

12401

No. _____

Supreme Court of Illinois

Winchell.

vs.

Strong.

71641  7

109

Milo Winchell
vs
George Strong

109

2407

1856

X

United States of America }
 State of Illinois } S.S.
 County of Cook }

Shas before the Hon-
 able John M. Wilson Judge of the Cook County Court
 of Common Pleas at a regular term of said Cook
 County Court of Common Pleas in and for the
 County of Cook and State of Illinois, begun and
 holden at the Court house in the City of Chicago
 in said County and State on the second Monday
 being the tenth day of September in the year of
 our Lord one thousand eight hundred and fifty
 five, and of the Independence of the United States
 the eightieth;

Present the Honorable John M. Wilson Judge
 Daniel M. Shoy Prosecuting Attorney
 James Andrew Sheriff
 Walter Kimball Clerk

Attest.

It is remembered that heretofore to wit, on the
eighteenth day of May in the year of our Lord
one thousand eight hundred and fifty five
came George Strong Plaintiff by his Attorneys
Goodrich Scoville & Soley and filed in the
Office of the Clerk of the Cook County County
Court of Common Pleas his precept for a writ
of summons against Milo Winchel in a plea
of trespass on the case Standen which said
precept is in words and figures as follows to wit:

Cook County Ct of
Common Pleas

George Strong
" "
Milo Winchel

Actum on the case
Standen Dam \$5000=

Clerk will issue summons
in the above cause, returnable next term

Goodrich Scoville & Soley
Plffs Attys

And thereupon on the said eighteenth day of May in the year last aforesaid there accordingly issued out of the office of the Clerk of said Court a writ of summons, which said writ is in words and figures as follows to wit:

State of Illinois } S. S.
County of Cook }

The people of the State
of Illinois to the Sheriff of said County-Greeting

We command you that you summons Milo Michel if he shall be found in your County personally to be and appear before the Cook County Court of Common Pleas of said County on the first day of the next term thereof to be holden at the Court House in the City of Chicago in said County on the first Monday of June next to answer unto George Strong in a plea of trespass on the case slander to the damages of the 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— Walter Kimball Clerk

of our said Court, and the seal thereof
at the City of Chicago in said County
this 18th day of May A.D. 1855



Matth Kimball Clerk

"Endowment on said writ"

Served by reading the within named Milo
Munich this 20th day of May 1855

James Andrew Sheriff

By Ira Snow Deputy

And afterwards to wit; on the twenty second
day of June in the year last of us aforesaid
comes Plaintiff George Strong by his Attorneys
Godrich, Scirellet & Seely and filed in the
office of the Clerk of the Court of the said
Court his Declaration which said Declaration
is in words and figures as follows to wit;

State of Illinois	{	On the Cook County
		Court of Common Pleas
County of Cook	{	of the July Term A.D. 1855
		George Strong the Plaintiff

in this suit by Goodrich Scoville & Seelye his
attorneys, complains of Heilo Winchell defendant
herein who is summoned &c of a plea of trespass
as on the case——

For that whereas the said pla-
ntiff hath not even been guilty or until the
time of the speaking and publishing of the
several false, scandalous, malicious & defam-
atory words by the said defendant as herein
after mentioned, been suspected to have been
guilty of theft or of any other crime as here-
after stated to have been charged upon and
imputed to him by the said defendant——

Yet the said defendant well knowing the
premises, but greatly enjoining the happy state
and condition of the said plaintiff, and
contriving and wickedly & maliciously intending
to injure the said plaintiff in his good
name, fame & credit & to bring him in to
public scandal, infamy & disgrace with &
amongst all his neighbours & other good &
worthy citizens & to cause it to be suspected
& believed by those neighbours & citizens that
he the said plaintiff had been & was guilty
of theft. Hereof to wit: on the 16th day
of May A.D. 1855 at the County of Cobb
aforesaid in a certain discourse which
the said defendant then & there had with

the said plaintiff & of & concerning the
said plaintiff in the presence & hearing
of one Stephen Lamb and of divers other good
& worthy citizens then & there in the presence
and hearing of the said citizens, falsely &
maliciously spoke and published of and
concerning the said plaintiff & to the said
plaintiff, the false, scandalous, malicious
and defamatory words following, that is to
say "You meaning the said plaintiff; stole
the timber to build the Alton Bridge" You
meaning the said plaintiff; "Stole the timber
to build the Alton Bridge & I can prove it."

By means of the speaking and publish-
ing of which said several false scandalous
malicious & 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 with
and amongst all his neighbors & other good
& worthy citizens - and also by means of
the premises the said plaintiff hath been
& is otherwise much injured and damaged
to wit; at the County of Cook aforesaid.

And afterwards to wit; on the day
& year aforesaid at the said County of
Cook in a certain other discourse which
the said defendant then & there had in

at ~~extra~~ the presence and hearing of divers
other good and worthy citizens Presidents
of the said county of Cook the said defend-
ant further entreprising and intending
as aforesaid then & there in the presence and
hearing of the said last mentioned citi-
zens, falsely and maliciously spoke & pub-
lished of and concerning the said plaintiff
the false scandalous, malicious and
defamatory words following that is to say
Goy (meaning the said Plaintiff) stole
the timber to build the bridge (meaning
a certain bridge called the Alison bridge
with and I can prove it - strong. (meaning
the said Plaintiff did steal the timber
meaning the timber of which a certain
bridge commonly called the Alison bridge
was built -

