No. 13486

Supreme Court of Illinois

Vanwinkle.

vs.

Gross.

71641

State of Illinois } ss. In the Supreme
County of Henry } Court. Third Grand
Division. April term 1861.

Adrian Van Winkle } Appellants
et ux
vs
Sophia Groyz } Appellee

John S. Buckles being
duly sworn on his oath says
that he is one of the firm of
Buckles & Carpenter Attorneys
at law in said County of
Henry: that he assisted in
the trial of said cause in the
Circuit Court of said County as
one of the Attorneys for said
Appellants: that said cause
was appealed to the Supreme
Court of said State at Ottawa
to the April term A.D. 1860
thereof:
that at the October term
A.D. 1860 of the Circuit Court
of said County of Henry
the said Appellee by her
Attorneys moved said Circuit
Court to amend the record
in said cause by entering
a judgment on the verdict

in said cause: that said
Court failed to enter a
judgment on said verdict
at the term of said Circuit
Court when said cause
was tried:
Deponent further says that,
at said October term, when
said amendment of said
record was made, it was
expressly agreed by and between
Wilkinson & Pleasants on behalf
of said Appellee, and Buckles &
Carpenter and Knox & Rud on
behalf of said Appellants
that said amendment should
be made, upon condition that
the said appeal to said
Supreme Court should be
and remain just the same
as though no such amend-
ment should be made:
and that such amendment
should in no manner affect
or disturb said appeal to
said Supreme Court:
Deponent says he was surprised
to hear that said appeal had
been dismissed at the present
term of said Supreme Court,
as he supposed the said
cause had been heard by said
Supreme court at the April
term A.D. 1860 thereof, and by
said court taken under
advisement.

J S Buckles

Subscribed and sworn to before me J M Smith
a Justice of the Peace in and for said
County this April 29 A.D. 1861

J M Smith J.P.

State of Illinois } In April term A.D.
Supreme Court } 1861
Third Grand Division }

Adrian Van Winkle
et ux
vs
Sophia Grose

Charles H Reed being duly sworn on his oath says that he is one of the late firm of Knox & Reed attorneys at law at Rock Island Illinois: that he assisted said appellants on the trial of said cause in the circuit court as one of their attorneys: deponent further says that he has read the above and foregoing affidavit of John L. Buckles: that he knows the contents thereof: and that the matters and things stated and contained in said affidavit of said Buckles are true in substance and fact as deponent of his own knowledge knows.
deponent further says he supposed said cause had been argued and submitted to said Supreme court at the April term A.D. 1860 as Hon. B.R. Sheldon so informed deponent

Charles H Reed

Subscribed & Sworn to before me this 30 day of April 1861
L. Leander Clerk
by D. Rice Deputy

44

Adrian Van Winkle
et al
vs
Sophia Grose

Aff. of J. S. Buckles

1861.

13486

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

ADRIAN VAN WINKLE and MARGERY VAN WINKLE *vs.* SOPHIA GROZE. } *Appeal from Henry.*

Page of Rec.

1 This was an action on the case for slander, commenced by appellee vs. appellant, March 23d, 1859.

2 Declaration in usual form.

6 and 7 Affidavit filed and leave to plaintiff to prosecute as a poor person.

8 Sept. 29, 1859, amended narr. filed; words charged, "Sophia Groze is a whore."

13 Plea of justification, that plaintiff was a whore, &c.

14 Replication to the country.

19 Trial; verdict for plaintiff for $3,000. Motion for new trial overruled.

23 Defendants, at the trial, claimed the right under the issue to open and close the case. The Court ruled that the plaintiff had the right to open and close, to which ruling defendants then and there excepted.

Plaintiff called *Philip Ott*, who testified that he had known plaintiff six years; that she is between 18 and 19 years old, never been married. Plaintiff has lived at Yorktown, Hoop Pole Grove, and Geneseo, in this State; her mother is living—resides with her son in Yorktown.

24 Plaintiff asked the witness this question,—"What are the pecuniary circumstances of the plaintiff and her mother?" to which the defendants objected. The Court overruled the objection and defendants excepted. Witness answered, she is a poor widow and they are poor folks. Plaintiff has always worked for a living.

25 *Whitfield Sanford* testified that defendants were worth $15,000 or $20,000.

25 *Alfred W. Perry* testified that defendants are worth $12,000 or $15,000.

25 *Hattie Sayres* testified,—I heard defendant, Margery Van Winkle, say two or three weeks ago, at Mr. Robert Cherry's house, in conversation with Mrs. Cherry and others, that it would be no job to prove plaintiff to be what she had called her. She

Page of Rec. was speaking of this suit. To the introduction of this testimony
25 the defendants objected when it was offered. The objection was overruled and defendants excepted.

