No. 13481

Supreme Court of Illinois

Wolbrecht.

vs.

Baumgarten.

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 248.

Walbrecht
vs
Baumgarten

1861

1348

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION. APRIL TERM, 1861.

GEORGE WOLBRECHT, *Appellant,*
vs.
CHARLES BAUMGARTEN, *Appellee.*

APPEAL FROM STEPHENSON.

Brief and Points for Appellant.

1.

This was an action at Common Law for Slander. The charge in each count of the declaration is that the defendant spoke certain words, meaning and intending thereby to impute the crime of perjury to the plaintiff.

The evidence adduced by the plaintiff below, shows that there was a judicial proceeding, in which appellee testified as a witness, on the 5th of November, 1857. On the 13th of the same month the parties met, and appellant then charged that appellee had sworn falsely in his testimony on the 5th, and pointed out that portion of the testimony of the appellee, which he characterized as false. The proof is, that at the trial on the 5th, appellee was prosecuting witness on a charge against appellant for an assault upon him with a deadly weapon. The assault was charged to have been made on the same day.—Mr. Burchard, counsel for appellant, in that proceeding, at his suggestion asked the witness (appellee) if he had not spoken to appellant in the street previous to the day of the alleged assault, and called his attention to a certain time and place before the day of the assault. The witness replied that he had not.

On the 13th appellant was speaking in reference to the trial on the 5th, and said that appellee had sworn falsely, and went on to state in what he had sworn falsely, that he had sworn that he had not spoken to him before that time, which was false—and he could prove it by his own daughter.

In that proceeding, which was a trial on a complaint of an assault with a deadly weapon, it was obviously immaterial to the issue pending, whether the prosecuting witness had or had not spoken to the defendant previous to that day.

Such proof would be no defense, and it is inadmissible in mitigation of damages for an assault.

Lee v. *Wolsey*, 19 John., 319.
Rawlings v. *Commonwealth*, 1 Leigh R., 581.

No words will justify an assault.

Wharton Am. Crim. Law, 4th ed. § 1253.
State v. *Wood*, 1 Day, 351.
Wharton, § 970.
Ib. § 1242.

1 Hawk C. 61, p. 110.
3 Greenleaf Ev. §§ 61 and 64, p. 65, 67.
1 Phil. Ev. 4th Am. Ed., 748, note.

In this case, in order to maintain the plaintiff's action, it was requisite that the proof should show that the testimony charged to be false was material to the issue in the case when it was given.

Darling v. *Banks*, 14 Ill. 48.

In an action for words which may be understood to convey a charge either of felony or fraud, although they would be actionable in the latter sense, as well as the former, if the declaration contain an inuendo that the defendant thereby meant to impute felony to the defendant, this must be made out in evidence.

3 Phil. Ev. 4th Am. Ed. 559.
Smith v. *Cary*, 3 Campb. N. P. C., 461.
Oldham v. *Peake*, 2 Bl. R., 959.
Black v. *Holmes*, Fox & Smith, Ir. Rep., 39.

The *allegata* and *probata* must agree.

Hicks v. *Rising*, 24 Ill., 566.
Sherman v. *Blackman*, Ib., 350.

The immateriality of the testimony was clearly established by the evidence, and the action cannot be maintained.

In the case of *Darling* v. *Banks*, 14 Ill., 48, the Court say. "This action was not brought under the statute which declares it to be actionable to charge another with false swearing, without reference to a judicial proceeding. The declaration alleged that the words were spoken concerning the testimony given by the plaintiff on the trial of a certain cause, and that the defendant thereby intended to charge him with the commission of the crime of perjury. The case must therefore be considered with reference to the common law, and irrespective of the statute. To constitute the offence of perjury, a party must swear falsely respecting a fact material to the issue. If he swear falsely as to an immaterial matter, he is not guilty of perjury. It is actionable to charge a witness with swearing falsely upon a material point, and the party making the charge can only excuse himself by showing that the witness was guilty of perjury. The justification must be as broad as the charge. The same strictness is required in establishing a justification as in sustaining a prosecution for perjury. But if the charge was made in reference to a particular portion of the witnesses' testimony, the question of its materiality is left open for investigation; and if it turns out that the testimony was wholly immaterial, the words are not

actionable, and the suit cannot be maintained, (citing *Crookshank* v. *Gray*, 20 Johns, 344; *Ross* v. *Rouse*, 1 Wend., 475). In such case the defendant may show, under the general issue, that the testimony to which the charge was applied, was immaterial, and, therefore, that he did not impute the crime of perjury to the witness," (citing *Sibley* v. *Marsh*, 7 Pick., 38; *Coon* v. *Robinson*, 3 Barbour S. C., 625). And in this case judgment was reversed, because the evidence did not authorize the verdict.

Van Rensselaer v Dole 1 Johns Cas. 279

There were two new trials of this cause in the Court below. After the first trial the plaintiff filed an additional or 4th count to his declaration, charging that defendant spoke the words with intent to accuse the plaintiff of false swearing. To this count the defendant pleaded in justification that the testimony was false, &c., (page 39 to 44 of the record,) but plaintiff then entered *nolle prosequi* to his fourth count. The defendant could plead the truth in justification to a statutory action, but could not plead in justification in this case, because he could not prove that the plaintiff committed perjury in his testimony on the 5th of November, as the plaintiff would not commit perjury, in swearing falsely that he had not spoken to the defendant before that time. The justification must be as broad as the charge.

"If the charge be of having sworn falsely in a judicial proceeding, without necessary averments to make the slander amount to an imputation of perjury, then a plea of justification that the plaintiff did swear falsely in the proceeding would be sufficient; but if the declaration be so framed as to show that the defendant by the slanderous words, intended to impute perjury to the plaintiff, the defendant can justify such charge only by proving that the plaintiff committed perjury. The justification must be co-extensive with the slander."

Sanford v. *Gaddis*, 13 Ill., 340.

2.

The Court below erred in permitting the plaintiff to give evidence of the proceeding before the Justice of the Peace on the 5th of November, before the issue on trial was proved, and in admitting the docket of the Justice as evidence. The Court erred in allowing the plaintiff to give secondary evidence of the contents of the warrant and papers in the case before the Justice, without laying proper foundation for the introduction of such evidence. The witness Guiteau had commenced to search for the papers but fifteen minutes before he testifies as a witness. He had not been requested to search for them before this trial. It does not appear that any proper and diligent search had been made. The witness did not know whether the papers had been left with him or not. It does not appear that they were ever taken from the Justice.

Rankin v. *Crowe*, 19 Ill., 629.
Mariner v. *Saunders*, 5 Gilm., 117.

In *Whitehall* v. *Smith*, 24 Ill., 166, the testimony was as follows: "Plaintiff called *H. C. Bryant*, who testified he was a Justice of the Peace, and when S. M. Ayers went away he left his books and a box of papers, saying there were the books and papers belonging to his office. Witness then stated that he never made any examination until the commencement of this trial, for the affidavit and warrant; that he had only examined the box which had been kept open on his desk since Ayers had left, and he couldn't find them there, and he had then examined every place in his office where the papers might have been placed, and he couldn't find them. That Ayers generally pinned the papers on the docket; he had examined the docket and could not find them; that Ayers had left other papers with one *Joiner*, but what they were he did not know." The docket was then identified and read in evidence under objection.

By the Court, CATON, C. J., (p. 167): "The proof of the loss of the affidavit and warrant was insufficient to admit secondary evidence of the contents."

3.

The Circuit Court erred in giving the instructions asked by the plaintiff below. The testimony did not warrant a verdict in his favor. Under the law and the evidence the plaintiff had made out no case. There was nothing in the evidence to warrant the instructions. There was no evidence to support them. On the contrary the evidence showed clearly that the testimony of the plaintiff characterized as false, was wholly immaterial at the trial when it was given, and the Court should not have instructed the jury that they were at liberty to find that it was material. Such instructions even if containing a correct principle of law were mere abstractions, not based on evidence in the case, and should have been refused, as calculated to mislead the jury and induce them to believe that the plaintiff had made out a case.

"Such instructions only should be given as are based upon legitimate evidence in the case; and if an irrelevant instruction be given, although it be unobjectionable as an abstract proposition of law, which is calculated to mislead the jury and affect their conclusion upon the issue submitted to them, it will be error."

Coughlin v. *The People*, 18 Ill., 267–8.

"In the absence of proof there is a manifest impropriety in directing the at-

tention of the jury to that which is not in the case, and call upon them to tax their imagination to supply the want of facts. The tenth instruction has not any evidence on which to base it, and the Court should not send the jury out into the broad field of conjecture, but confine them to the facts as proven, on which alone, instructions can be properly raised."

Ewing v. *Runkle*, 20 Ill., 464.

Instructions not based on evidence should not be given.

C. B & Q. Railroad Co. v. *George*, 19 Ill., 518.

Burnett v. Dulton 1 Jones Law 544

The seventh instruction asked by the plaintiff is objectionable in form and substance.

The jury are instructed that they are at liberty to give the plaintiff $5,000 damages on this evidence, provided they think he is entitled to that amount.—The amount of damages laid in the declaration is no criterion for the jury, and they ought not to have their attention directed to it as forming any basis for their verdict.

4.

The Court erred in refusing the 5th instruction asked by the defendant below, and in giving the third instruction asked by the plaintiff.

The 5th instruction asked by the defendant is as follows:

5. The gist and foundation of this action of slander is malice; the question of malice is a question for the jury to decide; and if they find from the testimony that the words used by defendant were spoken during a quarrel, in heat and passion without malice, then the jury must find defendant not guilty.

Prima facie, slanderous words in law imply malice. If the jury find that they were spoken in heat and passion, without malice, does the law require them to find the defendant guilty?

"The speaking of actionable words is evidence of malice. Malice is the gist of this action. It has been held in Massachusetts and other States, that words spoken through mere heat of passion are not actionable, and I think very justly, *as it evidences a want of deliberation and malice which is the gravamen of this action.* The instructions therefore, given for the defendant, were proper as falling within these principles. They contain the summary of the law, governing the case; that the ground of the action was malice; that the jury were judges of that malice; that all the facts and conversations were to be weighed

in ascertaining it; *and if they believe he did not speak the words with that intent, they should find for the defendant.*" *McKee* v. *Ingalls*, 4 Scam., 33.

In the case last cited the words were *per se* actionable.

Passion excludes the presumption of malice.

People v. *Garretson*, 2 Wheeler C. C., 347.
U. S. v. *Thayer*, 2 Wheeler C. C., 503.

5.

The Circuit Court erred in permitting the 5th instruction asked by defendant to go to the jury, and in allowing them to take the same to their jury room, after the Court had refused said instruction, and written the word "Refused" on the margin of the same.

It should seem that the practice of giving to the jury all the instructions which have been asked, including those given and those refused, is erroneous.

It is the province of the Court to instruct the jury as to the law, and not to confuse them by giving them propositions declared not to be the law. A certain proposition of law in a particular case may be incorrect—the converse of it may be equally remote from the truth—and a refused instruction given to a jury cannot fail to prejudice the case of the party asking it.

"Few know the secret and insiduous manner by which impressions are made on the minds of a jury, or how slight the operating cause may be."

Rawson v. *Curtis*, 19 Ill., 481.

And yet this practice to some extent prevails. The instructions are all read to the jury and left with them, those given and those refused, and they are left to grope their way through them and around them, into the light, if they can.

Here the Court refused the instruction and handed it to the jury. The defendant objected to having the instruction go to the jury at all, after it was refused, but the Court overruled the objection. The jury took the instruction with the others, and retained it with them in their jury room, until they returned their verdict.

The rule is that if material papers, not read in evidence, are handed to the jury by mistake, it is sufficient cause for a new trial, and if the attention of the Court is drawn to the matter, and the Court decide to allow them to go to the jury and exception is taken, it is error.

19 Ill., 484.

And this even if they have been expressly instructed to disregard them.
Ib. 481.

6.

The appellant after verdict, moved the Court for a new trial; in arrest of judgment; to set aside the verdict of the jury; to set aside the verdict and enter judgment for defendant; to issue *venire facias de novo.*

The only point made by plaintiff on argument of the motions, was that two new trials had already been granted, and on this ground the Court overruled the motions and entered judgment. The statute provides (Scates' statute, 260,) "if either party may wish to except to the verdict or for other causes to move for a new trial, or in arrest of judgment, he shall, before final judgment be entered, give, by himself or counsel, to the opposite party or his counsel, the points in writing particularly specifying the grounds of such motion, and shall also furnish the judge with a copy of the same, and final judgment shall thereupon be stayed until such motion can be heard by the Court. But no more than two new trials shall be granted to the same party in the same cause."

This act was passed in 1827. The act allowing exceptions to the overruling of motions for new trials by the Circuit Court was not adopted until 1837.—The act of 1827 was directory to the Circuit Caurt and designed to limit its discretion in granting new trials, but has no application to the Supreme Court unless to preclude the defendant from assigning the decision of the Circuit Court in overruling his motion for a new trial, for error. This Court has decided that the motion for a new trial in criminal cases cannot be assigned for error, yet the Court will reverse the judgment for other errors, and if the verdict is not sustained by, or is contrary to the evidence, or contrary to law.

Scates' Comp. 616
Trott v. West
10 Yerg. 500
Ferrell v. Alder
2 Swan 78
Burton v. Brashear
3 A. K. Marshall 1132

In the case of *Tindal et. al.* v. *Brown*, 1 Durnford & East, 164–167, (1 T. R., 94), the defendant moved in King's Bench for a third trial—two juries having found against him. *Erskine* for the plaintiff, said the amount in litigation was small—that in *Metcalf* v. *Hall* the Court had refused to grant a third trial. The Court say, (top paging 97) "that though it was true in general that the Court would refuse to grant a new trial when the sum in litigation was small, yet that rule did not apply when the judgment had been given against law.—That the reason why the Court refused granting a third trial in the case of *Metcalf* and *Hall* was because the plaintiff had proved his deed under a commission of bankrupt, which had issued against the drawers of the bill between the time of the verdict and the motion for a new trial."

The rule for a new trial was made absolute.

Note (*a*) on the third trial a special verdict was found containing the same

facts, on which the Court gave judgment for the defendant; which was unanimously affirmed in the Exchequer Chamber.

"From the whole of the evidence, the party might have altered the endorsement or credit on his own note, and still no criminality attach to his conduct." Judgment was reversed because evidence did not sustain the verdict.

Breese 233.

In *Joseph* v. *Fisher*, 3 Scam., 137, the Court say the evidence was not sufficient to justify the verdict, and they therefore reversed the judgment.

The Court will reverse a judgment when the verdict is contrary to law, or is not sustained by the evidence.

Lincoln v. *The People*, 20 Ill., 367.

In *Gutchins* v. *The People*, 21 Ill., 644, judgment was reversed and defendant discharged, because the evidence did not make out a case, and the Court say (p. 645). "The proof of an offence under one section of the statute cannot support a conviction under the other. That is too plain to require discussion."

When a verdict is manifestly against the evidence, it will be reversed.

School Inspectors v. *Hughes*, 24 Ill., 231.
Boyle v. *Leving*, Ib. 223.
Baker v. *Prichett*, 16 Ill., 66.
Higgins v. *Lee*, Ib. 500.

This Court has decided that the practice of instructing the jury to find for the defendant as in case of non suit, has never been adopted in this State, and is not sanctioned by our practice.

The People ex rel v. *Browne*, 3 Gilm., 88.
Stumps v. *Kelley*, 22 Ill., 142.

"The proper motion seems to be to request the Court to instruct the jury that it is their duty, in the absence of testimony proving the issues on the part of the plaintiff, to find a verdict for the defendant."

Amos v. *Sinnott*, 4 Scam., 447.

In this case the defendant asked the Court to instruct the jury that the speaking of harsh words by the plaintiff to defendant previous to the day of the assault, would be no defense to a charge of an assault with a deadly weapon—and would be immaterial to the issue, and that upon such proof they should find for

the defendant. Had the jury found their verdict according to the law under these instructions, they must have found for the defendant.

7.

The Court erred in overruling the defendant's motion in arrest of judgment.

The finding of an erroneous verdict by the jury is good cause for arrest of judgment.

The verdict will be set aside and judgment arrested for error of the jury.

Dorr v. *Fenno*, 12 Pick., 527.
Harvey v. *Pickett*, 15 Johns., 87.
Talmadge v. *Northrop*, 1 Root, 454.
Howard v. *Cobb*, 3 Day, 309.

In *Warner* v. *Robinson*, 1 Root Reports, 194: Motion in arrest, on the ground that the jury erred in assessing the amount of the plaintiff's damages. Held good cause for arrest. Judgment was arrested.

Error or misconduct on the part of the jury, it seems would be proper ground for a new trial, but it also appears to be good cause in arrest of judgment.

In *Kellogg* v. *Wilder*, 15 Johns., 455, the Court say that independent of misconduct of the jury, the verdict is against the evidence. If the Court be of opinion that error has been committed by the jury, they will reverse the judgment, although no motion for a new trial could be made in the Court below, (*Rose* v. *Smith*, 4 Cow., 19,) because it is an evil for which some remedy must be had. And it is not perceived that an error in assessment, or a 'chance verdict,' found by taking the quotient of the several sums designated by jurors, is any greater evil to the parties than a verdict contrary to law and evidence.—Such a verdict is found upon an 'illegal principle.' This is apparent without inquiry of the jury, and should be set aside. 12 Pick., 526; 9 Ib., 431–2; 6 Ib., 208.

TURNER & INGALLS, for Appellant.

Bryant v. Com. Ins. Co. 13 Pick 543.
Van Rensselaer v. Dole 1. Johns Cas. 279

248

Wolbrecht
v
Baumgarten

Brief and Points
for appellant

1 Hawk C. 61, p. 110.
3 Greenleaf Ev. §§ 61 and 64, p. 65, 67.
1 Phil. Ev. 4th Am. Ed., 748, note.

In this case, in order to maintain the plaintiff's action, it was requisite that the proof should show that the testimony charged to be false was material to the issue in the case when it was given.

Darling v. *Banks*, 14 Ill. 48.

In an action for words which may be understood to convey a charge either of felony or fraud, although they would be actionable in the latter sense, as well as the former, if the declaration contain an inuendo that the defendant thereby meant to impute felony to the defendant, this must be made out in evidence.

3 Phil. Ev. 4th Am. Ed. 559.
Smith v. *Cary*, 3 Campb. N. P. C., 461.
Oldham v. *Peake*, 2 Bl. R., 959.
Black v. *Holmes*, Fox & Smith, Ir. Rep., 39.

The *allegata* and *probata* must agree.

Hicks v. *Rising*, 24 Ill., 566.
Sherman v. *Blackman*, Ib., 350.

The immateriality of the testimony was clearly established by the evidence, and the action cannot be maintained.

In the case of *Darling* v. *Banks*, 14 Ill., 48, the Court say. "This action was not brought under the statute which declares it to be actionable to charge another with false swearing, without reference to a judicial proceeding. The declaration alleged that the words were spoken concerning the testimony given by the plaintiff on the trial of a certain cause, and that the defendant thereby intended to charge him with the commission of the crime of perjury. The case must therefore be considered with reference to the common law, and irrespective of the statute. To constitute the offence of perjury, a party must swear falsely respecting a fact material to the issue. If he swear falsely as to an immaterial matter, he is not guilty of perjury. It is actionable to charge a witness with swearing falsely upon a material point, and the party making the charge can only excuse himself by showing that the witness was guilty of perjury. The justification must be as broad as the charge. The same strictness is required in establishing a justification as in sustaining a prosecution for perjury. But if the charge was made in reference to a particular portion of the witnesses' testimony, the question of its materiality is left open for investigation; and if it turns out that the testimony was wholly immaterial, the words are not

actionable, and the suit cannot be maintained, (citing *Crookshank* v. *Gray*, 20 Johns, 344; *Ross* v. *Rouse*, 1 Wend., 475). In such case the defendant may show, under the general issue, that the testimony to which the charge was applied, was immaterial, and, therefore, that he did not impute the crime of perjury to the witness," (citing *Sibley* v. *Marsh*, 7 Pick., 38; *Coon* v. *Robinson*, 3 Barbour S. C., 625). And in this case judgment was reversed, because the evidence did not authorize the verdict.

Van Rensselaer v. Dole 1 Johns Cas. 279

There were two new trials of this cause in the Court below. After the first trial the plaintiff filed an additional or 4th count to his declaration, charging that defendant spoke the words with intent to accuse the plaintiff of false swearing. To this count the defendant pleaded in justification that the testimony was false, &c., (page 39 to 44 of the record,) but plaintiff then entered *nolle prosequi* to his fourth count. The defendant could plead the truth in justification to a statutory action, but could not plead in justification in this case, because he could not prove that the plaintiff committed perjury in his testimony on the 5th of November, as the plaintiff would not commit perjury, in swearing falsely that he had not spoken to the defendant before that time. The justification must be as broad as the charge.

