H. MAX McCARTHY, Appellant, v. **A. C. WEEKS**, Appellee.

RE-ARGUED FEBRUARY 17, 1911. DECIDED FEBRUARY 24, 1911.

Toliver, C. J., Wood and McCants-Stewart, JJ.

1. There is no authority of law for a judge, after granting a change of venue, to issue a commission to justices of the peace to take the depositions of the parties to the action and their witnesses, and for the trial to proceed to final determination before a jury in the jurisdiction to which the ease is removed upon such depositions; and such depositions alone are incompetent to support a verdict.

2. In an action for slander the defamatory words alleged in the complaint must be substantially proved.

3. It is reversible error to allow leading questions upon material matters affecting or tending to affect the result.

Mr. Justice McCants-Stewart delivered the opinion of the court:

Slander—Appeal from Judgment. This is an action to recover damages for slander brought in the Court of Quarter Sessions and Common Pleas for Maryland County by A. C. Weeks, now appellee, against H. Max McCarthy, appellant. Appellee alleged in his complaint that appellant, on June 18th, 1909, at the City of Harper, in Maryland County, with the intent to injure the good name and reputation of the appellee, maliciously uttered the following words in the presence of divers persons.

"Mr. Weeks (meaning the plaintiff) broke open my drawer and stole out of it three gold finger rings and several valuable papers belonging to me, that I had locked up inside said drawer for safe keeping until my return from Sierra Leone. So Mr. Dayrell please tell Mr. Weeks for me, I say kindly bring back to me those three gold finger rings and several valuable papers that he broke open my drawer and stolen out."

Appellee further alleged in his complaint that appellant, on June 19, 1909, at the city, county and Republic aforesaid, in the hearing and presence of divers persons, maliciously uttered and spoke certain false, defamatory, and slanderous words of and concerning the appellee, to wit :

"In preparing to go to Sierra Leone upon a furlough, I locked up my drawer with three gold finger rings and several valuable papers inside of said drawer. This drawer Mr. Weeks (meaning the plaintiff aforesaid) opened with a false key and stole out of said drawer my said three gold finger rings and valuable papers, that I left locked up inside of said drawer for safe keeping until I returned from Sierra Leone."

Appellee demanded judgment for five thousand dollars. In his answer, appellant denied that he uttered the words above set forth, and admitted using the following words, to wit:

"He told Mr. Dayrell, the party named in plaintiff's complaint, that he locked up in his drawer one gold ring belonging to Mr. Thomas J. Neal and some private papers of his own and receipt for road taxes that he had paid and taken the key of the drawer after locking the said drawer, with him to Sierra Leone.

"Since his return he had an occasion to go into the drawer to get his receipt for road taxes paid. He still found the drawer locked but the gold ring (finger), receipt and all defendant's private papers were gone, and the hair brush of plaintiff's, his razor and private notes were found in the drawer notwithstanding he, the defendant, had the key with him in Sierra Leone.

"Whereupon the defendant spoke to Mr. Dayrell of the strange occurrence and asked him to speak to Mr. Weeks whether he could inform him what had become of his articles he had left in his drawer locked up. His reasons for asking him, the plaintiff, for information were because his (the plaintiff's) brush, razor and other papers were found in the drawer to defendant's surprise."

It appears from the record that after issue was joined, the judge of the Court of Quarter Sessions and Common Pleas for Maryland County granted a

change of venue to the Court of Quarter Sessions and Common Pleas for Montserrado County, and thereafter directed the clerk of his court to issue a commission to a justice of the peace to take the testimony of appellee and his witnesses; and thereafter said judge directed the issuance of another certificate to a justice of the peace to take the testimony of the appellant and his witnesses. Under these commissions depositions on the part of the parties and their witnesses were taken, that is, witnesses were called and they testified under oath, and were examined, and cross-examined, and re-examined by counsel for the respective parties as they would be in court in the course of a regular trial. These depositions thus taken were subsequently forwarded to the Court of Quarter Sessions and Common Pleas for Montserrado County, to which the case had been sent for trial, and the evidence on the trial of the case in said court consisted solely of these depositions, they being read to the jury, after which counsel addressed the jury, and the presiding judge delivered his charge. Whereupon the jury rendered a verdict for the full amount demanded, namely $5,000.

This case was thus practically tried before the justices of the peace who took the depositions, the proceedings in the Court of Quarter Sessions and Common Pleas for Montserrado County being substantially formal. The justices of the peace passed upon the legality of the evidence by sustaining or overruling objections in the course of the taking of depositions before them from the parties and their witnesses.

Such evidence is not competent to sustain a verdict and a subsequent judgment based thereon, as there is no authority of law for a judge, after granting a change of venue to issue a commission to justices of the peace to take the depositions of the parties to the action and their witnesses, and for the trial to proceed to final determination before a jury in the jurisdiction to which the case is removed upon such depositions.