26 Plaintiff rested.

Defendants called *Robert Cherry*, who testified that at a party at his house, in December previous, he found plaintiff and a man named Brundige in bed together, in a bed-room adjoining the room where they were dancing, and that he ordered them out of the room and locked it, and that they then went up stairs; and

28 *Abraham Phelps*, who testified that on the same occasion he followed the plaintiff and Brundige up stairs, saw them get into bed together, and that they had sexual intercourse, and that Michael Cryle and Laurence Cherry were with him at the time.

31 *Michael Cryle* and *Laurence Cherry* testified to the same thing as Phelps.

32 *Geo. Layland* testified that he had seen plaintiff at night, from 11 to 2 o'clock, in different parts of the town, with different men.

33 *David Anderson* testified that he saw plaintiff and Brundige lying on the ground together, 50 or 60 feet from Cherry's house, on the night of the party spoken of by the other witnesses.

36 *Laurence Cherry* testified to same as Abraham Phelps, and in addition that he had sexual intercourse with plaintiff on the way home from the party.

41 Plaintiff called *Aaron Brundige*, who expressly contradicted the testimony of defendants' witnesses, so far as he was concerned.

Plaintiff's counsel asked witness this question,—Are the statements of Laurence Cherry and Michael Cryle, or any or either of them, in respect to your being in bed with plaintiff up stairs at Robert Cherry's true?

To which defendants objected. The Court overruled the objection, the defendants excepted.

49 The witness answered,—They are not in any respect. Plaintiff's counsel then asked this question,—Did you ever at any time, in Robert Cherry's house or out of and about it, have illicit intercourse with the plaintiff, or take any improper liberties with her? Defendants' counsel objected to the question. The Court overruled the objection, defendants excepted. Witness answered,—I never did.

46 The witness testified to a history of the occurrences at the dance spoken of by the other witnesses.

48.-54 Plaintiff introduced *Wm. Seibel*, *Mrs. Ann Eliza Seibel*, and *Miss Hattie Sayers* and *Frank Edgecomb*, who each testified that they were at the dance spoken of, and whose testimony tended

Page of Rec.

54 to corroborate the testimony of Brundige as to the occurrences of the evening.

This was all the testimony.

The Court, at the request of plaintiff, instructed the jury as follows:

56, 57, 58 1. The words "you are a whore," spoken by a person of a woman, are by law made actionable, and the law implies malice in the speaking thereof, and an intention that they should be believed.

2. By the pleadings in this case, the defendants admit the speaking of the words charged in the plaintiff's declaration, and the law entitles the plaintiff to recover damages therefor in this action, unless the words so spoken are proved to the satisfaction of the jury to be true.

3. In this case the jury will find a verdict for the plaintiff, unless they are satisfied, from the evidence, that the plaintiff is a whore; and it is not incumbent on the plaintiff to prove the malice of the defendants, nor actual damage to the plaintiff.—The law in such case presumes the existence of both malice and damage, unless the words are true.

4. A witness may be impeached by his appearance on the stand, by inconsistencies and contradictions in his testimony, by the improbability and unreasonableness of his statements, by the interest he manifests in the case, and by his manner of testifying, as well as by contradictions by other witnessess, or proof of general bad character.

5. If the jury are satisfied that a witness has in his testimony made any wilful misstatements, the jury may disregard his whole testimony.

6. It is for the jury to determine the credibility of witnesses, and in determining it they may consider the relation of such witnesses to the parties or either of them, their conduct on the stand, the probability or improbability of their statements and their comparative means of knowledge of the facts of which they testify, as well as contradictions by other witnesses. And in this case, if the jury believe that the statements of any of the witnesses are unworthy of credit, by reason of the unreasonableness and improbable character of such statements, or by the contradictions in their own testimony or in the testimony of other witnesses, the jury have a right to disregard all such statements, notwithstanding the character of such witnesses may not have been proven by other witnesses to be bad.

7. In this action the jury may rightfully consider the pecuniary circumstances of the defendants in fixing the amount of plaintiff's damages, which damages the jury may find by way of

Page of Rec.
58 punishment to the defendants, as well as compensation to the plaintiff.

8. If the jury believe from the evidence, that the defence in this case is false, and fabricated by a conspiracy to which the defendant is a party or privy, or that the original slander has been since repeated, they may consider those circumstances or either of them in aggravation of the plaintiff's damages.