"If the charge be of having sworn falsely in a judicial proceeding, without necessary averments to make the slander amount to an imputation of perjury, then a plea of justification that the plaintiff did swear falsely in the proceeding would be sufficient; but if the declaration be so framed as to show that the defendant by the slanderous words, intended to impute perjury to the plaintiff, the defendant can justify such charge only by proving that the plaintiff committed perjury. The justification must be co-extensive with the slander."

Sanford v. *Gaddis*, 13 Ill., 340.

2.

The Court below erred in permitting the plaintiff to give evidence of the proceeding before the Justice of the Peace on the 5th of November, before the issue on trial was proved, and in admitting the docket of the Justice as evidence. The Court erred in allowing the plaintiff to give secondary evidence of the contents of the warrant and papers in the case before the Justice, without laying proper foundation for the introduction of such evidence. The witness Guiteau had commenced to search for the papers but fifteen minutes before he testifies as a witness. He had not been requested to search for them before this trial. It does not appear that any proper and diligent search had been made. The witness did not know whether the papers had been left with him or not. It does not appear that they were ever taken from the Justice.

Rankin v. *Crowe*, 19 Ill., 629.
Mariner v. *Saunders*, 5 Gilm., 117.

In *Whitehall* v. *Smith*, 24 Ill., 166, the testimony was as follows: "Plaintiff called *H. C. Bryant*, who testified he was a Justice of the Peace, and when S. M. Ayers went away he left his books and a box of papers, saying there were the books and papers belonging to his office. Witness then stated that he never made any examination until the commencement of this trial, for the affidavit and warrant; that he had only examined the box which had been kept open on his desk since Ayers had left, and he couldn't find them there, and he had then examined every place in his office where the papers might have been placed, and he couldn't find them. That Ayers generally pinned the papers on the docket; he had examined the docket and could not find them; that Ayers had left other papers with one *Joiner*, but what they were he did not know." The docket was then identified and read in evidence under objection.

By the Court, CATON, C. J., (p. 167): "The proof of the loss of the affidavit and warrant was insufficient to admit secondary evidence of the contents."

3.

The Circuit Court erred in giving the instructions asked by the plaintiff below. The testimony did not warrant a verdict in his favor. Under the law and the evidence the plaintiff had made out no case. There was nothing in the evidence to warrant the instructions. There was no evidence to support them. On the contrary the evidence showed clearly that the testimony of the plaintiff characterized as false, was wholly immaterial at the trial when it was given, and the Court should not have instructed the jury that they were at liberty to find that it was material. Such instructions even if containing a correct principle of law were mere abstractions, not based on evidence in the case, and should have been refused, as calculated to mislead the jury and induce them to believe that the plaintiff had made out a case.

"Such instructions only should be given as are based upon legitimate evidence in the case; and if an irrelevant instruction be given, although it be unobjectionable as an abstract proposition of law, which is calculated to mislead the jury and affect their conclusion upon the issue submitted to them, it will be error."

Coughlin v. *The People*, 18 Ill., 267-8.

"In the absence of proof there is a manifest impropriety in directing the at-

tention of the jury to that which is not in the case, and call upon them to tax their imagination to supply the want of facts. The tenth instruction has not any evidence on which to base it, and the Court should not send the jury out into the broad field of conjecture, but confine them to the facts as proven, on which alone, instructions can be properly raised."

Ewing v. *Runkle*, 20 Ill., 464.

Instructions not based on evidence should not be given.

C. B & Q. Railroad Co. v. *George*, 19 Ill., 518.

Burnett v. Fulton 1 Jones' Law 548

The seventh instruction asked by the plaintiff is objectionable in form and substance.

The jury are instructed that they are at liberty to give the plaintiff $5,000 damages on this evidence, provided they think he is entitled to that amount.—The amount of damages laid in the declaration is no criterion for the jury, and they ought not to have their attention directed to it as forming any basis for their verdict.

4.

The Court erred in refusing the 5th instruction asked by the defendant below, and in giving the third instruction asked by the plaintiff.

The 5th instruction asked by the defendant is as follows:

5. The gist and foundation of this action of slander is malice; the question of malice is a question for the jury to decide; and if they find from the testimony that the words used by defendant were spoken during a quarrel, in heat and passion without malice, then the jury must find defendant not guilty.

Prima facie, slanderous words in law imply malice. If the jury find that they were spoken in heat and passion, without malice, does the law require them to find the defendant guilty?

"The speaking of actionable words is evidence of malice. Malice is the gist of this action. It has been held in Massachusetts and other States, that words spoken through mere heat of passion are not actionable, and I think very justly, *as it evidences a want of deliberation and malice which is the gravamen of this action.* The instructions therefore, given for the defendant, were proper as falling within these principles. They contain the summary of the law, governing the case; that the ground of the action was malice; that the jury were judges of that malice; that all the facts and conversations were to be weighed

in ascertaining it; *and if they believe he did not speak the words with that intent, they should find for the defendant.*" *McKee* v. *Ingalls*, 4 Scam., 33.

In the case last cited the words were *per se* actionable.

Passion excludes the presumption of malice.

People v. *Garretson*, 2 Wheeler C. C., 347.
U. S. v. *Thayer*, 2 Wheeler C. C., 503.

5.

The Circuit Court erred in permitting the 5th instruction asked by defendant to go to the jury, and in allowing them to take the same to their jury room, after the Court had refused said instruction, and written the word "Refused" on the margin of the same.

It should seem that the practice of giving to the jury all the instructions which have been asked, including those given and those refused, is erroneous.

It is the province of the Court to instruct the jury as to the law, and not to confuse them by giving them propositions declared not to be the law. A certain proposition of law in a particular case may be incorrect—the converse of it may be equally remote from the truth—and a refused instruction given to a jury cannot fail to prejudice the case of the party asking it.

"Few know the secret and insiduous manner by which impressions are made on the minds of a jury, or how slight the operating cause may be."

Rawson v. *Curtis*, 19 Ill., 481.

And yet this practice to some extent prevails. The instructions are all read to the jury and left with them, those given and those refused, and they are left to grope their way through them and around them, into the light, if they can.

Here the Court refused the instruction and handed it to the jury. The defendant objected to having the instruction go to the jury at all, after it was refused, but the Court overruled the objection. The jury took the instruction with the others, and retained it with them in their jury room, until they returned their verdict.

The rule is that if material papers, not read in evidence, are handed to the jury by mistake, it is sufficient cause for a new trial, and if the attention of the Court is drawn to the matter, and the Court decide to allow them to go to the jury and exception is taken, it is error.

19 Ill., 484.

And this even if they have been expressly instructed to disregard them.
Ib. 481.

6.

The appellant after verdict, moved the Court for a new trial; in arrest of judgment; to set aside the verdict of the jury; to set aside the verdict and enter judgment for defendant; to issue *venire facias de novo.*

The only point made by plaintiff on argument of the motions, was that two new trials had already been granted, and on this ground the Court overruled the motions and entered judgment. The statute provides (Scates' statute, 260,) "if either party may wish to except to the verdict or for other causes to move for a new trial, or in arrest of judgment, he shall, before final judgment be entered, give, by himself or counsel, to the opposite party or his counsel, the points in writing particularly specifying the grounds of such motion, and shall also furnish the judge with a copy of the same, and final judgment shall thereupon be stayed until such motion can be heard by the Court. But no more than two new trials shall be granted to the same party in the same cause."

This act was passed in 1827. The act allowing exceptions to the overruling of motions for new trials by the Circuit Court was not adopted until 1837.—The act of 1827 was directory to the Circuit Caurt and designed to limit its discretion in granting new trials, but has no application to the Supreme Court unless to preclude the defendant from assigning the decision of the Circuit Court in overruling his motion for a new trial, for error. This Court has decided that the motion for a new trial in criminal cases cannot be assigned for error, yet the Court will reverse the judgment for other errors, and if the verdict is not sustained by, or is contrary to the evidence, or contrary to law.

Scates Comp. 616
Trott v Wash 10 Yerg. 500
Ferrell v. Alder 2 Swan 78
Burton v. Rashan 3 A. K. Marshall 1132

In the case of *Tindal et. al.* v. *Brown*, 1 Durnford & East, 164–167, (1 T. R., 94), the defendant moved in King's Bench for a third trial—two juries having found against him. *Erskine* for the plaintiff, said the amount in litigation was small—that in *Metcalf* v. *Hall* the Court had refused to grant a third trial. The Court say, (top paging 97) "that though it was true in general that the Court would refuse to grant a new trial when the sum in litigation was small, yet that rule did not apply when the judgment had been given against law.—That the reason why the Court refused granting a third trial in the case of *Metcalf* and *Hall* was because the plaintiff had proved his deed under a commission of bankrupt, which had issued against the drawers of the bill between the time of the verdict and the motion for a new trial."

The rule for a new trial was made absolute.

Note (*a*) on the third trial a special verdict was found containing the same

facts, on which the Court gave judgment for the defendant; which was unanimously affirmed in the Exchequer Chamber.

"From the whole of the evidence, the party might have altered the endorsement or credit on his own note, and still no criminality attach to his conduct." Judgment was reversed because evidence did not sustain the verdict.

Breese 233.

In *Joseph* v. *Fisher*, 3 Scam., 137, the Court say the evidence was not sufficient to justify the verdict, and they therefore reversed the judgment.

The Court will reverse a judgment when the verdict is contrary to law, or is not sustained by the evidence.

Lincoln v. *The People*, 20 Ill., 367.

In *Gutchins* v. *The People*, 21 Ill., 644, judgment was reversed and defendant discharged, because the evidence did not make out a case, and the Court say (p. 645). "The proof of an offence under one section of the statute cannot support a conviction under the other. That is too plain to require discussion."

When a verdict is manifestly against the evidence, it will be reversed.

School Inspectors v. *Hughes*, 24 Ill., 231.
Boyle v. *Leving*, Ib. 223.
Baker v. *Prichett*, 16 Ill., 66.
Higgins v. *Lee*, Ib. 500.

This Court has decided that the practice of instructing the jury to find for the defendant as in case of non suit, has never been adopted in this State, and is not sanctioned by our practice.

The People ex rel v. *Browne*, 3 Gilm., 88.
Stumps v. *Kelley*, 22 Ill., 142.

"The proper motion seems to be to request the Court to instruct the jury that it is their duty, in the absence of testimony proving the issues on the part of the plaintiff, to find a verdict for the defendant."

Amos v. *Sinnott*, 4 Scam., 447.

In this case the defendant asked the Court to instruct the jury that the speaking of harsh words by the plaintiff to defendant previous to the day of the assault, would be no defense to a charge of an assault with a deadly weapon—and would be immaterial to the issue, and that upon such proof they should find for

the defendant. Had the jury found their verdict according to the law under these instructions, they must have found for the defendant.

7.

The Court erred in overruling the defendant's motion in arrest of judgment.

The finding of an erroneous verdict by the jury is good cause for arrest of judgment.

The verdict will be set aside and judgment arrested for error of the jury.

Dorr v. *Fenno*, 12 Pick., 527.
Harvey v. *Pickett*, 15 Johns., 87.
Talmadge v. *Northrop*, 1 Root, 454.
Howard v. *Cobb*, 3 Day, 309.

In *Warner* v. *Robinson*, 1 Root Reports, 194: Motion in arrest, on the ground that the jury erred in assessing the amount of the plaintiff's damages. Held good cause for arrest. Judgment was arrested.

Error or misconduct on the part of the jury, it seems would be proper ground for a new trial, but it also appears to be good cause in arrest of judgment.

In *Kellogg* v. *Wilder*, 15 Johns., 455, the Court say that independent of misconduct of the jury, the verdict is against the evidence. If the Court be of opinion that error has been committed by the jury, they will reverse the judgment, although no motion for a new trial could be made in the Court below, (*Rose* v. *Smith*, 4 Cow., 19,) because it is an evil for which some remedy must be had. And it is not perceived that an error in assessment, or a 'chance verdict,' found by taking the quotient of the several sums designated by jurors, is any greater evil to the parties than a verdict contrary to law and evidence.—Such a verdict is found upon an 'illegal principle.' This is apparent without inquiry of the jury, and should be set aside. 12 Pick., 526; 9 Ib., 431-2; 6 Ib., 208.

TURNER & INGALLS, for Appellant.

Bryant v. Com. Ins. Co. 13 Pick 543.
Van Rensselaer v. Dole. 1 Johns cas. 279.

248

Wolbrecht
vs
Baumgarten

Brief and Points
for appellant

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION. APRIL TERM, 1861.

GEORGE WOLBRECHT,
Appellant,
vs.
CHARLES BAUMGARTEN,
Appellee.

APPEAL FROM STEPHENSON.

Brief and Points for Appellant.

1.

This was an action at Common Law for Slander. The charge in each count of the declaration is that the defendant spoke certain words, meaning and intending thereby to impute the crime of perjury to the plaintiff.

The evidence adduced by the plaintiff below, shows that there was a judicial proceeding, in which appellee testified as a witness, on the 5th of November, 1857. On the 13th of the same month the parties met, and appellant then charged that appellee had sworn falsely in his testimony on the 5th, and pointed out that portion of the testimony of the appellee, which he characterized as false. The proof is, that at the trial on the 5th, appellee was prosecuting witness on a charge against appellant for an assault upon him with a deadly weapon. The assault was charged to have been made on the same day.—Mr. Burchard, counsel for appellant, in that proceeding, at his suggestion asked the witness (appellee) if he had not spoken to appellant in the street previous to the day of the alleged assault, and called his attention to a certain time and place before the day of the assault. The witness replied that he had not.

On the 13th appellant was speaking in reference to the trial on the 5th, and said that appellee had sworn falsely, and went on to state in what he had sworn falsely, that he had sworn that he had not spoken to him before that time, which was false—and he could prove it by his own daughter.

In that proceeding, which was a trial on a complaint of an assault with a deadly weapon, it was obviously immaterial to the issue pending, whether the prosecuting witness had or had not spoken to the defendant previous to that day.

Such proof would be no defense, and it is inadmissible in mitigation of damages for an assault.

Lee v. *Wolsey*, 19 John., 319.
Rawlings v. *Commonwealth*, 1 Leigh R., 581.

No words will justify an assault.

Wharton Am. Crim. Law, 4th ed. § 1253.
State v. *Wood*, 1 Day, 351.
Wharton, § 970.
Ib. § 1242.

1 Hawk C. 61, p. 110.
3 Greenleaf Ev. §§ 61 and 64, p. 65, 67.
1 Phil. Ev. 4th Am. Ed., 748, note.

In this case, in order to maintain the plaintiff's action, it was requisite that the proof should show that the testimony charged to be false was material to the issue in the case when it was given.

Darling v. *Banks*, 14 Ill. 48.

In an action for words which may be understood to convey a charge either of felony or fraud, although they would be actionable in the latter sense, as well as the former, if the declaration contain an inuendo that the defendant thereby meant to impute felony to the defendant, this must be made out in evidence.

3 Phil. Ev. 4th Am. Ed. 559.
Smith v. *Cary*, 3 Campb. N. P. C., 461.
Oldham v. *Peake*, 2 Bl. R., 959.
Black v. *Holmes*, Fox & Smith, Ir. Rep., 39.

The *allegata* and *probata* must agree.

Hicks v. *Rising*, 24 Ill., 566.
Sherman v. *Blackman*, Ib., 350.

The immateriality of the testimony was clearly established by the evidence, and the action cannot be maintained.

In the case of *Darling* v. *Banks*, 14 Ill., 48, the Court say. "This action was not brought under the statute which declares it to be actionable to charge another with false swearing, without reference to a judicial proceeding. The declaration alleged that the words were spoken concerning the testimony given by the plaintiff on the trial of a certain cause, and that the defendant thereby intended to charge him with the commission of the crime of perjury. The case must therefore be considered with reference to the common law, and irrespective of the statute. To constitute the offence of perjury, a party must swear falsely respecting a fact material to the issue. If he swear falsely as to an immaterial matter, he is not guilty of perjury. It is actionable to charge a witness with swearing falsely upon a material point, and the party making the charge can only excuse himself by showing that the witness was guilty of perjury. The justification must be as broad as the charge. The same strictness is required in establishing a justification as in sustaining a prosecution for perjury. But if the charge was made in reference to a particular portion of the witnesses' testimony, the question of its materiality is left open for investigation; and if it turns out that the testimony was wholly immaterial, the words are not

actionable, and the suit cannot be maintained, (citing *Crookshank* v. *Gray*, 20 Johns, 344; *Ross* v. *Rouse*, 1 Wend., 475). In such case the defendant may show, under the general issue, that the testimony to which the charge was applied, was immaterial, and, therefore, that he did not impute the crime of perjury to the witness," (citing *Sibley* v. *Marsh*, 7 Pick., 38; *Coon* v. *Robinson*, 3 Barbour S. C., 625). And in this case judgment was reversed, because the evidence did not authorize the verdict.

Van Rensselaer v. Dole 1 Johns Cas. 279

There were two new trials of this cause in the Court below. After the first trial the plaintiff filed an additional or 4th count to his declaration, charging that defendant spoke the words with intent to accuse the plaintiff of false swearing. To this count the defendant pleaded in justification that the testimony was false, &c., (page 39 to 44 of the record,) but plaintiff then entered *nolle prosequi* to his fourth count. The defendant could plead the truth in justification to a statutory action, but could not plead in justification in this case, because he could not prove that the plaintiff committed perjury in his testimony on the 5th of November, as the plaintiff would not commit perjury, in swearing falsely that he had not spoken to the defendant before that time. The justification must be as broad as the charge.

"If the charge be of having sworn falsely in a judicial proceeding, without necessary averments to make the slander amount to an imputation of perjury, then a plea of justification that the plaintiff did swear falsely in the proceeding would be sufficient; but if the declaration be so framed as to show that the defendant by the slanderous words, intended to impute perjury to the plaintiff, the defendant can justify such charge only by proving that the plaintiff committed perjury. The justification must be co-extensive with the slander."

Sanford v. *Gaddis*, 13 Ill., 340.

2.

The Court below erred in permitting the plaintiff to give evidence of the proceeding before the Justice of the Peace on the 5th of November, before the issue on trial was proved, and in admitting the docket of the Justice as evidence. The Court erred in allowing the plaintiff to give secondary evidence of the contents of the warrant and papers in the case before the Justice, without laying proper foundation for the introduction of such evidence. The witness Guiteau had commenced to search for the papers but fifteen minutes before he testifies as a witness. He had not been requested to search for them before this trial. It does not appear that any proper and diligent search had been made. The witness did not know whether the papers had been left with him or not. It does not appear that they were ever taken from the Justice.

Rankin v. *Crowe*, 19 Ill., 629.
Mariner v. *Saunders*, 5 Gilm., 117.

In *Whitehall* v. *Smith*, 24 Ill., 166, the testimony was as follows: "Plaintiff called *H. C. Bryant*, who testified he was a Justice of the Peace, and when S. M. Ayers went away he left his books and a box of papers, saying there were the books and papers belonging to his office. Witness then stated that he never made any examination until the commencement of this trial, for the affidavit and warrant; that he had only examined the box which had been kept open on his desk since Ayers had left, and he couldn't find them there, and he had then examined every place in his office where the papers might have been placed, and he couldn't find them. That Ayers generally pinned the papers on the docket; he had examined the docket and could not find them; that Ayers had left other papers with one *Joiner*, but what they were he did not know." The docket was then identified and read in evidence under objection.

By the Court, CATON, C. J., (p. 167): "The proof of the loss of the affidavit and warrant was insufficient to admit secondary evidence of the contents."

3.

The Circuit Court erred in giving the instructions asked by the plaintiff below. The testimony did not warrant a verdict in his favor. Under the law and the evidence the plaintiff had made out no case. There was nothing in the evidence to warrant the instructions. There was no evidence to support them. On the contrary the evidence showed clearly that the testimony of the plaintiff characterized as false, was wholly immaterial at the trial when it was given, and the Court should not have instructed the jury that they were at liberty to find that it was material. Such instructions even if containing a correct principle of law were mere abstractions, not based on evidence in the case, and should have been refused, as calculated to mislead the jury and induce them to believe that the plaintiff had made out a case.

"Such instructions only should be given as are based upon legitimate evidence in the case; and if an irrelevant instruction be given, although it be unobjectionable as an abstract proposition of law, which is calculated to mislead the jury and affect their conclusion upon the issue submitted to them, it will be error."

Coughlin v. *The People*, 18 Ill., 267–8.

