

No. 14556 $\frac{1}{2}$

Supreme Court of Illinois

Thomas

vs.

Dunaway

Supreme Court---Second Grand Division.

JANUARY TERM, 1863.

RICHARD S. THOMAS, Appellant, }
vs. } *Appeal from Morgan.*
JACOB DUNAWAY, Appellee. }

BRIEF OF APPELLEE.

As to the first error assigned:

1st. There was no error in overruling the motion to suppress the deposition of Weltner and the two Dunaways; appellant having appeared, by attorney, at the examination of the witnesses and waived the putting of cross interrogatories, thereby waiving his right to except to their formality. Appellant failed to except to the decision of the Cass Circuit Court in overruling the motion to suppress the depositions of the Dunaways and Weltner, as appears by the record, and a party cannot be permitted to assign for error in the Supreme Court any decision or opinion of the Circuit Court made during the progress of the cause, in the propriety of which, at the time of its occurrence, he silently acquiesced. *Hill vs. Ward*, 2 Gilm. 285; *Leigh vs. Hodges*, 3 Scam. 15; *Dickhert vs. Durell*, 11 Ill. 72.

The same facts stated in said depositions were proved by Jas. Dunaway, a witness introduced by the plaintiff, and, therefore, their admission could not affect the merits of the case. *Wheeler vs. Shields*, 2 Scam. 348.

1 Gilm 425-

2d. A defendant in libel cannot show in mitigation of damages that he has been informed of libelous matter by another person, and if he could, Schooley was not the proper person by whom to prove what J. E. Dunaway had communicated to appellant, he being the best evidence, and having testified to the same facts on the trial. *Coleman vs. Southwick*, 9 John. 45; *Treat vs. Browning and wife*, 4 Con. 408; *Mapes vs. Weeks*, 4 Wend. 659; *Wolcott vs. Hall*, 6 Mass. 514; *Bush vs. Prosser*, 1 Kernan. 347; *Shehan vs. Collins*, 20 Illinois 325.

3d. There was no error in refusing the instructions 3, 4, 5 and 7. It is not error to refuse even a proper instruction if the court gives other instruction, embracing the correct principle of law involved in the instruction refused. *Bland vs. The People*, 3 Scam. 364.

All the evidence offered by the defendant below (except the testimony of Schooley to show that Thomas had heard the libelous matter from witness and J. E. Dunaway) was admitted by the court, and by the plaintiff's instructions was fairly submitted to the consideration of the jury in estimating the amount of damages.

4th. A court will not grant a new trial, or reverse a judgment on error, because of the admission of improper or the rejection of proper testimony, or for want of proper direction or misdirection of the judge who tried the case, provided the court can clearly see, by an inspection of the whole record, that justice has been done, and that the error complained of could not have affected the merits of the case, or influenced the verdict of the jury. *Gillet vs. Sweat*, 1 Gilm. 475; *Hill vs. Ward*, 2 Gilm. 285; *Blanchard vs. Morris*, 15 Ills. 35; *Young vs. Sleikwood*, 11 Ills. 36; *Greenup vs. Stokes*, 3 Gilm. 202; *Wheeler vs. Shields*, 2 Scam. 349; *Bland vs. The People*, 3 Scam. 364.

5th. The damages must be outrageous, otherwise the court will not interfere. *Tillotson vs. Cheetham*, 2 John. 74; *Southwick vs. Stevens*, 10. John. 443; *Coleman vs. Southwick*, 9 John. 45. *16. Ill. 405- 2 Gilm 472*

6th. The fact proposed to be proven by Schooley that he had informed appellant (Thomas) that appellee had deposited \$1,000 after coming to this country was immaterial under the pleading in this case; and the witness, J. E. Dunaway, had already testified that he had communicated the matter charged in the libel complained of to the appellant (Thomas) before the publication of the same.

