No. 8668

Supreme Court of Illinois

Hiram Boren

vs.

Augustus C. Bartleson

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State of Illinois } Set.
Pulaski County } at a Circuit
Court begun and
1 held at the Court house in Caledonia
2 Pulaski County and State of Illinois
3 Commencing on the third Monday
4 in the Month of April the Same
5 being the 14th day of Said Month in
6 the year of our Lord one thousand
7 Eight hundred and Sixty three
8 Before the Honorable Wesley Sloan
9 presiding Judge of Said Court
10 the following proceedings Was
11 had and entered of record in
12 Said Court Comit
13 Herman Bosen
14 vs
15 Augustus C Bartleson
16 Be it remembered
17 that heretofore to Wit on the 26th day
18 of March 1862 the Said plaintiffs
19 Filed in the Clerks office of Said
20 Circuit Court the following Decla-
21 ration, reading in these Words to wit
22 State of Illinois } Set.
23 Pulaski County } at the April Term
24 of the Pulaski Circuit
25 A.D. 1862 Herman Bosen by J
26 Daugherty & Son his attorneys Comp-
lains of Augustus C Bartleson

[8668-1]

in custody &c of a plea of trespass
For that the said Augustus C
Bastleau defendant at the County
of Peoria and State of Illinois
on the tenth day of November
in the year of our Lord one
thousand eight hundred and
sixty one with force and arms
an assault did make and him the
said Hiram Baxen plaintiff did
strike and smite many grievous
blows upon his face head sides
breast and body with the fists
a pistol and an iron bar of him
the said Augustus C Bastleau
defendant and did then and
there and thereby throw the plaintiff
to and upon the ground and him
the plaintiff ~~did~~ then and there did
grievously beat bruise and wound
as well by striking the plaintiff
with the hands pistol and iron
bar of him the said defendant
and did then and there and thereby
inflict upon the head of the
plaintiff a serious wound of the
length of six inches and of the depth
of one inch so that the said plaintiff
life was thereby greatly endangered

3 —

and of which he suffered great
anguish of body and of mind
and said plaintiff was then and
thereby confined to his bed and
room for a long space of time
to wit for the space of two months
then next ensuing, and the said plaintiff
was then and there and thereby compelled
of necessity and necessarily did expend
large sums of money in and about
the healing and curing said wounds
& bruises and did necessarily then
and there and thereby expend large
sums of money in procuring
and paying a physician and surgeon
in and about the healing his
said wounds to wit the sum of
$200. Two Hundred dollars, and the
said plaintiff then and there and
thereby necessarily was ~~compelled~~
confined to his bed and room
totally unable to attend to his
business for a long space of time
to wit the space of two months
next ensuing said assault
and then and there and thereby
has been and will forever
during his natural life
necessarily suffer pain and

[8668-2]

Anguish and permanent disabi-
2 -lity in his body & mind, and
other enormities. to the said defen-
4 -dant then and there did to the said
plaintiff. Contrary to the peace
6 and dignity of the people of the
State of Illinois and to the
8 damage of the said plaintiff of
Four thousand dollars and
10 therefore he sues &c

J Langhorne & Son for
12 Pltff Hiram Boren

2 Count. — And for that oftentimes but
14 on &c at &c aforesaid for that the
said Augustus C Batterson on the
16 10th day of November in the year of
our lord one thousand eight hund-
18 -red and Eighty one at the County
of Pulaski and State of Illinois
20 with force and arms viz and
upon the plaintiff then and there
22 made an attack of fault and
with a pistol did then and there
24 beat bruised wounded and
evil intreated so that for a long
26 time then next ensuing he the
said plaintiff was sick sore
28 lame and wounded and suffered

2nd

3th page

great anguish of body & mind
and was then and there and for
a long time thereafter to wit for
the period of two months then
next ensuing confined to his
bed and is thereby permanently
disabled and had necessarily to
lay out and expend large sums
of money in and about the
curing of his said wounds,
to wit the sum of $200 and other
damages and enormities to the said
plaintiff then and there did against
the peace and dignity of the people
of the State of Illinois and to the
damage of the said plaintiff
of seven thousand dollars and
therefore he sues &c

J Dougherty & Son
Ats Plff Hiram Boren

And Be it further remembered
that on the said 26th day of March
A.D. 1862 a Summons was issued
in this cause and was in the
words and figures following to wit
State of Illinois
Pulaski County } ss

[2LLB-3]