"In the absence of proof there is a manifest impropriety in directing the at-

tention of the jury to that which is not in the case, and call upon them to tax their imagination to supply the want of facts. The tenth instruction has not any evidence on which to base it, and the Court should not send the jury out into the broad field of conjecture, but confine them to the facts as proven, on which alone, instructions can be properly raised."

Ewing v. *Runkle*, 20 Ill., 464.

Instructions not based on evidence should not be given.

C. B & Q. Railroad Co. v. *George*, 19 Ill., 518.

Burnet v. Fulton / Jones Law 544

The seventh instruction asked by the plaintiff is objectionable in form and substance.

The jury are instructed that they are at liberty to give the plaintiff $5,000 damages on this evidence, provided they think he is entitled to that amount.—The amount of damages laid in the declaration is no criterion for the jury, and they ought not to have their attention directed to it as forming any basis for their verdict.

4.

The Court erred in refusing the 5th instruction asked by the defendant below, and in giving the third instruction asked by the plaintiff.

The 5th instruction asked by the defendant is as follows:

5. The gist and foundation of this action of slander is malice; the question of malice is a question for the jury to decide; and if they find from the testimony that the words used by defendant were spoken during a quarrel, in heat and passion without malice, then the jury must find defendant not guilty.

Prima facie, slanderous words in law imply malice. If the jury find that they were spoken in heat and passion, without malice, does the law require them to find the defendant guilty?

"The speaking of actionable words is evidence of malice. Malice is the gist of this action. It has been held in Massachusetts and other States, that words spoken through mere heat of passion are not actionable, and I think very justly, *as it evidences a want of deliberation and malice which is the gravamen of this action.* The instructions therefore, given for the defendant, were proper as falling within these principles. They contain the summary of the law, governing the case; that the ground of the action was malice; that the jury were judges of that malice: that all the facts and conversations were to be weighed

in ascertaining it; *and if they believe he did not speak the words with that intent, they should find for the defendant.*" *McKee* v. *Ingalls*, 4 Scam., 33.

In the case last cited the words were *per se* actionable.

Passion excludes the presumption of malice.

People v. *Garretson*, 2 Wheeler C. C., 347.
U. S. v. *Thayer*, 2 Wheeler C. C., 503.

5.

The Circuit Court erred in permitting the 5th instruction asked by defendant to go to the jury, and in allowing them to take the same to their jury room, after the Court had refused said instruction, and written the word "Refused" on the margin of the same.

It should seem that the practice of giving to the jury all the instructions which have been asked, including those given and those refused, is erroneous.

It is the province of the Court to instruct the jury as to the law, and not to confuse them by giving them propositions declared not to be the law. A certain proposition of law in a particular case may be incorrect—the converse of it may be equally remote from the truth—and a refused instruction given to a jury cannot fail to prejudice the case of the party asking it.

"Few know the secret and insiduous manner by which impressions are made on the minds of a jury, or how slight the operating cause may be."

Rawson v. *Curtis*, 19 Ill., 481.

And yet this practice to some extent prevails. The instructions are all read to the jury and left with them, those given and those refused, and they are left to grope their way through them and around them, into the light, if they can.

Here the Court refused the instruction and handed it to the jury. The defendant objected to having the instruction go to the jury at all, after it was refused, but the Court overruled the objection. The jury took the instruction with the others, and retained it with them in their jury room, until they returned their verdict.

The rule is that if material papers, not read in evidence, are handed to the jury by mistake, it is sufficient cause for a new trial, and if the attention of the Court is drawn to the matter, and the Court decide to allow them to go to the jury and exception is taken, it is error.

19 Ill., 484.

And this even if they have been expressly instructed to disregard them. Ib. 481.

6.

The appellant after verdict, moved the Court for a new trial; in arrest of judgment; to set aside the verdict of the jury; to set aside the verdict and enter judgment for defendant; to issue *venire facias de novo*.

The only point made by plaintiff on argument of the motions, was that two new trials had already been granted, and on this ground the Court overruled the motions and entered judgment. The statute provides (Scates' statute, 260,) "if either party may wish to except to the verdict or for other causes to move for a new trial, or in arrest of judgment, he shall, before final judgment be entered, give, by himself or counsel, to the opposite party or his counsel, the points in writing particularly specifying the grounds of such motion, and shall also furnish the judge with a copy of the same, and final judgment shall thereupon be stayed until such motion can be heard by the Court. But no more than two new trials shall be granted to the same party in the same cause."

This act was passed in 1827. The act allowing exceptions to the overruling of motions for new trials by the Circuit Court was not adopted until 1837.—The act of 1827 was directory to the Circuit Caurt and designed to limit its discretion in granting new trials, but has no application to the Supreme Court unless to preclude the defendant from assigning the decision of the Circuit Court in overruling his motion for a new trial, for error. This Court has decided that the motion for a new trial in criminal cases cannot be assigned for error, yet the Court will reverse the judgment for other errors, and if the verdict is not sustained by, or is contrary to the evidence, or contrary to law.

Scates' Comp. 616
Trott v. West 10 Yerg. 500
Ferrell v. Alder 2 Swan 78
Burton v. Braskeau 3 A. K. Marshall 1132

In the case of *Tindal et. al.* v. *Brown*, 1 Durnford & East, 164–167, (1 T. R., 94), the defendant moved in King's Bench for a third trial—two juries having found against him. *Erskine* for the plaintiff, said the amount in litigation was small—that in *Metcalf* v. *Hall* the Court had refused to grant a third trial. The Court say, (top paging 97) "that though it was true in general that the Court would refuse to grant a new trial when the sum in litigation was small, yet that rule did not apply when the judgment had been given against law.—That the reason why the Court refused granting a third trial in the case of *Metcalf* and *Hall* was because the plaintiff had proved his deed under a commission of bankrupt, which had issued against the drawers of the bill between the time of the verdict and the motion for a new trial."

The rule for a new trial was made absolute.

Note (*a*) on the third trial a special verdict was found containing the same

facts, on which the Court gave judgment for the defendant; which was unanimously affirmed in the Exchequer Chamber.

"From the whole of the evidence, the party might have altered the endorsement or credit on his own note, and still no criminality attach to his conduct." Judgment was reversed because evidence did not sustain the verdict.

Breese 233.

In *Joseph* v. *Fisher*, 3 Scam., 137, the Court say the evidence was not sufficient to justify the verdict, and they therefore reversed the judgment.

The Court will reverse a judgment when the verdict is contrary to law, or is not sustained by the evidence.

Lincoln v. *The People*, 20 Ill., 367.

In *Gutchins* v. *The People*, 21 Ill., 644, judgment was reversed and defendant discharged, because the evidence did not make out a case, and the Court say (p. 645). "The proof of an offence under one section of the statute cannot support a conviction under the other. That is too plain to require discussion."

When a verdict is manifestly against the evidence, it will be reversed.

School Inspectors v. *Hughes*, 24 Ill., 231.
Boyle v. *Leving*, Ib. 223.
Baker v. *Prichett*, 16 Ill., 66.
Higgins v. *Lee*, Ib. 500.

This Court has decided that the practice of instructing the jury to find for the defendant as in case of non suit, has never been adopted in this State, and is not sanctioned by our practice.

The People ex rel v. *Browne*, 3 Gilm., 88.
Stumps v. *Kelley*, 22 Ill., 142.

"The proper motion seems to be to request the Court to instruct the jury that it is their duty, in the absence of testimony proving the issues on the part of the plaintiff, to find a verdict for the defendant."

Amos v. *Sinnott*, 4 Scam., 447.

In this case the defendant asked the Court to instruct the jury that the speaking of harsh words by the plaintiff to defendant previous to the day of the assault, would be no defense to a charge of an assault with a deadly weapon—and would be immaterial to the issue, and that upon such proof they should find for

the defendant. Had the jury found their verdict according to the law under these instructions, they must have found for the defendant.

7.

The Court erred in overruling the defendant's motion in arrest of judgment.

The finding of an erroneous verdict by the jury is good cause for arrest of judgment.

The verdict will be set aside and judgment arrested for error of the jury.

Dorr v. *Fenno*, 12 Pick., 527.
Harvey v. *Pickett*, 15 Johns., 87.
Talmadge v. *Northrop*, 1 Root, 454.
Howard v. *Cobb*, 3 Day, 309.

In *Warner* v. *Robinson*, 1 Root Reports, 194: Motion in arrest, on the ground that the jury erred in assessing the amount of the plaintiff's damages. Held good cause for arrest. Judgment was arrested.

Error or misconduct on the part of the jury, it seems would be proper ground for a new trial, but it also appears to be good cause in arrest of judgment.

In *Kellogg* v. *Wilder*, 15 Johns., 455, the Court say that independent of misconduct of the jury, the verdict is against the evidence. If the Court be of opinion that error has been committed by the jury, they will reverse the judgment, although no motion for a new trial could be made in the Court below, (*Rose* v. *Smith*, 4 Cow., 19.) because it is an evil for which some remedy must be had. And it is not perceived that an error in assessment, or a 'chance verdict,' found by taking the quotient of the several sums designated by jurors, is any greater evil to the parties than a verdict contrary to law and evidence.—Such a verdict is found upon an 'illegal principle.' This is apparent without inquiry of the jury, and should be set aside. 12 Pick., 526; 9 Ib., 431-2; 6 Ib., 208.

TURNER & INGALLS, for Appellant.

Bryant v. Com. Ins. Co. 13 Pick 543
Van Rensselaer v. Dole 1 Johns Cas. 279.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, APRIL TERM, A. D. 1861.

GEORGE WOLBRECHT,
Appellant.
vs.
CHARLES BAUMGARTEN,
Appellee.

APPEAL FROM STEPHENSON.

This was an action of case at common law, for slander, brought by appellee in the Circuit Court of Winnebago, and thence taken by change of venue to the Stephenson Circuit Court.

5 The first count of the declaration charges: For that whereas the said Plaintiff (appellee) always was and is a good, true and honest citizen of this state, and (until the grievances hereinafter mentioned) unsuspected of any perjury, false swearing, or other crime whatever, and thereby had deservedly gained the good opinion of all his neighbors, &c.; and whereas, before the speaking and publishing of the false and scandalous words in this count mentioned, to wit: on the fifth day of November, A. D. 1857, at the city of Freeport in the county of Stephenson, &c., to wit: in the county of Winnebago, &c., the said Charles Baumgarten, plaintiff in this suit, had duly appeared before Samuel Sankey, Esq., a Justice of the Peace in and for the town of Freeport, in the county of Stephenson and state of Illinois, duly elected and sworn as such Justice of the Peace, and being then and there a witness on the trial of a certain cause before said Justice of the Peace, in which the People of the State of Illinois was plaintiff, and George Wolbrecht was defendant, and being then and there sworn by the said Samuel Sankey, Justice of the Peace as aforesaid, to testify upon the trial of said cause, (the said Samuel Sankey, Esq., as such Justice having full power to administer such oath to the plaintiff,) and after having been duly sworn as aforesaid, the said plaintiff did on oath testify and make certain statements material to the issue in the said cause then pending before the said Samuel Sankey, Esq., Justice of the Peace as aforesaid. Yet the said George Wolbrecht, defendant, well

6 knowing the premises, &c., and then and there maliciously, and falsely intending to have it believed, that the said Charles Baumgarten, plaintiff, had been guilty of false swearing and perjury, before the aforesaid Justice of the Peace, in the trial of the aforesaid cause, and that he the said plaintiff, was guilty of perjury therein, afterwards, to wit: on the thirteenth day of November, A. D. 1857, at said county of Stephenson, to wit: at, &c., in a certain conversation which said Wolbrecht, defendant, then and there had with said Charles Baumgarten, plaintiff, in the presence and hearing of divers good and worthy citizens, &c., of and concerning, and to the said Charles Baumgarten, plaintiff, and of and concerning his aforesaid oath, and his evidence under said oath, on the trial of the cause aforesaid, before Samuel Sankey, Esq., Justice of the Peace as aforesaid, then and there in a loud voice, and in the presence and hearing of the aforesaid citizens, falsely, wickedly, wrongfully and maliciously uttered, spoke, published and proclaimed, of and concerning and to the said Charles Baumgarten, plaintiff, and of and concerning his oath and evidence as aforesaid, these false, scandalous, malicious and defamatory words following, that is to say: "You" (meaning the said plaintiff) "have sworn to a damned lie," (meaning the oath and evidence aforesaid, so taken as aforesaid by and before Samuel Sankey, Justice of the Peace as aforesaid). "You" (meaning the plaintiff) "have sworn to a damned lie before Samuel Sankey, and I can prove it." "You" (meaning the said plaintiff) "swore to a lie." "You" (meaning the said plaintiff) "have sworn to a lie. I can

7 prove it by your own daughter." "You" (meaning the said plaintiff) "have sworn that you never spoke to me previous to that time in the street, and that is a damned lie, and I can prove it; and now go and sue me in the Court if you dare; you had better take down the names of witnesses." "You" (meaning the said plaintiff)

"have sworn falsely, and I can prove it." "You" (meaning the said plaintiff) "have committed perjury." "You" (meaning the said plaintiff) "committed perjury, and I can prove it by your daughter." "You committed perjury." "You swore falsely." "You swore to a lie." "You swore to a damned lie." "I would not believe you under oath." "You are a damned liar, and you swore to a damned lie before Sankey." "You swore falsely before Samuel Sankey on the trial."

Meaning thereby that the said plaintiff had committed the crime of perjury, all of which is to the great damage of said plaintiff.

The second count charges that said plaintiff afterwards, &c., on the thirteenth day of November, A. D. 1857, at, &c., was and is a good, true and honest citizen, &c., and never was guilty of the crimes hereinafter laid to his charge; nevertheless the said defendant well knowing, &c., but contriving and intending to injure, defame and slander the plaintiff in his good name, to wit: on, &c., at, &c., in presence of divers good and worthy citizens, &c., and in a loud voice falsely, &c., spoke, published, &c.,
8 of and concerning and to the said plaintiff, in order to have it believed that he, the said plaintiff, was guilty of the crime of perjury, the following false, &c., words, that is to say: "You" (meaning said plaintiff) "swore to a damned lie." "You" (meaning said plaintiff) "have sworn to a damned lie before Samuel Sankey," (meaning that the plaintiff had committed perjury). "You" (meaning said plaintiff) "have sworn to a damned lie before Samuel Sankey, and I can prove it." "You" (meaning said plaintiff) "swore to a lie." "You" (meaning said plaintiff) "have sworn to a lie, I can prove it by your own daughter." "You" [meaning the said plaintiff] "have sworn that you never spoke to me previous to that time in the street, and that is a damned lie, and I can prove it; and now go and sue me if you dare." "You" [meaning said plaintiff] "swore to a damned lie, and I can prove it by your daughter." "You" [meaning the said plaintiff] "have sworn falsely, and I can prove it."

Meaning thereby that the plaintiff had committed the crime of perjury, all of which is to the great damage of said plaintiff.

The third count charges that said plaintiff afterwards, on the 13th day of November, A. D. 1857, at, &c., was and is a good and true man, &c., and never was guilty of the crimes hereinafter laid to his charge, nevertheless the said defendant well knowing, &c., but contriving and intending to injure, defame and slander said plaintiff
9 in his good name, &c., to wit: on the 13th of November, 1857, at, &c., in the presence and hearing, &c., of and concerning said plaintiff, these false, &c., words, did speak, publish and declare, to wit: "You" [meaning said plaintiff] "swore to a damned lie." "You" [meaning said plaintiff] "have sworn to a damned lie, and I can prove it." "You" [meaning the said plaintiff] "swore to a damned lie before Samuel Sankey, and I can prove it." "You" [meaning said plaintiff] "swore to a lie." "You" [meaning said plaintiff] "have sworn to a lie, and I can prove it by your own daughter." "You" [meaning said plaintiff] "have sworn that you never spoke to me previous to that time in the street, and that is a damned lie, and I can prove it; and now go and sue me if you dare; you had better take down the names of the witnesses." "You" [meaning said plaintiff] "have sworn falsely." "You" [meaning said plaintiff] "have sworn false before Sankey, and I can prove it by your oldest daughter."

Meaning thereby that the said plaintiff had committed the crime of perjury.

Damages laid at $5000.

12 To this declaration defendant filed his plea of the general issue.

13 On the 19th day of September, 1859, at the September term of the Stephenson Circuit Court, the cause came on for trial. The Jury found defendant guilty, and assessed the damages at $500. Thereupon the defendant moved the Court for a new trial and in arrest of judgment. And afterwards, on the 24th day of September,

came on to be heard said defendant's motions, and the Court granted a new trial, conditioned that defendant pay costs of term within 30 days. Leave to the plaintiff to amend his declaration and add another count. Leave to defendant to file additional pleas.

16 Afterwards plaintiff filed 4th count to his declaration, to which defendant pleaded, and plaintiff then entered nolle prosequi to his 4th count.

17 Afterwards on the 7th day of April, 1860, at the April term of said Court, said cause was again tried, and the Jury found defendant guilty, and assessed the damages at $150. Whereupon, defendant moved for a new trial and in arrest of judgment.

18 And afterwards, on the first day of May, came on to be heard said defendant's motion for a new trial and in arrest of judgment, whereupon the Court granted a new trial.

19 And afterwards, on the fourth day of September, 1860, it being of the September term of said Court, said cause again came on for trial, whereupon a jury came, who were duly elected, tried and sworn, &c., and the following evidence was adduced.

PLAINTIFF'S TESTIMONY.

23 *Samuel Sankey sworn.*—Witness testified: I have known the plaintiff and defendant about seven years; I was acting as Justice of the Peace about four years; I was present at a conversation between plaintiff and defendant, at my office in this city, about the 13th of November, 1857; there was a suit pending where Baumgarten was complaining witness and Wolbrecht defendant; the parties had some talk; the words I remember were, Baumgarten said to Wolbrecht you have ruined my family; Wolbrecht said he was a liar; they exchanged words in that way; there was a good deal said; I only remember the specific charges; Wolbrecht said he had sworn to a damned lie before me, and he could prove it by his own daughter; he was speaking to Mr. Baumgarten; he resented it, and Wolbrecht said he could prove it by his own daughter; and then said that he had sworn before Squire Sankey that he hadn't spoken to
24 him prior to that time; he said you had better sue me in Court, and you had better take down the names of your witnesses; Mr. Wolbrecht said so; Daniel S. Bogar and Abel Smith were present; I was engaged at the time and paid no attention until these particular charges were made; there had been a hearing before me between the same parties about the 5th of November, 1857, and now they were in on the 13th, and were talking about the other suit on the 5th; Baumgarten was complaining witness in the suit of the 5th; he was sworn by me, and testified in that case; Baumgarten says to Wolbrecht, you have ruined my family; Wolbrecht replied to him, you lie; he then said he had sworn to a lie before Squire Sankey, and he could prove it by his own daughter; you swore before Squire Sankey that you hadn't spoken to me before that time; they were speaking of the 5th of November; that is all there is of it; they were talking about what had been sworn to at that time; Mr. Burchard was present as Wolbrecht's attorney on the 5th of November; Kean appeared for Baumgarten. (Defendant objected to evidence of what took place at the trial on the 5th November, until the issue then on trial is proved. Objection overruled and excepted to by defendant.) Mr. Burchard in cross examining Baumgarten, asked him whether he had not frequently before this time used insulting language to Wolbrecht, and tried to pick a quarrel with him, and referred to one particular time before my office, and asked him if he had not then used insulting language; Baumgarten said that he had not.

Mr. Burchard asked him whether he hadn't, previous to the 5th of November, at various times, used insulting language, and whether he did not on a certain occasion, opposite those buildings, use insulting language; Baumgarten said he had not; I don't remember any other questions than I have stated; on the 13th they were talking this
25 matter over; think Wolbrecht said you are a liar; you swore to a lie before Squire

Sankey, and I can prove it by your own daughter; think he said you swore to a lie before Squire Sankey, also Samuel Sankey; it was in my office in Freeport, Stephenson county, Illinois.

Cross.—On the occasion of the conversation on the 13th, Wolbrecht was angry; I was sitting inside the railing in my office writing a deed; Wolbrecht was angry and boisterous; Baumgarten did not appear as much excited as Wolbrecht; some one, I think it was Kean, came to me the next day with the words written down, and asked me if I could swear to them; should not probably remember a word of it if he had not come to me the next day.

L. W. Guiteau, sworn.—Witness testified: I have searched for the papers, the complaint and warrant in the case of the People *vs.* Wolbrecht, before Sankey on the 5th of November, 1857; I could not find them; commenced to search for them about fifteen minutes since; I have not been requested to search for them before this trial;
26 I do not know that these papers were left with me; think if they were they went before the Grand Jury; papers of that kind when sent to the Grand Jury and no indictment is found, are frequently not returned; such papers are kept in a particular place by themselves in my office.