And afterwards to wit: on the day
& year aforesaid at the County of Cook afo-
said in a certain other discourse which
the said defendant then & there had in
the presence & hearing of divers other
good & worthy citizens of said County
the said defendant further entreprising
& intending as aforesaid - then & there in
the presence & hearing of the said last
mentioned citizens, falsely and maliciously

spoke & published of & concerning the said
plaintiff, the false scandalous, malicious
& defamatory words following, that is to say
You (meaning the said plaintiff) stole
the timber to build the bridge with (mean-
ing a certain bridge commonly called
the Alison Bridge) and I can prove it
without going out of this shop (meaning
the shop in which the said last men-
tioned citizen & the said defendant
& plaintiff then were —

By means of the committing
of which said several grievances by
the said defendant as aforesaid the
said plaintiff hath been and is greatly
injured in his good name fame and
Credit and brought in to public scandal
infamy & disgrace with & amongst all
his neighbours & other good & worthy citi-
zens inasmuch that divers of those neighbours
& citizens to whom the innocence & integri-
ty of the Plaintiff in the premises were well
known have on account of the committing
of the said grievances by the said defen-
dant as aforesaid from thence hitherto
suspected & believed & still do suspect and
believe the said plaintiff to have been
and to be a person guilty of theft so as

afteraid charged upon & imputed to him
by the said defendant; and also by
means of the premises the said plain-
tiff hath been and is otherwise greatly
injured & damaged to wit; at said county
of Cook = So the damage of said
plaintiff of Five Thousand Dollars &
therefore he brings suit &c

Goodrich Sewell Esq
Plff's Atty

And afterwards to wit; on the ninth day
of August in the year last aforesaid
comes the Defendant Milo Muechel by Edward
Martin his attorney and files in the Office
of the Clerk of said Court. his Plea which
said Plea is in words and figures as
follows to wit;

In the Cook County
Court of Common Pleas
Of September Term Anno A.D. 1855

Milo Muechel
ad
Geo Strong

And the Defendant

by Edward Martin his attorney says
that he is not guilty of the supposed
grievances above laid to his charge or
of either of them or any part thereof
in manner and form as the Plaintiff
hath above thereof complained against
him and of this the Defendant puts
himself upon the country &c

Edward Martin
Def't Atty

And the plaintiff doth the like &c
Goodrich & Scoville
Plff's Attys

And afterwards to wit; on the sixteenth
day of October in the year of our Lord
one thousand eight hundred and
fifty five. said day being one of the days
of the September Term of said Court County
Court of Common Pleas. the following
among other proceedings were had in
said cause and entered of Record to wit;

George Strong }
" } Preside on the Case
Milo. Wmchel }

This day comes the said Plaintiff by Goodrich Scoville & Seelye his attorneys and the said defendant by Edward Maltin his attorney also comes and issue being joined herein it is Ordered that a jury come and thereupon come a jury of good and lawful men to wit:

John Orchard Bury Marshall S. J. Irish
Theodore Hubbard Moses & Pratt - John D. Morris
Geo W French Joseph Hawley. B. J. Cron S. E. Rob.
etc E. La Barr and H H Horton who being
duly elected tried and sworn well and truly
to try the issue joined as aforesaid after hearing
the testimony, adduced argument of counsel
and instructions of the Court retire to consider
of their verdict and by consent of said parties
~~it~~ it is ordered that when the jury
agree upon a verdict they may reduce
their verdict to writing sign and seal the
same and afterwards separate and meet
the Court to-morrow morning —

And afterwards to wit; on the Seventeen th
day of October in the year last aforesaid
said day still being one of the days of
the September Term of said Court - the
following further proceedings were had
in said cause and entered of Record
to wit;

George Strong }
 is } Trespass on Case
Milo Mutchel }

And now come the said
parties by their attorneys and the Jury
impanelled in this cause also come
into Court and say we the Jury find
the Defendant guilty as charged in
said plaintiffs declaration and we assess
the said plaintiffs damages to the sum
of Five Hundred Dollars -

And thereupon the said defendant
enters his Motion herein for a new trial in this
cause

And afterwards to wit; on the third day of November in the year of our Lord one thousand eight hundred and fifty Five said day, yet being one of the days of the September Term of said Court, the following among other proceedings were had in said cause and entered of record to wit;

George Strong	} Disputes in Case
"	
Milo Michel	

And now again comes the said parties by their said attorneys and the Court after argument of counsel heard on the said defendants motion for a new trial in this cause being now fully advised in the premises overrules said motion —

Whereupon it is considered that the said plaintiffs do have and recover of the said defendant his damages of Five Hundred dollars in form as aforesaid by the Jury awarded and also his costs and charges by him about his suit in this behalf expended and have execution therefor —

And thereupon said Defendant prays an appeal to the Supreme Court of the State of Illinois which is allowed on his

filing his appeal bond in the sum of one thousand dollars with security to be approved by the Judge of this court said bond and bill of Exceptions to be filed within thirty days from this day—

And afterwards to wit: on the thirtieth day of November in the year last aforesaid there was filed in the office of the Clerk of said Court an appeal bond which is in words and figures as follows to wit;

Know all men by these presents that we Minto Murchie of the County of Cook in the State of Illinois and Joseph Felkins of the said County and State as his surety are jointly and severally held and firmly bound unto George Strong of the County and State aforesaid in the penal sum of one thousand Dollars of lawful money of the United States for the payment of which said sum to the said George Strong or his certain attorney or attorneys. His executors administrators and assigns we and each of us do hereby bind ourselves our and each of our heirs executors administrators and

assigns, for you firmly by these presents
sealed with our seals and dated this
twenty second day of November A.D. 1855