The people of the State of Illinois
To the Sheriff of Pulaski County
Greeting - We Command you to
Summon Augustus C Bottleson
if to be found in your County to
appear before the circuit Court
of Pulaski County on the first day
of the next term thereof to be
holden at the Court House in
Mc Cahidania on the First Monday
in the month of April 1862 to
answer Hiram Boren in a plea
of Trespass - To the damage of the
said plaintiff as he says $5000.00
and hereof make due return to
our said Court as the law directs
and have you then this Writ

Witness H M Smith clerk of
our said Court and the
Judicial Seal thereof at M
Cahidania this 26th day of
March A D 1862
Henry M Smith Clerk

(Seal)

And Be it further remembered
that afterwards to wit on the 27th day
of March A D 1862 the said
Summons Was returned into
the circuit clerks office of

7a

Said Court with the following endorse-
2 ment thereon Written to wit
the Within executed by reading to the
4 within named A. C. Bastleson
this 27th day of March A.D. 1862
6 W M Boren Sheriff
And afterwards to wit at a
8 Circuit Court begun and held
at the Court House in Caldonia
10 Commencing on the 1st Monday
in the Month of April 1862 the said
12 first Monday being the Seventh
day of said Month the following
14 proceedings Was had and entered of
record in said Court to wit
16 Hiram Boren
vs
18 Augustus C Bastleson } Trespass
now on this day
Comes the defendant
20 by W H Green his attorney and enters
his motion to Quash Writ Comes
22 the plaintiff by Daugherty his attorney
and enters ~~cross~~ motion to Amend
24 Writ Amended and motion to
Quash Overruled
26 And afterwards to wit on the 2nd
Wednesday the ~~Twelfth~~ 10th day of the said term
28 aforesaid the following proceedings
Was had and entered of record

[2668-4]

in said cause to wit

And now again at this day comes the defendant by George Watkins & gives his attorneys, and interposes demurrer to plaintiff's declaration and the court being sufficiently advised: demurrer overruled and leave is given defendant until 9 o'clock to morrow morning to plea — And afterwards to wit on the 11th day of the term aforesaid the same being the 17th day of said month last aforesaid the defendant filed his pleas in the words and figures to wit

In the Pulaski Circuit Court
April T 1862

Augustus C. Bartleson
vs
Hezam Bowen

Trespass
And the said defendant by his attorneys comes & defends the force & injury when & where and says he is not guilty of the said several trespasses in the said declaration mentioned or any part thereof in manner & form as the said defendant hath a late thereof complained and of this he puts himself upon

9a

the Country &c

Watkins &

W H Green for dfdt

and the said plaintiff

doth the like

J Daugherty for Plff

3rd plea

And for a further plea in this behalf the defendant says that the said plaintiff first before the time when &c to wit on the day & year aforesaid with force and arms made an assault upon him the said defendant by striking him the said defendant on his body with the fists of him the said plaintiff and would then and there have beaten him the said defendant if he had not then & there defended himself against the said plaintiff whereupon the said defendant did then and there defend himself against the assault of the said plaintiff as he lawfully might for the cause aforesaid and in so doing did necessarily ill treat beat & wound the said plaintiff do no more than necessary damage to the said plaintiff on the occasion aforesaid

[8468]

And so the said defendant
10th 2 saith that if any damage
or hurt there and there
4 happened to the said plain-
tiff the same was occasioned
6 by the said assault so made
by the said plaintiff on him
8 the said defendant and
in necessary self defence
10 the said defendant against
the aforesaid assault of said
12 plaintiff which are the supposed
trespasses in the plea above
14 pleaded to whereof the
said plaintiff hath above
16 complained - and this the
said defendant is ready to
18 verify wherefore

Watkins &
W H Green for
20 Defendants

22 And he further remembered
that afterwards to wit at the term
24 of Court last aforesaid and on the
12th day of the term aforesaid the plaintiff
26 by Daugherty his attorney filed in the
said cause a Replication which is
28 in the words following to wit

11

Hiram Boren
vs
Augustus C Bartlesan } Trespass

And the said plaintiff by J Slaughter Esq comes and as to the 2nd plea by the defendant above by him pleaded says precludi non because he says that the said defendant at the said time whereof his own wrong and without the cause by him in his said second plea alleged committed the said several trespasses in the said plea attempted to be justified in manner and form as the said plaintiff have above in the said first & second counts of his said declaration complained against the said defendant and this the said plaintiff prays may be enquired of by the country &c

J Slaughter Esq
for Plff

Hiram Boren

And the said defendant doth the like

Green & Mulky for Deft

Whereupon motion cause continued generally —

[8668-6]