Samuel Sankey—Recalled by plaintiff to give secondary evidence of the contents of the papers, in the case of the People *vs.* Wolbrecht. (Counsel for defendant objected, on the ground that no proper foundation had been laid for the introduction of secondary evidence of the contents of the papers. The objection was overruled by the Court, and witness was allowed to give such evidence. Counsel for defendant excepted. The witness testified: The charge was that Mr. Wolbrecht had made an assault on Mr. Baumgarten, and threatened to shoot him; that was the case in which Mr. Burchard examined Baumgarten.

27 (The Docket of the witness containing his record of the suit was here offered in evidence by plaintiff. Defendant objected, on the ground that the papers of the suit were best evidence, and had not been produced. Objection overruled by the Court, to which ruling of the Court in admitting such evidence defendant excepted.)

The record of the docket was then read in evidence—case of the People *vs.* George Wolbrecht—November 5, 1857, on the oath of Charles Baumgarten a warrant issued to W. Smith, signed by J. C. Kean, Esq., a Justice of the Peace, returnable instanter. Warrant returned same day with defendant in custody; defendant pleads not guilty; applies for change venue which is granted, and papers came to me; whereupon cause is called for trial, and parties declared themselves ready, and Charles Baumgarten, W. Youngman, W. Best, and D. B. Langley were sworn. After hearing the testimony it is ordered by the Court that the defendant is guilty, and that he give bonds in $1000, &c.

Daniel S. Bogar, sworn.—Witness testified: I know plaintiff and defendant; I heard Sankey's testimony; I was in Sankey's office on that occasion; heard some words spoken there; Wolbrecht said, you swore to a lie, you swore to a damned lie and I can prove it by your own daughter; Wolbrecht said that; he was talking to Baumgarten; Sankey said after they went out of the office that we would have to be
28 witnesses; they were both excited and loud; I was reading a newspaper at the time.

Cross.—This was the same conversation that Sankey has sworn to; the parties were excited and speaking loud and in passion.

Frederick Bues, sworn.—Witness testified: I know Wolbrecht; don't know what he is worth; believes he owns the lot his store is on; think he is worth about $2,000 or $3,000.

David Seem, sworn.—Witness testified: Heard Wolbrecht say about a year ago he owned land in Missouri; think it was between 1,000 and 1,300 acres; can't say whether he owns it or not; I should think so far as I know he was worth from $3,000 to $4,000.

DEFENDANT'S TESTIMONY.

29 *U. D. Meacham sworn.*—Witness testified: I was present 13th November, 1857, at a trial before Sankey, in which the People were plaintiffs and Wolbrecht defendant; Sankey and Bogar were present; I was there as counsel for Wolbrecht; after we went in, a dispute arose between Baumgarten and Wolbrecht; they got very angry; Baumgarten remarked that he would swear to such a fact; Wolbrecht replied, you swear so, and you swear to a damned lie, and I can prove it by your own daughter; he spoke imperfect English; the expression he used was, you swear so, and you swear a damned lie, and I can prove it by your own daughter; I went in with Wolbrecht when he went in; I remained there, and he came out with me; I heard all the conversation; they were both very angry; what was said was in heat and passion; I paid particular attention at the time.

30 *Horatio C. Burchard sworn.*—Witness testified: I was counsel for Wolbrecht in a cause before Kean; there were two complaints against him; they were the same cases that Sankey and other witnesses have testified about; I was present at the trial on the 5th November, before Sankey, as Wolbrecht's counsel; that was a complaint by Baumgarten for an assault on him by Wolbrecht with a deadly weapon with intent to kill; the charge was that the assault was made that day, Nov. 5, 1857; I think the last trial on the 13th was a complaint to bind Wolbrecht over to keep the peace; at the trial on the 5th of November the question was asked Baumgarten whether he had spoken to Mr. Wolbrecht previous to the occasion of the alleged assault; Wolbrecht suggested that I should ask Baumgarten whether he had spoken to him before that day; Baumgarten said he had not; then I called his attention to a place in Stephenson street, at some time previous to the day of the assault; Baumgarten said that he had not spoken to him at that time; I asked the question because Wolbrecht suggested it; I did not see the object of the question.

The foregoing is all the evidence introduced at the trial of said cause.

Whereupon the counsel for the plaintiff asked the Court to instruct the Jury as follows, to wit:

PLAINTIFF'S INSTRUCTIONS.

1. That if the Jury believe from the evidence that the defendant maliciously said
31 to and of, and concerning the plaintiff, "You swore to a damned lie," intending thereby to impute the crime of perjury in a matter material to the issue in a judicial proceeding before that time had before Samuel Sankey, when speaking in reference to such proceeding, as charged in the declaration, they should find the defendant guilty and assess the plaintiff's damages.

2. That if the Jury believe from the evidence that the defendant is guilty of speaking the words as charged in the declaration, with the meaning as therein charged, and that the testimony charged to be false was material to the issue in a judicial proceeding before then had, as charged in the declaration, and that the words were spoken in reference to such proceeding, then in the speaking of such words the law implies malice.

3. If the Jury believe from the evidence that slanderous words, as charged in the declaration, with the intent to impute the crime of perjury, have been spoken by the defendant, it is evidence that the speaker of such words was actuated by malice, and it is not sufficient proof of itself, that a malicious intent was wanting in such speaker because he spoke such words when angry and in the heat of passion.

4. The plaintiff in this case is not obliged to prove all the words charged in the declaration; but if he prove some of them which are laid in the declaration and as charged therein, and which are actionable and slanderous, and that they were spoken
32 with the intent to impute the crime of perjury, it is sufficient.

5. The Jury, if they find the defendant guilty, may consider not only the injury incurred by the plaintiff, but also, if the injury was willful, his mental sufferings.

6. If the Jury find the defendant guilty, then the wealth of the defendant is a proper subject for the consideration of the Jury in the assessment of damages.

7. The Jury in this case, if they find the defendant guilty, are limited in the amount of damages which they may give in this suit only by the amount claimed at the end of the plaintiff's declaration, if they think the plaintiff is entitled to that amount from the evidence.

Which said instructions were given by the Court, and to the giving of which said instructions the counsel for the defendant then and there excepted.

The counsel for the defendant thereupon asked the Court to instruct the Jury as follows, to wit:

DEFENDANT'S INSTRUCTIONS.

1. This action cannot be maintained unless it has been proved to the Jury: 1. That the defendant spoke the words, or some of them substantially as charged in the declaration charging the plaintiff with perjury. 2. That the words were spoken of and concerning a judicial proceeding before Samuel Sankey, a Justice of the Peace, as charged in the declaration. Nor, if it appears from the evidence that the testimony
33 of the plaintiff charged to be false by the defendant, was not *material to the issue* on trial before said Sankey, when it was given.

2. False swearing is not perjury when the matter sworn to is not material to the issue on trial, and it is not slander under this action to charge a man with swearing falsely in such case, because it does not imply perjury.

3. Words spoken do not justify an assault, and it would be no defence to a charge of assaulting with a deadly weapon, to prove that the person on whom such assault was made had used harsh words to the person making the assault, and such proof would be *immaterial to the issue* in such case.

4. If the Jury find from the evidence that that part of the testimony of Baumgarten, which it is alleged the defendant Wolbrecht charged was false, was immaterial to the issue on trial when such testimony was given, then the Jury must find their verdict for the defendant.

6. If the Jury find from the testimony that the only charge that the defendant made against the plaintiff on the occasion before Esq. Sankey was, "If you swear" to a certain thing "then you swear to a lie, and I can prove it by your own daughter,"
34 such charge was not slander and will not sustain this action.

7. If the Jury believe from the evidence that the defendant's only charge of false swearing was that at a trial of defendant, Wolbrecht, on a charge of an assault with a deadly weapon, the plaintiff had testified that "he (the plaintiff) had not spoken to the defendant before that day," then the testimony charged to be false was not material to the issue at the trial, and the Jury must find the defendant not guilty.

8. The malice which the law implies when words are spoken charged to be slanderous, may be rebutted by circumstances showing a want of malice in the party speaking.

Which said instructions were given by the Court.

The counsel for the defendant also asked the Court to give (fifthly) the following instruction to the Jury, to wit:

5. The gist and foundation of this action of slander is malice; the question of malice is a question for the Jury to decide; and if they find from the testimony that the words used by defendant were spoken during a quarrel, in heat and passion, without malice, then the Jury must find the defendant not guilty.

35 Which said instruction was refused by the Court, and to which ruling of the Court in refusing said instruction the said defendant then and there excepted. And after the Court had refused the said instruction, and had written the word "Refused" on the margin thereof, the Court handed the same to the Jury, and the counsel for said defendant objected to having the said instruction go to the Jury, after the same had

been so refused by the Court, but the Court overruled said objection and permitted said instruction so refused as aforesaid to go to the Jury, and to be taken by them to their Jury room. To which ruling of the Court the said defendant then and there excepted.

Whereupon the Jury retired, &c., and afterwards on the 5th day of September, 1860, at said September term of said Court, returned into Court their verdict, finding the defendant guilty, and assessing the damages at $549.50.

Whereupon the counsel for said defendant moved the Court:

1. For a new trial.
2. In arrest of judgment.
3. To set aside the verdict of the Jury.
4. To set aside the verdict and enter judgment for the defendant in this cause.
5. That a *venire facias de novo* issue in said cause.
6. That judgment *non obstante veredicto* be entered for defendant.

And the said defendant assigned the following reasons in writing in support of his said motions, to wit:

1. The verdict is contrary to and not sustained by the evidence, or any part of it.
2. The verdict is contrary to law.

36 3. The Court allowed improper evidence to go to the Jury on the part of the plaintiff.

4. The Court erred in giving the instructions asked by the plaintiff.
5. The instructions asked by the plaintiff and each of them were abstract; there was no proof in the case to sustain them, and they should have been refused by the Court.
6. The Court erred in refusing the fifth instruction asked by the defendant.
7. The Court erred in permitting the fifth instruction asked by the defendant to be given to the Jury, and by them taken with them to their Jury room, after the Court had refused said instruction, and had written the word "Refused" on the margin thereof.
8. Under the law, and under the instructions asked by the defendant the Jury were bound to find a verdict for the defendant, and the verdict should be set aside because the Jury found against the law and contrary to the instructions of the Court.
9. The damages are excessive.

22 Which said motions coming on to be heard on the 22d day of September, 1860, were severally overruled by the Court, for the reason that two new trials had been granted in said cause.

Whereupon the Court rendered judgment in favor of said plaintiff and against said defendant, for the said sum of $549.50 and costs, and awarded execution for the same.

37 To which said decision of the Court in overruling the said several motions of the said defendant and each of them, and in rendering the judgment aforesaid, the counsel for the defendant did then and there except.

ERRORS ASSIGNED ON THE RECORD.

1. The Court erred in permitting improper testimony to be given to the Jury on the part of said plaintiff.
2. The Court erred in giving the instructions asked by the plaintiff.
3. The Court erred in refusing the 5th instruction asked by the defendant.
4. The Court erred in permitting the 5th instruction asked by the defendant to be given to the Jury and taken to their Jury room, after the Court had refused said instruction and had written the word "Refused" on the margin of the same.
5. The Court erred in overruling the defendant's motion for a new trial.
6. The Court erred in overruling the defendant's motion in arrest of judgment.
7. The Court erred in overruling the defendant's motion to set aside the verdict of the Jury.

8. The Court erred in overruling the defendant's motion to set aside the verdict and enter judgment for the defendant.

9. The Court erred in overruling the defendant's motion to enter judgment for the defendant *non obstante veredicto.*

10. The Court erred in overruling the defendant's motion to issue a *venire facias de novo* in this cause.

TURNER & INGALLS, for Appellant.

11, The court erred in rendering the judgment aforesaid against appellant

12. The verdict is contrary to law, and to the evidence

13 The verdict and judgment were against appellant, and should have been in his favor

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, APRIL TERM, A. D. 1861.

GEORGE WOLBRECHT,
Appellant.
vs.
CHARLES BAUMGARTEN,
Appellee.

APPEAL FROM STEPHENSON.

This was an action of case at common law, for slander, brought by appellee in the Circuit Court of Winnebago, and thence taken by change of venue to the Stephenson Circuit Court.

5 The first count of the declaration charges: For that whereas the said Plaintiff (appellee) always was and is a good, true and honest citizen of this state, and (until the grievances hereinafter mentioned) unsuspected of any perjury, false swearing, or other crime whatever, and thereby had deservedly gained the good opinion of all his neighbors, &c.; and whereas, before the speaking and publishing of the false and scandalous words in this count mentioned, to wit: on the fifth day of November, A. D. 1857, at the city of Freeport in the county of Stephenson, &c., to wit: in the county of Winnebago, &c., the said Charles Baumgarten, plaintiff in this suit, had duly appeared before Samuel Sankey, Esq., a Justice of the Peace in and for the town of Freeport, in the county of Stephenson and state of Illinois, duly elected and sworn as such Justice of the Peace, and being then and there a witness on the trial of a certain cause before said Justice of the Peace, in which the People of the State of Illinois was plaintiff, and George Wolbrecht was defendant, and being then and there sworn by the said Samuel Sankey, Justice of the Peace as aforesaid, to testify upon the trial of said cause, (the said Samuel Sankey, Esq., as such Justice having full power to administer such oath to the plaintiff,) and after having been duly sworn as aforesaid, the said plaintiff did on oath testify and make certain statements material to the issue in the said cause then pending before the said Samuel Sankey, Esq., Justice of the Peace as aforesaid. Yet the said George Wolbrecht, defendant, well
6 knowing the premises, &c., and then and there maliciously, and falsely intending to have it believed, that the said Charles Baumgarten, plaintiff, had been guilty of false swearing and perjury, before the aforesaid Justice of the Peace, in the trial of the aforesaid cause, and that he the said plaintiff, was guilty of perjury therein, afterwards, to wit: on the thirteenth day of November, A. D. 1857, at said county of Stephenson, to wit: at, &c., in a certain conversation which said Wolbrecht, defendant, then and there had with said Charles Baumgarten, plaintiff, in the presence and hearing of divers good and worthy citizens, &c., of and concerning, and to the said Charles Baumgarten, plaintiff, and of and concerning his aforesaid oath, and his evidence under said oath, on the trial of the cause aforesaid, before Samuel Sankey, Esq., Justice of the Peace as aforesaid, then and there in a loud voice, and in the presence and hearing of the aforesaid citizens, falsely, wickedly, wrongfully and maliciously uttered, spoke, published and proclaimed, of and concerning and to the said Charles Baumgarten, plaintiff, and of and concerning his oath and evidence as aforesaid, these false, scandalous, malicious and defamatory words following, that is to say: "You" (meaning the said plaintiff) "have sworn to a damned lie," (meaning the oath and evidence aforesaid, so taken as aforesaid by and before Samuel Sankey, Justice of the Peace as aforesaid). "You" (meaning the plaintiff) "have sworn to a damned lie before Samuel Sankey, and I can prove it." "You" (meaning the said plaintiff) "swore to a lie." "You" (meaning the said plaintiff) "have sworn to a lie. I can
7 prove it by your own daughter." "You" (meaning the said plaintiff) "have sworn that you never spoke to me previous to that time in the street, and that is a damned lie, and I can prove it; and now go and sue me in the Court if you dare; you had better take down the names of witnesses." "You" (meaning the said plaintiff)

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, APRIL TERM, A. D. 1861.

GEORGE WOLBRECHT,
Appellant.
vs.
CHARLES BAUMGARTEN,
Appellee.

APPEAL FROM STEPHENSON.

This was an action of case at common law, for slander, brought by appellee in the Circuit Court of Winnebago, and thence taken by change of venue to the Stephenson Circuit Court.

5 The first count of the declaration charges: For that whereas the said Plaintiff (appellee) always was and is a good, true and honest citizen of this state, and (until the grievances hereinafter mentioned) unsuspected of any perjury, false swearing, or other crime whatever, and thereby had deservedly gained the good opinion of all his neighbors, &c.; and whereas, before the speaking and publishing of the false and scandalous words in this count mentioned, to wit: on the fifth day of November, A. D. 1857, at the city of Freeport in the county of Stephenson, &c., to wit: in the county of Winnebago, &c., the said Charles Baumgarten, plaintiff in this suit, had duly appeared before Samuel Sankey, Esq., a Justice of the Peace in and for the town of Freeport, in the county of Stephenson and state of Illinois, duly elected and sworn as such Justice of the Peace, and being then and there a witness on the trial of a certain cause before said Justice of the Peace, in which the People of the State of Illinois was plaintiff, and George Wolbrecht was defendant, and being then and there sworn by the said Samuel Sankey, Justice of the Peace as aforesaid, to testify upon the trial of said cause, (the said Samuel Sankey, Esq., as such Justice having full power to administer such oath to the plaintiff,) and after having been duly sworn as aforesaid, the said plaintiff did on oath testify and make certain statements material to the issue in the said cause then pending before the said Samuel Sankey, Esq., Justice of the Peace as aforesaid. Yet the said George Wolbrecht, defendant, well
6 knowing the premises, &c., and then and there maliciously, and falsely intending to have it believed, that the said Charles Baumgarten, plaintiff, had been guilty of false swearing and perjury, before the aforesaid Justice of the Peace, in the trial of the aforesaid cause, and that he the said plaintiff, was guilty of perjury therein, afterwards, to wit: on the thirteenth day of November, A. D. 1857, at said county of Stephenson, to wit: at, &c., in a certain conversation which said Wolbrecht, defendant, then and there had with said Charles Baumgarten, plaintiff, in the presence and hearing of divers good and worthy citizens, &c., of and concerning, and to the said Charles Baumgarten, plaintiff, and of and concerning his aforesaid oath, and his evidence under said oath, on the trial of the cause aforesaid, before Samuel Sankey, Esq., Justice of the Peace as aforesaid, then and there in a loud voice, and in the presence and hearing of the aforesaid citizens, falsely, wickedly, wrongfully and maliciously uttered, spoke, published and proclaimed, of and concerning and to the said Charles Baumgarten, plaintiff, and of and concerning his oath and evidence as aforesaid, these false, scandalous, malicious and defamatory words following, that is to say: "You" (meaning the said plaintiff) "have sworn to a damned lie," (meaning the oath and evidence aforesaid, so taken as aforesaid by and before Samuel Sankey, Justice of the Peace as aforesaid). "You" (meaning the plaintiff) "have sworn to a damned lie before Samuel Sankey, and I can prove it." "You" (meaning the said plaintiff) "swore to a lie." "You" (meaning the said plaintiff) "have sworn to a lie. I can
7 prove it by your own daughter." "You" (meaning the said plaintiff) "have sworn that you never spoke to me previous to that time in the street, and that is a damned lie, and I can prove it; and now go and sue me in the Court if you dare; you had better take down the names of witnesses." "You" (meaning the said plaintiff)

"have sworn falsely, and I can prove it." "You" (meaning the said plaintiff) "have committed perjury." "You" (meaning the said plaintiff) "committed perjury, and I can prove it by your daughter." "You committed perjury." "You swore falsely." "You swore to a lie." "You swore to a damned lie." "I would not believe you under oath." "You are a damned liar, and you swore to a damned lie before Sankey." "You swore falsely before Samuel Sankey on the trial."

Meaning thereby that the said plaintiff had committed the crime of perjury, all of which is to the great damage of said plaintiff.

The second count charges that said plaintiff afterwards, &c., on the thirteenth day of November, A. D. 1857, at, &c., was and is a good, true and honest citizen, &c., and never was guilty of the crimes hereinafter laid to his charge; nevertheless the said defendant well knowing, &c., but contriving and intending to injure, defame and slander the plaintiff in his good name, to wit: on, &c., at, &c., in presence of divers good and worthy citizens, &c., and in a loud voice falsely, &c., spoke, published, &c.,
8 of and concerning and to the said plaintiff, in order to have it believed that he, the said plaintiff, was guilty of the crime of perjury, the following false, &c., words, that is to say: "You" (meaning said plaintiff) "swore to a damned lie." "You" (meaning said plaintiff) "have sworn to a damned lie before Samuel Sankey," (meaning that the plaintiff had committed perjury). "You" (meaning said plaintiff) "have sworn to a damned lie before Samuel Sankey, and I can prove it." "You" (meaning said plaintiff) "swore to a lie." "You" (meaning said plaintiff) "have sworn to a lie, I can prove it by your own daughter." "You" [meaning the said plaintiff] "have sworn that you never spoke to me previous to that time in the street, and that is a damned lie, and I can prove it; and now go and sue me if you dare." "You" [meaning said plaintiff] "swore to a damned lie, and I can prove it by your daughter." "You" [meaning the said plaintiff] "have sworn falsely, and I can prove it."