The condition of the above written
Obligation is such that whereas the said
George Strong did at the September
Term of the Cook County Court of Com-
mon Pleas now last past recover against
the above bounden Milo Michiel in an
action of Slander then a Judgment
for Five Hundred Dollars Damages and
Costs and the above bounden Milo Michiel
then and there prayed his appeal from
said Judgment which was granted
by said Court on filing appeal bond
in one thousand Dollars

Now therefore if the above bounden
Milo Michiel shall pay the Judgment
Cost in trust and damages in case said
Judgment shall be affirmed and shall
also duly prosecute said appeal then the
above written bond or obligation shall
be void and of no effect or else to be and
remain in full force and virtue

Signed Sealed and
delivered in presence of
O. Klemm
N. M. Davis

Milo Michiel
Joseph F. Williams

Approved this 29th day of Novr 1855.

John M Wilson

Judge of the Court Co Ct of C Pleas

And afterwards to wit: on the third day of December in the year last aforesaid, there was filed in the office of the Clerk of said Court, a Bill of exceptions which said Bill of exceptions is in words and figures as follows to wit:

In the Court County
Court of Common Pleas

Strong)
vs) Bill of Exceptions
Michell)

Which said several issues in manner aforesaid respectively joined between the Plaintiff and the Defendant, afterwards on the 16th day of October at the September term A.D. 1855, before the honorable John M. Wilson Judge of this Court came on to be tried at which day before said Judge came as well the plaintiff as the Defendant

by their respective attorneys aforesaid And the
Oaths of the Jury aforesaid whereof mention
is in this made being called likewise came
and were sworn to try said several issues
in manner aforesaid. respectively joined
and champion to maintain said issues
in this case the Plaintiff called as a
witness - A. W. Rees who being sworn testi-
fied on this direct examination that he
knew the parties was their neighbor
and had known them a number of
years - Was at Mr Rognetts last Spring
when the parties came there -

They were conversing about Bridges - Wm
Strong said he had given \$50 towards
the Allison Bridge Defendant said you
made \$100 on it & stole the timber to build
it with - repeated it twice said he could
prove it - Plaintiff told him he did
not believe it Defendant said he did
and he could prove it - Plaintiff said
he would prosecute him - which re-
peated it; Mr Woolworth Mr Lamb two
Mr Rognetts Mr Edwards and myself
were present and might have been some
others - Plaintiff and Defendant were
then when I got them - They were pretty
much through talking on the subject

when I left - It was 15 or 20 minutes before I left after the charges made -

On cross examination said witness testified that Whitchel did not say in what way Strong made the \$100 in building the Bridge - Did not say where he stole the timber from did not say the stealing consisted in cutting on other people's land and cutting the timber without their knowledge or consent -

They were talking about bridges when I got there Mr Strong called them to witness what Mr Whitchel said - Mr Whitchel's statement about Strong making the 100\$ was immediately after the statement of Strong that he had given \$50 towards the Bridge - When I entered both parties were cool - That at the same meeting and after the speaking of the words but before - Witness left the meeting - Defendant made a statement to Plaintiff respecting his meaning of the words -

That such statement might have been 15 or 20 minutes after the speaking of the words, whereupon Plaintiff Counsel objected to the admission in evidence of said statement - Defendant's counsel stated that the statement from Defendant

to Plaintiff he intended to prove by the witness was as follows = What I mean to be understood as saying is this that you entered upon other people's land and cut down and hauled away their timber without their knowledge or consent if the law calls that stealing I call it stealing if the law calls it trespass I call it trespass and he also stated that on the Defence he could prove the truth of the fact stated namely the cutting down and hauling away of the timber to build the above Bridge with, without the knowledge or consent of the owner - and the objection was sustained to which ruling of the Court the Defendant by his Attorney then and there excepted -

E. A. Allen a witness for Plaintiff being sworn testified he knew the parties had resided at Wheeling seven years - Was a little acquainted with the parties. Mr Strong said he had built the Allison Bridge for so much - Mr Michael said yes and made \$100 out of it and stole the timber to build it with - He stated it two or three times there were quite a number of persons present

could not tell how many —

On cross examination said witness states he was present at the beginning of the meeting — Mr Michel — claimed he had property in the Bridge they thought of vacating the Michel Bridge — Mr Strong did not contradict him — he said the thought when the donation was made it became the property of the town — When Defendant first accused Plaintiff with stealing the timber to build the bridge — I think Mr Strong told him he was excited and could not mean what he said — Mr Michel talked loud — Had not been loud talk — previous to the accusation — Mr Michel did not say in this examination that Strong had entered on other People's land and stole the timber and if the law called it stealing he did and if the law did not he did not. But he did make such a statement 10 or 15 minutes afterwards —

Mr Wolworth, a witness on the part of the Plaintiff being called and sworn testified that he had lived in Wheeling sometime — Knew the parties to an extent at the meeting spoken of had met at the Blacksmith's shop to discontinue a road

and bridge - Parties were discussing the advantages and disadvantages of rail Roads and plank Roads - Mr Strong did not think they were of so much benefit as some did Mr Winchel said Mr Strong was a man of not much public spirit - Defendant claimed a part of the bridge they were going to vacate - Mr Strong thought it belonged to the public - Mr Winchel said you stole all the timber to build the Ellison bridge with Mr Strong said you do not mean that Defendant repeated it two or three times said he could prove it -