This whole record is open to examination by this court, as this appeal is based on the ground that the verdict was contrary to the law and the evidence. We, therefore, do not hesitate to point out that the taking of depositions is regulated by statute, and the statute must be strictly followed in any proceedings had thereunder. If there were any legal reasons for the taking of depositions in this case, application should have been made to the judge of

the Court of Quarter Sessions and Common Pleas of Montserrado County, to whose jurisdiction the case was sent for trial. The judge of the Court of Quarter Sessions and Common Pleas for Maryland County, immediately upon granting the change of venue, lost jurisdiction over the case. Our statute provides, that upon change of venue, "the court to which any case is removed shall try the same after the usual lawful manner as if said case had been first docketed in that court" (Act of 1865).

It may be argued that the course pursued in this case has the sanction of custom. But, surely, it cannot be seriously contended that a custom should be allowed to nullify the plain provisions of the laws of the land. The sooner we rid ourselves of such customs, the better it will be for the impartial administration of justice.

But there is another serious error in this record. In actions for slander the defamatory words alleged in the complaint must be substantially proved. No authorities need be cited upon this point. It is elementary.

Now, appellee failed to prove substantially that appellant used the words complained of. A witness (W. A. Tubman) was interrogated before the justice of the peace, who took his deposition, and he answered as follows :

"Mr. Witness, the plaintiff A. C. Weeks has charged H. Max McCarthy, defendant in this action for damages for slander, for uttering and speaking certain false, defamatory and slanderous words in the hearing and presence of divers persons on the 19^{t}day of June, A. D. 1909, of and concerning him, the said plaintiff, with a wicked intent to maliciously injure his good name and reputation; and among divers persons mentioned in the first part of this question was yourself. Is this charge of the plaintiff against the defendant in this action true, as laid in plaintiff's complaint?

"Ans.: Yes, it is true according to the complaint in that instant.

"Then Mr. Witness, will you please state upon your oath what these certain false, defamatory and slanderous words the defendant in this action, H. Max McCarthy, uttered and spoke in your hearing and presence of and concerning

my client, A. C. Weeks, plaintiff in this action, on that 19th day of June, A.D. 1909?

"Ans.: Yes.

"Mr. Witness, do you give this court to understand that the defendant is guilty of the charge that is alleged in the complaint of my client, A. C. Weeks, plaintiff ?

"Ans.: Yes."

The witness Tubman did not put on record any words whatever which the appellant was charged with using. His answer, "yes," as given above constitutes the entire record in this connection. Upon cross-examination this same witness, Mr. Tubman, said:

"Mr. Witness, have you ever heard the complaint of the plaintiff and the allegations therein set forth and contained in said complaint in an action of damages for slander sued out by A. C. Weeks, the plaintiff in this action, in the sum of $5,000.00 damages?

"Ans.: No."

The nearest approach which was made to offering any proof, that the words alleged in the complaint were spoken, was put on the record in the following objectionable manner, to which counsel for appellant duly excepted. A witness (W. A. Harmon) was interrogated, and he answered as follows :

"Well, Mr. Witness, having distinctly heard that part of plaintiff's complaint in the above cited action read, which charged defendant aforesaid with uttering and 'speaking certain false, defamatory and slanderous words of and concerning my client the plaintiff aforesaid in the hearing and presence of divers persons on the 19th day of June, 1909, with a wicked intention to maliciously injure the good name and reputation of him the aforesaid plaintiff, A. C. Weeks, to the best of your present knowledge and recollection, is that part of plaintiff's said complaint against the defendant true?

"Question objected to by the defendant's attorney. Objection overruled. Defendant's attorney excepted.

"Ans.: I did on the 19th day of June hear Mr. McCarthy make use of the word that Mr. Weeks used a false key and broke open his drawer and taken out three gold finger rings and some important papers and corporation receipts."

The record abounds with questions and answers of this kind, and there would be a miscarriage of justice if this court were to sanction proceedings so irregular and so illegal as was the trial of this case. Take this final illustration for example. The following questions were asked of the appellee who was plaintiff in the court below and he answered them, as follows :

"Mr. Witness, do you upon your oath say that you believe H. Max McCarthy, the defendant in this action aforesaid, has actually damaged you in the sum of $5,000.00, as you have prayed this honorable court and jury to award you as the result of the causes stated in your complaint against him, the said defendant in this action of damages for slander?

"Ans.: Yes, he has truly damaged me in my good name and reputation as I have alleged in my complaint against him."

It should be borne in mind that this question was asked before the justice of the peace who was taking depositions, and yet reference is made in the question to "this honorable court and jury."

"Mr. Witness, are the allegations laid in your said complaint against H. Max McCarthy, the defendant aforesaid entirely true of him, i.e., do those allegations constitute certain false, defamatory and slanderous words, which he did utter and speak of and concerning you as he is expressly charged in your complaint against him in this action?

"Ans.: Yes, they are true, just as they are expressly laid in my complaint against the said defendant.

"Mr. Witness, is your entire complaint in this action as laid proven against the defendant aforesaid as you have alleged it?

"Ans.: Yes, it is entirely proven by a large preponderance of evidence."

Such leading questions which were asked this witness, and as were asked the witness Tubman over the objection of appellant's attorney furnished ground for reversal, as it is reversible error to allow leading questions upon material matters affecting or tending to affect the result.

The judgment in this case, therefore, must be reversed, and a new trial granted, costs to abide the event of such new trial: and it is so ordered.

C. B. Dunbar, for appellant.

T. W. Haynes and *C. A. Lincoln,* for appellee.