Meaning thereby that the plaintiff had committed the crime of perjury, all of which is to the great damage of said plaintiff.

The third count charges that said plaintiff afterwards, on the 13th day of November, A. D. 1857, at, &c., was and is a good and true man, &c., and never was guilty of the crimes hereinafter laid to his charge, nevertheless the said defendant well knowing, &c., but contriving and intending to injure, defame and slander said plaintiff
9 in his good name, &c., to wit: on the 13th of November, 1857, at, &c., in the presence and hearing, &c., of and concerning said plaintiff, these false, &c., words, did speak, publish and declare, to wit: "You" [meaning said plaintiff] "swore to a damned lie." "You" [meaning said plaintiff] "have sworn to a damned lie, and I can prove it." "You" [meaning the said plaintiff] "swore to a damned lie before Samuel Sankey, and I can prove it." "You" [meaning said plaintiff] "swore to a lie." "You" [meaning said plaintiff] "have sworn to a lie, and I can prove it by your own daughter." "You" [meaning said plaintiff] "have sworn that you never spoke to me previous to that time in the street, and that is a damned lie, and I can prove it; and now go and sue me if you dare; you had better take down the names of the witnesses." "You" [meaning said plaintiff] "have sworn falsely." "You" [meaning said plaintiff] "have sworn false before Sankey, and I can prove it by your oldest daughter."

Meaning thereby that the said plaintiff had committed the crime of perjury.

Damages laid at $5000.

12 To this declaration defendant filed his plea of the general issue.

13 On the 19th day of September, 1859, at the September term of the Stephenson Circuit Court, the cause came on for trial. The Jury found defendant guilty, and assessed the damages at $500. Thereupon the defendant moved the Court for a new trial and in arrest of judgment. And afterwards, on the 24th day of September,

came on to be heard said defendant's motions, and the Court granted a new trial, conditioned that defendant pay costs of term within 30 days. Leave to the plaintiff to amend his declaration and add another count. Leave to defendant to file additional pleas.

16 Afterwards plaintiff filed 4th count to his declaration, to which defendant pleaded, and plaintiff then entered nolle prosequi to his 4th count.

17 Afterwards on the 7th day of April, 1860, at the April term of said Court, said cause was again tried, and the Jury found defendant guilty, and assessed the damages at $150. Whereupon, defendant moved for a new trial and in arrest of judgment.

18 And afterwards, on the first day of May, came on to be heard said defendant's motion for a new trial and in arrest of judgment, whereupon the Court granted a new trial.

19 And afterwards, on the fourth day of September, 1860, it being of the September term of said Court, said cause again came on for trial, whereupon a jury came, who were duly elected, tried and sworn, &c., and the following evidence was adduced.

PLAINTIFF'S TESTIMONY.

23 *Samuel Sankey sworn.*—Witness testified: I have known the plaintiff and defendant about seven years; I was acting as Justice of the Peace about four years; I was present at a conversation between plaintiff and defendant, at my office in this city, about the 13th of November, 1857; there was a suit pending where Baumgarten was complaining witness and Wolbrecht defendant; the parties had some talk; the words I remember were, Baumgarten said to Wolbrecht you have ruined my family; Wolbrecht said he was a liar; they exchanged words in that way; there was a good deal said; I only remember the specific charges; Wolbrecht said he had sworn to a damned lie before me, and he could prove it by his own daughter; he was speaking to Mr. Baumgarten; he resented it, and Wolbrecht said he could prove it by his own daughter, and then said that he had sworn before Squire Sankey that he hadn't spoken to
24 him prior to that time; he said you had better sue me in Court, and you had better take down the names of your witnesses; Mr. Wolbrecht said so; Daniel S Bogar and Abel Smith were present; I was engaged at the time and paid no attention until these particular charges were made; there had been a hearing before me between the same parties about the 5th of November, 1857, and now they were in on the 13th, and were talking about the other suit on the 5th; Baumgarten was complaining witness in the suit of the 5th; he was sworn by me, and testified in that case; Baumgarten says to Wolbrecht, you have ruined my family; Wolbrecht replied to him, you lie; he then said he had sworn to a lie before Squire Sankey, and he could prove it by his own daughter; you swore before Squire Sankey that you hadn't spoken to me before that time; they were speaking of the 5th of November; that is all there is of it; they were talking about what had been sworn to at that time; Mr. Burchard was present as Wolbrecht's attorney on the 5th of November; Kean appeared for Baumgarten. (Defendant objected to evidence of what took place at the trial on the 5th November, until the issue then on trial is proved. Objection overruled and excepted to by defendant.) Mr. Burchard in cross examining Baumgarten, asked him whether he had not frequently before this time used insulting language to Wolbrecht, and tried to pick a quarrel with him, and referred to one particular time before my office, and asked him if he had not then used insulting language; Baumgarten said that he had not.

Mr. Burchard asked him whether he hadn't, previous to the 5th of November, at various times, used insulting language, and whether he did not on a certain occasion, opposite those buildings, use insulting language; Baumgarten said he had not; I don't remember any other questions than I have stated; on the 13th they were talking this
25 matter over; think Wolbrecht said you are a liar; you swore to a lie before Squire

Sankey, and I can prove it by your own daughter; think he said you swore to a lie before Squire Sankey, also Samuel Sankey; it was in my office in Freeport, Stephenson county, Illinois.

Cross.—On the occasion of the conversation on the 13th, Wolbrecht was angry; I was sitting inside the railing in my office writing a deed; Wolbrecht was angry and boisterous; Baumgarten did not appear as much excited as Wolbrecht; some one, I think it was Kean, came to me the next day with the words written down, and asked me if I could swear to them; should not probably remember a word of it if he had not come to me the next day.

L. W. Guiteau, sworn.—Witness testified: I have searched for the papers, the complaint and warrant in the case of the People *vs.* Wolbrecht, before Sankey on the 5th of November, 1857; I could not find them; commenced to search for them about fifteen minutes since; I have not been requested to search for them before this trial;
26 I do not know that these papers were left with me; think if they were they went before the Grand Jury; papers of that kind when sent to the Grand Jury and no indictment is found, are frequently not returned; such papers are kept in a particular place by themselves in my office.

Samuel Sankey—Recalled by plaintiff to give secondary evidence of the contents of the papers, in the case of the People *vs.* Wolbrecht. (Counsel for defendant objected, on the ground that no proper foundation had been laid for the introduction of secondary evidence of the contents of the papers. The objection was overruled by the Court, and witness was allowed to give such evidence. Counsel for defendant excepted. The witness testified: The charge was that Mr. Wolbrecht had made an assault on Mr. Baumgarten, and threatened to shoot him; that was the case in which Mr. Burchard examined Baumgarten.

27 (The Docket of the witness containing his record of the suit was here offered in evidence by plaintiff. Defendant objected, on the ground that the papers of the suit were best evidence, and had not been produced. Objection overruled by the Court, to which ruling of the Court in admitting such evidence defendant excepted.)

The record of the docket was then read in evidence—case of the People *vs.* George Wolbrecht—November 5, 1857, on the oath of Charles Baumgarten a warrant issued to W. Smith, signed by J. C. Kean, Esq., a Justice of the Peace, returnable instanter. Warrant returned same day with defendant in custody; defendant pleads not guilty; applies for change venue which is granted, and papers came to me; whereupon cause is called for trial, and parties declared themselves ready, and Charles Baumgarten, W. Youngman, W. Best, and D. B. Langley were sworn. After hearing the testimony it is ordered by the Court that the defendant is guilty, and that he give bonds in $1000, &c.

Daniel S. Bogar, sworn.—Witness testified: I know plaintiff and defendant; I heard Sankey's testimony; I was in Sankey's office on that occasion; heard some words spoken there; Wolbrecht said, you swore to a lie, you swore to a damned lie and I can prove it by your own daughter; Wolbrecht said that; he was talking to Baumgarten; Sankey said after they went out of the office that we would have to be
28 witnesses; they were both excited and loud; I was reading a newspaper at the time.

Cross.—This was the same conversation that Sankey has sworn to; the parties were excited and speaking loud and in passion.

Frederick Bues, sworn.—Witness testified: I know Wolbrecht; don't know what he is worth; believes he owns the lot his store is on; think he is worth about $2,000 or $3,000.

David Seem, sworn.—Witness testified: Heard Wolbrecht say about a year ago he owned land in Missouri; think it was between 1,000 and 1,300 acres; can't say whether he owns it or not; I should think so far as I know he was worth from $3,000 to $4,000.

DEFENDANT'S TESTIMONY.

29 *U. D. Meacham sworn.*—Witness testified: I was present 13th November, 1857, at a trial before Sankey, in which the People were plaintiffs and Wolbrecht defendant; Sankey and Bogar were present; I was there as counsel for Wolbrecht; after we went in, a dispute arose between Baumgarten and Wolbrecht; they got very angry; Baumgarten remarked that he would swear to such a fact; Wolbrecht replied, you swear so, and you swear to a damned lie, and I can prove it by your own daughter; he spoke imperfect English; the expression he used was, you swear so, and you swear a damned lie, and I can prove it by your own daughter; I went in with Wolbrecht when he went in; I remained there, and he came out with me; I heard all the conversation; they were both very angry; what was said was in heat and passion; I paid particular attention at the time.

30 *Horatio C. Burchard sworn.*—Witness testified: I was counsel for Wolbrecht in a cause before Kean; there were two complaints against him; they were the same cases that Sankey and other witnesses have testified about; I was present at the trial on the 5th November, before Sankey, as Wolbrecht's counsel; that was a complaint by Baumgarten for an assault on him by Wolbrecht with a deadly weapon with intent to kill; the charge was that the assault was made that day, Nov. 5, 1857; I think the last trial on the 13th was a complaint to bind Wolbrecht over to keep the peace; at the trial on the 5th of November the question was asked Baumgarten whether he had spoken to Mr. Wolbrecht previous to the occasion of the alleged assault; Wolbrecht suggested that I should ask Baumgarten whether he had spoken to him before that day; Baumgarten said he had not; then I called his attention to a place in Stephenson street, at some time previous to the day of the assault; Baumgarten said that he had not spoken to him at that time; I asked the question because Wolbrecht suggested it; I did not see the object of the question.

The foregoing is all the evidence introduced at the trial of said cause.

Whereupon the counsel for the plaintiff asked the Court to instruct the Jury as follows, to wit:

PLAINTIFF'S INSTRUCTIONS.

1. That if the Jury believe from the evidence that the defendant maliciously said
31 to and of, and concerning the plaintiff, "You swore to a damned lie," intending thereby to impute the crime of perjury in a matter material to the issue in a judicial proceeding before that time had before Samuel Sankey, when speaking in reference to such proceeding, as charged in the declaration, they should find the defendant guilty and assess the plaintiff's damages.

2. That if the Jury believe from the evidence that the defendant is guilty of speaking the words as charged in the declaration, with the meaning as therein charged, and that the testimony charged to be false was material to the issue in a judicial proceeding before then had, as charged in the declaration, and that the words were spoken in reference to such proceeding, then in the speaking of such words the law implies malice.

3. If the Jury believe from the evidence that slanderous words, as charged in the declaration, with the intent to impute the crime of perjury, have been spoken by the defendant, it is evidence that the speaker of such words was actuated by malice, and it is not sufficient proof of itself, that a malicious intent was wanting in such speaker because he spoke such words when angry and in the heat of passion.

4. The plaintiff in this case is not obliged to prove all the words charged in the declaration; but if he prove some of them which are laid in the declaration and as charged therein, and which are actionable and slanderous, and that they were spoken
32 with the intent to impute the crime of perjury, it is sufficient.

5. The Jury, if they find the defendant guilty, may consider not only the injury incurred by the plaintiff, but also, if the injury was willful, his mental sufferings.

6. If the Jury find the defendant guilty, then the wealth of the defendant is a proper subject for the consideration of the Jury in the assessment of damages.

7. The Jury in this case, if they find the defendant guilty, are limited in the amount of damages which they may give in this suit only by the amount claimed at the end of the plaintiff's declaration, if they think the plaintiff is entitled to that amount from the evidence.

Which said instructions were given by the Court, and to the giving of which said instructions the counsel for the defendant then and there excepted.

The counsel for the defendant thereupon asked the Court to instruct the Jury as follows, to wit:

DEFENDANT'S INSTRUCTIONS.

1. This action cannot be maintained unless it has been proved to the Jury: 1. That the defendant spoke the words, or some of them substantially as charged in the declaration charging the plaintiff with perjury. 2. That the words were spoken of and concerning a judicial proceeding before Samuel Sankey, a Justice of the Peace, as charged in the declaration. Nor, if it appears from the evidence that the testimony
33 of the plaintiff charged to be false by the defendant, was not *material to the issue* on trial before said Sankey, when it was given.

2. False swearing is not perjury when the matter sworn to is not material to the issue on trial, and it is not slander under this action to charge a man with swearing falsely in such case, because it does not imply perjury.

3. Words spoken do not justify an assault, and it would be no defence to a charge of assaulting with a deadly weapon, to prove that the person on whom such assault was made had used harsh words to the person making the assault, and such proof would be *immaterial to the issue* in such case.

4. If the Jury find from the evidence that that part of the testimony of Baumgarten, which it is alleged the defendant Wolbrecht charged was false, was immaterial to the issue on trial when such testimony was given, then the Jury must find their verdict for the defendant.

6. If the Jury find from the testimony that the only charge that the defendant made against the plaintiff on the occasion before Esq. Sankey was, "If you swear" to a certain thing "then you swear to a lie, and I can prove it by your own daughter,"
34 such charge was not slander and will not sustain this action.

7. If the Jury believe from the evidence that the defendant's only charge of false swearing was that at a trial of defendant, Wolbrecht, on a charge of an assault with a deadly weapon, the plaintiff had testified that "he (the plaintiff) had not spoken to the defendant before that day," then the testimony charged to be false was not material to the issue at the trial, and the Jury must find the defendant not guilty.

8. The malice which the law implies when words are spoken charged to be slanderous, may be rebutted by circumstances showing a want of malice in the party speaking.

Which said instructions were given by the Court.

The counsel for the defendant also asked the Court to give (fifthly) the following instruction to the Jury, to wit:

5. The gist and foundation of this action of slander is malice; the question of malice is a question for the Jury to decide; and if they find from the testimony that the words used by defendant were spoken during a quarrel, in heat and passion, without malice, then the Jury must find the defendant not guilty.

35 Which said instruction was refused by the Court, and to which ruling of the Court in refusing said instruction the said defendant then and there excepted. And after the Court had refused the said instruction, and had written the word "Refused" on the margin thereof, the Court handed the same to the Jury, and the counsel for said defendant objected to having the said instruction go to the Jury, after the same had

been so refused by the Court, but the Court overruled said objection and permitted said instruction so refused as aforesaid to go to the Jury, and to be taken by them to their Jury room. To which ruling of the Court the said defendant then and there excepted.

Whereupon the Jury retired, &c., and afterwards on the 5th day of September, 1860, at said September term of said Court, returned into Court their verdict, finding the defendant guilty, and assessing the damages at $549.50.

Whereupon the counsel for said defendant moved the Court:

1. For a new trial.
2. In arrest of judgment.
3. To set aside the verdict of the Jury.
4. To set aside the verdict and enter judgment for the defendant in this cause.
5. That a *venire facias de novo* issue in said cause.
6. That judgment *non obstante veredicto* be entered for defendant.

And the said defendant assigned the following reasons in writing in support of his said motions, to wit:

1. The verdict is contrary to and not sustained by the evidence, or any part of it.
2. The verdict is contrary to law.

36 3. The Court allowed improper evidence to go to the Jury on the part of the plaintiff.

4. The Court erred in giving the instructions asked by the plaintiff.

5. The instructions asked by the plaintiff and each of them were abstract; there was no proof in the case to sustain them, and they should have been refused by the Court.

6. The Court erred in refusing the fifth instruction asked by the defendant.

7. The Court erred in permitting the fifth instruction asked by the defendant to be given to the Jury, and by them taken with them to their Jury room, after the Court had refused said instruction, and had written the word "Refused" on the margin thereof.

8. Under the law, and under the instructions asked by the defendant the Jury were bound to find a verdict for the defendant, and the verdict should be set aside because the Jury found against the law and contrary to the instructions of the Court.

9. The damages are excessive.

22 Which said motions coming on to be heard on the 22d day of September, 1860, were severally overruled by the Court, for the reason that two new trials had been granted in said cause.

Whereupon the Court rendered judgment in favor of said plaintiff and against said defendant, for the said sum of $549.50 and costs, and awarded execution for the same.

37 To which said decision of the Court in overruling the said several motions of the said defendant and each of them, and in rendering the judgment aforesaid, the counsel for the defendant did then and there except.

ERRORS ASSIGNED ON THE RECORD.

1. The Court erred in permitting improper testimony to be given to the Jury on the part of said plaintiff.
2. The Court erred in giving the instructions asked by the plaintiff.
3. The Court erred in refusing the 5th instruction asked by the defendant.
4. The Court erred in permitting the 5th instruction asked by the defendant to be given to the Jury and taken to their Jury room, after the Court had refused said instruction and had written the word "Refused" on the margin of the same.
5. The Court erred in overruling the defendant's motion for a new trial.
6. The Court erred in overruling the defendant's motion in arrest of judgment.
7. The Court erred in overruling the defendant's motion to set aside the verdict of the Jury.

8. The Court erred in overruling the defendant's motion to set aside the verdict and enter judgment for the defendant.

9. The Court erred in overruling the defendant's motion to enter judgment for the defendant *non obstante veredicto*.

10. The Court erred in overruling the defendant's motion to issue a *venire facias de novo* in this cause.

TURNER & INGALLS, for Appellant.

11, The Court erred in rendering the judgment aforesaid against appellant

12 The verdict is contrary to law, and to the evidence

13 The verdict and judgment were against appellant, and should have been in his favor

248-104

Wolbrecht
vs
Baumgarten

Abstract

Filed Apr 17, 1860
Sedelmeyer
Clerk

Supreme Court of Ill. 3d Division
April Term 1861.

Woolbrecht vs Baumgarten

We insist that the act of the Legislature being imperative on the Court below, that no more than two new trials shall be granted to the same party in the Circuit Court, there can be no error in the Court refusing to do that which the law prohibits it from doing. It is evident that the Legislature intended to put an end to litigation when there had been a decision of a ~~Court~~ Cause the same way three times in the Circuit Court, as well when the Court had erred as when the jury had rendered an improper verdict, & it is well that some end should come to trials, even though errors may have been committed. Such, we believe, to have been the intention of the Legislature, & the language of the act seems plainly to convey this idea.

The language of the act is, if either party

may wish to except to the verdict or for other causes to move for a new trial. he shall &c. But no more than two new trials shall be granted to the same party in the same cause.

What are the other causes besides an exception to the verdict, unless they are the errors of the Judge on the trial? We cannot conceive of any. An authority in Tennessee & one in Kentucky are cited - 10 Yerg. 500. 3 A.K. Marsh. 1132.

We are unable to inform the Court what the language of the Statutes of these two States is. There may be a difference & the words "for other causes" may have been used in our Statute for the purpose of conveying the idea for which we contend. There is, however, a marked difference between the principle of these cases & of that at bar. Three some of the new trials necessary to make up the number were granted by the Court for the correction of errors & for that reason they ~~were~~ did not count as operating to exhaust the power of the Court below. If the Court below in this case had refused one of the new trials, & this Court for error below had reversed the decision & allowed it, the power of the Court below would, perhaps, not have been exhausted.

The question here is, had Judge Sheldon the power to allow the cause to have been tried again.

The language of the Statute is too plainly imperative to admit of any doubt. He could not have granted a new trial on account of any Exception to the verdict or "for any other Causes". If so, how can he have Committed an Error of law in refusing to do that which the law forbade him from doing?

II Are the Errors Insufficient to reverse the judgment & require to be granted here the new trial which the judge below, as we claim, could not?

It is said that it appears from the Evidence that the Charge of falsity was in relation to a Statement not material to the issue. There may be some question as to Whether the defendant in charging the perjury upon plff. pointed out in what particular portion of the Evidence the perjury was committed. There is a Conflict on this subject - One witness states it & one does not. If, under the declaration in this case, the plff. proved that there was a judicial proceeding before the justice over which he had jurisdiction & that the defts. said that on that occasion the plff. swore to a lie, this, we take it, would make out the Case, though it did not appear that the defts. alluded to any particular portion of the Evidence & that the words referred to some portion of the Evidence not material must be proved in defence.

