# MEMORIAL

TO

# RAY EARL PLANKERTON

( November 2, 1878 – December 11, 1935 )

Hennepin County Bar Association
Hennepin County District Court
Minneapolis, Minnesota
February 8, 1936

MEMORIAL TO RAY EARL PLANKERTON,

READ AT THE MEMORIAL SERVICE

OF THE HENNEPIN COUNTY BAR ASSOCIATION,

FEBRUARY 8, 1936

Ray E. Plankerton was born in Joe Davis County, Illinois, November 2, 1878, on land purchased from the Government by his grandmother, who had come West from Pittsburgh after the death of her husband. Here she established herself with her son Harry Plankerton, father of Ray Plankerton. Katherine Keenan, mother of Ray Plankerton, was also a child of the Midwest pioneer days, having been brought west by her parents when less than six years of age.

Mr. Plankerton died at Minneapolis, December 11, 1935. He left surviving his wife, Minerva Plankerton, and one brother, H. A. Plankerton, both of Minneapolis, and one sister, Mrs. Frank D. Murphy of Stockton, Illinois.

Mr. Plankerton grew up in the vicinity of Stockton, Illinois, and attended the public schools, graduating from the Stockton High School at Stockton, Illinois, as valedictorian of his class. After completing a business course at the Dixon Business College at Dixon, Illinois, he worked a short time for Borden Milk Company in Chicago.

Thereafter he entered the employ of the Jewel Tea Company, which company soon sent him to St. Paul to establish a branch store. Later he moved to Minneapolis and opened another branch store for the company.

He became interested in the study of law, and in 1910 completed the requirements of the University of Minnesota Law School for the degree of Bachelor of Laws.[1]

In private and professional dealings he was generous with his time and talent. He derived great personal pleasure from quietly arranging pleasure for others. He was a champion of the ethics of his profession and believed in law as the backbone of civil order. He considered citizenship a great privilege, to be carefully guarded.

[1] He was admitted to the bar on June 10, 1910.

Immediately after graduation he took up the practice of law and established offices in the Palace Building, where he continued to maintain his office until his death.[2]

Mr. Plamkerton was a modest, unassuming man, but stood firm and uncompromising when principle was involved. He was an able lawyer, a worthy adversary in a law suit, and a faithful friend.

Shortly after he opened his law office an employee of Jewel Tea Company consulted Mr. Plankerton with reference to certain acts of the company. Mr. Plankerton gave the employee and the company his opinion in the matter, and the company maintained its position. Mr. Plankerton then brought action against his former employer. The company employed one of the largest and best law firms in the City to defend its position and the case went to the Supreme Court, where the young lawyer Plankerton established new law and the soundness of his reasoning. [3] The litigation did not wreck the friendship between Mr. Plankerton and Mr. Ross, President of Jewel Tea Company.

I have received a letter from Mr. Ross, a copy of which I have taken the liberty of attaching to the Memorial, and which I wish to read at this time.

I visited Mr. Plankerton during his illness and he said, "We lawyers will work to prepare and win cases for our clients, but true to human nature we let the preparation of our own and final case be postponed until we receive the call we soon to appear before the Great Judge. If I could travel this road again I would take more part in Church work."

Experience teaches us not to attempt to fix the final worth of our fellows who have preceded us to their reward. An occasion such as this has a mellowing effect on us all, and differences we may have had with our departed brethren are much forgotten, but the pleasures we have enjoyed with them sill furnish us delightful reflection. We are gathered here in the spirit of reverence and charity. We are recalling and dwelling upon the better natures of our departed friends. If the same reverence and charity could motivate us in our daily dealings with the bench and bar of this

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[2] The College of Law's Alumni Directory published in 1915 has this entry:

> Ray E. Plankerton, LL. B., 10; grad. Northern Ill. Bus. Coll.; Lawyer; mem. Knights of Pythias. 602 Palace Bldg., and 3228 Holmes Ave., Mpl's., Minn.,

[3] Manion v. Jewel Tea Co., 135 Minn. 250 (1916), is posted in the Appendix, at 5-8.

County, this Court House would soon be become a temple of justice indeed.

The sons of men are like the sands of the sea shore in numbers, but history perpetuates the memory of few. How quickly are we covered by the waters of oblivion.

Some we meet who compel our love and admiration.

The name of Ray E. Plankerton may not be extensively written on the pages of history, but by his life his name is written in the hearts of those who knew him well.