Cross Examination

Said Witness on Cross examination stated that Defendant did not explain what he meant by charging Plaintiff with Stealing - He did not in the same conversation - He did 15, or 20 minutes after Plaintiff objected to such explanation as not being in the same conversation - He said nothing in that conversation about other peoples land - I did not understand Winchel to mean by the charge either that Strong cut down growing timber or took it after it was down -

On re-examination said witness said

he understood defendant to mean stealing
or else he would not have said so -
I did not understand him as meaning
anything about cutting growing timber

Mr Larrab being called and sworn
on the part of the Plaintiff testified
he lived at Wheeling since 1840 - Parties
were there when I went - I was present
at the meeting. Defendant - said Strong
had stole the timber to build the bridge
or a bridge - Strong denied the charge
Winchel said he had stole the timber
and he could prove it -

Some few minutes after he qualified
it - Mr Strong then said you try to back
out of it - It was some ten or fifteen
minutes - He had accused him of stealing
the timber as many as three times before this -

There was nothing about standing timber
at the beginning - Mr Winchel owns a
sawyer represented to be worth ten or fifteen
thousand Dollars -

On cross examination
he said both were some excited - Not appa-
rently so until after the accusation -

Now the testimony for the Plaintiff
was closed and the Plaintiff rested his
Case -

Defence

Thereupon the defendant - called as a witness Francis Edwards - who being duly sworn testified, that he resided at Whellington was present at the meeting, the last part of it - Heard all about the stealing the timber - Mr Strong told Mr Mirchel he had lost \$50 or \$100 in building the Allison Bridge - Mirchel said he made \$100 and state part of the timber to build with - Mr Strong said to the bystanders I want you all to take notice he accuses me of stealing - Mr Mirchel immediately turned to them and said - I mean to be understood that Mr Strong entered upon other people's land and cut and hauled timber to build it without their knowledge or consent - Defendant's Attorney offered to prove by this witness, that Plaintiff did enter upon the land of this witness and cut and hauled off his growing timber to build the Allison bridge with without his knowledge or consent to the reception of which evidence the Plaintiff's Attorneys then and there objected and the objection sustained by the Court and to the ruling of the Court in soot arriving said objection the defendants

attorney then and there excepted - Before that Mr Strong told Mr Michels he was an old grey headed liar - It was at the same meeting and before the accusation - He was as mad as any man could talk - Mr Michels was very much excited -

On cross-examination said witness said he called him a hoary headed liar before the accusation of theft. It was 15 minutes before Mr Allen was present - Mr Phelps was not present.

The lie was given in regard to Michels having given anything for the Bridge - Mr Strong said he had never given anything; he was a liar. Mr Strong and I had a conversation after the accusation - It was not after our conversation that he said he had cut down a part of the timber from other people's land to build the bridge -

I have had no difficulty with Mr Strong - I did offer a man \$10 to flog Strong - It was some years since -

I did not state that - I only heard the last part of the conversation - I heard it all -

Re-examined by defendant = says it was five years ago he made the offer of \$10 to Strong = Have had no difficulty since = my conversation with Strong was after the explanation = I heard all the conversation about the Allison Bridge = Michael Bridge could not tell so clearly the conversation about the Michael bridge - as the parties had got pretty warm when talking about the Allison bridge. They were very much excited -

Re-crossed: the excitement commenced when Strong called Michael a liar -

George Salner - called by defendant and cross-examined - says - have lived in the neighborhood 14 or 15 years and have known the parties all that time = I was present at the meeting part of the time - part of the time I was out of the shop = I heard what Michael said about the Michael bridge Strong said he had subscribed \$50 for the Allison bridge Defendant = said yes - you made \$100 out of it and stole the timber, or a part of the timber - I don't know which - charged him with stealing the timber nothing else - There was nothing at all said about cutting down timber I do not know how long after this - after this

Michell said he called it stealing & whether the law does or not I think it was some little time - Most of those present, were attentive to the conversation between these two men -

Cross. Examined by Plaintiffs Counsel the Witness says - Mr Strong said to Mr Michell - Now Mr Michell you have gray hairs on your head - and I wish you would confine yourself to the truth - This was said after the charge of stealing I think -

Re-examined by Plaintiffs Counsel said witness said the conversation about telling the truth was about the Allison Bridge - Michell said something about having subscribed to the Michell bridge I do not know that Mr Strong denied it -

John Roguet called and sworn on behalf of Defendant - says he was present at the meeting - Mr Michell said Strong had stole the timber to build the Allison Bridge of and he could prove it - Mr Strong told him he would put him in a way to prove it - Mr Michell then said if the law called it stealing he did he had been on another Mans land and cut the timber to build the bridge

with = They were excited —

On cross-examination he says I did not hear plaintiff say to Defendant you do not mean that = Mitchell said he stole it twice = The conversation between Edwards and Strong was 10 or 15 minutes after the charge of stealing — I did not hear Strong call Mitchell a liar —

Mean the defendant rested —

The Plaintiff then recalled E. A. Allen who testified he heard nothing about lying until after the charge of theft — That if Strong had called Mitchell a liar he thinks he should recollect it —

The witness Feat recalled says he was present at the conversation about the Mitchell bridge — heard nothing about lying until after the charge of stealing — Thinks he should recollect it if any such thing as testified to by Edwards had occurred —

The witness Wolworth recalled says he was present at the conversation about the Mitchell Bridge — there was no such statement made by Strong about lying as Mr Edwards testified to —