12

And Be it further remembered
that heretofore to wit at a
circuit court began and held
at the court house in Columbia
for the county and state aforesaid
commencing on the third
Monday in the month of
April a d 1863. the said third
Monday being the 20th day of said
month and on the second
Friday of said term the following
proceedings was had and entered
of record in said court to wit
Hiram Boren
vs
Augustus C Bartlemus } Trespass.
now on this day
comes the plaintiff
by Pedigan his attorney and the
defendant by Lemuel his attorney
and for sufficient cause appearing
cause continued at the costs
of plaintiff. Judgment is
therefore hereby entered in favor
of the said defendant and against
the said plaintiff for his costs
and that he may have
execution therefor 2 vo L

And Be it further remembered
that heretofore court at a circuit

Court begun and held at the Court
2 House in McConnellsville in and for
the County and State aforesaid
4 Commencing on third Monday
in the month of September
6 AD 1863. the said third Monday
being the 21st day of said month
8 and on Friday the 5th day of said
term the following proceedings
10 was had and entered of record
in said Court to wit

12 Hiram Boren
vs
14 Augustus C Bartram } Trespass

now on this
day comes the
16 plaintiff by Dougherty his attorney
and the defendant by Green his
18 attorney and upon motion and
for sufficient cause appearing
20 cause continued at the costs
of defendant. Judgement is
22 therefore hereby entered in favor
of the said plaintiff and against
24 the said defendant for costs and
that he may have execution
26 therefor

And Beit further remembered
28 that heretofore to wit on the
23rd day of December AD 1863 the

[9668-B]

14

following affidavit was
filed in the Clerks office of
said Court Court

Pulaski County Circuit
Court April Term 1864

Hiram Boren
vs
Augustus C Barthson } Trespass

Hiram Boren
the plaintiff in the above entitled
suit being first duly sworn
deposes and says that George
Brattan a citizen of Johnson
County State of Illinois & not
a resident of Pulaski County
Illinois is a material Witness
for him as he is advised in the
above styled cause, and said
Witness not being a resident of
the County in which said cause
is pending he intends & desires
to take his deposition in the said
County of Johnson & State of Illinois
to be read in evidence in
the above styled cause and
further he saith not

Hiram Boren

Sworn to and subscribed before me
the 25th day of Decr 1864 Henry H Smith
Clerk

185

And Be it further remembered
that heretofore to wit on the day
and year last aforesaid the said
plaintiff filed in the clerks office
of said Court a notice in the
words and figures following to wit

Pulaski County Circuit
Court April term 1864

Hiram Boren
vs
Augustus B Bartleson } Trespass

Mr Augustus B Bartleson
Sir in the above styled cause will
please take notice that I shall at the
Court house in the town of Vienna
Johnson County State of Illinois
on the 16th day of March next
between the hours of 9 o clock A M
& 6 o clock P M of that day before
Barney Smith Clerk of the County
Court in and for said County
of Johnson & State of Illinois at
his office proceed to take the
deposition of George Brattan a
witness resident of said County
of Johnson when & where you &
you please attend and cross examine
said witness which deposition
when so taken will be read in
evidence on the trial of the above

[8448-8]

Styled Cause — yours truly
16th 2 Hiram Boren
to A. C. Bartleson
4 on the back of which notice
is the words and figures viz
6 Served the within notice on
A. C. Bartleson by reading and
8 handing him a true copy of
the same Dec 25th 1863
10 G. H. Boren
And Be it further Remembered
12 that heretofore to wit at a circuit
Court begun and held at the Court
14 House in N Columbia Commen-
-cing on the third Monday in the
16 Month of April 1864 the said third
Monday being the 18th day of said
18 Month the said third Monday
being the 18th day of said Month
20 and on the 2nd Monday of said
term the said Second Monday
22 being the 25th day of said Month
of April the following proceedings
24 was had and entered of record in
said Court to wit
26 Hiram Boren
vs
28 Augustus C Bartleson } Trespass
Move on this
day Comes

