

NEW JERSEY COURT OF ERRORS AND
APPEALS.

MARY SHAW,
Plaintiff-Appellee,

vs.

ELLA S. BENDER,
Defendant-Appellant.

} BRIEF OF APPELLANT.

BRIEF OF APPELLANT.

BOLTE, SOOY AND GILL, for Appellant.
LEE WASHINGTON, for Appellee.

Assignments of Error, p. 67 of Case.

FIRST

Motion to Non-Suit—p. 34.

(A)

It will be seen by the complaint, pp. 1 and 2, that no pecuniary damages are specified in the declaration and not the appearance of any attempt to prove any from the first to the last—hence no cause of action alleged or proved.

If the declaration was, from the parley exhibited on page 35, deemed amended—the want of all appearance of proof of pecuniary damages—contradistinguished—to damages for injury to the feelings is fatal—mere subjective suffering did not help the case—as allegation without proof has the same result as proof without allegation.

It is laid down in Section 59 of “Townsend on Slander,” p. 112.

By similar processes to those detailed in the last preceding section, it has come to pass that the remedy for injuries by language, in theory given only to redress a pecuniary loss, is now applied to and embraces cases in which no pecuniary loss is or can be shown to have occurred. The process by which this result has been arrived at is by adopting the rule of evidence above referred to (59), that certain language is *per se*, and without other evidence, conclusive proof of pecuniary loss; this, however, is only a rule evidence, and the rule of right remains intact—that a pecuniary loss must be shown to entitle a remedy. That the rule is so, is demonstrated

by the case of words to which the rule of evidence just referred to does not apply, or to words which are said not to be actionable *per se*—that is, which are not *per se* evidence of pecuniary loss. As to these, it has never been doubted that a pecuniary loss must be shown to entitle the plaintiff to a remedy. Citing—*Beach vs. Ranney*, 2 Hill, 309; *Her- rick vs. Lapham*, 10 Johnson, 291; *Hallock vs. Mil- ler*, 2 Barb, 630; *Hersh vs. Ringwalt*, 3 Yeates, 508.

See further Starkie on S. and L. 5's 57 & 58. Jus- tice Depue says—*Potter vs. Bath*, 43 Vr. 470.—In pleading, the terms usually employed to denote the relation between the slander and the loss for which the plaintiff claims damages are that “by means of” the slander the loss was suffered. 2 Chitt. Pl. 633 *et seq.* In the opinions of Judges speaking on this topic, the relation is indicated by such expressions as these:

That the loss is occasioned by, or is sustained by the reason of, or in consequence of, or as result of, the slander, or more definitely, that the loss is the natural and proximate effect of the slander. In *Cuff vs. Newark & N. Y. R. R. Co.*, 35 N. J. Law 17, 10 Am. Rep. 205, Mr. Justice Depue, after a full ex- amination of cases, summed up the general doctrine as to the necessary connection between tort and re- coverable damage in these words: “Damage to be recovered must be the natural and proximate con- sequence arising from the wrong complained of,” and his views were afterward approved by this Court. *Id.* p. 574. In *Hammill vs. Pennsylvania R. Co.*, 56 N. J. Law 379, 29 Atl. 151, 24 L. R. A. 531, it was said that the efficient and predominating cause, the *causa causans*, must be looked in deter- mining liability.

The plain import of these and similar expressions

is that the tort of the defendant must be the efficient cause of the damage sustained, in order to hold him responsible therefor. This rule was ignored in the present case.

The loss of the plaintiff's situation was an indivisible thing, and if the evidence presented the question whether the words of the defendant or the admitted conduct of the plaintiff was to be deemed in law the cause of that loss, the jury should have been instructed to determine which of the two was the efficient cause.

If that was found in the admissions of the plaintiff himself, an undefined contribution to the effect, proceeding from the words of the defendant, would not render him unanswerable for the loss.

The judgment must be reversed, and a *venire de novo* awarded.

See further *Butler vs. Hoboken Printing Co.*, 44 and 45, 62 Atl. 272.

(B)

Now, there was no evidence of the Essentials of Publication. There must be publication in slander. The words must be distinctly addressed to some third person.

The evidence, p. 23, is:

“Q. But did she address any conversation to them?

A. I don't know.

Q. Well, don't you know she did not, she talked to you distinctly?

A. She was talking to me, yes, to me personally.

Q. Nobody but you?

A. Nobody but me, no.”

Witness Rose Scanlan—p. 32.

“Q. Mrs. Bender did not direct any of her conversation to you, did she?

A. No, sir.

Q. You just simply overheard it?

A. I heard it.

Q. That is all, you heard it?

A. Yes, sir.”

It is laid down in *Starkie on Slander*, Sec. 95:

“Every communication of language by one to another, is a publication, but to constitute an actionable publication, that is, such a publication as may confer a remedy by civil action, it is essential that there be a publication to a third person, that is, to some person other than the author or publisher, and he whom or whose affairs the language concerns.” Same effect. *Starkie on L. & S.*, p. 37.

The distinction is ventilated in *Brodwick vs. James*, 3 *Daly*, C. P. N. Y., 48.

(C)

The communication was privileged. 136 Mass. 177 and *Billings vs. Fairbanks*, 29 N. E. R. 544.

Slander—Privileged Communications—Conversation between the *Parties*. Charges made to one by another that he has committed an indictable offense against him are privileged, though a third person is present.

Action of Tort for Slander.

The facts are sufficiently stated in the opinion. At the trial below the defendant requested the Court to rule that the alleged slander was a privileged communication. The Court refused so to rule, and the verdict being for the plaintiff the defendant excepted.

COLBURN, *J.* The defendant, claiming to have lost money, accused the plaintiff, who was in his employ, with stealing it. Upon this accusation being made, the plaintiff, through his wife, informed one Leonard Foster, with whom he had lived for many years from his boyhood up, of the accusation, and sought his advice. Foster went to the defendant and had an interview with him, in which the defendant informed him of the grounds upon which he made the accusation. Upon this application made to him by the plaintiff, Foster had such an interest in the subject and duty to perform, that he was entitled to have the interview with the defendant, and the statement made by the defendant, upon the subject to which the interview related, were privileged. During this interview the plaintiff came in. The plaintiff asked the defendant to settle with him what he owed him, to which the defendant replied that he hired him for a year. The plaintiff then said, "You do not want a man who steals your money, and I do not want to work for a man who charges me with it." To which the defendant replied, "I know you took the money and there is another person who knows it also." It is upon these words, so spoken, that the plaintiff relies as the substantive slander, for which he brings this action. We are of the opinion that these words were, under the circumstances,

privileged, and the jury should have been so instructed. It is of no importance whether the interview between Foster and the defendant had ended or not. If Foster had not been present the words were clearly privileged. The plaintiff commenced the conversation, and introduced the subject of the charge of larceny made against him. The words used by the defendant were spoken in this conversation, and the mere fact that the words were spoken in the presence of Foster, who, as the friend of the plaintiff, investigating the charge and had been fully informed of all the facts and circumstances, did not defeat the privilege. In *Toogood vs. Spyring*, 1 Cr. M. & R. 181; 4 Tyrwh. 583, which was an action for slander in charging the plaintiff in presence of third persons with larceny from the defendant, Baron Parke says, "I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry alone, and not in the presence of a third party." If made with honesty of purpose to a party who has any interest in the inquiry (and that has been liberally construed) the simple fact that there has been some casual bystander cannot alter the nature of the transaction. This case is cited, and the decision upon this point fully affirmed, in *Brow vs. Hathaway*, 13 Allen, 239, which is an action for slander, in accusing the plaintiff of larceny, by the defendant, in presence of third persons, in which Mr. Justice Wells says, "This privilege is not defeated by the mere fact that the statements were made in the presence of others than the parties immediately interested; not that they were intemperate or excessive from over excitement."

Fahr vs. Hayes—21 Vr. 279.

It is equally clear that the defendant's statements were made under an honest belief in their truth. His information was such as would almost inevitably engender in his mind the belief that the plaintiff had stolen the chains, and if we assume (what the plaintiff did not uniformly allege in her testimony) that the defendant asserted that the plaintiff had actually been indicted, even that, in view of the fact that the matter had been laid before the Grand Jury and of the strong grounds of suspicion against the plaintiff *prima facie*, should be considered as only in accordance with the defendant's belief.

So much being established on behalf of the defendant, it then became incumbent on the plaintiff to show that the defamatory words were uttered out of what is called express malice. If he produce any evidence from which express malice could legally be inferred, then it was proper to submit the question to the jury; if he did not, a verdict for the defendant should have been directed.

By express malice in this connection is meant some motive, actuating the defendant, different from that which *prima facie* rendered the communication privileged, and being a motive contrary to good morals.

The existence of such a motive may be legitimately gathered from the character of the defamatory communication as if the terms used be utterly beyond disproportionate to the facts which the defendant has reason to believe (*Spill vs. Maule, L. R., 4 Exch. 232*); or from the circumstances under which the communication is made, as if an opportunity is sought to make it before third persons not legally interested in hearing it, rather than to those only who are so interested (*Toogood vs. Spyring, 1 C. M., M. & R. 181*); or from any extraneous facts which in reason tend to prove it.

The motive which in the present case the law *prima facie* imputes to the defendant, in regarding his conduct as innocent, is a desire to give Thoma true information, in order to prevent his crediting the plaintiff, whom the defendant thought not worthy of credit, and hence the question here is whether the evidence tended to establish any other motive contrary to good morals. The language used by the defendant fairly discloses another motive that the imputed one, not indeed inconsistent, but rather conjoined with it, viz., indignation towards the plaintiff for his supposed crime.

This motive, however, is not contrary to good morals, and, therefore, cannot be ranked as malicious *per se*, and so long as it does not impel its possessor into an illegal act, it cannot subject him to the condemnation of the law. At the time now under review it did not betray the defendant into any expression beyond what was pertinent to the subject of Thoma's injury, and was honestly believed by the defendant, and, therefore, was legalized by the privileged occasion and motive.

The circumstances in which the defamatory statements were uttered present no signs of illegality. It is true there were hearers who are not shown to have been lawfully interested, and that the defendant had an opportunity, in his own office, of making the disclosure to Thoma without further publicity. But he was entitled not merely to warn, but to convince Thoma of the danger of trusting the plaintiff, and for this purpose he had a right to confront the plaintiff and there declare whatever was of itself within the privilege. The presence of bystanders at that meeting was a mere casual incident, not in any sense sought for by the defendant, and for which, therefore, he should not be held responsible.

The only extraneous fact to which counsel referred as evidence of express malice was that within a week after the statement as to Thoma, the defendant sent to various jewelry firms in New York and elsewhere a circular stating that the plaintiff was trying to obtain credit by exhibiting the bills of Wheeler, Parsons and Hayes, and that he had been arrested for stealing gold chains at their factory, two of which had been found upon him.

SECOND

(A)

The Court erred in refusing to non-suit at the close of the case for the reasons herein assigned in addition to those assigned on motion to non-suit at the close of plaintiff's evidence.

THIRD

(A)

The Court erred in his charge "To call a woman a thief and prostitute in the presence of third persons is slander"—for the reason that this specific charge was not based upon the hypothesis of specific and special testimony as to the same place and cause of the conversation, as it stood uncontradicted.

(B)

The Court erred in charging that "The plaintiff would be entitled to damages for the indignity and if the words were uttered maliciously the plaintiff

would be entitled to exemplary damages," for the reason that there was no evidence of special damages, nor was there any allegation pointing out any damages whatever and in the absence of all proof of special damages—there could not be any such thing as exemplary damages.

(C)

The Court erred in charging "On the fact that the only person who is said to have heard it 'is the young woman who came in with the plaintiff, she said she heard it,' well, if that be so, gentlemen, that is all there is about it, the defendant is guilty"—for the many reasons assigned in this brief.

See further the case of *Butler vs. Hoboken Printing Co.*, above cited, and 62 Atl. 272.

The judgment should be reversed.

BOLTE, SOOY AND GILL,
For Appellants.

New Jersey Court of Errors and Appeals

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MARY SHAW,

Plaintiff-Appellee,

vs.

ELLA A. BENDER,

Defendant-Appellant.

} BRIEF OF APPELLEE.

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Bolte, Sooy and Gill, for Appellant.
Washington & Smith, for Appellee.