If the words are clearly proved to have referred to that portion of the Evidence of the witness in which he states "you swore that you never spoke to me previous to that time in the Street, & that is a damned lie", how does it appear without we have all the Evidence on the trial before the justice, that this was not material on the enquiry as to whether dft. should be held to bail?
It is a very difficult matter with the lights we have, to say this was not a material fact. Thorough for the purposes of a justification the dft. must prove the materiality of the Evidence & the other facts necessary to make out the Offence of perjury. We do not conceive it necessary in a Slander Suit for the Plff. to prove that the dft. in speaking the words referred to Evidence which was material. If the dft. should say "On the trial of a case tried yesterday in the Circuit Court of La Salle County in which I was plff. & A. B. was dft. you swore to a deliberate false hood", the plff. in the Slander Suit could never prove whether the Speaker alluded to material or immaterial Evidence on the general issue ~~thereby~~ Therefore the dft. must show that the allusion was to immaterial

evidence, & this, it is almost impossible for him to do, unless he proves all that was shown ~~showed~~ on the trial. Suppose the whole evidence showed that there was a question of identity — whether it was really Woolbrecht or some other person who had committed the supposed assault — what transpired between them at a certain place at a previous time might be very material. There might have been a meeting & conversation inconsistent with the idea that the deft. then on trial had a motive to commit the assault & the witness may have desired to conceal what then transpired. Suppose the witness on that occasion had told deft. he intended to kill him on sight, indeed, had attempted to do it, & threatened to make the attempt, we can readily imagine how an interview the day before & what then transpired may have had an important bearing on the issue. The slanderous words being proved to have been spoken of & concerning testimony in a judicial proceeding over which the tribunal had jurisdiction, the deft. must, under the general issue, make out the immateriality of the evidence alluded to & he has failed to do it. There is no allegation of the materiality of the evidence in the form in 2 Chitty 620.

See 1 Hemp. 506

It is objected that the secondary evidence of the proceedings before Squire Sarby was

improperly admitted. There being no plea of justification in, we insist that it is enough for the plff. to prove that the defdt. charged the defdt. with having committed perjury by swearing falsely in a judicial proceeding & if it clearly appears that this was charged, it was slander, though no such proceeding existed. 12 Penn. S. 200. It would be strange indeed, if a person could charge another with having sworn falsely in a certain Court in a certain cause in a material matter & the defdt. could successfully defend himself by proving that the whole statement was a lie – that there was no such trial, cause or Court. The allegations in the declaration are sufficient & it is clearly proved that the false swearing was charged to ~~him~~ have been on a trial of a cause before a justice of which he had jurisdiction. Now suppose there was no such trial before such justice – does this excuse the defdt.? It is true that a charge of false swearing is not enough – it must be made intending to impute perjury & if the evidence shows such to have been the intent of the speaker of the words, it is enough. The burthen then, is on the defdt. to show that there was a trial & a testifying on a subject not material & that to this the words were applied.

We think for in dist. if enough appears in proof in this case, to show that the defd. alluded to a proceeding before a justice in which a false statement by a witness would be perjury, if material, the burthen is not on the plff. to show to what particular portion of the evidence the slanderous words applied. Was the idea conveyed to the minds of the hearers that the defd. meant a kind of false swearing which was perjury? If he desires to excuse himself on the technical ground that he was speaking about some immaterial swearing, let him prove it by proving what the issue really was & that he was speaking about a part of the evidence not material. If the rule contended for on the other side be correct, slander can be committed with impunity. The docket of the justice was enough to show a judicial proceeding before him - indeed, this fact of there being a judicial proceeding & what it was, for the purposes of this action, can be shown by parol, because the question is not what actually existed, but what was the charge intended to be made by the speaker. Did he intend to charge perjury, or false swearing not perjury? Admission of the parol proof of the contents of the papers did no harm - It was evidence necessary for

dfts. not for plff.

III It is said that the plff's instructions are not applicable to the evidence. What we have already said, is all we desire to say on this point. The 7th instruction is a mere statement that the damages cannot exceed the ad damnum & may be given to that extent, if the jury think plff. entitled to so much. It is a mere common place statement of an unquestioned truth. It is not a statement of an

× ~~excessive~~ enormous rule of estimating the damages. Would the omission of the prohibition have been error on the part of the dfts. viz; "You should not allow the whole amount of the ad damnum if you think plff. not entitled to so much".

IV. It is said the 5th instruction of dfts. should have been given. If the charge intended was one of perjury, & without this plff. could not recover, there was malice in law & whether malice in fact or not was immaterial. 13 Ill. 271. 20. Ill. 115.

There was no evidence tending to show that the words were spoken under privileged circumstances

There being no evidence tending to rebut the legal malice implied, the instruction was properly refused.

Leland & Leland for Appellee

248 - 104

Woolbrechl

vs

Baumgarten

[redacted]

Argument of Appellee

L & L

Filed April 30. 1851

L. Leland

Clerk

United States of America }
State of Illinois } ss.
Stephenson County }

Pleas before the Honorable Benjamin R Sheldon Judge of the Fourteenth Judicial Circuit of the State of Illinois, at a regular term of the Circuit Court in and for the County of Stephenson in the Judicial Circuit aforesaid, begun and held in pursuance of law at the Court House in the City of Freeport in said County on the first monday of April A.D. 1859.

Present Hon Benjamin R. Sheldon, Judge
U. D. Meacham Esq States attorney
Charles F Taggart, Sheriff
Luther H Gurtan, Clerk

Be it remembered that on the 7th day of April A.D. 1859 the same being one of the days of said April term of said Court the following papers were filed in said Court in a certain Cause wherein Charles Baumgarten is Plaintiff and Georg Wolbrecht is Defendant, to wit; Transcript, Praecipe for Summons Summons, Declaration, Affidavit & Motion for rule on Plaintiff to give security for costs, Bond for costs, and petition & affidavit for change of venue, and all in the words and figures following to wit;

United States of America }
State of Illinois, Winnebago County } ss.

Pleas before the Hon Benj. R. Sheldon Judge of the Fourteenth Judicial Circuit of the State of Illinois begun and held at the Court House in said County of Winnebago on the 7th day of February, 1859.

Present - Hon Benj. R. Sheldon, Judge

N. D. Meacham, States attorney
King B. Milliken, Sheriff
Attest. M B. Derrick, clerk

And afterwards, to wit: on the 22nd day of February it being one of the days of the aforesaid term of court the following entry was made

Chas Baumgarten
vs
Geo Wolbrecht } Now comes the defendant by Marsh his attorney & on his Motion Plaintiff is rules to file security for costs in this cause by Thursday Morning next,

And afterwards, to wit: on the 25th day of February 1859 it being one of the days of the aforesaid term of court the following entry was made:

Charles Baumgarten } Trespass
vs
Geo Woolbrecht. } On motion of Defendant by Marsh his attorny on affidavit filed it is ordered that the venue in this cause be & the same is hereby changed to the County of Stephenson in this Judicial Distrist, and it is further ordered that the Clerk of this Court transmit all the papers on file appertaining to this Cause together with a certified Copy of the records therein without any unnecessary delay to the Clerk of the Circuit Court of said County of Stephenson in the State of Illinois:—

State of Illinois }
Winnebago County } ss I. M. B. Derrick Clerk of the Circuit Court in and for said

3 County do hereby certify that the foregoing are true copies from the records, in the foregoing entitled cause in my office, and that the accompanying papers marked from "A" to L. are all the papers on file pertaining to said cause — Witness my hand and the Seal of said Court at Rockford this 6th day of April 1859. {Seal} M. B. Derrick Clerk
By O. A. Pennoyer Dep Clerk

Chas Baumgarten vs Geo. Woolbrecht — Trespass ch Venue

Doc 10 Ap 15 Sum 40 file P 20 Subp 40 2 af 20	1,45
B.C. 30 C.D 20 Ct & S 35	.85
	2.30
Sheff Ser Sum Church	85
" " Sub Taggart	1,20
Wit D. S. Bogar 2 D 30 M	3.50
" S. Sankey 2 D 30 M	3.50
Deft Costs	
Ap 15 Afw 10 Af 10 M sug 20 ord 20 M.C.V. 20 or Do 20	1,15
Sub 40 file P 15 B.C. 30 C.D. 20 Ct & S 35	1,40
	2,55
Transcript	1.50
	$4.55
Wit U. D. Meacham 2 D 28 M	3,40
Sheff Ser Sub Milliken	1,05
	$8.50

State of Illinois
Winnebago County } SS. I hereby certify the foregoing to be a true copy from my fee book of the Plaintiff & Defendants Costs in the foregoing entitled cause,
{Seal} M. B. Derrick Clerk By O. A. Pennoyer Dep Clk

Filed April 7, 1859 L. W. Guiteau, Clerk

Charles Baumgarten vs George Woolbrecht — Winnebago Cir Court, Trespass on the Case, Damages $5000.

The Clerk will please issue a Summons in this case returnable according to Law — Oct. 14, 1858 — I. L. Loop, Atty for Pltff

Filed Oct 14/58 M. B. Derrick Clerk

Filed April 7, 1859 L. W. Gulean Clerk

State of Illinois }
Winnebago County } ss:- The People of the State of Illinois
to the Sheriff of said County- Greeting

We Command You that you Summon George Wolbrecht if he shall be found in your County, personally to be and appear before the Circuit Court of said Winnebago County, on the first day of the next term thereof, to be holden at the Court House in the City of Rockford in said Winnebago County on the first Monday of February A.D. 1859 to answer unto Charles Baumgarten, in a plea of Trespass on the Case to the damage of said Plaintiff as he Says in the Sum of Five thousand Dollars, And have you then and there this Writ, with an endorsement thereon in what manner you Shall have executed the Same.

Witness, Morris B. Derrick Clerk of said Court, and the Seal thereof at his office in the City of Rockford in said Winnebago County this 14th day of October A.D. 1858.

(Seal)

M. B. Derrick Clerk

State of Illinois }
Winnebago County } I duly Served the within by reading the Same to the within named George Wolbrecht this 14th day of October 1858 as I am therein Commanded.

Fees- Service .5c Mileage 25- Return 10 — 85

Saml J Church
Sheriff

Filed April 7, 1859 L. W. Gulean Clerk

State of Illinois } In the Winnebago Circuit Court
Winnebago County } ss:- of the February Term 1859.

5

Charles Baumgarten, Plaintiff in this suit by J. L. Loop his attorney complains of George Wolbrecht defendant in this suit, being summoned of a plea of trespass on the case: For that whereas the said Plaintiff always was and is a good true and honest citizen of this state and, (until the grievances hereinafter mentioned) unsuspected of any perjury, false swearing or other crime whatever, and thereby had deservedly gained the good opinion of all his neighbors, and all others who knew him; And whereas before the speaking and publishing of the false and scandalous words in this count mentioned, to wit: on the fifth day of November A. D. Eighteen hundred and fifty seven at the City of Freeport in the County of Stephenson and State of Illinois, to wit: at the County of Winnebago in the State of Illinois the said Charles Baumgarten, Plaintiff in this suit had duly appeared before Samuel Sankey Esq a Justice of the peace in and for the Town of Freeport, in the County of Stephenson and State of Illinois, duly elected & sworn as such Justice of the peace, and being then and there a Witness on the trial of a certain cause before said Justice of the peace, in which the People of the State of Illinois was Plaintiff and George Wolbrecht was defendant and being then and there sworn by the said Samuel Sankey, Justice of the peace as aforesaid to testify upon the trial of said cause (the said Samuel Sankey Esq as such Justice having full power to administer such oath to the Plaintiff) and after having been duly sworn as aforesaid, the said Plaintiff did on oath testify and make certain statements material to the issue in the said cause then pending before the said Samuel Sankey Esq Justice of the peace as aforesaid. Yet the said George Wolbrecht defendant well knowing the

premises but greatly envying the happy state and condition of the said Plaintiff, and then and there maliciously and falsely intending to have it believed that the said Charles Baumgahrn plaintiff, had been guilty of false swearing and perjury before the aforesaid Justice of the peace in the trial of the aforesaid cause, and that he the said Plaintiff was guilty of perjury therein, aforesaid to wit: on the thirteenth day of November A.D. 1857 at the County of Stephenson in the State of Illinois, to wit: at the County of Winnebago in the State of Illinois, in a certain conversation which the said Georg Wolbrecht defendant then and there had with the said Charles Baumgahrn plaintiff in the presence and hearing of divers good and worthy citizens of the State of Illinois of and concerning and to the said Charles Baumgahrn plaintiff and of and concerning his aforesaid oath and his evidence under said oath, on the trial of the cause aforesaid, before Samuel Sankey Esq. Justice of the peace as aforesaid, then and there in a loud voice and in the presence and hearing of the aforesaid citizens, falsely, wickedly, corruptly and maliciously uttered, spoke, published and proclaimed of and concerning and to the said Charles Baumgahrn, plaintiff and of and concerning his oath and evidence as aforesaid these false scandalous malicious and defamatory words following that is to say "You" (meaning the said Plaintiff) "have sworn to a damned lie" (meaning the oath and evidence aforesaid so taken as aforesaid by and before Samuel Sankey Justice of the peace as aforesaid.)

"You" (meaning the Plaintiff) "have sworn to a damned lie before Samuel Sankey and I can prove it" "You" (meaning the said Plaintiff) "swore to a lie" - "You" (meaning the said Plaintiff)

7

"have sworn to a lie I can prove it by your own daughter" "You" (meaning the said plaintiff) "have sworn that you never spoke to me previous to that time in the street, and that is a damned lie, and I can prove it, and now go and sue me in the Court if you dare you had better take down the name of Witness" "You" (meaning the said plaintiff) "have sworn falsely and I can prove it" - "You" (meaning the said plaintiff) "have committed perjury" "You" (meaning the said Plaintiff) "committed perjury and I can prove it by your daughter" - "you committed perjury" "You swore falsely" "You swore to a lie" "You swore to a damned lie" "I could not believe you under oath" "You are a damned liar and you swore to a damned lie before Sankey" "You swore falsely before Samuel Sankey on the trial" Meaning thereby that the said Plaintiff had committed the crime of perjury all of which is to the great damage of the said Plaintiff -

And for that whereas also the said Charley Baumgarten plaintiff, aforesaid, to wit: on the thirteenth day of September A. D. 1857, at the County of Stephenson, to wit: at the said County of Winnebago always had and is a good true and honest citizen of this State and never was guilty of any of the crimes hereinafter laid to his charge, nevertheless the said George Wolbrecht defendant, well knowing the premises, but contriving and maliciously intending to injure defend and slander the said plaintiff in his good name, to wit: on the day and year last aforesaid, and at the place aforesaid, in the presence and hearing of divers good and worthy citizens of the State of Illinois and in a loud voice falsely, wickedly and maliciously, spoke, uttered, published and proclaimed of and concerning and to the

said plaintiff, in order to have it believed that he the said plaintiff was guilty of the crime of perjury the following false, scandalous, malicious and defamatory words that is to say—

"You" (meaning the said Plaintiff) "swore to a damned lie" "You" (meaning the said Plaintiff) have sworn to a damned lie before Samuel Sankey" (meaning that the plaintiff had committed perjury) "You" (meaning the said Plaintiff) "have sworn to a damned lie before Samuel Sankey and I can prove it" "You" (meaning the said plaintiff) "swore to a lie" "You" (meaning the said plaintiff) "have sworn to a lie I can prove it by your own daughter" "You" (meaning the said plaintiff) "have sworn that you never spoke to me previous to that time in the street and that is a damned lie and I can prove it and now go and see me if you dare" "You" (meaning the said plaintiff) "swore to a damned lie and I can prove it by your daughter" "You" (meaning the said plaintiff) "have sworn falsely and I can prove it" meaning thereby that the plaintiff had committed the crime of perjury all of which is to the great damage of the said plaintiff— And also for that whereas the said defendant on about the thirteenth day of November A.D. 1857. at the County of Stephenson, to wit: at the County of Winnebago and State of Illinois always was and is a good and true man and honest citizen of this State, and never was guilty of any of the crimes herein after laid to his charge, nevertheless the said defendant well knowing the premises but contriving and wickedly and maliciously intending to injure, defame and slander the said plaintiff in his good name, fame and credit

to wit: on the thirteenth day of November A.D. 1857 at the County of Stephenson, to wit: at the County of Winnebago in the State of Illinois, in a certain discourse which the said Defendant then and there had with the said Plaintiff in the presence and hearing of divers good and worthy citizens of the State of Illinois to, of and concerning the said Plaintiff, these false, scandalous and malicious and defamatory words, did speak, publish and declare, to wit.

"You" (meaning the said plaintiff) "are to a damned lie" "You" (meaning the said plaintiff) "have sworn to a damned lie and I can prove it" "You" (meaning the said plaintiff) "are to a damned lie before Samuel Sankey and I can prove it" "You" (meaning the said plaintiff) "are to a lie" "You" (meaning the said plaintiff) "have sworn to a lie and I can prove it by your own daughter" "You" (meaning the said plaintiff) "have sworn that you never spoke to me previous to that time in the street and that is a damned lie and I can prove it, and now go and sue me if you dare, you had better take down the names of the witnesses" "You" (meaning the said Plaintiff) "have sworn falsely" "You" (meaning the Plaintiff) "have sworn false before Sankey and I can prove it by your oldest daughter" meaning thereby that the said plaintiff had committed the crime of perjury. By reason of the speaking uttering and publishing of which said false, scandalous malicious and defamatory words the said plaintiff is greatly injured and prejudiced in his good name fame and credit and reputation, wherefore the said plaintiff says that he is injured and has sustained damage to the amount of Five thousand dollars and therefore the said plaintiff brings suit &c

James L. Loop
Atty for Pltff

Filed Jan. 20th 1859, M. B. Derick clerk by O. A. Pomroy Dep. clk
Filed April 7th 1859. L. W. Leitaw. clk

George Wolbrecht } Win. Cir. Court
vs
Charles Baumgarten } State of Illinois, Winnebago County
ss. George Wolbrecht the above named defendant, being duly sworn deposes and says that the above entitles suit is an action on the case for slander, that the cause of action if any, arose in the County of Stephenson & that in the opinion of this deponent and as he is advised, the said suit will necessarily involve a large amount of costs; This deponent further says that said plaintiff is a resident of said County of Stephenson and is not in the opinion of this deponent responsible for, and is unable to pay the costs of this suit & this deponent believes that he and the officers of this court will be in danger of loosing their costs unless said plaintiff shall be made to give security for costs in this suit pursuant to the statute.
Subscribed & sworn to this 22nd day of } George Wolbrecht
Feb A.D. 1859, before me M. B. Derick, clk

The said defendant by J. Marsh comes & moves the Court for a rule upon said plaintiff to give security for costs upon the aforesaid affidavit, dated Feb 22nd 1859. J. Marsh, atty for deft. To J. & L. Loop Esq atty for Plff
Filed Feb 22nd 1859. M. B. Derick clerk
Filed April 7. 1859. L. W. Leitaw, clerk

State of Illinois } Winnebago County, Cir. Ct.
County of Winnebago } ss. February Term A.D. 1859

Charles Baumgarten } In trespass on the case
vs } I Entir myself security for cost.
George Wolbrecht } in this cause and—

11

promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him I hereby agree and Stipulate that execution may issue against my property for any costs taxed against him. Dated this 22nd day of February A.D. 1859.