the plaintiff by Pedgeon his
2 attorney and the defendant by
Green & Mulkey his attorneys
4 and upon motion leave is given
Plaintiff to open depositions W—
6 And now again at this day comes
the plaintiff by Pedgeon his attorney
8 and the defendant by Green &
Mulkey his attorneys — and the issue
10 being joined let a jury come
and now comes the jurors of the
12 jury to wit A C Atherton — Elijah
Shepperd Thomas Price Jacob Collins —
14 John Worthington John C Albright —
Solomon Easter Orlando Wilson —
16 Elijah Ayley J J McClelland —
J W Cohison — and Joel Lackey Jr
18 who being elected tried and sworn
the truth to say on the issue joined
20 do say we the jury find the defendant
not guilty L. whereupon the
22 plaintiff by his attorney enters a
motion for a new trial" L.
24 And now again at this day comes
the plaintiff by Pedgeon his attorney
26 and the defendant by Green & Mulkey
his attorney and the motion
28 for a new trial having been
fully considered whereupon

motion for a new trial over-
18 2 ruled - and Judgment is therefore
hereby entered in favor of the
4 said defendant and against
the said plaintiff for his costs
6 and charges in this behalf
by him expended and that he
8 may have execution therefor
to all of which the plaintiff excepts
10 and prays an appeal - which said
Appeal is allowed on his entering
12 into bond payable to the defendant
in the sum of Three Hundred
14 dollars with Joseph W Garrett
as security conditioned as the
16 law directs - within thirty days
from the date hereof D. M.
18 And Be it further remembered
that on the 25th day of April 1864
20 the plaintiff by George A Pidgeon
his attorney filed his bill of exception
22 which is signed and sealed by the
Honorable Wesley Sloan and is in the
24 words and figures to wit
Hiram Boren. Pltf
26 vs
Augustus C. Butterworth deft } Pulaski County Cir Court April Term 1864 Trespass
28 Be it remembered that on the fourth day
of the April Term AD 1864

19

of the Pulaski County circuit
2 Court the parties in the above
Styled Suit a Jury having been
4 empanelled and Sworn to try the
Same — the plantiff introduced
6 the following Witnesses who testify-
-ed as follows
8 Jes E Olmsted having been first
duly Sworn testifies that Some time
10 in November 1861. he was Standing
not far from the Court house heard
12 the defendant Bartleson call the
plantiff in this Suit Boren came up
14 when Bartleson read a letter to him and
then Said, if you Say that is true you
16 a bad damned infernal liar, Boren then
Struck at or Caught him in the breast
18 Bartleson then Slepped back a few steps
and drew a revolver and Snapped at
20 him. Bartleson then advanced on
Boren and Struck him over the head
22 with the pistol, Boren came to his Knees
- they then fell, Boren being underneath
24 and Bartleson on top. Several persons then
2 interfered and the parties were Separated
26 did not See but one blow with the
pistol. Could not Say whether Boren
28 Struck Bartleson or whether he pushed
him with the open hand, at this time
they were Standing on opposite Sides

[P.C.C.B.-10]

of a post about 12 inches in diameter
20a 2 about 4 feet high do not remember
the exact language used by Bartleson
4 but think it was that if Boren stood
such facts to be the case he was a good
6 damned infernal liar Bartleson stepped
back, and Boren moved in an oblique
8 direction from him at this the pistol
snapped they were about six feet apart
10 Boren at the time retreating Bartleson
struck him a pretty good lick could
12 not say whether Boren hat was on or
not the language used by Bartleson
14 was the commencement of what
I saw of the difficulty. Saw Boren
16 after the fight saw the wound on the
left side of head - Boren was bloody
18 it was about 10 or 12 feet from the
post to where they fell didn't hear
20 Boren say anything after the fight
commenced Saw him some
22 time afternoons at his house
guest usually visited him
24 several times - Cross examined
the first words were you are a good
26 damned infernal liar never saw
or read the letter - Boren struck
28 on the breast or face - Boren
stood still untill Bartleson drew

21st

his pistol - after Boren was struck
2 on head think he came to his knees
first then fell backwards - Boren
4 ~~the~~ never recovered from the first
blow - When the pistol was drawn
6 Boren slipped back a few feet -
Witness examined on examination
8 that Bartleson on calling to Boren
were first words he heard on that
10 occasion - did not see Boren
have any thing
12 James B Watkington having been
sworn as a witness stated at the
14 time of the difficulty Watkins
Leavidge and myself were present
16 We were looking at and talking about
an article in a newspaper
18 Boren was leaning on the post
Bartleson came up, and read a
20 letter to Boren and said if you say
~~that~~ the statements in said letter
22 be true, you are a good damned
liar or a damned stinking liar
24 Boren thereupon pushed or struck
Bartleson who staggered a few steps
26 back drew his pistol and dropped
it at him - Bartleson then struck
28 him with pistol," while they were
closer Boren said take him away
or dare let him hurt me - after