7th. In this State the rule in relation to mitigating testimony in actions of slander and libel is: 1st. That defendant may show the general bad character of the plaintiff; and, 2d. Facts and circumstances which tend to disprove malice, but do not tend to prove the truth of the charge. 2 Gilm. 140; 20 Ills. 225.

POLLARD & ROSS, Attorneys for Appellee.

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R. S. Thomas

vs

Jacob Dunaway

Appellee Brief

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Filed Aug 15/63
W. A. Turney

SUPREME COURT OF ILLINOIS---SECOND DIVISION.

JANUARY TERM, A. D. 1863.

RICHARD S. THOMAS, Appellant, }
vs. } Appeal from Morgan county, Brief and Argument of
JACOB DUNAWAY, Appellee. } Appellant.

This is an action on the case, brought by Dunaway vs. Thomas, for libel, based on a newspaper publication, which charged that Dunaway had been in the State of Pennsylvania many years before entrusted with a drove of cattle belonging to his father and brother; that he received the purchase money for the cattle, and did not account for the same, whereby his father and brother were broken up in their business, and that the plaintiff had brought money to Illinois shortly after the cattle transaction took place.

The defendant pleaded the general issue and justification.

On the trial the plaintiff proved the publication, and that Thomas was worth from \$10,000 to \$20,000.

The defendant Thomas, in his defence,

1st. Introduced the brother of the plaintiff, alluded to in the publication, who testified that the charges in the publication were true, excepting the bringing of money to Illinois, about which he knew nothing.

2d. Defendant introduced evidence that the charges in the publication were not fabricated by himself, but were communicated to him under circumstances that justified him in believing that the said charges were true.

3d. Defendant introduced evidence showing that Plaintiff Duncan had brought money to Illinois on his first coming to the State, and shortly after the cattle transaction in Pennsylvania.

4th. Defendant offered to prove in mitigation of charges, by M. H. L. Schooley, a competent witness, that the statement in the publication that plaintiff brought money to Illinois shortly after the cattle transaction, was true, and was communicated by witness to defendant, Thomas, before the publication of the article sued on, and also that all the charges in the publication sued on were communicated to Thomas before the publication, and under circumstances that justified him in believing that said charges were true, which evidence was rejected by the court.

5th. Defendant Thomas introduced in mitigation of the damages, two newspaper articles published by Defendant Dunaway, under his own signature, one five days, and the other twelve days before the publication of the article sued on, charging Thomas with frauds and crimes, and challenging and inviting Thomas to a newspaper controversy,—Dunaway's first article being the first of the newspaper controversy. The article sued on was a reply to Dunaway's articles, and particularly to his said second article; and the following words set out in the declaration as actionable, to wit: "Steal the widow's mite and orphan's substance," were words contained in Dunaway's said second article against Thomas. The newspapers in which these publications were made were weekly papers, published in the town where both parties lived.

The brother of Dunaway (the witness who testified to the truth of the charges in the article sued on) was then impeached by the evidence of one H. Tate, who testified that he told witness, Tate, after the publication sued on was made, that all the statements in that publication were untrue.

The witness, Tate, was then impeached by eleven witnesses, who testified that his character for truth and veracity was bad, and that they would not believe him on oath; and in turn, his character for truth and veracity was sustained by seventeen witnesses, who swore that his character for truth and veracity was good, and that they would believe him on oath.

The court then instructed the jury, in substance, that if they believed from the testimony that the article sued on was published by Thomas, and did not believe that the statements of that publication were true, they should find for the plaintiff, any sum, not exceeding \$10,000, the ad damnum

laid in the declaration. And the court refused to instruct the jury for the defendant, that they might, (if believed by the jury from the evidence to be true) regard as mitigating circumstances, either the fact that Thomas was not the fabricator of the charges against Dunaway, and bona fide believed them to be true when published, and when attempted to be proved; or the fact, (if believed by the jury from the evidence to be true) that provoking publications had been made by Dunaway against Thomas shortly previous to the article sued on.