Respectfully,
Edward Chalgren

Ross Letter attached

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Chicago, Illinois

Mr. Edward Chalgren
Attorney At Law
Minneapolis, Minnesota

Dear Mr. Chalgren:

I received your letter advising me of the Bar Association Memorial for those members of your Bench and Bar who had passed away during the preceding year, and note that my old and valued friend, R. E. Plankerton, would be included among those for whom this Memorial Service will be held.

I regret more than I can adequately express, my disappointment because I would not be there in person to attest to the esteem in which Mr. Plankerton was held, not only by myself, but by all who knew him.

I first met Mr. Plankerton when he started, as a very very young man, in the employ of my Company. At that time his unfailing courtesy, industry and stick-to-tiveness, controlled by a high type of intelligence, early demonstrated his ability for leadership.

Early in his business career, because of questions coming up in business from time to time, he became attracted to law and after some preliminary

studies, resigned from our company to devote his whole life to fitting himself for his profession, in which I am advised he became a leader. Whatever the position he may have occupied in the estimation of his brother members, to me, as a layman, he embodied all of the qualities of an ideal lawyer. He was honest, industrious, courteous, fair, and prompt in attending to any business entrusted to him,

My friendship with him and our correspondence since I retired from active business will always remain a cherished memory.

I am happy to have this opportunity of recording my sincere appreciation of my friend R. E. Planketon, not only as a lawyer, but as a man.

I shall be with you all in spirit at his Memorial Service.

I am

Very truly yours,
F. P. Ross.

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# APPENDIX

In his eulogy Edward Chalgren mentioned “young lawyer Plankerton’s” successful suit against the Jewel Tea Company. In the appeal, he did not act alone. He enlisted the assistance of one of the most prominent lawyers of the period: Charles B. Elliott, who served on the Hennepin County District Court from 1894 to 1905, and as Associate Justice on the Supreme Court from 1905 to 1909.

## MANION v. JEWEL TEA. CO.

135 Minn. 250
(December 29, 1916)

1. It is slanderous per se to say to the customers of a salesman that he is a thief and ought to be sent to the penitentiary, and that be failed to turn in money of his employer.

2. The question whether an employer is liable for a slander uttered by an employed is determined by the same principles applicable to other torts. The employer is liable if the slander is uttered by the employed in the course of his employment, with a view to furthering the employer's business, and not for a purpose personal

3. Within this rule, the defendant is liable for a slander of plaintiff, a former employé, uttered by a managing agent while trying to hold customers procured by plaintiff while in defendant's employ and which is calculated to prevent plaintiff from taking the customers with him.

4. There was evidence from which a jury might find exemplary damages in this case.

Appeal from District Court, Hennepin County; John H. Steele, Judge.

Action by Sylvester G. Manion against the Jewel Tea Company. From an order denying an alternative motion for judgment or a new trial, defendant appeals. Affirmed.

Swan, Stinchfield & Richards and F. H. Stinchfield, all of Minneapolis, for appellant.

R. E. Plankerton and C. B. Elliott, both of Minneapolis, for respondent

HALLAM, J. Defendant is an Illinois corporation with its principal place of business in Chicago and a branch in Minneapolis. Its business is dealing in tea, coffee and other merchandise. Its merchandise is sold by employés who drive delivery wagons from house to house, soliciting trade as they go, and as an inducement to purchase it gives away premiums, which are usually chinaware or other merchandise, or coupons which are exchangeable for merchandise. The driver is intrusted with the premiums or coupons. Plaintiff was in the employ of the defendant in Minneapolis as a driver, with a regular territory assigned to him. T. A. Hansen was manager of the Minneapolis branch. He was subject to directions from the head office In Chicago, but there was no one higher in authority in Minneapolis or in Minnesota. It was part of his business to extend the company's sales and to hold the customers of the company against competition, and he gave out the territory to the canvassers and directed their work. Hansen discharged plaintiff. Some time later plaintiff brought this action against defendant for slander uttered by Hansen, alleging that Hansen charged that "Manion is a thief. He stole coupons from the Jewel Tea Company." The court submitted to the jury the questions whether Hansen made such statements, and, if so, whether defendant was liable therefor. The jury gave plaintiff a verdict. Defendant appeals from an order denying its motion in the alternative for judgment or for a new trial.

