

No. 8844

Supreme Court of Illinois

Isaac Fitzgerrel

vs.

Richard Furgeson, et al

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 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 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.

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

Enough will have been mentioned, & that will ought to have been assigned by the Court. It is obvious that a writ of habeas corpus was granted, upon the ground that the writ should have been left to the jury.

The instructions were in general before us, we think may have misled the jury. It is not correct to say that the second assignment of error is correct. The Court has no discretion over the jury's verdict. The defendant should be permitted to abandon his whole defense or any separate part of it, as he chooses in his declaration. The rights of the parties are not affected by the fact that the defendant has no other right to do so. It is not correct to say that the second assignment of error is correct. The Court has no discretion over the jury's verdict. The defendant should be permitted to abandon his whole defense or any separate part of it, as he chooses in his declaration. The rights of the parties are not affected by the fact that the defendant has no other right to do so.

ERRORS FOR REVERSAL OR ERROR.

- 1. The Court erred in granting the motion for a new trial.
- 2. The Court erred in finding the instruction for habeas corpus.
- 3. The Court erred in overruling the motion to withdraw the plea.
- 4. The Court erred in granting the motion for judgment.

It is the duty of the Court to assign the errors for which a writ of habeas corpus should be granted. The Court has no discretion over the jury's verdict. The defendant should be permitted to abandon his whole defense or any separate part of it, as he chooses in his declaration. The rights of the parties are not affected by the fact that the defendant has no other right to do so.

1860

[Handwritten signature]

Received, Mt. Vernon, Ill. Nov. 18, 1860, of
E. Beaman, Esq. Three Dales, in full of
Printed Brief in case of Fitzgibbon vs. Ferguson.

\$3.00

[8844-3]

Russell Wall.

Mr. Rumpf

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