28625-113

they were partial Scrunge said he
22 2 had pistal and man of them should
have it - Bartleson said damn the
4 pistal - did not hear him say
that it had never failed him before
6 I did not have the pistal afterwards
it looked like a 4 inch barrel colts
8 patent - marked with a name anyone
might weigh more, Saw Same
10 blood running down Borens
coat. after the fight think Boren
12 hat was on when struck
Cross examined
14 did not heare Bartleson call Boren
think Boren was at the post and Bartleson
16 in middle of street coming towards
him read a letter Something about
18 money. said if you say that is true
you are a damned liar or a damned
20 stinking liar no other blow struck
after the first blow with pistal
22 that I saw - while Bartleson was
advancing with the pistol - Boren
24 said mind what you are about
then they fell Bartleson went over
26 Boren - Boren got hold of pistal
during scuffle - there was several
28 knocks and a stone near they fell
Boren was near Court house in

bottles leaving position and
2 looking at Bartleson as well as
I could see
4 W M Hathaway Sworn Stated I am
a physician residing in Caledonia
6 I called to see Boren in fall of 1861
after difficulty between him and
8 Bartleson did not see difficulty but
heard of it found Boren with "a bad
10 wound on left side of head scalp
smooth wound thick of an inch deep
12 and down to the bone", about the size
of an 8 penny nail seemed to have
14 been made by a blow from some
blunt instrument" a lick with
16 such an instrument would produce
an irregular fracture" Boren had
18 high fever called only once profession-
ally several times as neighbor
20 about 2 weeks times between my
first and last visit - plaintiff paid
22 me one dollar for my visit Boren
illness lasted several months
24 Cross examined
I was called in to see Boren next day
26 dont know of any other Physician being
called did not discover any other wound
28 on the head - recommended same
liniments and same constitutional
treatment Witness asked if he

considered himself capable from
his experience to treat such cases
objected to objection sustained
A L Ridgeley being sworn stated
I am a Physician residing in Coldwater
after difficulty between Bartlesan and
Boren in fall of 1861 found Boren
with gradual of fever with a wound
just above the left ear about 1/2
inch long and as deep with scalp
swollen it was from a blow with
some blunt instrument was
laboring under pretty high fever
complained of pain in the head
and body and general indisposition
recommended sending for Dr Bratton
of Vienna Johnson Co Illinois had a
consultation with him he borrowed
of me a probe we examined wound
found slight depression of the
skull bone such depression from
a blow often produce extra vas
=ation of blood and inflamation
are dangerous my bill for medical
services was fifteen or eighteen dollars
which plaintiff paid me
cross examined
I think Dr Hathaway had been
called in previous to myself

Boren had been unwell before
2 the difficulty with Bartleson
had a bilious attack think the
4 fever = Boren had efected by wound
about three weeks how long he was
6 confined considered myself
competent of treating such cases -
8 recommended sending for Dr
Brattons to satisfy the family
10 Franklin Boren sworn states
I was in Cairo at the time of the diffi-
12 culty came up next day October
20 1861 saw plaintiff at his house in
14 bed confined from a wound on
the head twas about 3 months
16 before he could get about -
was not stout for some time
18 general health not good since
as before difficulty, I resided
20 with plaintiff was with him during
sickness waited on him he
22 complained of his head passed
blood and corruption through
24 his nose for several weeks
cross examined
26 I am not a physician It was my
opinion plaintiff was suffering
28 and confined to his bed from
the wounds on his head. Deft
[Sub-13] objected to witnesses opinions and

26 objection sustained to which plaintiffs
2 then and there excepted, the plaintiffs
then read in Evidence the
4 deposition of George Bratton
Interrogatory first are you acquainted with the
6 Parties plaintiff and defendant
answer I am acquainted with the plaintiff
8 only and have been for twenty years
9 Past
Interrogatory Second Please State your occupation
answer a Physician & Surgeon
Interrogatory third State what you know if anything
13 in relation to the plaintiff Wounded on
14 his head on or about the 20th day of
15 October 1861.
answer I saw Deft about the 23d day of October
17 1861. and found him with a Wound
18 on the left side of his head over
the Parietal bone the Wound was the
22 result of a blow which had been given
on Defts head with some hard substance
24 or Weapon so much so as to depress
and fracture the outer plate of the
26 aforesaid bone
Interrogatory Fourth describe particularly
28 his Wounds and the danger of them
answer the Wounds on the scalp was not
30 very large with lacerated edges
some contusions and Swelling