1. The evidence goes to show that Hansen made charges on three occasions, as follows:

First. Two other employés, anxious about their own tenure, because of the discharge of plaintiff, went to Hansen and asked why plaintiff "got fired?' Hansen replied:

> "Manion is a thief; he took the company's coupons and he is a bad character all around— you needn't be afraid you will get fired because that is the reason he got fired."

Second. Mrs. Johnson was one of plaintiff's customers. After plaintiff's discharge he went to work for another dealer and was trying to take with him Mrs. Johnson's patronage. Defendant also was trying to hold her trade. Defendant's representative called on her and she reported to Hansen that this man had told her Manion was a thief and that she was as bad as he was if she continued to trade with him. She resented the imputation that she was in any sense a thief, and Hansen directed another agent named Plant to go and see her and "fix the matter up, and at the same time to try and retain Mrs. Johnson's patronage." Plant testified that Hansen told him to tell her "that it was not meant that she was a thief, but that Manion was a thief."

Third. Mrs. Blethen was a customer of plaintiff. Two representatives of defendant called on her after plaintiff was discharged and she refused to buy of them, and Hansen went personally to see her to "fix up" the matter. He asked the reason she had refused to buy of defendant. She told him that it was because they spoke disrespectfully of plaintiff. Hansen said he wanted she "should still continue taking coffee from the house." She testified that:

> "He said that Mr. Manion had left the company for good and they had fired him and they were going to put him to the penitentiary; he ought to have been there years ago, and he had been drinking and was in the saloons a great share of his time. And he said, 'You see, look at this book.' And he showed me two sides of the book where there were neighbors in my immediate neighborhood that were taking coffee the same as I had for years from Mr. Manion, and he said that they had paid him he believed they had paid him and he did not turn in the money."

This evidence goes to prove substantially the allegations of the complaint. No attempt was made to prove the truth of any of the charges. The words alleged were words directly disparaging plaintiff in his employment or calling, and were actionable per se. It is not material whether they charged a crime or not. Beek v. Nelson, 126 Minn. 10, 147 N.W. 668.

2. The next question is, was the defendant answerable for the slander uttered by Hansen? The court charged the jury that "the defendant would be liable for the words of Hansen if Hansen spoke them in the course of his employment by defendant and with a view to furthering the business of the defendant, and not for a personal purpose to himself." The charge correctly states the law of this state. The liability of a corporation

for slander uttered by its agent is determined by the same rule as its liability in case of a libel published by its agent, and this is the same rule both as to compensatory and exemplary damages, as is applied generally in determining the liability of a principal for the torts of an agent Roemer v. Schmidt Brg. Co., 132 Minn. 399, 157 N.W. 640. The rule was correctly stated by the court. See Smith v. Munch, 65 Minn. 256, 68 N.W. 19.

3. The court submitted to the jury the question whether the words spoken by Hansen were spoken in the course of his employment and with a view to furthering the business of the defendant, and not for a purpose personal to himself. The jury by its verdict, found this issue in favor of the plaintiff. As to the second and third occasions we entertain no doubt that the finding of the jury is sustained by the evidence. In each case the words were uttered by Hansen while engaged in trying to hold trade for defendant, and with the distinct purpose of accomplishing that end.

4. Exception is taken to the charge of the court permitting the jury to assess exemplary damages. After the court had so charged, counsel for the defendant asked the court to charge that there was no evidence of actual malice and that there can be no exemplary damages. The court said:

> "I shall refuse that charge. Of course, I might say to you there is no evidence of actual malice as applying to exemplary damages, but malice may be inferred from the words that it is claimed were spoken, that is, if they were spoken."

The rule is well settled that exemplary damages can be allowed only where the slander is uttered willfully or wantonly and with actual malice. Peterson v. Western Union Telegraph Co., 75 Minn. 368, 372, 77 N. W. 985, 43 L. R. A. 581, 14 Am. St. Rep. 502. Counsel construes the remark of the court just quoted as a ruling that there was no evidence from which the jury could find the existence of actual malice. If the court so ruled, the ruling was both wrong and inconsistent with the charge he had given. But we do not construe the remark of the court as counsel does. To us it seems to mean that there was no direct evidence of malice, but that there was evidence from which malice might be inferred. This statement was quite as favorable to defendant as the facts of the case would warrant.

Order affirmed.