The jury gave a verdict of \$3,000 against Thomas, and the court, overruling a motion for a new trial, rendered judgment on the verdict.

P O I N T S.

1. The pleading of inconsistent pleas under our statute is a matter of right.

The Statute of Illinois, page 823, Purple's Edition.

reads as follows :

The defendant may plead as many matters of fact as he may deem necessary for his defence,

When the pleas of justification and general issue are both in, neither should be permitted to restrict the rights secured by either plea if pleaded alone. Neither should embarrass the other, either in the evidence to be admitted, or in the instructions to be given by the Court. Such is a fair construction of our Statute.

Our Statute is a copy of the Virginia Statute, which was passed in A. D. 1788, and reads thus : "The plaintiff in replevin and the defendant in all other actions may plead as many several matters, whether of law or fact, as he may think necessary for his defence." See Virginia Statutes at large, printed in 1808, vol. 12, page 745.

The Virginia Statute has also been adopted by the States of Kentucky and Alabama, and the Courts of those States have adopted the construction we contend for, that when the pleas of the general issue and justification are both in, the defendant has the same advantages he would have under each plea, if pleaded alone. When the Statute of another State is adopted, we adopt the construction (if not against some public policy) which the Courts of that State have given the Statute.

2 Ben. Monroe, 213.
8 Leigh, 552, 553.
18 Alabama, 631.
20 Alabama, 413.
14 Illinois, 425.

It is admitted that the New York and Massachusetts Courts have created a system of law on this subject, that is inconsistent with the position we assume. They have generally decided, that where the general issue and justification are both pleaded, evidence in mitigation of damages is excluded, which would be admissible under the general issue, if pleaded alone; that the plea of justification is a reiteration of the slander, and in some cases, that the plea of justification may be used to prove the publication.

The New York and Massachusetts Courts have always acted with reference to the Statute of Anne, or similar Statutes, which allowed double and inconsistent pleas not as a *matter of right*, but by *leave of the Court*.

As to Statute of Anne, see 1st vol. Chitty's Pleadings, page 594, 595.

The New York Statute is thus: "The defendant in any action may plead as many several matters as he may think necessary for his defence, subject to the power of the Court, to compel him to elect by which plea he will abide, in cases where he may plead inconsistent pleas."

Page 352 of vol. 2, N. Y. Statutes.

When the Courts under such Statutes grant the privilege of pleading double, there is perhaps some reason for controlling the party who has plead inconsistent pleas in his evidence. But that reason does not exist here, where the privilege of pleading double is matter of right, and not by leave of the Court.

See 18 Alabama, page 631.
Pope vs. Welse's Adm'.

2. If the foregoing position be correct, that Thomas had the same right to introduce evidence in mitigation of damages, and have it considered by the jury, that he would have had, if the general issue alone had been pleaded; then the Circuit Court erred in rejecting Schooley's testimony and in its instructions to the jury. Any circumstances which disprove malice and do not tend to prove the truth, may be given in evidence under the general issue.

20 Ill. Sheehan vs Collins.

3. We cite the following cases as direct authority for the position that, matters of provocation and similar mitigating circumstances, and especially recent previous publications, may be given in evidence and considered by the jury in mitigation of damages, where the pleas of the general issue and justification are both pleaded.

15 Ben. Monroe, 198.
1 vol. Maryland Rep., 178.
2 Swann Tenn., 32.
13 Pickering, p. 503.

4. We cite the following cases as direct authority for the position that evidence showing that the defendant in an action for libel was not the fabricator of the charges, and that he received them from others under circumstances justifying the belief that the charges were true, may be admitted in evidence and considered by the jury in mitigation of damages, where the general issue and justification are both pleaded.