The witness Lamb recalled say he was present during the whole of the conversation - String made no such declaration as testified to by Edwards -

And on the part of the plaintiff the following instructions were asked and given, and to the giving of which instructions the Defendants Attorney then and there excepted -

Plaintiffs Instruction

1 If the Jury shall believe from the evidence that the defendant made the charge against the plaintiff substantially as laid in the declaration & thereby intended to charge upon the plaintiff the crime of stealing the plaintiff is entitled to recover in this action - and the ^{Jury} may in estimating the damages take into consideration the defendants pecuniary circumstances & may give in their discretion exemplary damages -

2 Although the Jury shall believe from the evidence that after the ^{defendant} plaintiff made the charge stated in the declaration & was threatened with a suit by the plaintiff the defendant made the explanation stated by the witness Edwards yet if they shall further believe

it was not intended as an honest retraction of the charge of stealing - but rather for his own protection against the consequences of his previous charge it might not to mitigate the damages -

And on the part of the Defendant the following instructions were asked and given

Defendants Instructions

- 1 If the Jury believe from the evidence that the words charged by the Plaintiff were spoken in the heat of passion and without any malice the Law is for the Defendant -
- 2 The words said in the Declaration impute a felony in Law - cutting down and taking away growing timber is not a felony in Law - The language of the Defendant is to be taken by the Jury in the sense he means to speak them, and if the Jury believe from the evidence that the Defendant means to charge the Plaintiff with cutting down and taking growing timber, and not with stealing timber already cut down, then there is a fatal variance between the Declaration and the proof and the Law is for the Defendant -

which Bill of Exceptions he prays may be
signed & sealed by the Judge of said
Court which is accordingly done this
3^d day of December 1855

John W. Wilson 
Judge of the Cook County
Court of Common Pleas

State of Illinois
County of Cook

Walter Kimball Clerk

of the Cook County Court of Common Pleas
in & for the County & State aforesaid do hereby
Certify that the foregoing is a full true &
correct Transcript of all the papers filed
and of the Orders entered of Record in said
Court, in the Case of George Strong vs. Miles
Winchell.

In Testimony whereof I have
hereunto set my hand & the Seal
of said Court at Chicago in said
County this 7th day of June A.D. 1856
Walter Kimball

Clerk

Miles Winchell

vs

George Strong

}

In the Supreme Court of the
State of Illinois

on the third Grand Revision
of the June Term A.D. 1856

And now comes the said Milo Mitchell by Davis and Martin his attorneys and says that in the Record of the proceedings aforesaid and in the rendition of the judgment aforesaid manifest error hath intervened to his prejudice in this Court

1st That it appears by the record aforesaid that the said Cook County Court of Common Pleas erred in refusing proper evidence offered in the trial aforesaid by the Plaintiff in error

2nd That it appears by the record aforesaid that the said Cook County Court of Common Pleas erred in refusing to admit proper evidence offered on the trial aforesaid by the Plaintiff in error

3rd That it appears by the record aforesaid that the said Cook County Court of Common Pleas erred in giving the first instruction asked by the Defendant in error

4th That it appears by the record aforesaid that the said Cook County Court of Common Pleas erred in giving the second instruction asked by the Defendant in error

5th That it appears by the record aforesaid that the said Cook County Court of Common Pleas erred in rendering judgment for the said Defendant in error when by the laws of the Land said judgment ought

To have been for the Plaintiff in error
and this the said Milo Minkell is
ready to verify by the record aforesaid
wherefore for the errors aforesaid and
others in the said record appearing
he prays process &c. And that for the
errors aforesaid the said judgment of
the Cook County Court of Common
Pleas may be reversed set aside &
annulled and for nothing esteemed and
that he may be restored to all things
which he may have lost by occasion
thereof &c.

Davis Martin

for Pet in error

And the said defendant in error by G. Goodrich his
attorney comes and says that no such errors
appearing in said record as by said plaintiff
is supposed

Grant Goodrich
Deft's atty

109

George Strong
1 my 1854

Wm. W. W. W.

Filed June 11 1854
L. Leland
Clerk

Tras. A. Hunt
pd by 10.11
11.11.00

Stone
and
Michael

II The first point made by plaintiff in error is the rejection of the explanation by the witness that

Answer - The witness testified that the qualification was not made until some 15 or 20 minutes after the suppression of the magnified slander - that the conversation in which the slander was uttered had ceased

The witness deposes that Michael made no explanation about cutting & carrying away timber in the conversation in which the slander was made - "Did not say the stealing consisted in cutting on other people's land & cutting the timber without their knowledge" It is clear therefore that after the conversation had ended in which the charge was made & perhaps a portion of those who had heard the magnified slander had departed, carrying away with them the charge, the defendant below, 15 or 20 minutes after, to protect himself may have made the declaration & sought to be proved - but he expressly negates the explanation in the conversation in which the charge was made

After the timber was cut down it became
personal property, & the hauling it
away would be Larceny—

The case of libel or verbal slander is dif-
ferent. In a person the charges
or explanation go together, but not
so with verbal slander.

The word "timber" must mean especially
when it refers to the particular timber
in the bridge, can have no other meaning
than down timber, such as used in the
construction of the bridge.

There was no lawful obstruction of the
Hearings - even at the subsequent conversation
14. Feb. 1839

The witness of Michael Geo. Jones testified
the expression used in the subsequent
conversation was, "I call it stealing
whether the law does or not".

Even if the charge at the time it heard
some witness had been explained in
the way which is said, still under
our statute it was actionable.