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Many years later, Plankerton prevailed in another appeal to the state supreme court. The issue in this case was the propriety of a trial judge's order correcting a judgment entered by the clerk of court. The opinion of Commissioner Ingervall M. Olsen in *Plankerton v. Continental Casualty Company* follows:

# PLANKERTON v. CONTINENTAL CASUALTY CO.

180 Minn. 168
April 17, 1930

1. Where the clerk of the district court, without authority or direction from the court, through mistake and error enters a judgment not in conformity with the written findings of tact and conclusions of law filed by the judge the court has power to correct such mistake and error and, on its own motion, order and cause the correct judgment to be entered nunc pro tunc.

2. The findings of fact cover all issues in the case, and sustain the conclusions of law and judgment.

3. The correction of the judgment and entry thereof nunc pro tunc did not affect the rights of, or prejudice third persons not parties to the suit.

4. Defendant's rights were not impaired nor prejudiced by the delay of nearly six months before the judgment was corrected.

5. This being an action for damages for breach of the condition of the replevin bond, the only proper judgment was a money judgment.

Appeal from District Court, Washington County; Alfred P. Stolberg, Judge.

Action by R. E. Plankerton, administrator with the will annexed of the estate of Almira Claywell, deceased, against the Continental Casualty Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Sterling, Converse & Spence, of St. Paul, for appellant.

R. E. Plankerton, of Minneapolis, for respondent.

OLSEN, C.

Defendant appeals from the judgment in the district court.

PIaintiff, respondent here, is the administrator of the estate of Almira Claywell, deceased. In January, 1927, Almira Claywell was in possession of certain personal property. At that time, Elsie Claywell, her daughter-in-law, claiming to own the property, commenced an action in replevin to recover same, or, in case return of the property could not be had, then to recover its value, alleged to be $1,200. The answer admitted the value. Defendant, Continental Casualty Company, as surety, joined with Elsie

Claywell in the replevin bond. The bond contained the provisions that, if plaintiff in that action "shall prosecute said action with effect, and said property shall be returned to said defendant if a return thereof shall be adjudged, and if payment shall be made to said defendant of such sum as for any cause may be adjudged in his favor, then this obligation shall be void; otherwise to remain in full force."

The replevin action appears to have been tried in May, 1928, before the court without a jury. On October 6, 1928, findings of fact and conclusions of law were made and filed by the court. The conclusions of law were that Almira Claywell was entitled to a return of the property and, in case a return could not be had, then for judgment for $1,200, the value of the property, and interest thereon from the time it was taken.

On October 27, 1928, the clerk of court, without other or further direction from the court, and in purported compliance with the findings of fact and conclusions of law, entered a money judgment only in favor of Almira Claywell and against Elsie Clayweli for $1,200, the value of the property, and for the interest thereon and costs, a total of $1,348.60. Thereafter, on April 22, 1929, the district court, on its own motion, after the matter had been called to its attention by motion on behalf of the present plaintiff, made and entered an order that the judgment entered by the clerk on October 27,1928, be corrected to conform to the court's findings of fact and conclusions of law, so as to adjudge that Almira Claywell recover of Elsie Claywell the possession of the property in question, and, in case a return of the property cannot be had, to recover of Elsie Claywell the sum of $1,200, the value of the property, with interest and costs, and that judgment be so entered nunc pro tunc as of October 27, 1928. Judgment was thereupon so entered. Thereafter, and on May 18, 1929, on motion of the plaintiff in the present action, the court permitted him to file an amended and supplemental complaint setting forth the amendment of the judgment, as before stated, and setting forth that an execution had been issued on the judgment and returned wholly unsatisfied. It further alleges demand upon the defendant, Continental Casualty Company, for the return of the property or for payment of its value and refusal to comply; that the judgment debtor, Elsie Claywell, cannot be found; and alleges, on information and belief, that Elsie Claywell, within a few days after she obtained possession of the property in January, 1927, sold and disposed of the same, so that it could not be returned.

The answer of the defendant casualty company contains no general or special denials. The only defense attempted to be set up is that the clerk, without authority, entered the original judgment on October 27, 1928, as a money judgment only. The answer was interposed to the original complaint before the judgment was amended by order of the court, and before the amended and supplemental complaint was filed. The answer alleged that the original judgment had not been amended or corrected. That was true at the time the answer was interposed. But the court thereafter amended and corrected the judgment, and the amended and corrected judgment was pleaded in the amended

and supplemental complaint. In its order permitting the amended and supplemental complaint to be filed, the court said "that the answer of defendant to the original complaint heretofore flied, may stand as the answer to the amended and supplemental complaint, or that the defendant may at its option serve and file a further answer to the said amended and supplemental complaint if it so elects." Defendant made no further answer. There is no settled case. The action was tried May 27, 1929, and, on July 6, 1929, the court made and flied its findings of fact and conclusions of law. Judgment was entered August 22, 1929.