To the giving of each of which instructions the defendants excepted.

59 The defendants asked the Court to instruct the jury as follows:

1. Under the issue made by the parties in this case, it is not necessary for the defendants to prove that the plaintiff was a *common prostitute* at the time of the speaking of the words charged in the plaintiff's declaration, but they are only required to show that she had been guilty of fornication prior to the time of the speaking of said words.

2. Fornication by an unmarried female person is the having illicit carnal intercourse with a male person, and one single act of the kind is sufficient to constitute fornication.

3. If the jury believe from the evidence, that the plaintiff had been guilty of fornication in a single instance, prior to the time of the speaking of the words as alleged in the plaintiff's declaration, then the jury should find for the defendants.

7. Whenever a witness is contradicted by other credible witnesses upon material facts, such as his never lying upon a bed in a bed-room with the plaintiff; that he was never so lying, either covered up or otherwise; that he was sleeping an hour, or any other material facts, such contradiction tends to discredit his whole testimony.

61 And modified the following instruction asked by defendants, to wit:

5. To sustain the defendants' plea of justification and make out a full and perfect defence to this action, it is not necessary that they should prove by positive testimony that the plaintiff had been guilty of fornication prior to the time of speaking th words as alleged in the plaintiff's declaration; but if the jury are satisfied by circumstantial evidence that such had been the case, then they should find for the defendants.

By striking out the words, "had been guilty of fornication,"
61 therein contained, and substituting therefor, the words "was a whore." To the refusal of the Court to give said 1st, 2d, 3d, and 7th instructions, and modifying the 7th instruction, the defendants at the time excepted.

The jury found a verdict for the plaintiff for $3,000.

The defendants moved in arrest of judgment for a new trial.

Court overruled the motions severally, and defendants excepted at the time.

Assignment of Errors.

And now come the said appellants, by Knox, Eustace, and Reed, and say that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error, in this, to wit:

1. The Court erred in refusing to the plaintiff the right to open and conclude the case, under the issue in the case.

2. The Court erred in receiving improper testimony offered by plaintiff.

3. The Court erred in refusing competent and proper evidence offered by defendants, to be received.

4. The Court erred in giving the first instruction asked for by plaintiff.

5. The Court erred in giving each of the instructions asked by plaintiff severally.

6. The Court erred in refusing to give each of the instructions asked by defendants, which were refused.

7. The Court erred in modifying defendants' 5th instruction.

8. The Court erred in overruling the motion for a new trial.

9. The Court erred in overruling the motion in arrest of judgment.

10. The Court erred in rendering the judgment aforesaid, in manner and form aforesaid.

POINTS MADE BY APPELLANT'S.

1. The defendants had the affirmative of the issue, and had the right to open and close the case.

Latham vs Sell Rus R 11 Texas 314
Hunter vs Ayres 15 B Monroe 217
Edelen vs Edelen 6 Maryland 288
Seavey vs Dearborn 17 N. H. 357

When the Defendant has the affirmative of the issue, he has the right to open and close the case.

Latham vs. *Selkerk*, 11 Texas, 314.
Hunter vs. *Ayers*, 15 B. Monroe, 217.
Edelen vs. *Edelen*, 6 Maryland, 288.
Seavy vs. *Dearborn*, 19 N. H. 351.
Davis vs. *Mason*, 4 Pick. 156.
Goodtitle vs. *Braham*, 4 Tenn. R. 497.
1 Stark Ev. (5 Am. Ed.) 367, 368.
Sawyer vs. *Merrick*, 6 Pick. 478.
1 Chitty Pl. (6 Am. Ed.) 539.
Daviess vs. *Evans*, 7 Car. & P. 63.
Rawlins vs. *Desborough*, 8 Car. and P. 321.
Lambert vs. *Hall*, 9 Car. and P. 506.
Pole vs. *Rogers*, 2 M. and Rob. 287.
Smith vs. *Masters*, 1 Car. and M. 58.
Chapman vs *Emden*, 9 Car. and P. 712.
Cooper vs. *Wakely*, 3 Car. and P. 474.
Steinkeller vs. *Newton*, 9 Car. and P. 313.
Harnett vs. *Johnson*, ib. 206.
Cotton vs. *James*, 3 Car. and P. 505.
Burrell vs. *Nicholson*, 6 Car. and P. 202.
Jackson vs. *Heskieth*, 2 Stark. 518.
Hodges vs. *Holder*, 3 Camp. 366.
Aston vs. *Perkes*, 9 Car. and P. 231.
Tucker vs. *Tucker*, M. and M. 536.
Corbitt vs. *Corbitt*, 3 Camp. 368.
Brooks vs. *Barret*, 7 Pick. 94.
Faith vs. *McIntyre*, 7 Car. and P. 44.
Lees vs *Hoffstadt*, 9 Car. and P. 599.
Warner vs. *Haines*, 6 Car. and P. 666.
Barker vs. *Malcolm*, 7 Car. and P. 101.
Mills vs. *Oldy*, 6 Car. and P. 728.
Brigham vs. *Stanly*, 9 Car. and P. 374.
Notton vs. *Barton*, 1 M. and Rob. 578.
Rowe vs. *Underhill*, M and Rob. 440.
Absalom vs. *Beaumont*, M. and Rob. 441.
Lewis vs. *Wells*, 7 Car. and P. 221.
Hudson vs. *Brown*, 8 Car. and P 774.
Sandford vs. *Hunt*, 1 Car. and P. 118.
Lacon vs. *Higgins*, 3 Stark. 178.
Penson vs. *Lee*, 2 B. and P. 331.
Rex vs. *Yates*, 1 Car. and P. 323.
Rowles vs. *Neale*, 7 Car. and P. 262.