III But the judge must be affirmed
at all events -

There is no obligation in the bill
of exceptions that it contains
all the evidence in the case.

It may have been that subsequently
the objection was withdrawn
or overruled & the testimony
admitted. The Record does
not negative such a course
and the reports are full of
cases that a cause will not
be removed when the bill
of exceptions does not contain
an averment that it contains
all the evidence.

1. It was clearly right -
It requires the Jury to believe from the evidence, in order to protect the defendant below. That, they should believe that Winchell intended honestly to withdraw the charge of stealing - or retract the charge.

This is surely correct. For if by what he said the charge of stealing was left unretracted, then it amounted to nothing. Nothing short of that which amounted to a retraction could repair the damages, or repair the injury -

The party could not protect himself against the effect of his slander by an explanation which still left the slander & injury in full force. Any other rule would be the protection of the slanderer.

We would allow him to utter a slander, & then say at some time make an explanation which we suppose would protect him, but which leaves the slander still in force - unretracted and to work out its injury.

But does the witness say he

Mudroorah (Briard) to change the
Strong with Strong - Other with per
say the same
14 Mss. 459

IV

The depts. Third point, is fully disposed of
by our cross the facts -
Edward gave the pretended explanation
in full -

This was all the stuff in error could
ask -

But after having given it, under
the general issue he could not
give the truth of the explanation
in evidence

2 Mss. 39

2 Hermanns Digest 1461 - where the ac-
tion is an cited

Why, then, if first of the evidence would
have proved the Strong guilty of
a Misdeemeanor, to justify a charge
of felony -

On this point, labor is superfluous
The authorities cited by pl. ff. cannot
have no application to the point
in issue, & belong to another class
of disputes

V.

There is nothing in the 4 points of the
pleff. in error

The practice of giving premium
in emplacements in evidence, has
always been practiced and is
suffered by our own courts
in the case of in

3 Gill. 436 -

3 Wms 36

A. This whole case shows a most
atrocious slander, uttered in a public
meeting - repeated, with the con-
fidence of his ability to provide
and when told by Strong he did
not believe the charge, he
replied he did & he could
prove it -

Under the circumstances, the
jury let the verdict off easily -

And it is manifest from what
of the testimony is preserved
that ample justice is done
and in as much as the title
of exceptions does not pro-
pse to contain all the evidence
the Court will presume, it
sufficient to sustain the verdict
and that any apparent errors were
subsequently corrected

Wm H. Odick
for defendant

109
Strong left in even
and

Amulet

Prisoners
of war in even

Filed June 24 1856.
L. Seland
Clerk

Amulet
Prisoners
of war in even

STATE OF ILLINOIS, SUPREME COURT,

TO JUNE TERM, 1856.

MILO WINCHELL *vs.* GEORGE STRONG.

Abstract of the Record.

Page 28. 3.

The declaration is in case for slander, and comprises two counts.

The first count states that in a colloquium on 16th May, 1855, with the defendant, in the hearing of one Stephen Lamb, and others, the plaintiff falsely and maliciously spoke and published of and concerning the defendant, the false, scandalous, malicious, and defamatory words following, that is to say: "You," meaning the said defendant, "stole the timber to build the Alison Bridge. You," meaning the defendant, "stole the timber to build the Alison Bridge, and I can prove it."

The second count states the words to be: "You," meaning the defendant, "stole the timber to build the bridge with," meaning a certain bridge commonly called the Alison Bridge, "and I can prove it without going out of this shop," meaning the shop in which certain citizens and the plaintiff and defendant then were. Damages \$5000.

Plea—Not guilty, and *similiter*.

The trial was had before a jury, in the Cook County Court of Common Pleas, on 16th October, 1855, and a verdict of guilty rendered with \$500 damages.

On the 3d November, 1855, motion for new trial was made and overruled, and appeal to this court prayed, granted, and ordered.

Page 15.

At the trial the defendant produced A. N. Peets, who, on his direct examination, testified that he knew the parties; was their neighbor, and had known them a number of years; he was at Mr. Roquet's last spring when the parties came there; they were conversing about bridges; William Strong said he had given \$50 towards the Alison Bridge; defendant said, "you stole the timber to build it with;" repeated it twice; said he could prove it; defendant told him he did not believe it; plaintiff said he did, and he could prove it; defendant said he would prosecute him; Winchell repeated it; Mr. Woolworth, Mr. Lamb, two Mr. Roquets, Mr. Edwards, and witness were present; there might have been some others; defendant and plaintiff were there when witness got there; they were pretty much through talking on the subject when witness left; it was 15 or 20 minutes before witness left, which was 15 or 20 minutes after the charges.

On cross examination the witness testified that Winchell did not say in what way Strong made the \$100 in building the bridge; did not say where he stole the timber from; did not say the stealing consisted in cutting on other people's land, and cutting the timber without their knowledge or consent; that they were talking about bridges when witness got there; Mr. Strong called them to witness what Mr. Winchell said; Mr. Winchell's statement about Strong making the \$100 was immediately after the statement of Strong that he had given \$50 towards the bridge; when witness entered both parties were cool; that, at the

same meeting, and after the speaking of the words, but before witness left the meeting, plaintiff made a statement to defendant respecting his meaning of the words; that such statement might have been 15 or 20 minutes after the speaking of the words. Whereupon defendant's counsel objected to the admission of said statement in evidence. Plaintiff's counsel then stated that the statement he intended to prove was as follows: "What I mean to be understood as saying is this: that you entered upon other people's land and cut down and hauled away their timber without their knowledge or consent; if the law calls that stealing, I call that stealing; if the law calls it trespass, I call it trespass; and he also stated that on the defence he could prove the truth of the fact stated, namely: the cutting down and hauling away of the timber to build the above bridge with, without the knowledge or consent of the owner." The objection was sustained and exception taken.