Defendant's Objection as to Failure to allege and prove "pecuniary damages."

"If the words declared upon are actionable per se the law presumes damages, and it is not necessary that special damages should be alleged; a general allegation that plaintiff has suffered damage by reason of the publication is sufficient."

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25 Cyc 533 and cases; also
March vs. Edge, 68 N. J. L. 661;
54 Atl. 834.

"Where the words are clearly actionable per se, it is of course unnecessary to claim general damages, though it is sometimes done; but any special damage that may have accrued must in every case be specifi-

cally stated and with sufficient particularity to enable the defendant to know precisely what case he has to meet."

Odgers, Libel & Slander,

(1st Am. Ed.) p. 408.

The libellous words alleged were actionable per se.

10 In the case of Johnson vs. Shields, 25 N. J. L. 116, our Supreme Court held that words charging the crime of larceny are actionable per se, and that an action may be maintained without proof of special damage.

In the case of Joralemon vs. Pomeroy, 22 N. J. 274, where the spoken words sued upon had implied a charge of fornication, our Supreme Court said: "Whatever may yet be the rule in England, undoubtedly it is actionable in this state to impute this offence, one involving moral turpitude, and which here has long since been made punishable by indictment."

20 In the complaint as first served it was alleged that "Said words were false and malicious." There was also an express claim for "damages". (State of Case, p. 2.)

Even, if the above had not been sufficient, it was clearly cured by the amendment during the trial, as follows: (State of Case, p. 36) :

30 "Mr. Washington: Now, if your Honor please, I would like to request to amend the complaint by alleging that as the result of those imputations plaintiff was injured in her good reputation and standing in the community, and that the making of such statements damaged the plaintiff in her business as a boarding house keeper. I would like to add such a statement to the complaint, to each count of the complaint.

"The Court: All right. Now, then, proceed with the case. Do you claim any damages, injury to her feelings?"

"Mr. Washington: We claim, if your Honor please, that in addition there should be an allegation in the complaint that as a result of speaking those words the plaintiff was humiliated and injured in her feelings as well by the indignity from speaking those words."

In reply to motion of Mr. Crandall for non-suit, the court then said (State of Case, p. 36): "You better go on with your defense and make your motion at the end, if you want to. Motion to non-suit denied."

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The defendant raised no question as to surprise and asked for no continuance but proceeded to put in her defense.

There is ample in the record to sustain the finding of the jury.

Plaintiff testified in part as follows (State of Case, p. 15): "I went after her and I walked in and I said, 'Did you want to see me, Mrs. Bender?' And she says 'Yes. You God damn thief, you stole my sign, I want you to bring that sign back you stole last night.' I said, 'Now you be careful who you are talking to, I didn't steal your sign.' 'You are a God damn thief, you stole my sign, you stole my gas jets, you stole part of my stove. You are nothing but a God damn thief.' That is what I met when I went in to talk to Mrs. Bender."

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"Q. Now, at the time that that conversation commenced who was in the room?"

"A. Mr. Colligan, her brother, stood alongside of her."

"Q. What did he do?"

"A. Why, he tried to pacify her and kept saying, 'Nellie, Nellie, be careful.'"

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Instead of ceasing, the defendant proceeded with her tirade of foul abuse (State of Case, p. 16):

"Q. What else did she say?"

"A. She said I was so low I didn't know what I was, and she said that I was 'Nothing but a God damn low prostitute.'"

"Q. Did she make any reference to a Col. Kelly?

"A. Yes, she did.

"Q. What did she say?

"A. She said Col. Kelly and I stole the sign last night. I said 'I didn't see Col. Kelly last night.' She said, 'You are a God damn liar; he lives with you'."

It is to be noted that this defamation was in a loud tone and heard by many people, who had been attracted (State of Case, p. 16):

10 "Q. How loud did the defendant speak?

"A. Why, she hollered, fairly hollered.

"Q. Was she heard on the street?

"A. Yes, by over fifty people.

"Q. How do you know?

"A. Why, because I was ashamed to go out and face the crowd that was standing outside when I got that tearing out."

The testimony of Mrs. Rose Scanlon, a witness for the plaintiff, also corroborated her fully (State of Case, p. 30):

20 "A. Mrs. Bender called Mrs. Shaw a God damn thief, and told her to bring back the sign that her and Col. Kelly stole last night."

"Q. What did Mrs. Shaw say?

"A. Mrs. Shaw said that she didn't take her sign last night, that she hadn't seen Col. Kelly, and that she knew nothing about the sign, only it was in the yard, she had left it in the yard.

"Q. What did Mrs. Bender say to that?

"A. Mrs. Bender said it wasn't in the yard.

"Q. Go on.

"A. Beg pardon?

30 "Q. Just go on then and tell us the whole thing that occurred.

"A. Well, she also accused Mrs. Bender, also accused Mrs. Shaw of stealing her gas fixtures, part of her stove, the sign, and the chair, little chair, and she called her a God damn thief. Then—

"Q. Now, who were present at the time?

"A. Mr. Colligan and myself.

"Q. Who is Mr. Colligan?

"A. Mrs. Bender's brother.

"Q. Any other persons outside the door?

"A. Yes, there were quite a few outside.

"Q. How was the door, closed or open?

"A. It was open.

"Q. Do you know whether those persons heard the conversation?

"A. Yes, sir.

"Q. How loud was Mrs. Bender talking?

"A. Well, she was talking very loud, just hollering. 10

"Q. Now, while this was going on, what did Mr. Colligan do, if anything?

"A. Mr. Colligan tried to pacify her, stepped between her," etc.

The same witness also testified that she heard defendant call plaintiff a "God damn low prostitute, she was so low, she didn't know who she was" and that "She accused Mrs. Shaw of living with Mr. Kelly." 20

The testimony of defendant's witnesses was almost entirely negative. In the face of the direct testimony of the two witnesses above who testified positively that they did hear the words, the testimony of others who came up after the commencement of the tirade that they themselves did not hear them, is not entitled to much weight. It is possible that the witnesses produced by defendant did not arrive on the scene till after the words had been spoken. It would also seem that the reasoning in railroad accident cases as to blowing of whistles on steam locomotives is applicable. As to such a situation, this court in the case of McLean vs. Erie R. Co., 69 N. J. L., 70 N. J. L. 337, held: 30

"It is for the jury to say whether the testimony of a witness having an equal opportunity to hear and whose hearing is equally good, and who testifies that he did not hear the blowing of a whistle, or the ringing of a bell, notwithstanding he listened, shall

or shall not be given equal credit with the testimony of a witness, similarly situated, who testifies that he did hear."

2.

Publication.

10 Publication, in view of the evidence as detailed above, was clearly and fully proven. A man or woman is presumed to intend the natural consequences of his acts. He is taken to intend that others shall hear what he speaks loudly in the presence of such others. The law has even gone very much farther. As Odger's (*Libel & Slander*, 1st Am. Ed.) p. 138 has said: "To shout defamatory words on a desert moor where no one can hear you is not publication; but if any one chances to hear you, it is a publication, although you thought no one was by."

20 "So it is no defense that a third person was not intended to overhear the slander or to read the libel, if in fact he has done so. An accidental or inadvertent communication is quite sufficient." Odgers, *supra*, p. 141.

Counsel errs in the assumption that "the words must be distinctly addressed to some third person."

It is true that there must be a communication to some person other than plaintiff and defendant. "But it is no defense to an action for slander that the words were spoken to and not of plaintiff, when others were present and heard the words spoken."

25 Cyc. 365, and cases cited.

30 In the case of *Shaw vs. Sweeney*, 2 *Greene* (Iowa) 587, the court held that it was no defense that the words were spoken at defendant's fireside in the presence of but two other neighbors.

Question of Privilege.

Defendant again attempts to exonerate herself from liability by claim of privilege.

It is suggested that the question of privilege need not be considered by this court, inasmuch as it was not specially set up by the defendant in her answer. Plaintiff contends that under the practice act of 1912 this is necessary. It has been ruled in England that the Judicature Act changed the common law and made it necessary to expressly plead privilege:

Odgers Libel & Slander,
(1st Am. Ed.), p. 416;
Simmonds vs. Dunne,
Ir. R. 5 C. L. 358.

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However, we examine the point.

It is true that "Where a party makes a communication and such communication is prompted by a duty owed either to the public or to a third party, or the communication is one in which the party has an interest and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice."

25 Cyc. 385.
Rotholz vs. Dunkle,
53 N. J. L. 438,
22 Atl. 193,
26 Am. St. Rep. 432,
13 L. R. A. 655.

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But note the requirement that the communication be made in good faith and without actual malice. Defendant showed her actual malice fully by her bitter and repeated vituperation. As to this attention is called particularly to the testimony on pages 15, 16 and 17 of the State of Case. And again, assuming that defendant might have had an interest in the question of whether or not plaintiff had stolen certain articles enumerated, defendant failed utterly to prove the truth of her words. Furthermore, we fail to see what interest defendant had in the question of plaintiff's chastity. Not only did the unwarranted accusations that plaintiff was a "God damn common low prostitute" (State of Case, p. 16) and that Col. Kelly lived with her (Id.) show express malice and excess of privilege, but they were also

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actionable per se. The sense in which the words "he lives with you" were understood by the hearers is shown by the testimony of Mrs. Rose Scanlon:

(State of Case, p. 31):

"Q. Did Mrs. Bender make any reference to Mr. Kelly?

"A. Yes, sir, she accused Mrs. Shaw of living with Mr. Kelly.

10 "Q. What did Mrs. Shaw say?

"A. Mrs. Shaw said that she didn't live with Kelly, she would make her prove what she said."

Witness used the word "accused", showing that she did not understand defendant to have meant simply that Kelly boarded with the plaintiff. That plaintiff also so understood the words is shown by her statement that "she would make" defendant "prove what she said".

20 Where the words are ambiguous, it has been held by this court that it is for the jury to determine the sense in which the words were used.

Slaacke vs. Stratford (1906) 64 Atl. Rept. p. 146.

In the same case, the court said: "What was understood by the by-standers, not what was intended by the speaker is the test whether words spoken are actionable or not. It is the effect of the words upon the by-standers that is a basis of damages, for there are no damages unless the words spoken are heard by others than the parties."

30 On the question of privilege the case of Kruse vs. Rabe (Errors & Appeals—1910) 79 Atl. Rep. 316, is applicable. In this case, our Courts of Errors and Appeals quoted from Odgers on Libel & Slander, at page 245, as follows: "If the words be spoken in the presence of strangers wholly uninterested in the matter, the communication loses all privilege. The defendant in these cases must be careful that his words reach only those who are concerned to hear

them. Words of admonition or confidential advice should be given privately, not shouted across the streets, or written on post cards, or published in a newspaper. It is true that the accidental presence of some third person will not alone take the case out of the privilege, if it was unavoidable or happened in the usual course of business affairs. But if the defendant purposely contrive that a stranger be present, and who in natural course of things not be present, all privilege is lost. And, when a defendant deliberately adopts a method of communication which gives unnecessary publicity to statements defamatory of plaintiff, the jury will be apt to infer malice." 10

In the case of *Savage vs. Stover* (Supreme Ct.—1914), 92 Atl. 285, our Supreme Court touched upon the question of privilege, which the defendant had set up as a defense. The Court said in part: "This was clearly outside the scope of the business under discussion between the two attorneys, and raised the question whether the letter was privileged as to such surplus matter. The authorities appear to be in some conflict on this point. 25 Cyc. 386, 387. In *Fahr vs. Hayes*, 50 N. J. L. 275, 280, 13 Atl. 261, 263, a slander suit, the defendant on the privileged occasion used strong language, but this court held that his motive "did not betray the defendant into any expression beyond which was pertinent to the subject of . . . the inquiry, and was honestly believed by the defendant and therefore was legalized by the privileged occasion and motive". The inference is open that, if the language used had been, "beyond what was pertinent to the subject of . . . the inquiry," another view of defendant's liability would have been taken. In the case at bar the language was not spoken, but written; and was not in response to any inquiry, confidential or otherwise, but was manifestly volunteered. Hence it clearly exceeded the demands of the occasion; and in such case we think the true rule is that such excessive language is not covered by the privilege. 20 30

"If, however, the rule be otherwise, the judgment below is not necessarily erroneous. The burden of showing privilege is on the defendant, and if he sus-

tains it the plaintiff may still hold him liable by showing express malice. *Fahr vs. Hayes*, supra. This might appear from the very language used *id.* 25 Cyc. 387. As we read this letter, its very language was evidence justifying the jury, or the court sitting in the jury, in finding the existence of express malice."