2. The plaintiff had no right to give testimony showing the pecuniary circumstances of plaintiff's mother.

3. The questions asked the witness, Brundige, and objected to, ought not to have been allowed. It is not the proper way to impeach their testimony & was not allowable for any other purpose

2 Grim 41 3 Grim 117

4. The first instruction asked by plaintiff was clearly wrong. The words were not actionable unless they were false, and that was the very question on the case.

2 Johns 114
5 Cr 188
2 M'Cord 204
2 Bibb Ky 473
22 Miss 423
4 Blackf 496 & 463
2 Stanton Standard 121
1 Cr 25

The 5th instruction is wrong.

The Court erred in refusing the 1st, 2d, and 3d instructions, and in modifying the 5th instruction.

The motion for a new trial should have been sustained. The evidence sustained defendants' plea.

Glover, Cooley
+ Campbell
attys for appts

STATE OF ILLINOIS, ss.

IN THE SUPREME COURT AT OTTAWA,
Of the April *Term, A. D.* 186)

Laurence Vanbuskirk

v.

James F. Murden

APPEAL FROM PEORIA.

Judgment below for Appellee for $ 45 ~~22~~ and costs.

Certificate of Judgment and Appeal.

STATE OF ILLINOIS, } ss.
PEORIA COUNTY.

I, ENOCH P. SLOAN, Clerk of the Circuit Court within and for said county, do hereby certify that at the March Term, A. D. 18 60 of the said Circuit Court, Laurence Van Buskirk recovered by the consideration thereof, a judgment against James F. Murden for the sum of Forty five Dollars and ~~twenty three~~ cents, and costs of suit ~~taxed at the further sum of Dollars and cents;~~ and that thereupon, to wit, on the twenty third day of March A. D. 18 60 the said James F. Murden prayed an appeal from said judgment to the Supreme Court of said State, which was allowed by said Court on filing bond pursuant to the statute in such case made and provided, in the penal sum of Five hundred Dollars, with Securities to be approved by the clerk of this court, by ~~a surety~~ agreement of parties within thirty days next after the date last aforesaid. And I do hereby further certify that within the time so limited, to wit, on the Ninth day of April A. D. 18 60 the said appellant filed in my office an appeal bond, in all things according to the order of said court and the statute aforesaid therefor, thereby perfecting said appeal.

Witness my hand and the seal of said Court, at Peoria, this Twelfth day of March A. D. 18 61

Enoch P. Sloan

Circuit Clerk, Peoria County.

Jas Thurston D.C.

MOTION TO DISMISS APPEAL, &C.

Upon the filing of the foregoing certificate of the judgment of the said Circuit Court in the above entitled cause, and of the perfecting of an appeal therefrom by the said appellants, the appellees aforesaid move the said Supreme Court here to dismiss said appeal for that the said appellant has not lodged in the office of the Clerk of said Supreme Court an authenticated copy of the record of the judgment aforesaid appealed from, as the law requires, &c. And the said appellees pray damages pursuant to the statute in consequence of the delay occasioned by such appeal, &c.

M. Williamson

Counsel for Appellees.

309

Lawrence Van Burkirk

as

James H. Murder

Certificate of Judgment
& appeal.

309

1861

Filed Apl. 19. 1861
L. Leland Clk.

Judgt. $45,000
45,000

Williamson atty.
& S. P. Clk.