KRISTIAN HERMAN JOGENSEN, Appellant, vs. **URIAS KNOWLAND**, Appellee.

LRSC 1; 1 LLR 266

[January Term, A. D. 1895.]

Appeal from the Court of Quarter Sessions and Common Pleas, Sinoe County.

Damages.

1. A verdict which upon its face appears to be the unanimous conclusion of a petit jury upon facts submitted, is valid even though defective in form. Verdicts cannot be set aside for error in form; by the rules of practice such defects are allowed to be corrected.

2. The want of proof will defeat the best laid action; the statement of facts in a declaration, however clearly and logically they may be set forth, cannot be taken as proof of their truthfulness.

3. In actions for damages the jury should take into consideration the misconduct of the defendant when shown, in mitigation of damages.

This is an appeal from the proceedings and decision of the Court of Quarter Sessions, Sinoe County, at its February term, A. D. 1894. The action was brought by the appellee, plaintiff below, for damages on account of an alleged assault and battery. At the trial the appellee obtained judgment, the same being based upon the verdict of the jury, unto whom the facts were submitted by the court; from which judgment, and other proceedings of said court, exceptions were taken by the appellant and upon the exceptions thus taken the case is before this court for review. The first exception taken is to the verdict of the jury, because it was without date, which objection the lower court did not sustain, and ordered said verdict recorded.

This court says a verdict is the unanimous agreement of a petty jury as to facts submitted to them for determination, and the dating or non-dating of it is a matter of form; and that a verdict should not be set aside for want of form, as such defects are met by the rules and practice of courts, allowing such to be amended. Hence this exception is not well taken. Second, because the verdict rendered is contrary to the evidence, as the evidence failed to prove the allegations set forth in the complaint, but rather sustains the plea of justification set up in the answer of the appellant.

This court is of opinion that this objection and exception is well taken, because "every party alleging the existence of a fact is required to prove the same, and also that the want of proof must defeat the best laid action, because facts, however logically set forth in a

complaint, can never in law be accepted as proof, but must be supported by evidence to warrant either a court or jury to consider such statement true, upon the principle that ((every man is presumed to be innocent until he is proven guilty."

This action is founded in damages for an assault and battery unprovoked, and without any legal cause. The appellant pleads justification in whatever may have been his acts. Hence the plain duty of the court is to ascertain, from the record and testimony rendered in the court below, whether or not the verdict and judgment are supported by the law and the evidence rendered in the case.

Having divested this case of all extraneous matter, we find the evidence as follows:
D. W. Frazier, witness, stated as follows: "I did not see the affair between the plaintiff and defendant. I was at the defendant's place of business, the Norwegian's store. The defendant asked the chief manager to assist him to clear the store, as a row was coming. I heard Knowland say the defendant had kicked him; this defendant denied, and charged the plaintiff with being in his way. I saw no signs of injury done."

H. W. Brooks, Jr., says: "I saw the plaintiff below, and Daniel Beal, at the time mentioned in the complaint, sitting on the steps leading into the store of the Norwegian. I saw when the appellant came to the door, stood between them, and shoved them off; before this he told them twice to move. Knowland asked, why did he shove him from the steps? He, the defendant, answered, You are in my way."

Samuel Ferguson states that at the time laid in the complaint, he was present, and that the plaintiff and Beal were sitting on the steps leading to the store of defendant. The defendant asked them, "What are you hanging round my store for?" Plaintiff looked up at him and went on talking. Defendant came up to the steps again and asked the same question; receiving no reply, he stood between them and said, "Excuse me." They did not move. Then with his feet he sidewise shoved them both off the steps. He thought the defendant was protecting his premises.

Daniel Beal says he and the plaintiff were much in liquor, sitting on the steps and talking very loud about the war at Palmas; that they annoyed traders in the store. The defendant below came to the door and asked, "What are you doing here?" They gave no answer. He came again and eased them off the steps. Had they not been in liquor it would not have happened. As to damages and injury, he does not know that plaintiff was injured; he was not. C. B. Scotland knew nothing about the plaintiff being injured or damaged by the defendant. This closes the testimony bearing on the case. From the evidence it is clear to

the mind of the court that while it shows that the defendant did shove plaintiff with his feet from off the steps of the defendant's store, or place where he was employed, yet we are of the opinion that the court below, and the jury, should have taken into consideration the rule of mitigation of damages, because of the misconduct or provocation proved by the testimony, as well as the right of men to protect their premises. Carefully looking into all the circumstances surrounding this case, we are forced to the following conclusions: First, that the verdict rendered in this case is against the law and the evidence; second, that the judgment rendered based upon said verdict is unlawful, not being founded upon a lawful verdict. Therefore, to sustain such proceedings would work great damage, and would place mercantile houses at the mercy of intruders.

Therefore, this court adjudges that the judgment rendered in this case is hereby reversed, and that the appellant recover from the appellee his legal costs in this action; and further, that the clerk of this court issue a lawful mandate to the court in which the action was tried, to the effect of this judgment.

Key Description: Assault (Provocation)