Damages for Indignity.

"Where the libel is gross, the jury may give compensation for the wounded feelings of plaintiff."

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Deyo vs. Clough, (1899)

N. J. L.

43 Atl. 653.

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In the case of *Knowlden vs. Guardian Printing & Publishing Co.* (Errors & Appeals—1903), 55 Atl. Rep. 207, an action had been brought by a married woman to recover damages resulting from a publication in the Newspaper of the Guardian Company, charging her with adultery. The trial judge instructed the jury that plaintiff was not entitled to recover punitive damages, but was entitled to recover such damages as would compensate her for injury done to her reputation and feelings by the free publication made by defendant, and conceded to be untrue. This court approved such instructions. The court went so far as to state that it found no error in the following portion of the charge, which was excepted to: "That is the case before you. If, with that case before you, you give this lady, as counsel for the defendant urges, six cents, the courts of justice should feel the same sense of shame and mortification Mrs. Knowlden must have felt when the publication was made. It would be an utter disgrace to the administration of law, to say that such a publication, such a damage to reputation, such an evasion of feelings, were to be compensated for by six cents. It is your duty in this case to see that she has substantial compensation for the grievous wrong."

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In the case of *Butler vs. Hoboken Printing & Publishing Co.* (Supreme Ct.—1905), 62 Atl. Rep. 272, the court said in part:

"It is conceded, however, that while mental suffering will not support an action for words not actionable per se, nevertheless, damages for mental suffering may be assessed in actions for defamation actionable per se. In Massachusetts, such damages for mental distress are regarded as general, and recoverable, without being specially pleaded. (Citing cases.) In New York such damages seem to be regarded as punitive and assessable only in cases where there is proof of actual malice. (Citing cases.)

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"The right of a libeled person to recover damages as a compensation for her feelings was recognized by our Court of Errors and Appeals in the case of Knowlden vs. Guardian Printing Co., reported in 55 Atl. 287.

"Indeed, mental anguish, mortification, and anger are the necessary results from defamation of character, and so may be said to be legally inferred from the fact of defamation. But, when physical injury is predicated of the defamatory words spoken, it cannot be said that it is either the necessary or natural consequence therefrom. In rare instances physical sickness may result from mental worry, but it is an exception to the rule. Even then, it is a step removed from the first result, and cannot be said to be the proximate consequence of the defamatory words. The entire absence of any precedent, so far as I have examined the question, for the assessment of damages in this class of cases for physical ailment is a remarkable feature in the administration of the law, if such right of damages exists. There is an abundance of authorities supporting the assessment of damages for mental anxiety, but none for damages for physical sickness. The same may be said of the other class of actions alluded to by Lord Wensleysdale, actions for seduction based upon the fiction of loss of services. By inveterate usage, the relations of master and servant having been established, the parent is to be permitted to recover for injured feelings. But it admittedly rests upon the ground that inveterate usage, not upon any logical basis. Sedgwick on Damages, p. 542."

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In the case of Garrison vs. Newark Call (Errors & Appeals—1914, 92 Atl. Rep.) the court said, in part: "The right to recover for mental suffering in defamation cases is well settled. Knowlden vs. Guardian Co., 69 N. J. L. 670, 55 Atl. 287."

Objections to Court's Charge.

10 These are so trivial that we will not waste the time of the Court in their discussion. Taking the charge as an entirety, it is perfectly fair, clear and proper. If any error was committed, it was in favor of and not against the defendant.

We feel fully convinced that no reversible error was committed by either Court or Jury.

Respectfully submitted,

WASHINGTON & SMITH,

Attys. for Appellee.

LEE F. WASHINGTON,

of Counsel.

20

30

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COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

MARY SHAW,
Plaintiff,

vs.

ELLA BENDER,
Defendant.

10

ACTION AT LAW.
COMPLAINT.

The plaintiff, Mary Shaw, whose residence is in the City of Atlantic City, in the County of Atlantic and State of New Jersey, says that: 20

FIRST COUNT:

1. On November 6th, 1914, in Atlantic City, in the County of Atlantic and State of New Jersey, defendant spoke in the presence of Rose Scanlan, William Colligan and various other persons, the following words concerning the plaintiff; "You (meaning the plaintiff) bring that sign back you stole last night, you and Col. Kelley***You are a God damned liar, you stole it out of that window last night***You are nothing but a thief***You stole my chair***You stole part of my range***You stole the gas light out of the dining room." Meaning thereby that the plaintiff was a thief and guilty of the crime of larceny. 30

2. Said words were false and malicious.

Plaintiff demands five thousand dollars damages on this count.

SECOND COUNT:

1. On November 6th, 1914, in Atlantic City, in the County of Atlantic and State of New Jersey, defendant spoke in the presence of Rose Scanlan, William Colligan and various other persons the following words concerning the plaintiff: "You (meaning the plaintiff) are nothing but a common, low prostitute***You are so God damned low, you don't know who you are***You are a liar***He (meaning Col. Kelley) lives with you." Meaning thereby that plaintiff was unchaste, subject to the punishments inflicted upon common prostitutes, and that plaintiff was guilty of the crime of adultery or fornication with the said Col. Kelley.

20

2. Said words were false and malicious.

Plaintiff demands five thousand dollars damages on this count.

Plaintiff demands as a total upon both counts the sum of ten thousand dollars, besides costs of suit, to be taxed.

LEE F. WASHINGTON,
Attorney for Plaintiff.

30

To the within-named defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of the service hereof upon you, and that unless

you file such affidavit, judgment by default will be entered against you at the end of said ten days; and that, in case you file said affidavit, unless you file an answer within twenty days from the date of service hereof upon you, judgment by default will in such case be entered against you at the end of said twenty days.

LEE F. WASHINGTON,
Atty. for Pltf. 10

I hereby deputize and appoint James Applegate to serve the within writ.

Witness my hand and seal this 8th day of May, A. D. 1915.

(L. S.)
JOSEPH R. BARTLETT, (SEAL)
Sheriff Atlantic County,
by 20

Under Sheriff.

Duly served within summons & complaint May 8th, 1915, personally on Ella A. Bender, at 182 South South Carolina Avenue, Atlantic City, Atlantic County, New Jersey.

JOSEPH R. BARTLETT, 30
Sheriff, by
JAMES R. APPLGATE,
Special Deputy Sheriff.

Sheriff's fees \$5.24

ANSWER OF DEFENDANT.

ATLANTIC COUNTY CIRCUIT COURT.

ELLA A. BENDER,
Defendant,
ADS.
MARY SHAW,
Plaintiff.

ACTION AT LAW.
ANSWER OF DEFEND-
ANT.

10

Now comes defendant by her counsel, J. J. Cran-
dall, and for answer to the complaint in the above-
stated avers:

20

FIRST.

That there is no allegation in either of the two
counts of the declaration that the words spoken or
any of them were used in a defamatory sense and
further that no special damage is alleged to have
resulted to the plaintiff as a consequence or other-
wise of the words alleged to have been spoken; and
defendant insists that for want of such averments the
declaration declare no cause of action and that de-
fendant should be dismissed and plaintiff non-
sued.

30

SECOND.

For a further defense to both counts of the declaration defendant avers that the several allegations therein are wholly false in fact and untrue, therefore defendant prays that the same may be inquired of by a jury.

10

J. J. CRANDALL,
For Defendant.

[ENDORSED]

Filed May 26th, at 9 A. M.
EDWIN A. PARKER,
Clerk.

20

30

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.
JANUARY TERM, 1916.

MARY SHAW,
Plaintiff,
vs.
ELLA A. BENDER,
Defendant.

ACTION AT LAW.
ON VERDICT.
LEE F. WASHINGTON,
ATTY.

10

Judgment entered January 26, 1916, at 9. A.M. 20

Damages	\$170.00
Costs	50.30
	<hr/>
	\$220.30

This action was tried before Judge Howard Carrow with a jury, in the presence of the counsel of the respective parties at the Atlantic County Circuit Court on the 18th day of January, 1916.

30

This cause having been heard and submitted to the jury they returned their verdict in the favor of the plaintiff, Mary Shaw, and against the defendant, Ella A. Bender, for the sum of one hundred and seventy dollars damages.

Whereupon it is adjudged that the plaintiff,

Mary Shaw, recover of the defendant, Ella A. Bender, the sum of one hundred and seventy dollars damages and her costs which are taxed at the sum of fifty dollars and thirty cents.

HOWARD CARROW,
Judge.

(County Circuit Judgments #12, page 242, &c.)

10

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss:

I, EDWIN A. PARKER, clerk of the County of Atlantic, and also clerk of the Circuit Court, holden therein, said court being a court of record, having a common seal, do hereby certify that the foregoing is a true copy of a certain summons and complaint, affidavit of merits, answer of defendant, notice of trial, replication, rule for judgment, judgment and notice of appeal, and order of substitution of counsel in the suit of Mary Shaw vs. Ella A. Bender, as the same is filed and of record in my said office.

20

In testimony whereof, I have hereunto set my hand and affixed my official seal at Mays Landing, N. J., this seventh day of April, A. D. 1916.

EDWIN A. PARKER,
Clerk, by
BERTON A. GASKILL,
Deputy Clerk.

30

NOTICE OF APPEAL.

ATLANTIC COUNTY CIRCUIT COURT.

MARY SHAW,
vs.
ELLA A. BENDER.



NOTICE OF APPEAL.

10

To Lee F. Washington, attorney for plaintiff,
take notice that the defendant appeals to the Court
of Errors and Appeals of the State of New Jersey
from the whole of the judgment entered in this
cause to be determined at the next term.

20

BOLTE, SOOY & GILL,
Attorneys for Defendant.

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss:

WILLIAM R. PAGE, being duly sworn, on his oath
says that on the 13th day of March, A. D. 1916, he
served a copy of the notice of appeal hereto at-
tached, on the attorney of the respondent, by leav-
ing a copy thereof, with a clerk in the office of said
attorney and making known the contents thereof.

30

WILLIAM R. PAGE,
(Signature of affiant.)

10

Notice of Appeal

Subscribed and sworn to before me this fourteenth
day of March, A. D. nineteen hundred and sixteen.

BELLA HIPSON, (SEAL)

Notary Public for New Jersey.

[ENDORSED]

10

Filed March 15th, 1916, at 9. A. M.

EDWIN A. PARKER,

Clerk.

20

30

ORDER OF SUBSTITUTION OF COUNSEL.

IN THE CIRCUIT COURT FOR ATLANTIC
COUNTY.

MARY SHAW,
vs.
ELLA A. BENDER.

} ACTION AT LAW.
ORDER OF SUBSTITU-
TION OF COUNSEL.

10

On motion of Bolte, Sooy and Gill.

It is ordered that Bolte, Sooy and Gill be and they are hereby substituted as attorneys and counselors for the defendant in the place and stead of John J. Crandall, at present on the record. 20

I hereby consent to the making of the above order.

JOHN J. CRANDALL,
above mentioned.

[ENDORSED]

Filed April 7th, 1916, at 9. A. M.

EDWIN A. PARKER,
Clerk.

30

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

10

MARY SHAW
vs.
ELLA A. BENDER.

}

ACTION AT LAW.

20

Mays Landing, N. J., January 18, 1916.

TESTIMONY.

30

HON. HOWARD CARROW, Judge, and jury.

APPEARANCES:

LEE F. WASHINGTON, Esq., for the plaintiff.
JOHN J. CRANDALL, Esq., for the defendant.

MARY SHAW, SWORN.

Direct examination.