Page 17.

The defendant also produced E. A. Allen, who testified that he knew the parties; had resided at Wheeling several years; was a little acquainted with the parties; Mr. Strong said he had built the Alison Bridge for so much; Mr. Winchell said "yes, and made \$100 out of it, and stole the timber to build it with;" he stated it two or three times; there were quite a number of persons present; could not tell how many.

On cross examination, witness stated he was present at the beginning of the meeting; Winchell claimed he had property in the bridge; they thought of vacating the Winchell Bridge; Mr. Strong did not contradict him; he said he thought when the donation was made it became the property of the town; when plaintiff first accused defendant with stealing the timber to build the bridge with, I think Mr. Strong told him he was excited and could not mean what he said; Mr. Winchell talked loud; had not been loud talk previous to the accusation; Mr. Winchell did not say in this conversation that Strong had entered on other people's land and stole the timber; and if the law called it stealing, he did—and if the law did not, he did not—but he did make such a statement 15 or 20 minutes afterwards.

Page 18.

The defendant also produced Mr. Woolworth, who testified that he had lived in Wheeling some time and knew the parties; was present at the meeting spoken of; Mr. Winchell said Mr. Strong was a man of not much public spirit; plaintiff claimed a part of the bridge they were going to vacate; Mr. Strong thought it belonged to the public; Winchell said "You stole all the timber to build the Alison bridge with;" Mr. Strong said, "You do not mean that;" plaintiff repeated it two or three times—said he could prove it.

On cross examination, witness stated that plaintiff did not explain what he meant by charging defendant with stealing—he did not in the same conversation—he did 15 or 20 minutes after; the plaintiff objected to such explanation as not being in the same conversation; he said nothing in that conversation about other people's land. Witness did not understand Winchell to mean by the charge either that Strong cut down growing timber or took it after it was down.

On re-examination, witness testified that he understood defendant to mean stealing, or he would not have said so; he did not understand him as meaning anything about cutting growing timber.

The defendant also produced Mr. Lamb, who testified: That he had

lived at Wheeling since 1840 ; parties were there when he went ; he was present at the meeting ; plaintiff said Strong had stole the timber to build the bridge, or a bridge ; Strong denied the charge ; Winchell said he had stole the timber and he could prove it ; some few minutes after, he qualified it ; Mr. Strong then said, " You try to back out of it ; " it was some ten or fifteen minutes ; he had accused him of stealing the timber as many as three times before this ; there was nothing about standing timber at the beginning ; that Mr. Winchell owned a farm, and was represented to be worth ten or fifteen thousand dollars.

On cross examination, he said both were some excited—not apparently so until after the accusation.

Page 23.

On the defence, the plaintiff in error produced as a witness Francis Edwards, who testified that he resided at Wheeling ; was present at the meeting—the last part of it ; Mr. Strong told Winchell he had lost \$50 or \$100 in building the Alison bridge ; Winchell said he made \$100, and stole part of the timber to build it with ; Mr. Strong said to the bystanders, " I want you all to take notice—he accuses me of stealing ; " Mr. Winchell immediately turned to them and said, " I mean to be understood, that Mr. Strong entered upon other people's land and cut and hauled timber to build it with, without their knowledge or consent."

Plaintiff's attorney then offered to prove, by said witness, that defendant did enter the land of this witness, and cut and hauled off his growing timber to build the Alison bridge with, without his knowledge or consent. Defendant objected to the reception of that evidence, which was sustained, and the plaintiff excepted thereto.

Witness further testified that, at the same meeting, and before the accusation, Mr. Strong told Mr. Winchell he was an old, grey-headed liar ; he was as mad as any man could talk—Mr. Winchell was very much excited.

On cross examination, said witness said he called him a hoary-headed liar before the accusation of theft ; it was 15 minutes before Mr. Allen was present ; Mr. Phelps was not present ; the lie was given in regard to Winchell's having given anything for the bridge ; Mr. Strong said he had never given anything—he was a liar ; Mr. Strong and I had a conversation after the accusation ; it was not after the conversation that he said he had cut down a part of the timber from other people's land to build the bridge ; witness had had no difficulty with Mr. Strong ; it was some years since he did offer a man \$10 to flog him—5 years ago ; he did not state that he only heard the last part of the conversation—he heard it all. On re-examination, he said, he heard all the conversation about the Alison Bridge ; both parties got warm, and very much excited ; the excitement commenced when Strong called Winchell a liar.

The plaintiff also produced George Tallner, who corroborated the evidence of defendant's witnesses.

The plaintiff also produced John Roquet, who testified that he was present at the meeting ; that Winchell said Strong had stole the timber to build the Alison Bridge of, and he could prove it ; Strong told him he would put him in a way to prove ; Winchell then said, if the law called it stealing, he did—he had been on another man's land and cut the timber to build the bridge with ; they were excited.

On cross examination, he said he did not hear Strong call Winchell a liar.

The defendant then re-called Allen, Peet, Woolworth, and Lamb, who all testified, that Strong did not call Winchell a liar. And on the part of the defendant, the following instructions were asked and given, and excepted to.