John Wolbel

Filed Feby 24 A.D. 1859 - M. B. Dennis Clerk

Filed April 7, 1859 - L. H. Gultian, Clk

George Wolbrecht ads Charles Baumgarten } Wm. Cs. Cir. Court
} Action on the Case

To the Honorable Circuit Court in & for the County of Winnebago - The Petition of George Wolbrecht the above named Defendant respectfully Shows that this is the first term since the commencement of the above entitled Cause, that the cause of action is for an alleged Slander, & arose in the County of Stephenson where said parties & their witnesses reside - The undersigned further Shows that he fears that he will not receive a fair & impartial in the said County of Winnebago for the reason that the inhabitants of said County of Winnebago are so prejudiced against this defendant that he cannot have a fair & impartial trial in this Cause; and also for the reason that said plaintiff has such undue influence over the minds of the inhabitants of said County as to produce a prejudice against this defendant, and the undersigned therefore prays that a change of Venue may be awarded to him to said County of Stephenson -

George Wolbrecht

State of Illinois }
Winnebago County } S.S. George Wolbrecht being duly

Sworn deposes & says that he has read the foregoing petition & knows the contents thereof and he believes the same to be true,
Subscribed & Sworn to this 23 Feby 1859 before me, O.A. Pennoyer Dep Clerk } George Wolbrecht

Filed Feby 23. 1859. M.B. Derrick, Clerk, By O.A. Pennoyer Dep Clerk

Filed April 7. 1859. L.W. Guttau, Clk

And afterwards to wit, on the 18th day of April A.D. 1859, the same being one of the days of said term, the following entry appears of Record to wit,

Charles Baumgarten
vs
George Wolbrecht } Trespass on the Case

Now comes the said defendant by his attorney and files his plea, and it is ordered that this cause be continued to the next term of this Court,

State of Illinois }
Stephenson County } S.S. In the Circuit Court of the April Term A.D. 1859,

George Wolbrecht
ads
Charles Baumgarten } And the said Defendant by Macham & Bailey his Attornies comes and defends the wrong and injury when &c and says that he is not guilty of the said supposed grievance above laid to his charge or any or either of them or any part thereof in manner and form as the said plaintiff hath above thereof complained against him, And of this he the said defendant puts himself upon the Country &c,

Burchard & Barton
Defts Attys

Filed April 18, 1859, L.W. Guttau, Clk

4

13

And afterwards, to wit; at the September term of said Court, on the 19th day of September 1859 the same being one of the days of said term, Present the Same as at the April Term, the following entry appears of record to wit;

Charles Baumgarten
vs
George Wolbrecht — Trespass on the Case

Now on this day comes the parties with their attorneys and upon the issue joined for trial, put themselves upon the country, thereupon comes also a jury of twelve good and lawful men who were severally duly elected, tried and Sworn to wit, John De Armit and Eleven others — and after hearing the evidence adduced and arguments of counsel, they retire to consider their verdict, — and the hour of adjournment having arrived, by consent of parties they are instructed that when they agree, they may seal their verdict and bring the Same into Court tomorrow morning —

And afterward to wit on the twentieth day of September 1859, the Same being one of the days of said term of Court, the following entry appears of record to wit;

Charles Baumgarten
vs
George Wolbrecht — Trespass on the Case

Now again come the parties by their attorneys, and also come the Jury empannelled in this cause and bring their Sealed verdict as follows to wit; That they find the Defendant guilty, and assess the damages at the Sum of Five hundred dollars, thereupon the Said Defendant by his Attorneys enters his motion for a new trial and in arrest of Judgment

18
14

And afterward to wit; on the Twenty fourth day of September, the Same being one of the days of said term of Court, the following entry appears of record, to wit;—

Charles Baumgarten
vs
George Wolbrecht
} Trespass on the Case
Now came on to be heard the Defendants Motion for a New Trial, and after argument of Counsel, and the Court being advised in the premises, It is considered and ordered by the Court that the Motion be granted upon condition that Defendant pay the Costs of this term of Court within 30 days— On motion of Plaintiff, leave is given to amend his declaration, and to add another Count— leave is also given to the Defendant to file additional pleas.

And afterward, to wit; at the December Term A.D. 1859. of said Court, on the Sixth day of December the same being one of the days of said term, Present the same as before, the following entry appears of record to wit—

Charles Baumgarten
vs
George Wolbrecht
} Trespass on the Case
Now on this day comes the Defendant by Turner & Ingalls his attorneys, and files his demurrer to the 4th Count in Plffs declaration

George Wolbrecht
vs
Charles Baumgarten
} In the Circuit Court of Stephenson County Illinois, of the December term A.D. 1859

And the said defendant by Turner & Ingalls his Attorneys comes & defends the wrong & injury when &c, and says that the said additional & fourth Count

of the said declaration, and the matters therein contained, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said Defendant; & the said Defendant is not bound by law to answer the same, and this he is ready to verify. wherefore he prays judgment &c — And the said Defendant according to the form of the Statute in such case made and provided, States and Shows to the Court here the following causes of demurrer to the said Fourth Count of said Declaration. For that the said Fourth Count of said Declaration is entitled of the September Term A.D. 1859 of said Court, whereas the same appears to have been filed herein on the 23rd day of November A.D. 1859 — For that it does not appear in or by the said Fourth Count of said declaration on what day or time the said Defendant spoke and published the said supposed false & malicious words therein mentioned or any of them, and the said Fourth Count of said declaration is uncertain and insufficient in that behalf — For that the said Fourth Count is in other respects uncertain informal and insufficient &c. Turner & Angell's Defts Attys

For that the said Plaintiff hath in the said fourth Count upon the words, to wit; "I would not believe you" (meaning the said Plaintiff) "under oath" whereon no action lies for speaking such words by the said Plaintiff against the said Defendant —

Filed Dec 6, 1859 — L. W. Graham, Clk

And afterward, to wit; on the Seventh day of December A.D. 1859, the same being one of the days of said term the following entry appears of record to wit;

Charles Baumgarten
vs
George Wolbrecht

Trespass on the Case
Now came on to be heard the Defendants demurrer to the Plaintiffs announded Count in his declaration, and after argument of Counsel, the demurrer is sustained, And on motion of Plaintiffs leave is given him to amend his said annended Count in his declaration — And the said Plaintiff files his amended declaration —

And afterward to wit: on the Ninth day of December A.D. 1859, the same being one of the days of said term of Court, the following entries appear of record, to wit:

Charles Baumgarten
vs
George Wolbrecht

Trespass on the Case
Now comes the Defendant by Turner & Ingalls his Attorney and files his Plea to the 4th Count in Plaintiffs Declaration

The said Fourth count of the declaration and the defendants said Plea to said Fourth Count are correctly copied on page 39 to 44 of the Record

Charles Baumgarten
vs
George Wolbrecht

Trespass on the Case
Now comes the Plaintiff by Loop his Attorney and enters a Nolle Prosequi to the 4th Count in his Declaration — And on motion of Defendant, leave is given to withdraw his pleas to said 4th Count —

And afterwards, and on the fifth day of January A.D. 1860, at the January term of said Court, the same being one of the days of said Term, Present the same as before, the following entry appears of record to wit:

9-

17

Charles Baumgarten
vs
George Wolbricht
} Trespass on the Case
By consent of Parties
by their Attorneys, it is ordered that this suit be continued to next term of this Court—

And afterward to wit; at the April Term of said Court, on the 7th day of April A.D. 1860- the same being one of the days of said term Present the same as before, the following entry appears of record, to wit;

Charles Baumgarten
vs
George Wolbricht
} Trespass on the Case
Now on this day come the said parties by their Attorneys, and upon the issues joined for trial put themselves upon the Country, thereupon also comes a jury of twelve good and lawful men, to wit; Jacob Cook and Eleven others, who were severally duly elected tried and sworn— And after hearing the evidence adduced and arguments of counsel the jury retire in charge of an Officer to consider of their verdict, and after a short absence they return into Court with the following verdict, to wit; that they find the Defendant guilty, and assess the damages at One hundred and fifty Dollars, Thereupon the said Defendant enters his motion for a new trial & in arrest of judgment—

And afterward, to wit; on the Twenty Seventh day of April A.D. 1860, the same being one of the days of said Term, the following entry appears of record to wit

Charles Baumgarten }
vs } Trespass on the Case
George Wolbrecht } Now Comes the Defendant by Turner & Ingalls his attorney and files his motion for a new trial and in arrest of judgment

And afterward, to wit; on the First day of May A.D. 1860. the same being one of the days of said Term, the following entries appear of record, to wit;

Charles Baumgarten }
vs } Trespass on the Case
George Wolbrecht } Now came on to be heard the Defendants motion for a new trial and arrest of Judgment; and after argument of Counsel, the Court being advised in the premises, the motion for a new trial is sustained, and a new trial granted. On motion of Defendant by his attorney, it is ordered that he have leave to file an additional Plea by the 1st day of July next- and on motion of Plaintiff by his attorney leave is given him to file an additional Count to his Declaration by the 15th day of July next-

And afterward, to wit; at the September Term A.D. 1860. on the Fourth day of September the same being one of the days of said Term. Present the Same as before, the following entry appears of record, to wit:-

Charles Baumgarten }
vs } Trespass on the Case
George Wolbrecht } Now on this day come the parties with their Attornies, and upon the

627

19

issues joined for trial, put themselves upon the Country thereupon also comes a jury of twelve good and lawful men who were severally duly elected tried and sworn, to wit. Matteuly Addis and eleven others, and after hearing the evidence adduced, and part of the arguments of Counsel, the hour of adjournment having arrived, the further hearing is postponed until to morrow morning at the incoming of Court.

And afterwards to wit, on the fifth day of September AD 1860 the same being one of the days of said Term the following entry appears of Record to wit,

Charles Baumgarten
" } Trespass on the Case
George Wolbrecht
Now on this day again come the said parties, with their attorneys, and also the Jury empannelled in this cause, and after arguments of Counsel, the Jury retire in charge of an officer to consider of their verdict and after a short absence return with their verdict as follows to wit; that they find the defendant Guilty and assess the damages at Five Hundred forty nine $\frac{50}{100}$ Dollars thereupon the defendant by Scott his attorney enters his motion for a new trial

And afterwards to wit, on the 17th day of September AD 1860, the same being one of the days of said Term the following entry appears of Record to wit:

Charles Baumgarten
vs
George Walbrecht } Trespass on the Case
Now on this day comes the said Defendant by his attorney and files his motion and points for a new trial and in arrest of Judgment.

George Walbrecht
to
Charles Baumgarten } In the Circuit Court of Stephenson County Illinois of the September Term AD 1860

And now comes the said Defendant and moves the court here for a new trial and in arrest of Judgment in the above entitled cause, And the said Defendant also moves the Court to set aside the verdict of the Jury in the said Cause and to enter judgment for the Defendant And the said Defendant also moves the Court to set aside the verdict of the Jury in said Cause, And the said Defendant shows to the Court here the following reasons in support of his said motions to wit:

1 The verdict is contrary to, and not sustained by the evidence or any part of it

2 The verdict is contrary to the law

21

3 The Court allowed improper evidence to go to the Jury on the part of the Plaintiff

4 The Court erred in giving the instructions asked by the Plaintiff

5. The Instructions asked by the Plaintiff and each of them were abstract; there was no proof in the case to sustain them, and they should have been refused by the Court.

6 The Court erred in refusing the 5th instruction asked by the Defendant

7. The Court erred in permitting the 5th instruction asked by the Defendant to be given to the Jury and by them taken with them to their Jury room after the Court had refused said instruction and had written the word "refused" on the margin thereof.

8 Under the law and under the instruction asked by the defendant in this cause the Jury were bound to find a verdict for the Defendant, and the verdict should be set aside because the Jury found against the law, and contrary to the instructions of the Court

9 The damages are excessive

And the said defendant also moves the Court here that a venire facias de novo be issued out of this Court in this cause for the reasons above set forth and stated

And said Defendant also moves the Court that Judgment for the Defendant non obstante veredicto be entered in this cause for the reasons above set forth and stated and for other reasons appearing on the Record

Turner & Ingalls Defts Attys

Filed Sept 17. 1860, L. W. Gutteau Clk

And afterwards to wit; on the twenty second day of September A.D. 1860, the same being one of the days of said Term, the following entry appears of record to wit:

Charles Baumgarten
vs
George Walbrecht } Trespass on the Case

Now came on to be heard the Defendants motion for a new trial in this cause and two new trials having been granted to the Defendant the motion is overruled, and all the other motions are also overruled and the Defendant excepts. It is therefore considered and ordered that the said Plaintiff have and recover of said defendant the said sum of Five Hundred and forty nine dollars and fifty cents his damages as by the Jury assessed together with his costs by him about his suit in this behalf expended and that he have execution for the same, thereupon the said defendant prays an appeal and it is ordered that the appeal be allowed on defendants filing his appeal Bond with the Clerk of this Court within thirty days in the sum of Eight Hundred Dollars, properly conditioned to said Plaintiff with Christian Mueller & Frederick Walbrecht as sureties.

Bill of Exceptions

State of Illinois } In the Stephenson County Circuit
Stephenson County } ss Court of the September Term A.D. 1860

8

23

George Wolbrecht
vs
Charles Baumgarten

Be it remembered that on the Fourth day of September A D 1860, the same being one of the days of the September Term A D 1860 of said Stephenson County Circuit Court, this Cause came on to be heard by the Court and a jury Whereupon the Plaintiff herein produced the Witness hereinafter named who were sworn and testified as follows, to wit:

Samuel Sowbey

Witness testified — I have known the Plaintiff and defendant about seven years. I was acting as Justice of the Peace about four years. I was present at a conversation that the plaintiff and the defendant had with each other at my office in this City about the 13th of November 1857 They had some words there with each other. There was a suit or hearing pending when Baumgarten was complaining Witness and Wolbrecht defendant Have my Docket here, (Witness produces his Docket) The parties had some talk there. The words I remember were Baumgarten said to Wolbrecht You have ruined my family, Wolbrecht said he was a liar, They were talking back and forth exchanging words in that way, Wolbrecht said he had sworn to a damned lie before me and he could prove it by his own daughter. He was speaking to Mr Baumgarten. There was a good deal said, I only remember the specific charges. Baumgarten resented it, and Wolbrecht said he could prove it by his own daughter, and then said that he had sworn before Squire Sankey that he had not spoken to him prior to that time. When the lie was passed, He said you can go

and see me in Court, & you had better take down the names of your witnesses. Mr Wolbrecht said so. Daniel S. Boyer and Abel Smith were present, There were several there. This was the 13th of November 1857. I was engaged at the time and paid no attention until there particular charges were made. There had been a hearing before me between the same parties about the 5th of November 1857. and now they were in on the 13th and were talking about the other suit on the 5th. Baumgarten was complaining witness in the suit of the 5th He was sworn by me, and testified in that case Baumgarten say to Wolbrecht You have ruined my family, Wolbrecht then say to Baumgarten, You lie, and probably called him a liar four or five times. He then said he had sworn to a lie before Squire Sankey and he could prove it by his own daughter, You swore before Squire Sankey that you had not spoken to me before that time. They were speaking of the 5th of November, That is about all there is of it. They were talking about what had been sworn to at that time. Mr Burchard was there and was Wolbrecht attorney on the 5th of November (Defendants Counsel here objected to the evidence of what took place at the trial on the 5th of November until the issue then on trial is proved: The Counsel for Plaintiff stating he expects to prove the issue, the Court admits such evidence, Counsel for Defendant except to the ruling of the Court admitting such evidence) - Mr Burchard in cross examining Baumgarten, asked him whether he had not frequently, before this time used insulting language to Wolbrecht and tried to provoke a quarrel with him, & referred to one particular time before my office asked him if he had not then used insulting language, Baumgarten said that he had not. On the 13th they were talking this matter over. Mr Burchard asked him whether he had not previous to the 5th of November, at various times used insulting language, and whether he did not on a certain occasion opposite those buildings use insulting language Baumgarten said he had not Mr Burchard Cross examined Baumgarten, Kean appeared as attorney with Baumgarten I don't remember any other questions than I have stated, There were probably half a dozen present at the time of the conversations between Baumgarten & Wolbrecht

Dont know that I am acquainted with Wolbrechts circumstances. He is engaged here as a Tobacconist ever since I knew him. Think for 3 years he has been in the business — Think he said you are a liar, You swore to a lie before Squire Sankey & I can prove it by your own daughter. Think he said you swore to a lie before Squire Sankey, also Samuel Sankey — It was in my office in Freeport Stephenson County, Illinois.

Cross

On the occasion of the conversation on the 13th which I have spoken of Wolbrecht was angry — I was sitting inside of the rail in my office writing a deed, & dont undertake to State the whole conversation They were talking loud, Wolbrecht was angry and boisterous, Baumgarten did not seem to be as much excited as Wolbrecht. Somebody I think it was Rean, came to me the next day with the words written down, and asked me if I could swear to them, I should not probably remember a word about this if they had'nt come to me the next day, and I being a witness — I have no personal knowledge of Wolbrechts circumstances, Believe he is in Partnership with his brother in the Store, I think he was worth from 3 to 5 000 dollars,

L. W. Judson Clerk

Witness testified,—

I have searched for the papers, the complaint and Warrant in the case of the People vs Wolbrecht before Sankey on the 5th of November 1857. I could not find them, Commenced to search for them about fifteen minutes since, Have not been requested to search for them before this time, I do not know but

that these papers were left with me. Think if they were, they went before the grand jury. Papers of that kind when sent to the Grand Jury and no indictment found are frequently not returned; all such papers are kept in a particular place by themselves on my office.

Samuel Sankey

Recalled by Plaintiff to give secondary evidence of the contents of the papers in the case of the People vs Wolbrecht — Counsel for Defendant objected on the ground that no proper foundation had been laid for the addition of secondary evidence of the contents of the papers. The objection was overruled by the Court, and the witness was allowed to give such evidence. The counsel for Defendant thereupon excepted to the ruling of the Court in overruling said objection and in permitting such evidence to go before the jury —

The witness Testified — The charge was, that Mr Wolbrecht had made an assault on Baumgarten and threatened to shoot him. That was the case in which Mr Burchard examined Baumgarten.

The Docket of the witness containing his record or transcript of the suit was here offered in evidence by Plaintiff. Counsel for Defendant objected on the ground that it was improper evidence — the papers in the suit being the best evidence. The objection was overruled by the Court and the Docket admitted as evidence to which ruling of the Court the counsel for the Plaintiff excepted.

The Docket was then read in evidence as follows:

10

27

The People of the State of Illinois
vs
George Wolbrecht

Change of Venue
Assault with a deadly weapon

November 5th 1857 on this oath of Charles Baumgarten in writing a Warrant issued to W. Smith Signed by J. H. Bean Esqr a Justice of the Peace returnable instanter, November 5th 1857 warrant is returned with Defendant in custody of W. W. Smith the City Marshall, Defendant pleads not guilty and makes application for a change of Venue which is granted and the papers came to me, at which time the Cause is called for trial and parties declared themselves ready, whereupon Charles Baumgarten, W. Youngman, W Best & D. B. Langley, were sworn, after hearing the testimony it is ordered by the Court that the Defendant is guilty of the charge preferred against him, and that he give bonds in the Sum of One Thousand dollars for his personal appearance at the next term of the Stephenson County Circuit Court, Whereupon the said George Wolbrecht & Asahel W Rice entered into a Bond which is approved by the Court and whereupon the papers are sent into the Circuit Court

David S Boyer

Witness Testified:

I knows the Plaintiff and the Defendant. I heard the testimony of Sankey, I was in Sankeys office on that occasion, Heard some words spoken there, Wolbrecht said You Sworn to a lie, You Sworn to a damned lie, and I can prove it by your own daughter, Wolbrecht said that he was talking to Baumgarten, Sankey said after they went out of the office that he and would have to be a witnesses, They were both

excited and loud. I was reading a newspaper at the time. You swore to a lie. You swore to a damned lie and I can prove it by your own daughter.

Cross

This was the same conversation that Sankey has sworn to. The parties were excited and speaking loud and in passion.

Fredrick Buss

Witness Testified:

I know Wolbrecht. I dont know what he is worth. Believe he owns the lot his store is on. Think in all he is worth about Two or Three Thousand Dollars.

David Senn

Witness Testified:

I heard Mr Wolbrecht talk about some property he owned about a year ago. He said he owned some land in Missouri, think it was between Ten & Thirteen hundred acres. Think he said he owned some Town property in Winona. Cant say whether he owns it or not. I should think so far as I know he was worth from $3000. to $4000.

The Plaintiff thereupon rested his Case

(Testimony for Defendant)

The Defendant thereupon proceeded produced the witnesses hereinafter named, who were Sworn and testified as follows to wit:

29

N. D. Meacham

Witness Testified:- I was present on or about the 13th of November 1857 at a trial before Squire Sankey in which the People were Plaintiffs and Wolbrecht was defendant. Sankey and Boger were present. I was called upon by Mr Wolbrecht to attend the Suit, and went as his Counsel. I went with him to Sankeys office. After we got in a dispute arose between Baumgarten and Wolbrecht. They got very angry. Baumgarten made a remark that he would swear to such a fact. Mr Wolbrecht made this reply You swear so and you swear to a damned lie, and I can prove it by your own daughter. He spoke imperfect English. The Expression he used was, You swear so and You swear a damned lie and I can prove it by your own daughter. I went in with Wolbrecht, when he went in, I remained there, and he came out with me. I heard all the Conversation, and when I found they were getting into a quarrel, I used my exertions to stop it. This conversation I have stated was not in reference to any trial, It was in reference to a fact. Baumgarten said it was so, and Mr Wolbrecht said it was not so. Baumgarten said he would swear to it, and Wolbrecht said, You swear so and you swear to a damned lie, and I can prove it by your own daughter. They were both very angry. What was said was in heat and passion. I paid particular attention at the time -

Cross

I declined appearing as Counsel in this cause for the reason that I was a witness

Horatio C. Burchard

Witness Testified

I was counsel for Wolbrecht in a case before Bean. There were Two complaints against him. They were the same cases that Sankey and the other witnesses have testified about. I was present at the trial on the 5th of November as Wolbrechts counsel before Sankey. That was a complaint by Baumgarten for an assault on him by Wolbrecht with a deadly weapon, with intent to kill. The charge was that the assault was made that day November 5th 1857. I think the last trial on the 13th was a complaint to bind Wolbrecht over to keep the peace. The question was asked Baumgarten at the trial on the 5th of November whether he had Spoken to Mr Wolbrecht previous to the occasion of the alleged assault. Wolbrecht Suggested that I should ask Baumgarten whether he had Spoken to him before that day. Baumgarten Said he had not. Then I called his attention to a place in Stephenson Street, at some time previous to the day of the assault. Baumgarten Said that he had not Spoken to him at that time. I asked the question because Mr Wolbrecht Suggested it to me. I did not See the object of the question.