By Mr. Washington:

Q. Mrs. Shaw, you are the plaintiff in this case, 10
are you not?

A. Yes, sir.

Q. You are acquainted with the defendant?

A. Yes, sir.

Q. Is this the defendant, this lady here?

A. Mrs. Bender, yes, sir.

Q. How long have you known her?

A. I have known her for four years.

Q. Did you, prior to the sixth day of November, 20
1914, occupy a house belonging to the defendant?

A. November?

Q. Yes, sir, 1914, prior to that time?

A. No, sir, I moved out November first.

Q. Prior to November first, 1914, you had occu-
pied a house belonging to her?

A. November first?

Q. Up to November first, 1914?

A. Yes, sir.

Q. Had you occupied a house belonging to her? 30

A. Yes, sir.

Q. Under a lease?

A. Yes, sir.

Q. Under what circumstances did you move out
of those premises on November first?

A. Well, I had lived with Mrs. Bender for two
years and I paid her seven hundred and twenty-five

dollars a year, and in those two years I was after her for a new range, the roof leaked, she wouldn't do any repairs for me, when I was living under her. One year her toilets all leaked, I asked her to have her toilets fixed, when my lease was expiring November, 1913, and she wouldn't have it fixed, she said she wouldn't do it. Well, that was all right, I stayed another year, and in that other year she didn't do any repairs for me there, and I got another house one hundred and twenty-five dollars a month cheaper, at 2022 Pacific Avenue, so I moved and let her have her house.

Q. And you moved on or about the first day of November, that is 1914?

A. First day of November.

Q. That was November a year ago?

A. Yes, sir, November a year ago.

Q. Did you have some conversation with the defendant on the sixth day of November, 1914?

20 A. Yes, sir.

Q. Who were present?

A. Why, her brother, Mr. Colligan, and Mrs. Scanlan, and several others, neighbors.

Q. Where was this? Where was it that you had this conversation?

A. 2012, in her own home, the house I moved out of.

Q. Where were you living at that time?

A. 2022 Pacific Avenue.

30 Q. How far was that away from the other?

A. About four or five doors.

Q. Under what circumstances did you return to the place belonging to the defendant on that date?

A. Why, under the circumstances I returned, I was going to Philadelphia on November sixth, and I went over to the depot to get the expressman to

get my trunk, and when I came back, the party living at 2022, had sub-leased the basement off me, for the winter, told me that Mrs. Bender was there and told her to tell me to bring the sign back that I stole last night. I also had Mrs. Colligan's hamper that I had carried my bed clothes in from 2012 to 2022, and I said to Mrs. Scanlan, "Come on and we will go up to Mrs. Bender's, her sign is in the yard." I went up and gave Mrs. Colligan her hamper, and I said, "Is Mrs. Bender gone?" She says, "Yes." I says, "What is the matter with her sign?" She said, "Someone stole her sign," and I said, "No, that sign is in the yard," and just as I said that I saw Mrs. Colligan pass. I went after her and I walked in and I said, "Did you want to see me, Mrs. Bender?" And she says, "Yes. You God damn thief, you stole my sign, I want you to bring that sign back you stole last night." I said, "Now you be careful who you are talking to, I didn't steal your sign." "You are a God damn thief, you stole my sign, you stole my gas jets, you stole part of my new stove. You are nothing but a God damn thief." That is what I met when I went in to talk to Mrs. Bender. 10 20

Q. Now, at the time that that conversation commenced, who was in the room?

A. Mr. Colligan, her brother, stood alongside of her.

Q. What did he do?

A. Why, he tried to pacify her and kept saying, 30
"Nellie, Nellie, Nellie, be careful."

Q. Did she stop?

A. No, she didn't, she shook knuckles on my chin and then she called me a common prostitute, and I told her, if she would come outside I would show her who Mrs. Bender was and who Mrs. Shaw was, so Mrs. Scanlan stepped in between us.

Q. What else did she say?

A. She said I was so low I didn't know what I was, and she said that I was "Nothing but a God damn common low prostitute."

Q. Did she make any reference to a Col Kelly?

A. Yes, she did.

Q. What did she say?

A. She said Col Kelly and I stole the sign last night. I said, "I didn't see Col Kelly last night."

10 She said, "You are a God damn liar; he lives with you."

Q. Now, where was it that this conversation occurred, what sort of a place?

A. It was in the parlor of her own home where I had moved out of.

Q. On what floor?

A. On the first floor.

Q. Ground floor or the floor above?

A. Street floor.

20 Q. On the level with the street?

A. On the level with the street.

Q. What sort of a front does that house have?

A. Had a large window like a store window.

Q. Any doors opening on the street?

A. Yes, sir, one door.

Q. How loud did the defendant speak?

A. Why, she hollered, fairly hollered.

Q. Was she heard on the street?

A. Yes, by over fifty people.

30 Q. How do you know?

A. Why, because I was ashamed to go out and face the crowd that was standing outside when I got that tearing out.

Q. How long do you suppose the conversation and altercation between the two of you occurred?

A. About ten minutes.

Q. You think it continued that long?

A. Yes.

Q. Who were present, if you know, that heard the conversation?

A. Well, there was several there that I know that heard the conversation, but Mrs. Scanlan was the only one inside, and her brother, Mr. Colligan.

Q. Where were the others?

A. Outside the door.

Q. Were they listening to what went on? 10

A. Yes, sir.

Q. Were not passing by?

A. No, they were not. They were standing still, all in a group.

Q. Are you married or single?

A. No, sir, I am a widow.

Q. When did your husband die?

A. Why, he died nineteen years the ninth of this January.

Q. At the time the conversation occurred, what 20 were you doing for a living?

A. Keeping a boarding house.

Q. At the premises that had been rented?

A. Yes, sir.

Q. Of the defendant?

A. 2012, moved from 2012 to 2022.

Q. For how many years had you kept a boarding house in Atlantic City?

A. I had kept a boarding house for five years.

Q. At the same place? 30

A. No, sir, 25 South Florida was the first year, and 2012 was the second year and 2012 the second year under Mrs. Wisner, sub-leased from Mrs. Wisner, then when Mrs. Wisner moved out I rented the house from Mrs. Bender and lived two years under Mrs. Bender. I have lived a year now under Mr. Steuber, 2022.

Q. In how many of Mrs. Bender's houses did you live?

A. Just the one.

Q. Just the one?

Cross-examination.

By Mr. Crandall:

10 Q. Mrs. Shaw, you say that you were the tenant of Mrs. Bender on the sixth of September?

A. No, sir.

Q. No?

A. No, I had moved on the first of November.

Q. Your time was out on the first?

A. Yes, sir.

Q. Then you moved?

A. Yes, sir.

Q. How many doors from where you were?

20 A. Well, there is Mr. Colligan's, the Synagogue, and another house. I judge about four doors.

Q. Well, how came you to go over to her house?

A. Why, she came to my house and left word for me to bring the sign back I stole last night.

Q. That is the only reason?

A. Yes, sir.

Q. What other reason did you have to go there?

A. Because I thought that I was going to explain to her that her sign was in the yard where I left it, and I didn't think—

30 Q. Wait a minute. That her sign was in her yard or your yard?

A. Her yard, yes.

Q. Well, did you get the sign and show it to her?

A. No, sir, she claimed I —

Q. Wait a minute. I only want to have you answer my question.

A. Very well.

Q. She didn't see the sign that night, then?

A. I don't know whether she did or not.

Q. Well, what do you mean by the sign? What was the sign?

A. Well, if you will let me explain, I will explain it to you.

Q. No, but will you tell me what the sign was. Was it some—

A. A wooden sign. 10

Q. Was it some words painted on a board?

A. Yes, sir, "Pennlyn."

Q. Sign painted on a board?

A. Yes.

Q. And how came the sign to be in the yard? Did you put it there?

A. Yes, sir, I put an electric sign up and put the wooden sign—

Q. Wait a minute; you took the sign down and put it in the yard? 20

A. No, sir, my man did.

Q. Your man did?

A. Yes.

Q. And who was it, Mr. Kelly?

A. No, not Mr. Kelly, Mr. Scanlan.

Q. Mr. Stanger at your solicitation took the sign down and put it in the yard?

A. Yes, I put my electric sign up, I couldn't have two signs up.

Q. How? 30

A. Yes, I put my electric sign up. I couldn't have two signs up. I couldn't have a wooden sign and electric sign.

Q. I don't care about that, I want to know about this sign, the sign in controversy. Well, couldn't you have settled the matter there with her by just

telling her where the sign was or going out and getting it?

A. I didn't. I tried to explain to her her sign was in the yard.

Q. Well, then, that was all there was about the sign?

A. No, she said she lost her sign that night previous, on Thursday night.

Q. She said you stole the sign?

10 A. She said I stole the sign, yes.

Q. And you convinced her you didn't, didn't you?

A. No, I couldn't convince her I didn't.

Q. Wait a minute. Well, you didn't steal the sign?

A. No, I did not.

Q. Who do you say was present at that conversation?

A. Mr. Colligan, her brother.

Q. Her brother?

20 A. Yes.

Q. Didn't Mr. Colligan know where the sign was?

A. I don't know.

Q. You don't know?

A. No, I do not.

Q. How long have you known Mr. Colligan?

A. Mr. Colligan, I have known Mr. Colligan for four years. I have lived next door to him for four years.

30 Q. Never mind about that. You have known him for four years?

A. Yes, sir.

Q. Who else was present?

A. Mrs. Scanlan.

Q. Mr. who?

A. Mrs. Scanlan.

Q. Well, did he know where the sign was?

A. I don't know.

Q. Well, you was the only one in her parlor with her?

A. No, sir.

Q. Who?

A. Her brother, Mr. Colligan and Mrs. Scanlan and I stood alongside of one another.

Q. How came they to walk in with you?

A. Mrs. Scanlan was with me, for she was with me when I bought my ticket at the Reading to go home to Philadelphia on November sixth. 10

Q. Well, how came they to go in the house where you were?

A. Because she was in my company that afternoon.

Q. They were in your company up to Philadelphia?

A. No, they were not.

Q. Where, down to Atlantic City?

A. Yes, sir. 20

Q. Did you invite them to go up there with you?

A. Yes, sir, because I went—

Q. Wait a minute. I will ask you. You expected to have a scrap, didn't you?

A. No, sir, I did not.

Q. What did you want to take them along for?

A. I didn't take them along.

Q. What did you invite them to go for?

A. Because I was in her company. I couldn't leave her. 30

Q. How is that?

A. I was in her company and I couldn't leave her.

By the Court:

Q. Who was it went with you?

A. Mrs. Scanlan, Judge, your Honor.

Q. Did a man go with you?

A. No, sir, there was no man with me, her brother, Mr. Colligan, was in the house, followed me in.

By Mr. Crandall:

Q. Her brother was there when you got there?

10 A. No, he followed us in.

Q. He followed you in?

A. Yes, there was no one there but Mrs. Bender.

Q. And you don't know how he came to go in?

A. Walked in, of course.

Q. What induced him to go in?

A. Why, he heard his sister's voice.

Q. How is that?

A. He heard fussing, he heard his sister fussing.

Q. Who, his sister?

20 A. He heard his sister fussing with me, that is why he came in.

Q. Yes, he came in? Yes. Now to condense the whole thing, Mrs. Bender addressed, never spoke to anybody besides you, did she?