1st. If the jury shall believe, from the evidence, that the plaintiff made the charge against the defendant, substantially as laid in the declaration, and thereby intended to charge upon the plaintiff the crime of stealing, the defendant is entitled to recover in this action; and the jury may, in estimating the damages, take into consideration the plaintiff's pecuniary circumstances, and may give, in their discretion, exemplary damages.

2d. Although the jury shall believe from the evidence that, after the defendant made the charge stated in the declaration and was threatened with a suit by the plaintiff, the plaintiff made the explanation stated by the witness Edwards; yet, if they shall further believe it was not intended as an honest retraction of the charge of stealing, but rather for his own protection against the consequences of his previous charge, it ought not to mitigate the damages.

And on the part of the plaintiff, the following instructions were asked and given:

1st. That if the words were spoken in the heat of passion, the law is for plaintiff.

2d. That the words impute a felony; in law, cutting down and taking away growing timber is not a felony; the language of defendant is to be taken by the jury in the sense he meant to use it; and that, if plaintiff intended to charge a cutting down and carrying away growing timber, there is a fatal variance between the declaration and proof, and the law is for plaintiff.

The errors assigned are:

1. The rejection of proper evidence offered by plaintiff.
2. Refusing to admit proper evidence offered by plaintiff.
3. The giving defendant's 1st and 2d instructions.
4. The rendition of the judgment.

DAVIS & MARTIN,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT,
AT OTTAWA.

June Term, A. D. 1856.

WINCHELL } *Abstract of the*
vs. } *Record.*
STRONG. }

FILED JUNE 13, 1856.

DAVIS & MARTIN,
For Plaintiff in Error.

In the Supreme Court of the State of
Illinois

at Ottawa

June Term a.d. 1856

Milo Mitchell

vs.
George Strong

} Appeal from Cook

Brief of points made and authorities
cited by Plaintiff in error-

Points 1st The rejection of the explanation
offered from witness Peat

2nd The giving the second
Instruction

3 The rejection of the fact on
which the accusation was
based

4th The giving the first Instruction

As to the first Point, viz the
defendants explanation offered to be
proved by witness Peat-

(A) Defendant is entitled to have his
own meaning applied to his alleged

Libel Rex v. Lambert & Perry 2 Camp.

Mc Kee v. Ingalls 4 Scam.

(B) His own explanations are the best evidence of his intention.

Doctrine ~~Respecting~~
(C) A Proof of Collateral Explanations
and Statements ^{to prove intent is} contained in
Libel Law.

Rex v Lambert & Perry 2 Camp 398
2 Phil on Ev. 5 Eng Ed. Tet Defamation
The Subject has been discussed with
reference to statements made at
the same meeting to explain intent
Walkers Case cited 2 Phil 20 Title
Conspiracy

The same doctrine is recognized
in Slander Shipley v Sadhunder
7 C. & P. 180.

D The accusation of Stealing timber
is ambiguous Dexter v Taber 12 Johns 239

a portion the explanation should have
been received

V AS to Second Point viz
The giving Plaintiffs Second
Instruction -

(A) The explanation referred to followed
immediately after the accusation
and the Instruction says it must
be a retraction.

The Term
B A explanation does not imply retraction
Websters Dictionary "Retraction"

- (c) The Instruction is ambiguous for the defendant did mean to protect himself not indeed ^{from} ~~of~~ a prior charge ^{of felony} but of a prior misunderstanding of his statement, and this not by a retraction but by an ~~apology~~ explanation of the precise fact he intended to charge -

Third Point

III as to the exclusion from the jury of the fact on which the charge was based -

- (A) Courts should be very cautious in excluding evidence calculated to affect the reasonable discretion of the jury
- (B) The offered circumstances, would have ^{had} a material judgment of the jury in considering the injury to Plaintiff and also the degree of malice in defendant
- (C) ^{they should have been reserved} Doctrine Recognized 2 Camp 254
2 Starkie Stand by Wendell 180 (n 1)
2 Greenl & 275
- D There is no other mode of proving these facts except under Gen: Issue for they don't tend to prove the truth of the Slander as construed by Pt.

(but under the general issue they do tend to prove the truth of Plaintiff's intent as explained by him which is different from the sense attributed to ^{him} ~~them~~ by Plaintiff)

altho similar circumstances have been often excluded yet the ground of the exclusion is, not, that they would be immaterial, but because the Plaintiff might be taken by surprise

In the case at Bar the defendant expressly notified Plaintiff of the identical fact he intended to charge and therefore he could not have been surprised - hence the reason for excluding ceases and the rule was improperly applied

IIIIII

Fourth Point

as to Plaintiff's second instruction

(A) 2^d Defendant's pecuniary circumstances should not have been inserted in this instruction 2 Green 269 269

B It invites exemplary damages without basing it on the degree of malice

Two kinds of malice are

recognized

malice in Law

malice in fact

The character of Damages has
reference to this classification

malice in Law is inferred
from the speaking of words
actionable per se and the
appropriate damages ought to be
mere compensation

malice in fact is to be proved
and calls for exemplary damages

2. Greene v. § 253 (n 2)

Gilbreath v. Allen 10 Fed. 67

from the last proposition its
contradictory may fairly be inferred
that in the absence of malice in
fact exemplary damages ought
not to be given

The Instruction omits all
reference to the question of malice
yet calls for exemplary damages -

In the Supreme Court
at Ottawa
June Term A.D. 1856

Winchell

vs

Brief

Strong

of Points and
authorities for
Plaintiff in error

Filed June 24, 1856

L. Selous
Clerk

Martin
Attorney