27 Round the Wound also there was
2 fracture of the Parietal bone with
depression - the dangers growing out
4 of the Wound were the shock of the
nervous system from the concussion
6 - the next danger was the disposition
of Scalp Wounds to assume inflamatory
8 of erysipelatous character
Interrogatory 5th State whether the wound was
10 dangerous & how long it required to
11 heal
answer the Wound as all Scalp Wounds are
13 was dangerous and particularly Wounds
14 of the bony Cranium - Witness can not
State how long it was before the Wound
16 healed When Witness seen it, it had no
indications of healing - Wounds
18 on the head generally require
a longer time to heal and become
20 Sound than those of other parts
21 of the System
Interrogatory 6th - Please State your bill as a
23 Physician for Visiting Plff at times
24 Spoken of
answer Twenty five dollars
Interrogatory 7th State whether Plff was confined
27 to his bed or room from the Wounds
28 and if so how long
answer When Witness visited Plff he was
[9118-14] 30 confined to his bed but the length of

time he was so confused Witness
28 2 cannot state

Interrogatory 8th if there are any other facts
4 connected with the matter within
your knowledge pertinent to this cause
6 please state

answer Witness does not at this time
8 recollect any other material fact in
this case

10 10 internal revenue B.B. 16 March 1864 10 10

State of Illinois } ss
Johnson County } I Barney Smith
12 County Clerk within
& for said County do certify that the
14 above deposition was taken by me
at the time & place mentioned
16 in the caption thereof that the
said Witness was first duly
18 sworn & that the said deposition
was so signed by the Witness in
20 testimony this 16 day of March 1864
and to which I have affixed
22 the seal of the Johnson County
Court as evidence of my official
24 character as officer in Vienna
in said County the day and year
26 last above stated

Official Seal

10 10 internal revenue B.S.S. Mar 16 1864 10 10

B S Smith C Clk
Johnson Co Ills

29

H M Smith Swam testified and
2 acquainted with parties to this Suit
Was to See Boren after fight with
4 Battiste in Fall of 1861
He Was in bed Sore Wound Boren
6 Was reduced and in feeble health
long time afterwards and looked
8 bad Mr Boren Was formerly a
Strong muscled man, on cross
10 examination Witness Says, but
men as they grow old lose their
12 memory but is generally the case
Know such is the case with me
14 Lewis Jackson Swam testified
Was at Plaintiffs house in October
16 1861 he Was in bed suffering from
Wound on head Was there one
18 night set up gave him Water
dressed Wound Wiped his mouth
20 occasionally am acquainted with
defendant he Was clerking in
22 Hughes Store about 10 years ago
afterwards elected Sheriff twice
24 is reputed to be very Well off
claims a farm in this County
26 cross examined
Dont Know except from here
28 say who plaintiffs Physician Was
am not a Doctor It is my opinion
Plaintiff Was confined from

30 Named on hand objection to by
2 defendant and objection sustained
Robert J Colvin Sworn on oath
4 Stated that I am acquainted with
defendant. Know defendant
6 claims a farm 160 acres worth
about 12½ $ I cant know what
8 amount is worth generally said
to be in good circumstances
10 is now sheriff of the County
Was once before sheriff and
12 once deputy sheriff
E B Watkins Sworn testified I
14 ~~was~~ saw plaintiff on two occasions
after difficulty the night after
16 remained about our house Plaintiff
was in a delirium
18 The Plaintiff then asked Witness if he
had
any day previous to difficulty
20 between Plaintiff and defendant
or the day before had any conversa-
22 tion with the defendant about
the loan of a pistol and what
24 defendant said about it
question objected to objection
26 sustained and Plaintiff then
and there excepted
28 I was present at fight saw the pistol
it was a revolver 5 or 6 inch barrel

31

Would weigh probably 2 or 3 pounds
2 might weigh more, did not see
below Struck - And the plaintiff closed
4 Defendant then introduced
J M Loudge who being Sworn testified
6 I am acquainted with defendant at the time
of the difficulty he was winding up his
8 affairs as Sheriff - Plaintiff was past
Master & closing up the merchantile
10 business in fall of 1861. defendant
myself and several others were standing
12 near Court house - Plaintiff was passing
Defendant called him and commenced
14 reading a letter when he came to certain
Portion said if the Plaintiff was the
16 author of the letter he was a damned
stinking liar - defendant was then
18 struck or pushed back a step or
two and drew a pistol stopped and
20 then struck Plaintiff. my impression
is that he was facing defendant there
22 was several bricks and a sack near Court
House, Bowen was in a stooping position as I
24 thought watching Battleson with one
hand extended towards the grounds
26 wanted know the letter think it was Frank
Bowen writing - who acted deputy Postmaster
28 Witness shown two letters - Witness said it
was one of the letters shown defendant
read cannot say which one certainly