A. I don't know.

Q. Well——

A. Yes, she did.

Q. Wait a minute. Did she talk to anybody? Did she have any discourse to anybody except you personally?

30 A. In what way?

Q. Any way?

A. Yes, she told parties on the street that I stole her sign.

Q. Wait a minute, on the street?

A. Yes.

Q. I am talking about this particular occasion up in the house there in her room.

A. Well, I don't know who she talked to, there was several there.

Q. Well, there was several heard it?

A. Yes.

Q. But did she address any conversation to them?

A. I don't know.

Q. Well, don't you know she did not, she talked to you distinctly?

A. She was talking to me, yes, to me personally.

Q. Nobody but you?

10

A. Nobody but me, no.

Q. And all there is about it they just simply heard it?

A. He heard it, yes.

Q. That is all. Do you know Miss Rene Conroy?

A. Yes, sir.

Q. Did you have any conversation with her about what—

A. No, sir.

Q. Didn't say anything to her at all?

20

A. No, sir.

Q. Didn't you tell her that you wiped up the floor with Mrs.—

A. No, sir.

Q. Didn't tell her at all?

A. No, sir.

Q. Didn't have any conversation with her?

A. No, sir.

Q. Well, who was it that stepped in between you when you got belligerant there?

30

A. Her brother tried to pacify her to not call me names.

Q. Your brother—

A. Not my brother.

Q. Her brother stepped in between you?

A. Yes, sir.

Q. Well, was she—did she have her fist turned to strike you?

A. She hit me on the chin with her knuckles, right like that.

Q. Why didn't you turn on her and fight her?

A. Because I was in her own house.

Q. If she had been outdoors—

A. Yes.

Q. —you would have whipped her?

10 A. Yes, I would have taken the chance, but she was in her own home.

Q. Did you tell her there if she would come out doors you would do her?

A. I did.

Q. And you calculated to do it?

A. Yes, I would.

Q. Well, did you calculate to do her up if you caught her accidentally out in the street?

A. No, sir, I did not.

20 Q. Well, you could do her, couldn't you?

A. I would try to, the names she called me, yes.

Q. Well, where was it that she said you and Mr. Kelly was acquainted?

A. In her own home the day we had the fuss.

Q. Well, you never had any illegal intimacy with Mr. Kelly, did you?

A. No, sir, I did not.

Q. No? Well, she said Mr. Kelly lived with you?

A. Yes, sir.

30 Q. That is all she said. You keep boarders, don't you?

A. Yes, sir.

Q. Keep boarders? Did Mr. Kelly board with you?

A. No, sir, he has a good home.

Q. Wait a minute. Then she was mistaken about his living with you?

A. I guess she was.

Q. Boarding with you? Yes. But Mr. Kelly worked for you?

A. No, sir.

Q. Never worked for you at all?

A. Yes, he has done lots of odd things for me around the house, yes.

Q. How is that?

A. He has done lots of little things for me around the house, yes.

10

Q. Lots of little things?

A. Yes.

Q. Did he cook for you?

A. Well, I don't think so, no.

Q. Well, you know, don't you?

A. Well, he is not a cook. He didn't cook for me.

Q. Well, what little things, what little?

A. Why, such as plumbing work and such as putting in sash cords and such as rooms, he has papered rooms for me, I have given ten dollars for to paper three stairways, saving to Mrs. Bender, in Mrs. Bender's house, and I have bought the paper and he has papered it, I have given ten dollars for him to paper it, to do that.

20

Q. In other words he worked around your place for you?

A. No, he don't work, he only does little favors for me when he has nothing to do.

Q. Well, now, you say she said she stole your gas fixtures?

30

A. No, she didn't say—I stole hers. I was supposed to steal hers, not her steal mine. I haven't any.

Q. She said you stole her gas fixtures?

A. Yes.

Q. Those gas fixtures were like these, hung up in the room, weren't they?

A. Yes.

Q. What became of those gas fixtures?

A. I bought them and put them there, and when I moved I had taken them away.

Q. That is it?

A. Yes.

Q. They wasn't hers at all?

A. No, sir, they didn't belong to her.

Q. And there was a dispute about who owned
10 them?

A. No, no dispute at all. They belonged to me. I bought them, gas and electric, and when I moved away I asked—

Q. Wait a minute. Did they—were they used to supply some other ones?

A. No, sir, only myself.

Q. Well, there wasn't any there before you put them there?

A. No, sir.

20 Q. There was not?

A. There were in her part of the house, in the parlor there were when I took that chandelier down.

Q. What gas fixtures did she refer to when she said you stole her gas fixtures?

30 A. Well, I put a dome in the exchange, I taken the gas fixture in the exchange that belonged there and I put it away and I put two lights for the dining room, four lights on the bracket, gas and electric light for the dining room, and I put a dome for up-stairs for the hall, and I took her little bracket down and put my dome up, and when I moved away I asked Mrs. Bender to buy those things from me rather than take them away, and she promised to send me a check for six dollars for those fixtures, but the check never came, and when the time was up I took those old ones down and put the old ones in their place.

Q. You are sure the old ones was put back there?

A. What I found in the house I left there, yes.

Q. And it was that transaction she referred to when she said you stole the gas fixtures?

A. Yes, sir.

Q. Well, she said that you stole the lid for the stove?

A. Yes, sir.

Q. What was that about?

A. Well, she had, she asked my permission before 10
my lease was up to put in a new stove and I give
her permission to set it in the dining room. While I
was moving, of course, I didn't move it out, didn't
belong to me, I left it there and someone came along,
she claimed, and stole part of her stove. I don't
know what part she lost.

Q. Well, it was nothing but a stove lid anyhow.

A. Well, it is a good thing.

Q. Well, what about her, the window that she said
she stole? 20

A. The window?

Q. Yes.

A. She didn't accuse me of stealing any window.

Q. Well, then, the only thing she accused you of
was stealing the gas fixtures?

A. Yes, sir.

Q. Or stove lid?

A. Yes, sir.

Q. And that—that is all that she accused you of
stealing? 30

A. Her sign, her wooden sign.

Q. Oh, yes, the wooden sign. The wooden sign,
the gas fixtures and the stove lid?

A. And a small chair that I had when I rented the
house off her, the chair was there and I left the chair
when I moved, and she claimed I stole her chair.

Q. She said you stole that?

A. Yes, sir.

Q. What did you do with the chair?

A. Why, I left it in the house when I moved out.

Q. Didn't take it away at all?

A. No, sir.

10 MRS. ROSE SCANLAN, SWORN.

Direct examination.

By Mr. Washington:

Q. Mrs. Scanlan, are you single or married?

A. Married.

Q. Where do you reside?

A. 11 North Arkansas Avenue.

20 Q. Are you acquainted with the plaintiff in this case? Are you acquainted with Mrs. Shaw?

A. Yes, sir.

Q. Friend of hers?

A. Yes, sir.

Q. How long have you known her?

A. I have known her six years, worked with her two years.

Q. You have boarded with Mrs. Shaw?

A. Yes, sir.

30 Q. In her boarding house?

A. Yes, sir.

Q. You have heard the testimony of Mrs. Shaw with respect to a conversation on or about the sixth of November, 1914, that is November a year ago, that she said took place in the house that she had rented from Mrs. Shaw, were you present with Mrs. Shaw when that conversation occurred?

A. Yes, sir.

Q. How did you come to go to the old Bender house with Mrs. Shaw?

A. Mrs. Shaw was going to Philadelphia, and she came over to see me Friday afternoon, November sixth, 1914, to go to Dunlap's with her to get some cord to wrap her trunk with, so I——

Q. Were you going away with her to Philadelphia?

A. No, sir.

10

Q. You were going to the Dunlap store?

A. Just going over to where she had moved to, and we went to Dunlap's and got the cord and then went over to her house to wrap the trunk, as the expressman was waiting for it.

Q. What happened while you were at Mrs. Shaw's own home?

A. Then, when we came in Mrs. Shaw's—the people that had the——

Q. What happened while you were at Mrs. Shaw's own home wrapping up the trunk or making arrangements to wrap the trunk up?

A. Why, the lady that had the basement told us that Mrs. Bender had been there and wanted to see Mrs. Shaw about the sign that she had stolen last night, so we went down, I went down with Mrs. Shaw to Mrs. Bender's house, 2012.

Q. When you got to Mrs. Bender's house what took place? Just tell us.

A. Why, she called Mrs. Shaw—shall I use the same words? 30

Q. Just tell us the whole thing that occurred from the time you went in the place.

A. She called Mrs. Shaw a God——

Q. When you went in there what was the first thing occurred?

A. Mrs. Bender called 'Mrs. Shaw a God damn thief, and told her to bring back the sign that her and Col. Kelly stole last night.

Q. What did Mrs. Shaw say?

A. Mrs. Shaw said she didn't take her sign last night that she hadn't seen Col. Kelly, and that she knew nothing about the sign, only it was in the yard, she had left it in the yard.

Q. What did Mrs. Bender say to that?

10 A. Mrs. Bender said it wasn't in the yard.

Q. Go on.

A. Beg pardon?

Q. Just go on then and just tell us the whole thing that occurred.

A. Well, she also accused Mrs. Bender, also accused Mrs. Shaw of stealing her gas fixtures, part of her stove, the sign, and the chair, little chair, and she called her a God damn thief. Then——

Q. Now, who were present at the time?

20 A. Mr. Colligan and myself.

Q. Who is Mr. Colligan?

A. Mrs. Bender's brother.

Q. Any other persons outside the door?

A. Yes, there were quite a few outside.

Q. How was the door, closed or open?

A. It was open.

Q. Do you know whether those persons heard the conversation?

A. Yes, sir.

30 Q. How loud was Mrs. Bender talking?

A. Well, she was talking very loud, just hollering.

Q. Now, while this was going on, what did 'Mr. Colligan do, if anything?

A. Mr. Colligan tried to pacify her, stepped between her. She also—when she shook her fist in Mrs. Shaw's chin, her coiled fist touched Mrs.

Shaw's chin, and Mr. Colligan tried to pacify her then, and Mrs. Shaw then she called her nothing but a "God damn common, low prostitute" she was so low that she didn't know who she was, and Mrs. Shaw said, "Well, you have a beggar here and that is more than I have." She said, "Well, what do you know about me?" Well, Mrs. Shaw said, "What I know I am keeping to myself."

Q. Did Mrs. Bender make any reference to Mr. Kelly? 10

A. Yes, sir, she accused Mrs. Shaw of living with Mr. Kelly.

Q. What did Mrs. Shaw say?

A. Mrs. Shaw said that she didn't live with Kelly, she would make her prove what she said.

Q. Just a minute. Mrs. Scanlan, when you went with Mrs. Shaw did you go there with the expectation of beating Mrs. Bender in any way?

A. Well, just—no, sir, I did not, excepting with Mrs. Shaw to tell Mrs. Bender about her sign. I 20 had been with her and she said, "Let's go on down," and I was going home and so we went down.

Q. She went there to tell her where the sign was?

A. Yes, sir.

Cross-examination.

By Mr. Crandall:

Q. You knew that Mrs.—that Mr. Kelly didn't 30 live with Mrs. Shaw, didn't you?

A. Yes, sir.

Q. You knew that?

A. I certainly did, yes.

Q. And the other people knew it too, didn't they?

A. Yes, sir.

Q. They knew that? Mrs. Bender didn't direct any of her conversation to you, did she?

A. No, sir.

Q. You just simply overheard it?

A. I heard it.

Q. That is all, you heard it?

A. Yes, sir.

Q. Wait a minute. Now, you say that Mrs. Bender—that Mrs. Shaw told her the sign was out in the
10 yard?

A. Yes, sir.

Q. And Mrs. Bender said that it was not so. Did the conversation end then?

A. No, sir; no, sir, it did not.

Q. Well, there wasn't anything more said about the sign, was there?

A. No, sir.

Q. Nothing more said about the sign?

A. No, I don't know no more about the sign.

20 Q. After Mrs. Bender told her, after Mrs. Shaw told her it was out in the yard, that ended the conversation about the sign?

A. Yes, sir.

Q. What about the chair? Well, she accused her of the chair that had been in the house when she moved into it?

A. Well, that was all explained there, that was altogether, that is after the sign, after she had—

Q. The sign, we have got through with that.

30 A. Yes.

Q. Now, what about the chair? Did Mrs. Shaw give an explanation to Mrs. Bender about the chair?

A. No, sir, Mrs. Bender made the explanation to Mrs. Shaw that she had stole her chair.

Q. And that is all about it?

A. And that is all about it, "You stole my chair."

Q. Just simply said, "You stole my chair?"

A. Yes.

Q. Well, how much of a chair was that?

A. Well, to tell the truth, I never noticed the chair, it was a little bit of a chair I know, but then that is all I know.

Q. Worth a dollar and a half?

A. I don't know.

Q. A dollar? Well, the stove lid, did you ever see that? 10

A. Yes, I seen it on the stove, I ought to, lived there two years.

Q. How much was that worth, fifteen cents?

A. I guess so.

Q. Well, did you ever see the sign when it was up?

A. Yes, sir.

Q. Where was it? Was it nailed up on front of the house?

A. Yes, sir.

Q. Nailed up there? 20

A. Up on front of the house.

Q. Piece of the house, wasn't it?

A. Yes, sir.

Q. Nailed fast?

A. Yes, sir.

Q. Who took it down?

A. Mr. Scanlan, my husband.

Q. How is that?

A. Mr. Scanlan, my husband.

Q. Took it down for Mrs. Shaw? 30

A. Yes.

Q. Mrs. Shaw told him to take down the sign?

A. Yes, sir.

Q. Well, the gas fixtures, what about them? Them gas fixtures, she said, "You took my gas fixtures"?

A. "You stole my gas fixtures."

Q. Well, how much was that worth, how many lights were there?

A. Well, there was, I believe, there was six.

Q. Six?

A. Yes, sir. I just don't remember, but I think was about six in the dining room.

Q. And that fixture then was worth four or five dollars?

A. I suppose so.

10

PLAINTIFF RESTS.