The foregoing is all the evidence introduced at the trial of Said Cause.

The Counsel for the Plaintiffs then asked the Court to instruct the jury as follows to wit:—

Plaintiffs Instructions

1 That if the jury believe from the evidence that the Defendant maliciously Said to, and of and

11
31

concerning the Plaintiff "You swore to a damned lie, intending thereby to impute the crime of perjury in a matter material to the issue in a judicial proceeding before that time had before Samuel Sankey, when speaking in reference to such proceeding, as charged in the declaration, they should find the defendant guilty and assess the plaintiffs' damages

2 That if the Jury believe from the evidence that the defendant is guilty of speaking the words, as charged in the declaration, with the meaning as therein charged, and that the testimony charged to be false was material to the issue in a judicial proceeding before them had as charged in the declaration, and that the words were spoken in reference to such proceedings then in the speaking of such words the law implies malice

3 If the Jury believe from the evidence that slanderous words as charged in the declaration with the intent to impute the crime of perjury have been spoken by the defendant, it is evidence that the speaker of such words was actuated by malice, and it is not sufficient proof of itself that a malicious intent was wanting in such speaker, because he spoke such words when angry and in the heat of passion

4 The plaintiff in this case is not obliged to prove all the words charged in the declaration, but if he prove some of them which are laid in the declaration and as charged therein, and which are actionable and slanderous, and that they were spoken with the intent to impute the crime of

perjury. it is sufficient

5 The Jury. if they find the defendant guilty, may
. consider not only the injury incurred by the plaintiff
but also if the injury was wilful, his mental sufferings

6 If the Jury find the defendant guilty, then the wealth of the de-
fendant is a proper subject for the consideration of the Jury in
the assessment of damages

7 The Jury in this case, if they find the defendant guilty are
limited in the amount of damages which they may give in
this suit, only by the amount claimed at the end of the plain-
tiffs declaration if they think the plaintiff is entitled to
that amount from the evidence

Which said instructions were given by the Court, and to the giving of which said Instructions the Counsel for the defendant then and there excepted.

The Counsel for the defendant thereupon asked the Court to instruct the Jury as follows to wit,

Defendants' Instructions

1 This action cannot be maintained unless it has been proved to the Jury. – 1. That the defendant spoke the words or some of them substantially as charged in the declaration charging the plaintiff with perjury 2. That the words were spoken of and concerning a judicial proceeding before Samuel Sauky a Justice of the Peace, as charged in the declaration. Nor if it appear from the evidence that the testimony of

the plaintiff charged to be false by the defendant was not material to the issue on trial before said Sankey when it was given

2 False swearing is not perjury when the matter sworn to is not material to the issue on trial, and it is not slander under this action to charge a man with swearing falsely in such case, because it does not imply perjury

3 Words spoken do not justify an assault, and it would be no defense to a charge of assaulting with a deadly weapon to prove that the person on whom such assault was made had used harsh words to the person making the assault and such proof would be immaterial to the issue in such case.

4 If the Jury find from the evidence that that part of the testimony of Baumgarten which it is alleged the defendant Wolbrecht charged was false was immaterial to the issue on trial when such testimony was given then the Jury must find their verdict for the defendant

6 If the Jury find from the testimony that the only charge that the defendant made against the plaintiff on the occasion before Esq Sankey was "If you swear" to a certain thing "then you swear to a lie, and I can prove it by your own daughter" such charge was not slander

and will not sustain this action

7 If the Jury believe from the evidence that the defendants only charge of false swearing was that at a trial of defendant Wolbrecht on a charge of an assault with a deadly weapon the plaintiff had testified that "he (the plaintiff) had not spoken to the defendant before that day" then the testimony charged to be false was not material to the issue at the trial and the jury must find the defendant not guilty

8 The malice which the law implies when words are spoken charged to be slanderous may be rebutted by circumstances showing a want of malice in the party speaking

Which said Instructions were given by the Court

The Counsel for the defendant also asked the Court to give the following Instruction to the Jury, to wit

5 The gist and foundation of this action of Slander is malice; the question of malice is a question for the Jury to decide, and if they find from the testimony that the words said by defendant were spoken during a quarrel, in heat and passion, without malice, then the Jury must find the defendant not guilty

Which said instruction was refused by the Court and to which ruling of the Court in refusing said instruction the said Defendant by his Counsel then and there excepted. And after the Court had refused the said instruction and had written the word "Refused" on the margin thereof, the Court handed the same to the Jury, and the Counsel for the Defendant objected to having the said instruction go to the Jury after the same had been so refused by the Court; but the Court overruled the objection of the Counsel for the Defendant and permitted and allowed the said instruction so refused as aforesaid to go to the Jury, and be taken by them to their Jury room, To which ruling of the Court the said Defendant then and there excepted. Whereupon the Jury retired &c and afterward on the fifth day of September 1860, the same being one of the days of the September Term of said Stephenson County Circuit Court, the Jury returned into Court the following verdict to wit:- "We the Jury find the Defendant Guilty, and assess the damages at Five hundred and forty nine 50/100 Dollars" Whereupon the Counsel for the Defendant moved the Court for a new Trial and in arrest of judgment; and the said Defendant by his Counsel also moved the Court to set aside the verdict in this Cause, and to enter judgment for the Defendant. And the Counsel for said Defendant also moved the Court to set aside the verdict of the Jury in said Cause, and in support of said motions the Counsel for said Defendant assigned the following reasons, viz in writing, to wit:

1 The verdict is contrary to and not sustained by the evidence or any part of it.

2 The verdict is contrary to law.

36

3 The Court allowed improper evidence to go to the Jury on the part of the Plaintiff.

4 The Court erred in giving the instructions asked by the Plaintiff.

5 The instructions asked by the plaintiff and each of them were abstract, there was no proof in the Case to sustain them and they should have been refused by the Court.

6 The Court erred in refusing the 3rd instruction asked by the Defendant

7 The Court erred in permitting the fifth instruction asked by the Defendant to be given to the Jury and by them taken with them to their Jury room, after the Court had refused said instruction and had written the word "Refused" on the margin thereof.

8 Under the law and under the instructions asked by the Defendant in this cause the Jury were bound to find a verdict for the Defendant, and the verdict should be set aside because the Jury found against the law and contrary to the instructions of the Court.

9 The Damages are excessive.

Which said Motions of the said Defendant were severally overruled by the Court, the Court remarking that two new trials have been granted in said cause, and judgment was thereupon rendered by the Court against said Defendant and in favor of said plaintiff upon the verdict aforesaid for the said sum of Five hundred and forty nine & 50/100 Dollars together with his costs

of suit. To which said decission of the court in overruling the said defendants said several motions, and each of them, and in rendering the judgment aforesaid, the counsel for the defendant, did then and there except, and pray that this their bill of exceptions may be signed and sealed by the court, which is done Benj R. Sheldon (Seal)

Filed Sept 22. 1860. L. W. Guiteau Clerk
by Thos. North Dep.

Appeal Bond

Know all men by these presents that we George Walbrecht as principal, and Christian Muella and Frederick Walbrecht as sureties are held and firmly bound unto Charles Baumgartner in the penal sum of Eight hundred dollars lawful money of the United States for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors administrators and assigns, jointly and severally, firmly by these presents Signed with our hands, and sealed with our seals, this seventeenth day of October A D 1860,

The conditions of the above obligation are such, that whereas the above named Charles Baumgartner, did, on the 22nd day of September A D 1860, in the Circuit Court of Stephenson county in the

State of Illinois, recover a judgment against the above bounden George Wolbrecht for the sum of five hundred and forty nine and 50/100 Dollars and costs of suit, and from which judgment the said George Wolbrecht hath taken an appeal to the Supreme Court of the State of Illinois, Now if the said George Wolbrecht shall pay the said judgment costs interest and damages, in case the said judgment shall be affirmed, and shall duly prosecute his said appeal, then the above obligation to be void, otherwise to remain in full force and effect

G. Wolbrecht (Seal)
C. Mueller (Seal)
F. Wolbrecht (Seal)

On the back of which said bond, the following endorsement appears, to wit:

Filed Oct. 17. 1860
L. N. Guiteau
Clerk.

The following is a copy of the Fourth count of the declaration and the plea thereto as referred to on page 16

39

And on the 25th day of November 1859 the following paper was filed in said cause and is in the words and figures following, to wit:

State of Illinois } In the Circuit Court of the County
Stephenson County } ss. of Stephenson of the December
Term A. D. 1859-

Charles Baumgarten
vs
George Wolbrecht } Additional 4th Count
to Declaration in the above
entitled cause-

And whereas also the said Plaintiff hath not ever been guilty, or until the time of speaking and publishing of the several false, scandalous, malicious and defamatory words by the said Defendant as hereinafter mentioned been suspected to have been guilty of swearing falsely, lying, or of any other crime as hereafter stated to have been charged upon and imputed to him by the said Defendant- By means whereof the said Plaintiff before the committing of the said several grievances by the said Defendant, as hereinafter mentioned had deservedly obtained the good opinion and credit of all his neighbors and other good citizens of the State of Illinois to whom he was in any wise known, to wit: at the City of Freeport in the County of Stephenson and State of Illinois 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 his said good name, fame and credit, and to bring him into public Scandal, infamy and disgrace with and amongst all his neighbors, and other good and worthy citizens of the State of Illinois, and to cause it to be suspected and believed by those neighbors and citizens, that he the said Plaintiff had been and was guilty of lying and false swearing, as herein after stated to have been charged upon and imputed to him by the said Defendant, and to subject him to the pains and penalties by the laws of the State of Illinois made and provided, against and inflicted upon persons guilty thereof and to vex, harass oppress, impoverish and wholly ruin him, the said Plaintiff heretofore, to wit: On the thirteenth day of November A.D. Eighteen Hundred and fifty Seven (1857.) at the City of Freeport in the County of Stephenson and State of Illinois aforesaid, in a certain discourse which the said Defendant then and there had, with the said Plaintiff, and of and concerning the said lying and false swearing, in the presence & hearing of divers good and worthy citizens of the State of Illinois, then and there in the presence and hearing of the aforementioned citizens falsely and maliciously Spoke and published of and concerning and to the said Plaintiff, and of and concerning the

41

said lying and false swearing, the false, malicious scandalous and defamatory words following, that is to say: "You (meaning the said Plaintiff) swore to a lie" "You" (meaning the said Plaintiff) "swore to a damned lie" "You" (meaning the plaintiff aforesaid) "swore to a damned lie and I can prove it" "You" (meaning the said Plaintiff) "have sworn to a damned lie and I can prove it by your own daughter" "You" (meaning the said Plaintiff) "have sworn to a lie and I can prove it by your oldest daughter" "You" (meaning the said Plaintiff) "have sworn to a lie and I can prove it by your daughter" "You" (meaning the said Plaintiff) "have sworn falsely and I can prove it" "You" (meaning the said plaintiff) "have sworn that you never spoke to me previous to that time in the Street and that is a damned lie and I can prove it, and now go and sue me if you dare, you had better take down the names of witnesses" "I would not believe you" (meaning the said Plaintiff) "under oath" "You" (meaning the said Plaintiff) "are a damned liar, and swore to a damned lie before Sankey" "You" (meaning the said Plaintiff) "have sworn that you never spoke to me previous to that time in the Street, and that is a damned lie, and I can prove it, and now you go and sue me in the Court if you dare" meaning thereby that the Plaintiff had been and then was guilty of wilfully lying and false swearing

By means of the speaking and publishing of which said several false, malicious, scandalous & defamatory words by the said Defendant as aforesaid- the said Plaintiff hath been and is greatly injured in his said good name, fame and credit and brought into public scandal, infamy and disgrace, Wherefore the said Plaintiff says that he is injured and has sustained damages to the amount of Five Thousand Dollars, and therefore the said Plaintiff brings suit &c-

Kean, & Bright
Plffs. atty.

On the back of which paper the following endorsements appear- "files Nov 25. 1859 L. McGaitean clerk"
"files Dec 7. 1859 L. McGaitean. Clk"

And on the 9th day of December A.D. 1859, the following plea was filed in said cause, and is in the words and figures following, to wit:

In the Circuit Court of Stephenson County, Illinois of the December Term A.D. 1859-

Geo. Holbrecht
ats
Charles Baumgarten

And the said Defendant by Turner & Ingalls his attorneys, comes and defends the wrong and injury when &c, and as to the said fourth count of the said Plaintiffs declaration

says that he is not guilty of the said supposed grievances above in the said Fourth Count laid to his charge, or any or any or either of them, or any part thereof in manner and form as the said Plaintiff hath above thereof complained against him – And of this he the said Defendant puts himself upon the country &c –

And for a further plea in this behalf as to the said Fourth count of said Declaration, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that before the speaking and publishing the said words of and concerning and to the said plaintiff, in the said Fourth Count mentioned, to wit, on the Fifth day of November A.D. 1857, at said County of Stephenson, in a certain cause, then and there pending before Samuel Sankey Esq a Justice of the peace in and for the Town of Freeport in said County of Stephenson, the said Plaintiff then and there appeared as a witness, and was then and there sworn by the said Samuel Sankey, Justice of the peace as aforesaid, and after having been so sworn by the said Samuel Sankey, Justice as aforesaid, upon his Oath aforesaid, then and there, to wit: on the day and year, and at the place aforesaid, did swear falsely, and did then and there swear to a lie – And the said

plaintiff was thereby guilty of, and did thereby then and there upon his said oath in the trial of the cause aforesaid commit false swearing Wherefore the said defendant, at the said time when &c in the said Fourth count mentioned, at said County of Stephenson, spoke and published of concerning and to the said Plaintiff, the said several words, in the said Fourth count mentioned to have spoken and published of and concerning and to the said plaintiff by the said defendant, as it was lawful for him to do, for the cause aforesaid- And this the said defendant is ready to verify, wherefore he prays judgment &c

Turner & Ingalls
Atty's for Defts-

State of Illinois }
Stephenson County } ss. I J. Wilson Shaffer, Clerk of the Circuit Court within and for the County of Stephenson and State of Illinois, do hereby certify that the foregoing is a true and complete transcript of the record and files in the above entitled cause wherein Charles Baumgarten is Plaintiff and George Wolbrecht is defendant as the same appears of the records of said Court and the papers on file in said cause in my Office-

In witness whereof I have hereunto set my hand and the seal of said Court at

Freeport in said County this 11th day
of March A.D. 1861—
Attest: J. Wilson Shaffer, clerk
by L. W. Gentaw, Dep

Charles Baumgarten vs George Wolbrecht } In Stephenson County, Cir Court, September Term 1860 - Plaintiffs Costs

Doc Suit Terms 40c fil 13 paps 65c App & atty 15c	1.20
6 Subps & Opl 2.40 filg 9 paps in prog suit 45c	2.85
Entg Contin 20c Mo leave to amend Dec 20c	" 40
" Ord Amend Dec 20c Entg & filg Amend Dec 25c	" 45
" Nolle Pros to 4th count Dec 20c Ord Contin decl 20c	" 40
Swg & calg Jury 15c Swg Jury & ctr 60c verdict Jury 10c	" 85
Swg 5 Wit 25c Ord file Add count Dec 20c	" 45
Swg & calg Jury 2nd 15c Swg Jury ord 60c Swg 4 Wit 20c	" 95
Entg ord Papt 20c Entg verdict 10c Ord Judgt 20c	" 50
" Judgt 25c Satis Do 15c Ord Ex 20c Ex & filg 45c	1.05
Doc Ex 10c Sh Specln 10c B.C. 30c Ctf Seal 35c	" 85
Swg & Opl 13 Wit aff	1.95
	11.90
County for Jury	3.00
Shffs fees - Taggart, Sumg & calg 2 Jurys $1.20	
" " Servg duty Subpae 5.20	6.40
Witnesses - Joseph Quintus 13 days Apl 5-59 -	13.00
Danl S Bogar 3 " " " " 3.00	
" 23 " Dec " " 23.00	
" 5 " Apl " 60 5.00	31.00
Saml Sankey 3 " Apl " 59 3.00	
" 25 " Dec " 59 25.00	
" 5 " Apl " 60 5.00	
" 1 " Sept " 60 1.00	34.00
Danl Seem 22 " Dec " 59 22.00	
" 2 " Apl " 60 2.00	
" 1 " Sept " " 1.00	25.00
Fred Buss 22 " Dec " 59	22.00
Jos Meier 11 " Apl " 59	11.00
Costs in Win. Co. Clerks fees M B. Derrick 2.30	
Shff " Saml I. Church 85	
" Taggart 1.20	
Amt forward — $4.35	$157.30

	Am^t Forward	4.35	157.30
Witnesses	D. S. Bogan	3.50	
	Saml Sankey	3.50	11.35
	Total Pffs cost —		168.65

Same —

Defendants Costs

Entg app & atty 15c Entg & fil Plea 25c	" 40
" & fil Demr 25c Ord on Do 20c Entg & fil add Plea 25c	" 70
" Leave with Plea 4c cont 20c Swg 3 Wit 15c	" 35
" Mo N trial 20c Entg & filg pt & Mo New trial 25c	" 45
" Ord Sustg Mo N trial 20c Leave file add Plea 20c	" 40
Swg 2 Wit 10c Mo N trial 20c Entg & fil pt on Mo 25c	" 55
Entg ord overlg Mo N T 20c Entg Ex 20c	" 40
" prayer for Appeal 20c Ord Do 20c filg 12 paps on prg trial 60c	1.00
Swg & filg 2 Wit aff 30c 4 Subps & fil 1.60 takg & fil Bond 55c	2.45
B. Costs 30c fee Bill Ex 45c	" 75
	7.45
Shffs fees — Taggart Serrg deity subpse —	1.85
Witness William Best 22 days dur T. & g. 22.00	
" 1 " Apl T 60 1.00	23.00
	32.30
(Paid by Defts) Transcript for Supreme court	14 00

Costs in Winnebago Co

Clks	M B. Derrick	4.05	
Shff —	King & C. Milliken — Sumd —	1.05	
Witness	A D. Meacham 2 days 28 M	3.40	8.50
	Total Defts cost		54 80

State of Illinois }
Stephenson County } Ss

I J Wilson Shaffer clerk of the Circuit Court within and for said County, do certify that the foregoing is true copy from my fee Book

Witness my hand and the seal of said Court

J Wilson Shaffer, clerk
by S. W. Gentsaw Dep

State of Illinois }
Supreme Court }
Third Grand Division

Errors Assigned

The said George Wolbrecht appellant assigns the following Errors, of the said Circuit Court of Stephenson County

1 The said Court erred in permitting improper testimony to be given to the Jury on the part of the plaintiff below

2. The said Court erred in giving the instructions asked by the plaintiff

3. The said Court erred in refusing the fifth instruction asked by the defendant below

4. The Court erred in permitting the fifth instruction asked by defendant below to be given to the Jury, and taken to the Jury-room, after the Court had refused said instruction, and had written the word "Refused" on the margin of the same

5. The Court erred in overruling said defendant's motion for a new trial
6. The said Court erred in overruling said defendants' motion in arrest of judgment
7. The said Court erred in overruling said defendants' motion to set aside the verdict of the Jury
8. The said Court Erred in overruling said defendants motion to set aside the verdict and enter judgment for said defendant
9. The said Court erred in overruling said defendants' motion to enter judgment for said defendant, non obstante veredicto
10. The said Court erred in overruling said defendant motion to issue a venire facias de novo in said cause
11. The Court erred in rendering the judgment aforesaid, against the said defendant below *

Wherefore for the errors aforesaid, said defendant (appellant) prays said judgment may be reversed &c

James L Hagaler
Att'y for appellant

* 12 The verdict is contrary to law and the evidence
13 The verdict and judgment were against appellant, & should have been in his favor.

And now comes the ~~defendant in error~~ Appellee by Leland & Leland his atty & says that there is no error in said record & proceedings & prays an affirmance of the judgment

Leland & Leland
for Appellee

248

George Wolbrecht

vs

Charles Baumgarten

Record

Filed Apl 17. 1861

L. Leland

Clk.