdict. This we hold to be manifestly erroneous. An action of slander is, in its essence, an action to vindicate character. If the occupation of the plaintiff is such as no man of high and moral character would follow, and if, in fact, he daily, either directly or indirectly, violates, or causes to be violated, the criminal law of this State, surely the jury has a right to consider such facts in finding their verdict. In *Wheeler vs. Shields*, 2 Scam. 350, this Court says that the general good character might be introduced to increase the damages, and certainly the occupation of plaintiff, showing bad character, may be likewise introduced in mitigation of damages.

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D. W. MUNN and O'MELVENY & HOUCK,
Attorneys for Plaintiff in Error.

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 Leving
 vs
 Hewitt

Error to Alexander
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Attest

Filed June 5th 1864
 Wash Johnston Clk

D. H. ALLEN and G. BELLEVILLE & BOLICE
 Attorneys for Hewitt vs Leving

The Court gave improper instructions for the plaintiff.
 The Court erred in refusing further evidence on the part of the defendant.
 The verdict of the jury is excessive.
 The verdict of the jury is contrary to the evidence.

Brief of Counsel for Defendants.

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