S. PLUM-16

but recollected the substance of what
32 Bartlesan read from the letter it
was that a letter containing about
4 eight dollars in money had come
to the post office directed to the
6 collector, and that it had been
delivered to the person to whom it was
8 directed, Bartlesan advanced towards
Boren came together Boren said he
was unable to fight defendant I took
10 the pistol to A C Hunt Store where I
suppose it belonged

12 H L Riddle testifies - was
present when Dr Brattan examined
14 wound was a very slight examination
Brattan stayed all night - all
16 next day I cant think the blow would
have produced same effect
18 had plaintiff been in good health
Plaintiff before especially had been
20 unwell from a bilious attack
my opinion is that his subsequent
22 confinement was occasioned more
by the bilious attack than by the
24 wound on his head

Cross examined was present with
26 Dr Brattan about 1/2 hour dont
know that he made no other
28 examination defendant closed
which was all the evidence offered

the plaintiff Counsel then
2 furnished defendants attorneys
with brief of authorities —
4 after argument of defendants
attorneys to Jury - plaintiff attorney
6 offered to read to Jury authorities
cited in brief furnished defendants
8 objected. objection sustained, and
plaintiff then and there excepted to
10 the ruling of the Court
The plaintiff then asked the following
12 instruction to the Jury
The Court instructs the Jury that it is
14 not necessary there should be a
direct attempt at violence to constitute
16 an assault, and that if they believe
1 from the evidence that Bartleson
18 made the first assault, or that
being assaulted he used more
20 force to repel the same than was
necessary to protect himself
22 from injury they will find for the
plaintiff —
24 Which instruction the Court
refused to give, and the plaintiff
26 then and there excepted to the ruling
of the Court —
28

The Court gave the following.

34 instructions asked for by defendants
2 the Court instructs the Jury that if they
find from the evidence that Boren
4 made the first assault and that
Bartleson then acting under an honest
6 apprehension of receiving serious
bodily harm and if he was justified
8 under all the circumstances in
having such apprehension did
10 nothing more than any other prudent
man would have done under the
12 same circumstances to avert such
impending danger, the verdict
14 must be not guilty
the Court instructs the Jury that if
16 they find from the evidence that Boren
the plaintiff made the first assault
18 and that afterwards the defendant Bartleson
for the purpose of defending himself
20 did nothing more than was necessary
taking all the circumstances into
22 consideration to prevent a repetition
of the assault by Boren the verdict
24 must be not guilty
also the following
26 the Court instructs you in this
case that in order to entitle the
plaintiff to recover he must prove

all the material allegations in his
2 declaration and also that defendant
used more force in assaulting and
4 beating the plaintiff than was necessary
for his defts. - self defence
6 And if you believe from the evidence
that the plaintiff has proved all the
8 material allegations charged in
his declaration and also that
10 defendant used more force in
assaulting and beating plaintiff
12 than was necessary for defendants
self defence you should find
14 for the plaintiff - also the
following
16 the Court instructs you that
under the pleading in this case
18 it is the law that if it appears from
the evidence that the plaintiff
20 made the first assault on the
defendant - it then devolves upon
22 the plaintiff to show affirmatively
by evidence that the defendant
24 used more force in repelling such
assault than was necessary for his self
26 defence, and unless the plaintiff in this
case has offered such evidence the Jury

36 should find the defendant not guilty
2 To the giving of each of said instruct-
-ions the plaintiff then and there
4 excepted - and of lemuel the Jury
returned a verdict of not guilty
6 To the giving of which instructions
5 Plaff by his atty - then & there excepted
8 The Plaintiff entered his motion
for a new trial because the court
10 refused to give proper instructions
asked for by Plaintiff - and gave
12 improper instructions for the defendant
and because the verdict was contrary
14 to the law and the evidence
which motion was overruled and
16 the Plaintiff then and there excepted
to the same and prayed an appeal
18 to the Supreme Court -

Granted &c
20 Wesley Sloan (Seal)