3 Washington Circuit Court Report, 241.
1 Binney, 85.
1 Binney, 90.
2 Ben. Monroe.

5. We insist that under the plea of justification when pleaded alone, or with the general issue, all the facts and circumstances introduced in evidence to prove justification, but which fell short of proving it, should be allowed to be considered by the jury under cautionary instructions from the Court to prevent the misapplication of the evidence in mitigation of damages. Such evidence could not be introduced under the general issues because that plea gives no notice, and its introduction would be a surprise upon the plaintiff; but when facts and circumstances are properly introduced under the plea of justification, which is notice, justice can be done in

this case as in many other cases, only by allowing the jury to consider those facts and circumstances where they fail to prove justification, either in aggravation or in mitigation of the damages.

The case of _____ in 2d Keman, p. 67, well illustrates the position that justice cannot be done in many cases without allowing the facts introduced to prove justification, but which fail to do it, to be considered in mitigation. The law upon the subject of slander and libel in New York, as created by their Courts, became intolerable, and was abolished by a statute, which allows, in an action for libel, upon notice, the introduction of the evidence of the truth of the charges, and the consideration of that evidence by the jury in mitigation of damages, though it fails to prove the justification.

15 Illinois, p. 425.
4 Scam, 44.

In the case referred to in the 15th Ills. Report, 425, the Court seem to have gone to the extent of what we contend for, in principle if not in language. They say that the failure to justify does not necessarily aggravate the damages, and that it is a question for the jury to decide in each case, whether the justification was interposed in good faith.

6. One of the instructions asked for by the defendant Thomas, was in these words :

"The filing of the plea of justification does not necessarily aggravate the damages, if the jury, from the testimony, believe that the defendant insisted upon such plea, believing in good faith that he could prove it."

The refusal of the Court below to give this instruction, is in direct conflict with the decision of the Court in the case in 15 Ill., above referred to.

7. The damages were excessive, and though the Courts are averse to reverse a case on this ground, we believe this to be an exceptional case.

8. The Court below erred in not suppressing the depositions of John Weltner and William Dunaway.

These depositions were taken under a commission issued from the Cass County Circuit Court, directed to J. D. Springer, Esq., a Justice of the Peace of Fayette County, Penn.

There was no certificate of the official character of J. D. Springer, Justice, by the clerk of the proper court of Record."

2d Scam., p. 348.

1. There is no evidence on the face of the certificate or otherwise, that the clerk of the Court of Common Pleas had any authority under the laws of Pennsylvania, to give the certificate, which is attached to the deposition; or that there was in said Court any record evidence that Springer was a Justice. Can the word "proper" in the phrase "proper Court of record" be ignored? and will the certificate of the clerk of any Court of record be sufficient?

2. The Justice, J. D. Springer, did not return any answers to twenty-five of the cross interrogations of defendant Thomas, which were attached to the commission; but certified that "defendant's counsel waived the putting of the other interrogatories." Defendant Thomas, in support of his motion, filed an affidavit, denying that he had authorized any one to appear and waive answers to any of the cross-interrogatories attached to the commission.

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We insist that the certificate of the waiver is extra official—not authorized by the commission nor by the statute authorizing the taking of depositions by a commission, and does not, therefore, prove that there was a waiver. It is a nullity.

To the point that depositions will be suppressed, where answers are not returned to all the interrogatories and cross interrogatories, we cite :

- 1 Wash. C. C. Rep., p. 144.
- 1 Peters, C. C. Rep., p. 85.
- 3 Wash. C. C. Rep., p. 109.

To the point that Springer's certificate was extra official—unauthorized, and proves nothing. We cite:—

- Phil. Evidence, p. 382, 391.
- 37 Maine Reports, p. 411.

Again the authority to waive answers to the cross-interrogations is denied by Thomas' affidavit.

9. The instructions asked for by the Plaintiff Dunaway, and given by the Court when taken together, were calculated to miss-lead, and did miss-lead the jury in the rendition of their verdict.

DUMMER & LOGAN,

Attorneys for Appellant.

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Appellant's brief

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Watson