1. There are but two questions raised by the assignments of error. First, it is urged that the court erred in making the order amending and correcting the purported judgment entered by the clerk on October 27, 1928. Defendant, by its answer, concedes that the first judgment was unauthorized and did not comply with the findings and order for judgment made by the court.

That, where no judgment has been entered or an unauthorized judgment entered by the clerk, the court has power to amend or strike out and cause a proper judgment to be entered is hardly debatable. McClure v. Bruck, 43 Minn. 305, 45 N.W. 438; Nell v. Dayton, 47 Minn. 257, 49 N.W. 981; Chase v. Whitten, 62 Minn. 408, 65 N.W. 84; Wright v Krabbenhoft, 104 Minn. 460, 110 N.W. 940; Schloss v. Lennon, 123 Minn. 420, 144 N. W. 148; National Council of K. & L. of Security Silver, 138 Minn. 830, 104 N.W. 1015, 10 A.L.R. 523.

2. The second question raised is whether the findings of fact sustain the conclusions of law and judgment. We need not here set out the findings of fact in full. It is sufficient to say that the court found that through error and mistake, the clerk entered a money judgment only, on October 27, 1928, without including therein a provision for the return of the property; that on April 22, 1929, the attention of the court was called to the action of the clerk, and the court, on its own motion, corrected the error and mistake and caused the correct judgment to be entered as of October 27, 1928; that an execution was issued on the judgment on May 1,1929, for return of the property or recovery of the value thereof, in the amount stated, with interest and costs, in case a return of the property could not be had; that the sheriff returned the execution wholly unsatisfied and made return that he was unable to find the property, or any other property belonging to Elsie Claywell; that he had made diligent search for Elsie Claywell, and was unable to find her; that demand has been made by plaintiff upon defendant for the return of the property or for payment of its value, and the defendant has failed to return the property or pay for it; that the whereabouts of Elsie CLaywell are unknown; that shortly after she obtained possession of the property in the replevin suit Elsie Claywell sold and disposed of it to various persons in Washington and Dakota counties; that it does not appear to

whom the property was sold or what has become of it. The findings of fact fully cover all issues in the case and amply sustain the conclusions of law and judgment,

Defendant relies on the case of New England F. &. Co. v. Bryant, 64 Minn. 256, 66 N. W. 974, but in that case there had been no amendment of the erroneous judgment, hence the case does not here apply.

3. The case of Berthold v. Fox, 21 Minn. 51, is cited and relied on. There, the court held that the district court had the power to amend such a judgment more than two years after its entry, but that such amendment was inoperative to affect the rights of third persons not parties to the suit. The order made in the present case provides that it shall be without prejudice to the rights of third parties. While the Berthold case appears to hold that notice of motion for such an amendment was necessary, we are satisfied that notice of such a correction is not now necessary, and that the court may, on its own motion, correct mistakes of its clerk in making up its records or entering a judgment. The rule that the court has such power is general. 15 C.J. 975 and note 10; 15 C.J 972, §380, notes 73, 74.

4. Defendant contends that, because the erroneous judgment remained on the record for nearly six months before it was corrected by the court, it must be held that prejudice resulted. The specific claim is that, so long as the error was not corrected, defendant was prevented from returning or causing the property to be returned. The record discloses no such claim or situation. There is reference in defendant's brief to some evidence tending to show that it at some time made an investigation as to what had become of the property. As this evidence is not presented by any settled case, we have no right to consider it. Any alleged prejudice to defendant is sufficiently negatived by the findings of fact showing that all of the property was sold and disposed of by Elsie Claywell long before the original judgment in the replevin suit was entered, and showing that neither this defendant nor Elsie Claywell was in position to return the property at any time since long prior to the entry of such judgment. No effort or offer has ever been made to return the property. Defendant can claim no prejudice or Impairment of its rights.

It is urged, finally, that the judgment in the present action should be in the alternative, for return of the property or payment of its value. This is not a replevin suit to the recovery of the property but an action for damages for breach of the condition of the bond in the replevin suit. A recovery of money is the only proper relief in this action.

Judgment affirmed.

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