MOTION FOR NON-SUIT.

Mr. Crandall: Now, the proposition of law that I claim to be involved here is, the jury are instructed, if they believe from the evidence that the language used by the defendant on the occasion of the alleged slander was a part of a recriminating and acrimonious personal quarrel started by the acts and sayings of the plaintiff and the defendant, then they are authorized to find defendant not guilty, that is to say to find for the defendant.

Now, from the cross-examination and direct examination it is perfectly clear that the defendant, while she was in her own room, in her own parlor, that the plaintiff, from her attitude, what she says, went over there and provoked this crimination and re-crimination, this quarrel, went over there and provoked it, and that I will say to your Honor there is no cause of action there, and more especially inasmuch as there is no damage proved nor alleged. The fatal thing about the declaration is no damages are alleged. To just simply say five thousand dollar

damage is not enough. You have got to make an allegation to show how the damage took place, that it injured her in her business, injured her in her feelings, because that is a part of the argument I shall make, that injury to feelings is not recoverable in an action of slander.

The Court: I will allow the complaint to be amended.

Mr. Crandall: You can't amend it beyond the proof.

10

The Court: No, but I can allow the complaint to be amended so as to cover the item of damages. I wouldn't throw the case out on that ground.

Mr. Crandall: He hasn't proved any damages, that is the difficulty.

The Court: I think the complaint should allege that she was injured in her feelings.

20

Mr. Crandall: Now, if I show your Honor that there is no pain of mind that is recoverable, you can't recover for that.

The Court: Indignity.

Mr. Crandall: Yes, indignity. I will show you. That is right all there is about it. You have to take a little time.

30

The Court: I think that complaint can be amended, the damage clause of the complaint should be amended so as to cover whatever damages he thinks are recoverable in a case of this sort.

Mr. Crandall: Now, there is nothing recoverable. If he amended it, he would amend it right in the face of the law.

Mr. Washington: Now, if your Honor please, I would like to request to amend the complaint by alleging that as the result of those imputations plaintiff was injured in her good reputation and standing in the community, and that the making of such statements damaged the plaintiff in her business as a boarding house keeper. I would like to add such a statement to the complaint, to each count of the complaint.

The Court: All right. Now, then, proceed with the case. Do you claim any damages, injury to her feelings?

Mr. Washington: We claim, if your Honor please, that in addition there should be an allegation in the complaint that as a result of speaking those words the plaintiff was humiliated and injured in her feelings as well by the indignity from speaking those words.

The Court: You better go on with your defense and make your motion at the end, if you want to. Motion to non-suit denied.

30 (Exception noted for defendant.)

Recess taken until 1.10 P. M.

AFTERNOON SESSION.

Hearing Resumed at 1.10 P. M.

DEFENDANT'S TESTIMONY.

ELLA A. BENDER, SWORN. 10

Direct examination.

By Mr. Crandall:

Q. You are the defendant?

A. Yes, sir.

Q. Where do you live?

A. In Atlantic City. At present in Philadelphia.
I am in Philadelphia at present, but Atlantic City in 20
the summer-time.

Q. What is your business?

A. Hotel Windemere on South Carolina Avenue.

Q. What number?

A. 182 South South Carolina Avenue.

Q. How long have you kept that hotel?

A. Since ninety-eight—1898.

Q. Well, you know the plaintiff here, Mrs. Shaw?

A. Yes.

Q. How long has she been your tenant there? 30

A. About two years.

Q. You heard what she said occurred in your
house there on the sixth of September?

A. Yes, sir.

Mr. Washington: Pardon me, Judge, that is the
sixth of November.

Q. You heard what she said about your going to her house in her absence and calling for her?

A. Yes.

Q. How came you to go there then?

A. The things were missing, I went to the, somebody advised me to go to Magistrate Sontheimer, and I went to see him, and he told me to go there and make a demand, but not to get a search warrant, to come back to him, so I went, and Mrs. Shaw was not
10 in, so I knocked at the door and some woman came to the door and she said she was not in, so I looked in the window and I found there was paper there that I had sent down to paper my house, that they had papered rooms and as I was walking out I seen Col. Kelly, and I says, "Say Col., you used the paper on them two rooms?" He says, "Well"—room, I didn't say rooms—he says, "Well, what of it, if I papered two or three rooms with the paper?" Well, I says, "You stole, took the sign out of my window
20 that was nailed there." He says, "Well, if they show me I will put it back," and at that I went home and of course I hadn't—

Q. Go ahead.

A. And I went home and about five o'clock, men quit work around five, after that Mrs. Shaw came in and she says to me, she said, "You said that I stole that sign?" I said, "No, I never said that, but I said, "You stole my name, of course, of the house that had been there seven years," and she says—
30 word brought on another, and she commenced to get all excited, and I ordered her out of the house and she started to hit me and I told her to get out, and that made her mad, and there wasn't anything more said.

Q. There wasn't anything more said?

A. No, there wasn't any more as I remember.

Q. How is that?

A. As I can remember there wasn't anything more said, with the excitement she wanted to go, yes, she did, she wanted to take me out in the street and sweep the street with me.

Q. Did she make any passes at you?

A. Yes, I never raised my hand to her, never put my hand and fist up at all because I know she could whip me, at least I thought she could.

Q. Well, what about the gas fixtures?

10

A. Yes, when Mrs. Shaw took possession of the house she asked me to let her take the gas fixtures down and I told her yes, she could do that providing she would put my old ones back and she never put them back, and when I went there they wasn't there and she knew nothing about them and they are not there, my gas fixtures.

Q. Well, what was the talk about them? Did you accuse her of stealing them?

A. No, I never accused her of stealing them, but I 20
asked her where the gas fixtures was.

Q. You asked her?

A. Yes.

Q. Well, what about the chair?

A. Well, the chair, of course I can explain this, this Mrs. Shaw had rented the house, not Mrs. Shaw, but Mrs. Wiser, and Mrs. Wiser had it furnished and she called a sale and sold the furniture and of course she put up this furniture and I bought some things, I bought the sign with the name on it, the name of Pennlyn, with the name to stay on that sign, which I have witnesses here for that, and she took the name and the sign down and put an electric sign up with the name of Pennlyn, and when she went away she took that name with her, and got it on her house now without permission, and then the wooden 30

sign, she had that out in the yard, or wherever she had it, and Currie's man, one of the men painted the house, brought it in and nailed it across the window, five foot window it was, and of course that was gone one night, the sign was gone one night, piece of the stove, the damper of the stove, and of course Mrs.—I get mixed up with her name, Mrs. Shaw, she has the key of the house, and I went and asked her would she give me the key and she said I could have
10 the key if I give her seventy-five cents, so, instead of that, I sent and got a man to come and make the key, and I know the house was, well, it wasn't open, and nobody could get in that house, I didn't think they could, and I had a key made and she had the key.

Q. Well, she says that you accused her of staying with Kelly?

A. Oh, no, I never said anything of the kind. I never mentioned anything about that at all. I had
20 better sense than mention that.

Q. Well, did you notice who was with her when they came into your house?

A. No, she took me so suddenly, I had my back to her when she came in hollering the way she did, and I turned around and looked at her and I don't know, I think she had somebody with her, but through the excitement I did not particularly notice who it was.

Q. Did you talk to anyone besides her?

30 A. No, she was the only party that I was talking to.

Q. Well, you heard her say that you struck her?

A. Oh, yes, but I didn't do that. I never raised my hand to her.

Q. But she raised her hand to you?

A. Yes, she wanted me to go out in the street and she would wipe the street with me.

Q. Who did you say interfered?

A. Well, my brother, he came in and he went in and separated her, kept her away. I didn't know but what me and her was the best of friends until I asked her for the key and she wouldn't let me have them unless I paid seventy-five cents.

Q. Then, there is nothing to the thing but a little dispute between you and her?

A. That was all.

Q. You——

10

By the Court:

Q. Did you say she was a prostitute?

A. No, sir.

Q. You never used that language?

A. No.

Q. Did you call her a thief?

A. No, I only said that she took the name, "You stole the name of my sign of the house," you know, on seven years, and when I bought that sign I bought the name and she took the name away. 20

By Mr. Crandall:

Q. Yes, but the Court asked you if you ever called her a thief?

A. No, I only said, "That sign, you stole, my name," that is all I said to her, and she has got it on the house.

Q. Well, did you ever call her a strumpet?

A. No, I never did. I never called her a strumpet. 30

Cross-examination.

By Mr. Washington:

Q. Did you ever accuse Mrs. Shaw of stealing or did you not?

A. I never did, no, sir.

Q. Never did?

A. No, nothing more than that name I was telling you about.

Q. You spoke of a sign. Who paid for that sign?

A. I did, I paid for the wooden sign.

Q. Who paid for the sign that Mrs. Shaw took away and put on Mrs. Shaw's house?

A. I suppose she did. She made an electric sign.

10 Q. You didn't, did you?

A. No.

Q. And the sign she took was the sign she had bought and paid for?

A. Yes.

JOSEPH M. JOHNSON, SWORN.

20 Direct examination.

By Mr. Crandall:

Q. Mr. Johnson, where do you live?

A. 2010 Pacific Avenue.

Q. You know these parties?

A. Yes, sir.

Q. Were you at home there on the sixth of September when there was a little——

30 A. November.

Q. Yes, November, when there was a little jar up there?

A. Yes, sir.

Q. A little feminine disturbance?

A. Yes, sir.

Q. Tell the jury just what you saw.

A. My evidence would not be very much, I don't think in this matter. It looked to me just nothing more than a dispute between two ladies. I didn't hear this lady say a word, only I know somebody said, "There is a commotion next door," and I ran out of the office to see what was the matter and when I got out there I heard this lady going on to this other lady telling her if she would come outdoors she would wipe the street up with her.

10

By the Court:

Q. Who said that, the plaintiff?

A. The plaintiff said that, yes, sir.

Q. Did she seem to be the person who was creating the disturbance?

A. She was doing it all. I didn't hear the other lady open her mouth.

By Mr. Crandall:

20

Q. If she had opened her mouth you would have heard it, wouldn't you?

A. I certainly would, but I didn't stay there long. I didn't think there was much for me to do there.

Cross-examination.

By Mr. Washington:

30

Q. Mr. Johnson, after you got there how long did Mrs. Shaw stay there?

A. I don't know. I didn't stay.

The Court: Did you hear her call her a thief or a prostitute?

A. I never heard her open her mouth, and I never heard her say a word, when I went there this lady was standing there and this lady had her hands up telling her what she would do to her if she would come out on the street.

Q. So whatever Mrs. Bender said was said before you got there?

A. That is it, I didn't hear a word, or hear her open her mouth. I saw it was trouble between the
10 two and I made up my mind——

Q. There is no question, sir.

A. Yes, sir.

By the Court:

Q. You can state what it appeared to be.

A. It seemed to me to be a dispute between the two of them. That is what I thought it was.

20

MISS RENA CONROY, SWORN.

Direct examination.

By Mr. Crandall:

Q. Rena, where do you live?

A. 2003 Pacific.

30 Q. How is that?

A. 2003 Pacific Avenue.

Q. Did you see these parties, Mrs. Shaw and Mrs. Bender, on this sixth of November?

A. I came out of my father's office when I heard the commotion and saw Mrs. Shaw on the sidewalk with her coat off and said to Mrs. Bender if she

would come out she would wipe the street up with her.

Q. If Mrs. Bender would come out of her own house?

A. Out of her own house.

Q. Well, did Mrs. Bender go out?

A. No, she stayed in her own house.

Q. Was there any talking there that you heard?

A. No, I didn't hear any talk inside the house. It was only what was on the pavement. 10

By the Court:

Q. Did you hear Mrs. Bender say anything in an angry way?

A. No, I didn't hear a word Mrs. Bender said. The talking was all from the outside to the inside. Mrs. Shaw was talking.

Q. Well, was Mrs. Bender's condition angry?

A. Very angry. She didn't even appear as if she was any way fussed up about it at all, very ladylike in every way she was acting. 20

Cross-examination.

By Mr. Washington:

Q. You say that when you got there you heard Mrs. Shaw tell Mrs. Bender that if she would come outside she would wipe the street up with her? 30

A. Yes, sir.

Q. That is all?

A. Yes, sir.

Q. And it didn't make the slightest impression on Mrs. Bender and she was perfectly self-possessed and it made no difference to her?

A. She didn't move out of her own house.

MARY COLLIGAN, SWORN.

Direct examination.

By Mr. Crandall:

- 10 Q. Mary, where do you live?
A. 2014 Pacific Avenue.
Q. You any relation to the defendant?
A. Yes, sir.
Q. What?
A. A niece.
Q. Niece?
A. Yes.
Q. Who is your father?
A. William Colligan.
- 20 Q. The letter carrier there?
A. Yes, sir.
Q. Tell the jury in your own way now what you saw on this sixth of November between Mrs. Shaw and Mrs. Colligan, Mrs.— the defendant here.
A. You mean the day of the fight what I saw?
Q. Yes, tell them just what you saw.
A. Well, I wasn't in the room the day of the fight. I was in my own home.
Q. How is that?
- 30 A. I wasn't in the place the day of the fight. I didn't see the fight at all. All I seen is Mrs. Shaw was going to lick my aunt, she took off her coat and said, "Come out here and I will wipe the street up with you," and I saw her shake her fist under her face out here.
Q. Under her nose?

A. Yes.

Q. Did you hear her say or do anything?

A. No, I wasn't in there at all. I just seen them from our window.

Q. How is that?

A. I wasn't in there at all. I didn't hear any of the conversation.

Cross-examination.

10

By Mr. Washington:

Q. Mrs. Shaw, I presume, wanted to lick Mrs. Bender without any provocation at all?

A. Yes.

Q. No provocation at all?

A. Yes, sir.

Q. She just wanted her to come out in the street and she wanted to lick her?

A. Yes.

20

Mr. Washington: We will admit, Judge, that they will all testify the same way if that is your testimony.

The Court: He has a right to call his witnesses.

30

MRS. ANNA COLLIGAN, SWORN.

Direct examination.

By Mr. Crandall:

- 10 Q. Where do you live, Mrs. Colligan?
A. 2414 Pacific.
Q. How is that?
A. 2014 Pacific.
Q. Do you know these parties here, Mrs. Shaw
and Mrs. Bender?
A. Yes, sir.
Q. Did you see them on the sixth of November?
A. Yes, sir.
Q. Where were you?
20 A. In my own home.

The Court: What did you hear? Face the jury and tell them.

- A. I didn't hear a thing, all I heard Mrs. Shaw when she was leaving the house, after she got done to lick Mrs. Bender, she said, "You son-of-a-B, all is the matter with you you are hungry for money and you are mad you ain't getting your three hundred dollars this month on your rent." That is all I heard.

30 Q. That is what Mrs. Shaw said to her?

A. Yes, sir, when she was leaving the house after she got done putting her coat on, right in front of my door she said, "You are hungry for money, and you are mad you ain't getting your three hundred dollars this month for your rent."

Cross-examination.

By Mr. Washington:

Q. Well, did you understand from that that Mrs. Bender was angry?

A. Why, no, for I didn't hear Mrs. Bender say anything, all I heard just them few words.

Q. If Mrs. Bender was not angry, why do you suppose Mrs. Shaw said then, "That is the only reason you are angry," that is what she said?

A. That is what Mrs. Shaw said.

WILLIAM COLLIGAN, SWORN.

Direct examination.

20

By Mr. Crandall:

Q. What is your business?

A. Letter carrier, Atlantic City.

Q. Any relation to the defendant here?

A. My sister.

Q. How far do you live from where this scrimmage occurred on the sixth of November?

A. Right next door, about six or eight feet.

Q. Now, tell the jury what you know about it. 30

A. Well, on the afternoon of the sixth I was coming down from work, from the main post-office, and when I got near Michigan Avenue, gentlemen, this is below Michigan Avenue I live——

Q. A little louder.

A. A little below Michigan, between Michigan and

Arkansas, I seen all that crowd outside and I was wondering what was coming off, kind of scared me, of course, I was riding a bike, and I thought was something happened to some of the children, anyhow I rode up there, why, I seen it was my sister's house, and there was a crowd on the sidewalk and there was several in the house, and this Mrs. Shaw she was going on at a great gait, heard her tongue above them all. Of course was kids, and I know
10 people outside, they was making a lot of noise, yelping and laughing, so Mrs. Shaw rolled up her sleeves, I pushed through the crowd to get to the other gate, there is a door, I had to push my way through, and Mrs. Shaw was rolling up her sleeves and was making for my sister. Well, I jumped and got in between them.

Q. Well, did you hear what your sister said at any of the time?

A. No, I could hear Mrs. Shaw's tongue above
20 them all.

Q. How is that?

A. I could hear her tongue, couldn't hear nothing, only the outsiders was laughing and giggling, you know, fun inside, was doing something, it seems it was amusement.

Q. What did you hear Mrs. Shaw say?

A. She said she would wipe the street up with her if she would come outside.

Q. And that is all you know about it?

30 A. Well, then, she made some other remarks, "Oh, hell, you son-of-a-bitch, you are only sore that you ain't getting your three hundred dollars, that is all you are sore about, you are greedy for money," and that is all I heard.

Q. Then the dispute was about the rent?

A. Yes, dispute about the rent.

Q. Well, there was——

A. Yes.

Q. It was warming over an old——

A. Yes, she said she was sore, "You are only sore because you ain't getting your first payment of rent three hundred dollars."

Q. They were evidently bad friends?

A. Well, had some words, they had, I suppose, some words, yes. Of course I wasn't there, you know, I am not there only at meal-time, you know, and you see, only in the evening. 10

Q. Well, Mrs. Shaw was evidently out of humor anyhow?

A. Certainly was, like a raving maniac, I guess she would lick the lion if she would get hold of it.

Cross-examination.

By Mr. Washington:

20

Q. You say Mrs. Shaw and Mrs. Bender had been bad friends?

A. I don't know what, they had had some words I suppose.

Q. Well, had they or hadn't they?

A. I don't know.

Q. Then you don't know?

A. Had some words about as near as I could find out.

Q. Now, what did you hear your sister say? 30

A. My sister said something about the sign, something about the name on the sign.

Q. And you didn't hear what she said?

A. Something about the sign, yes.

Q. What did she say about the sign?

A. Mrs. Shaw, her tongue drowned pretty near

everything, with the kids and yelling around there, you couldn't get head nor tail.

Q. What did you say to your sister?

A. What did I say? I said, tried to keep them both quiet.

Q. What did you say?

A. I told her to keep quiet and not to get excited because I knew she had just come out of a sickbed.

Q. But you told your sister not to get excited, that
10 is right?

A. I told her just to keep quiet and got in between Mrs. Shaw, Mrs. Shaw made a break for her, rolled her sleeves up.

Q. How soon was that after you got there?

A. Oh, I suppose, as soon as I got in, the sidewalk was full, but doorway was jammed, I had to push in.

Q. Just the instant you got in the door Mrs. Shaw was rolling her sleeves up, is that right?

A. Yes, she done the same thing outside, she took
20 her coat off even outside.

Q. Never mind. What took place in there before you got in there, before she starts to roll up her sleeves, you didn't hear it, did you?

A. No, I didn't hear. I wasn't there when it first started.

MISS MARY A. BENDER, SWORN.

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Direct examination.

By Mr. Crandall:

Q. What is your name?

A. Mary A. Bender.

Q. And this lady, the defendant, is your mother?

A. She is my mother.

Q. Was you there when Mrs. Shaw had a little interview with her on the sixth of November?

A. I wasn't there at the time of the fight, no.

Q. How is that?

A. I wasn't there at the time of the fight. I had come down with my mother, we were having the house fixed, and when we came down we met the carpenter and Mother had said to him, "Have you started? Has the lumber come?" and he said, "Why, yes, we are in and we have cut the doors." She said, "Why, how is that?" He said "Why, the whole house is open," so we went down to Mrs. Shaw's to ask her for the key and she had paid seventy-five cents for that key, and, "If you want it you will pay seventy-five," and Mother said, "I will have them made," so we went down and called up Mr. Leigh's on Atlantic Avenue, to send his man and make the two keys, and after the men had finished the work that night, we always waited until they had finished, around five o'clock, and then we locked up and we had gone, so over night there was something missing and we had a wooden sign, one of Currie's men had nailed across the front window, it was a five foot sign and this was a five foot window, and just fit, so the following morning we came and the sign was gone, and a party said to me, "If I were you I would go get a search"——

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Mr. Washington: Objected to, if your Honor please, as pure hearsay.

The Court: Yes, not anything was said to you.

A. We went up, at any rate, to Magistrate Son-

theimer, wanted to explain the case to him and he told us not to get a search warrant, but go down and make a demand on the sign, so we went down to Mrs. Shaw's house, where she had moved, and she didn't seem, we knocked at the door upstairs, and there wasn't any—knocked at the door downstairs and the lady came to the door and she said, "I believe Mrs. Shaw has gone to Philadelphia," and the window was open, and as we pushed the curtain
10 back and looked in before she had come to the door, we saw some paper we had sent down for this other house to be papered on this wall. When we went out—

The Court: You mean to say paper on her wall?

A. Yes, house she had moved in, paper we had sent down to 2012 to have that house papered was on this house she had moved into, so we went outside and we met Mr. Col. Kelly on the pavement, and
20 my mother said to him, she said, "Col., you were seen last night to take the sign," and he said, "Well, I don't know, I am not here looking, Mrs. Bender, if I did," he said, "I will bring it back," and she said, "Furthermore" she said, "there is paper on that room in there that I had sent down for my other house." He says, "Oh, no, there is not." She said, "I seen it." Well, he says, "What of it if it is, only two or three rooms," so from that we went out of
30 the house.

By the Court:

Q. How much paper had you sent down?

A. Why, we had bought it wholesale over in Philadelphia.

Q. And the paper was to be used?

A. On this 2012.

Q. That she had previously occupied?

A. Yes, and she had taken the paper away.

Q. Taken the paper away and put on her own house?

A. Yes. So then we went on back to our house and we sat there, and Mother was in, was crocheting, and I was embroidering, and a lady came and we went on down to Chelsea to see a friend.

10

Q. Did you see the paper on the wall?

A. Yes, sir, I saw the paper on the wall.

Q. And did you know it was your mother's paper?

A. Yes, sir, I know positively it was Mother's paper, so I went away and left Mother there alone and when I came back there was a crowd out in front of Mrs. Shaw's, this house, and I thought the Synagogue was leaving out and I said to the lady I was with, "I guess the Synagogue is leaving out," and she said, "Let's go over on this side," so we went down the other side, and I got down here, why we found out there had been a fight.

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By Mr. Crandall:

Q. Then you wasn't there when this—

A. I wasn't there when the fight was going on, no, and Mother wasn't very well, she had not long before that been in the hospital and operated on.

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Cross-examination.

By Mr. Washington:

Q. Miss Bender, you say you are the daughter of the plaintiff?

A. I am.

The Court: You mean the defendant?

A. Defendant, yes.

Q. Defendant, pardon me.

A. Yes, sir.

Q. You say that you went to see Mrs. Shaw and that Mrs. Shaw said that she had paid seventy-five cents for a key; is that right?

A. Yes, that is what she said.

10 Q. Do you know whether Mrs. Shaw had paid seventy-five cents for that key?

A. Do I know she had?

Q. Yes.

A. No, I do not, but I know when she rented the house she surely must have had the keys to the house, or she wouldn't have taken the house without the keys.

Q. Do you know whether she paid the seventy-five cents?

20 A. No, how am I in a position to say whether she paid the seventy-five cents?

The Court: What did you hear Mrs. Shaw saying when you heard this commotion in the street, did you hear Mrs. Shaw say anything?

A. No, she was standing in front of her own house then, with a big crowd around her, and I was on the opposite side of the street and couldn't hear
30 anything.

Q. When you say you went to Mrs. Shaw's house that was before the fight took place?

A. Yes, I don't know whether it was that morning or the day before. I am not positive.

Q. I understood you to say—

A. I think it was the day before.

Q. I understood you to say "I went back to the house and found the crowd outside of the house"; is that correct, or am I mistaken?

A. I didn't say that. You are mistaken.

Q. What did you say?

A. I said I had been to Chelsea and when I came up the crowd was in front of Mrs. Shaw's house.

Q. This other conversation was the day before?

A. Yes, this other conversation was the day before. I am not positive whether day before or in the morning. I am not positive about that. 10

Q. Now, you say, you saw some wall paper on the wall of Mrs. Shaw's house?

A. Yes.

Q. Did you go through that house?

A. No, I did not.

Q. How did you see the paper?

A. Why, the window was open and they had a lace curtain and we were knocking there and nobody came, and I pushed the curtain back. I didn't see anybody and finally a lady came to the door and out front we asked Mr. Kelly and he said, "What of it if I do paper three or four rooms?" and he was the one that done the papering, so he acknowledged. 20

Q. Now, what room did you say?

A. Why, it was the front room in the basement.

Q. Front room in the basement?

A. Yes.

Q. Front room in the basement you saw that paper? 30

A. That room right next to the sign there, there is a window, and that window was open, it is right on the side in front of the basement.

Q. And you saw that paper?

A. I saw that paper, yes.

Q. How did that paper get in Mrs. Shaw's possession?

A. She evidently took that with her when she moved from 2012. I don't know.

Q. Nobody else has such paper?

A. I don't think so because it is a real old paper and we bought it when somebody sold out and it is a heavy felt, and one side plain felt, on the other design, on this side design, and same thing was papered down in 2012, part of it.

10 Q. Is there any reason why anybody except you and your mother can't buy such paper as that or would they only sell to her?

A. I guess other people could buy it, yes.

WILLIAM COLLIGAN, recalled.

By the Court:

20 Q. Mrs. Shaw, I think, said in her testimony that you were in the room when Mrs. Bender slandered her?

A. No, I was not.

Q. What is that?

A. No, sir, I was not. I was not present because, as I told you before, the commotion was going on, crowd was out front.

Q. She said that you were present when you heard your sister call her a prostitute?

30 A. No, I was not. Didn't hear nothing of the kind, no such words.

DEFENDANT RESTS.

PLAINTIFF'S REBUTTAL.

MARY SHAW, recalled.

Direct examination.

By Mr. Washington:

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Q. Mrs. Shaw, there has been testimony as to the sign. Will you just tell the jury whose sign that was?

A. Why, the wooden sign belonged to Mrs. Bender and the electric sign belonged to me.

Q. What was done with the wooden sign?

A. Why, Mr. Scanlan carried it back and put it in the yard, and when I left the house I left the sign there.

20

Q. What became of the electric sign?

A. I took it down to 2022 and had it connected.

Q. And is it there now?

A. Yes, sir.

Q. Who paid for that sign?

A. I did.

Q. There was testimony as to a key in this matter. Will you just tell the jury whose key that was?

A. Why, the key belonged to me. Mrs. Bender never give me a key, she never give me possession to her house, when the moving men went there on November second or November first they got in the windows, and Mary Colligan is the one bought me the lock for my upstairs door, and Mr. Kelly is the one that put it on, and Mrs. Bender never give me a key to her house in her life, that key belonged to

30

me, and when she came down and demanded the key off me she said, "I want the key of my house," which I intended to give her if she had come to me in a ladylike way, and I said, "You do? Did you ever give me a key to your house?" She said, "Don't make no God damn bit of difference; I want that key." And I said, "Well, if you want that key you will pay me seventy-five cents." And she said, "I could go to Hell and keep the key."

10 Mrs. Bender's daughter heard it all, the one that got off the stand.

Q. Mrs. Shaw, there was testimony here that in the conversation in the—at the time that Mrs. Bender made the remark against you that we sued for, that you called Mrs. Bender a son-of-a-B and swore also to her at that time, is that so?

A. No, sir, I never did. I never use profane language and that afternoon nor forenoon I never had my coat off, but I did lift my arm to throw my coat

20 off that way and Mrs. Scanlan pulled my coat on again. The testimony was given on this stand was a lie, because I never had my coat off my body.

Q. Mrs. Scanlan was with you during the whole transaction?

A. Yes, sir, she was.

No cross-examination.

DEFENDANT'S REBUTTAL.

MISS MARY A. BENDER, recalled.

Direct examination.

By Mr. Crandall:

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The Court: Mrs. Shaw said that this girl was present when her mother used certain profane language to Mrs. Shaw?

Mr. Crandall: Yes.

The Court: You ask her about that.

By Mr. Crandall:

20

Q. You heard what the Court said?

A. Yes, I heard it.

Q. Well, now, state all about that.

A. I went down with my mother to get the key. There was no profane language used at all. Mother asked Mrs. Shaw for the key and she said, "If you want this key I have bought and paid for it and paid seventy-five cents for it, if you will pay me seventy-five cents for it," and Mother said, "Well, I can go get them made," so we went to Mr. Leigh's store and had him send a man. 30

By the Court:

Q. Did you hear your mother use any profane language to her?

A. No, sir, I did not hear my mother use any profane language to her.

No cross-examination.

TESTIMONY CLOSED.

10 Mr. Crandall: If your Honor please, I am inclined to think that this case ought to be dismissed without debate.

The Court: I think this case should be submitted to the jury. Motion to direct a verdict for defendant is denied.

(Exception noted for defendant.)

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Mays Landing, N. J. January 18, 1916.

CHARGE OF THE COURT.

Carrow J: Gentlemen, the defendant is charged with slander. To call a woman a thief and prostitute in the presence of third persons is slander. If defendant did that, plaintiff is entitled to damages, unless the proof shows that the words were true. Plaintiff would be entitled to damages for the indignity and if the words were uttered maliciously, plaintiff would be entitled to exemplary damages, that is, damages by way of punishment and example. No special damages have been shown, nor are such damages claimed by the plaintiff in this case. 10

If you reach the question of damages, your verdict must not be the result of passion and prejudice. It must be reasonable. The law puts the burden of proof upon the plaintiff. She must convince you by a preponderance of the evidence that she was slandered by the defendant. Now, has she done it? That is a serious question of fact which you must decide. It appears that there was some dispute between these women over a key of a house. I believe the defendant went to the home of the plaintiff to get a key of the house, which the defendant owned. The plaintiff had been a former tenant. The difficulty between these two women began when the defendant refused to surrender the key to her landlord without seventy-five cents being paid for it. Mrs. Shaw heard that something had been said by Mrs. Bender with reference to a sign which had been taken off of the premises and she went down to Mrs. 20 30

Bender's house to see Mrs. Bender, taking the young woman who was on the witness stand, with her. She says that while she was there in Mrs. Bender's home Mrs. Bender used the slanderous language in question in the presence of this young girl and in the presence of Mr. Colligan, the defendant's brother. Now, I have told you that the law casts the burden upon the plaintiff to prove her case by a preponderance of evidence. You can readily see if that
10 were not the law, how easily unjust claims could be made, and how citizens, responsible citizens, could be annoyed by unjust suits if the law were not as it is. The law says "now, since you charge the defendant with slander and are trying to recover money from her, you must prove your case by a preponderance of evidence before any jury will allow you to have any money."

The defendant denies that she used any slanderous language towards plaintiff. She says she did
20 not call her a thief, she did not call her a prostitute. There you have defendant's word against the plaintiff's word. Her brother, Mr. Colligan, an old letter carrier in Atlantic City, says he was not in the house and never heard a word that was said in the house between these women. Mrs. Shaw says he was in the house, but, gentlemen, he says he was not in the house. That may throw light upon the question whether Mrs. Shaw is telling the truth or not. He says he was not in the house when the slanderous words are alleged to have been used, and Mrs.
30 Shaw says he was. He said that when he appeared on the scene Mrs. Shaw was shaking her fist or manifesting some angry physical attitude towards the defendant in the presence of people in the street, and other witnesses corroborated him and said that Mrs. Shaw was using offensive language and pro-

fane language in the street wanting to pick up a fight. Now, that may throw light upon the question, gentlemen, whether or not the defendant did use the slanderous words, or words alleged to have been slanderous, which are the subject-matter of this suit.

The facts are entirely for your consideration and decision, but before you can decide for the plaintiff you will have to be satisfied that defendant used the language which the plaintiff has sought to impute to her in this case. If you say, if you decide that the defendant did not slander the plaintiff by using the language in question, you will not hesitate to return a verdict for the defendant. If, upon the other hand, you decide that defendant did use the slanderous words in question, then the plaintiff would be entitled to the damages which I have mentioned, no special damages—there has been no proof of special damage,—damages by way of punishment and damages for the indignity and humiliation. Of course, gentlemen, if this was only a row between these two women and not within the hearing of anybody else, and if each accused the other of all the offenses known to the law, that would not be slander. It has got to be something more than that. The slanderous words must be published in the presence of third persons. Now, who were the third persons? The plaintiff says Mr. Colligan, and Mr. Colligan says it is not so. Well, who else heard it? Nobody, but this young woman, this witness who came with the plaintiff. I don't know whether she is a relation or not.

Mr. Washington: If your Honor please, along that point, my recollection is that the testimony was that there were a number of other people there who had heard, but we didn't know who they were.

The Court: Yes, there is testimony that a number of persons heard it in the street.

Mr. Washington: That is what I mean.

The Court: What the Court is commenting upon is the absence of such persons. If it was a matter of such notoriety, why were not some of those witnesses called? The Court is commenting upon the
10 fact that the only person who is said to have heard it is the young woman who came with the plaintiff. She said she heard it. Well, if that is so, gentlemen, that is all there is about it. The defendant is guilty, but if she is mistaken about it, and if the defendant is right that she did not use the abusive language in question, the plaintiff cannot recover. It is altogether a jury question. The Court has no opinion to express upon the facts, indeed, if the Court had
20 any opinion you would not be required to be bound by it. The responsibility of deciding the question is with you entirely. The Court has nothing to do with it. You must decide the facts under the law which the Court has laid down. You may retire.

**ASSIGNMENTS OF CAUSES FOR REVERSAL
ON APPEAL.**

NEW JERSEY COURT OF ERRORS
AND APPEALS.
APPEAL FROM ATLANTIC COUNTY CIRCUIT COURT. 10

MARY SHAW,
Plaintiff-Appellee, }
VS. } ASSIGNMENTS OF
ELLA A. BENDER, } CAUSES FOR RE-
Defendant-Appellant. } VERSAL ON APPEAL.
20

Appellant prays that the judgment in the above-
stated cause be reversed for the following reasons:

FIRST.

Defendant's request of the Court to non-suit the
plaintiff at the close of the plaintiff's case should
have been granted for the following reasons:— 30

(A)

By the plaintiff's evidence nothing occurred in
the parlor of defendant, but a personal acrimonious
altercation between the parties themselves person-
ally.

(B)

The statements made by the defendant to the plaintiff were directed to her personally and to no one else, hence the case lacks all the elements of publication which is the foundation element of slander.

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(C)

Nothing in the nature of any damage was either alleged or proved.

(D)

20 The allowance of the amendments of the declaration or order to consider the declaration amended so as to include allegations of damages, to reputation, to boarding house business, injury to feelings and humiliation, wrought injury to defendant, for the reason that plaintiff failed to exhibit any evidence of business or merchantile damage whatever, and mere injury to feelings or dignity is not the subject of damages in verbal slander.

SECOND.

30 At the close of the defendant's evidence the Court committed error injurious to defendant by refusal to non-suit the plaintiff for the reason:

(A)

That the plaintiff had introduced no additional evidence as to appreciable damage, nor yet publica-

tion addressed specially to some third person, nor yet damagable evidence to feelings.

THIRD.

The Court erred in charging the jury the following:

(A) 10

“To call a woman a thief and prostitute in the presence of third persons is slander.”

(B)

“The plaintiff would be entitled to damages for the indignity and if the words were uttered maliciously plaintiff would be entitled to exemplary damages.” 20

(C)

The Court in commenting upon the fact that the only person who is said to have heard it, “Is the young woman who came with the plaintiff, she said she heard it, well, if that is so, gentlemen. that is all there is about it, the defendant is guilty.”

Wherefore defendant prays that the judgment be 30
reversed.

BOLTE, SOOY AND GILL,
For Appellants.