22 And Be it further remembered
that afterwards towit ~~[illegible]~~
24 On the 20th day of May AD 1864
the said Plaintiff Hiram Boren
26 with Joseph Barnes as his Sureties
filed his appeal bond which is
28 in the words and figures

following to wit

37 Know all men by these presents
that we Hiram Boren and Joseph
Garrett are held and firmly
bound unto Augustus C Bartleson
in the penal sum of three Hundred
dollars, lawful money of the United
States, for the payment of which
well and truly to be made we bind
ourselves our heirs executors and
administrators jointly severally
and firmly by these presents
Witness our hands and seals
this 20th day of May A.D. 1864

The condition of the above
obligation is such that whereas the
said Augustus C Bartleson did at
the April term 1864 of the Pulaski County
Circuit Court for the County of
Pulaski and State of Illinois
recover a judgement against the
above bounden Hiram Boren
for costs in an action of Trespass
from which judgement the said
Hiram Boren has taken an
appeal to the Supreme Court
of the State of Illinois
Now if the said Hiram Boren

shall prosecute his said appeal
with effect and shall pay whatever
judgement may be rendered by
the Court upon dismissal or
trial of said appeal then the
above obligation to be void
otherwise to remain in full
force and effect

Heram Baron (Seal)
J. W. Barnett (Seal)

Heram Baron
vs
Aug & Bartleson } Justice
Circuit Court
April term 1864
Plaintiff Costs.

Clerk Suit 10. July 4 Witness 20	30
Iss 3 Subp & July 1. 20 ord to open def 20	1.40
ord to Call Jury 20 Call & Swe Jury 15	35
Swe Witness 25 Take 2 Writ of App. & July 20	45
July inst. 20 ent Rec 10	30
Ent Mo for new trial 20 Ent judgt 25	45
Tak. appeal bond & July 50 Rec 30	80
making transcript of proceedings —	10.00
Cert & seal	35
	$14.40
Sheriff Fees Serv Summons	60
Carried over	15.00

39 Amount costs brought over $15.00

Witnesses claims

Thomas B Warthington 3 days 3.00

Geo E Olmstead 3 days 25 miles travel 5.50

$ 23 50

Defendants costs

July 3 Fees 15. 15.— 15.

July inst 30 Ord over No. for new trial 20 30

Sw Wit 20. Bill 30 Copy 20 Certif & Seal 35 105

$ 1.70

State of Illinois } ss I

Pulaski County } Henry M Smith

Clerk of the Circuit

Court in and for said County and

State aforesaid do hereby certify

that the foregoing is a true full

and complete transcript

from the files and records in

my office in said entitled

Cause. In Witness of which I

have hereunto set my hand

and affixed the seal of said

Circuit Court (official)

at Caledonia this 6th day

of August A D 1864

Henry M Smith Clerk

In the Supreme Court Nov Term 1854 on from Dig Lewis

Hiram Baron

vs

Augustus C Bartleson

And the said plaintiff Hiram Baron comes and says that in the record and proceedings there is error in this to wit

1. The Court erred in admitting improper ~~refusing proper~~ testimony ~~instructions asked for by the plaintiff~~

2. " in giving improper instruction asked for by the defendant

3. " in excluding proper instruction asked by the plaintiff

4. " in overruling plaintiffs motion for a new Trial

5. " in giving judgment for the defendant.

J Dougherty, for Plff

[Pl C9-20]

No. 2

H Boren
vs
A C Barthson

Copy of
Record

Filed Oct. 5. 1864.
A. Schweitzer Clk
By Deputy

Filed by Defendant 8 M. Co

H Boren
vs
A C Barthson

In the Superior Court 1st Grand Division Nov Term 1864

And the said Plff Comes in says that in the rendition of judgment and proceedings in this cause there is manifest error in this to wit

1 The Court erred in refusing to admit proper testimony
2 The Court erred in admitting improper testimony
3 The Court erred in refusing instructions asked for by the plaintiff
4 The Court erred in giving improper instructions asked for by the defendant
5 The Court erred in overruling plaintiff's motion for a new trial
6 The verdict was contrary to the law
The verdict was contrary to the evidence

Joinder in Error.
Wm O'Brien and Mackey. Cobb & Wheeler for appellee

Jackie Dougherty & G S Peterson & Mackey

Cairo, Ill. Oct 24 1864

Noah Johnson

Dr Sir

I have just been informed that in Case of Boren vs Barthson process has been rec'd in Pulaski but that there is no Coroner in the County - This was unknown to me before - I herewith send an affidavit of that fact - & I suppose judging by analogy that your powers & duties are same in your Court as that of a Circuit Court Clerk in his Court that you can issue a process as directed in the affidavit - see Statues page 1126 sec 18 - at all events the judges of your Court have power to prescribe process &c see page 622 sec 6 - & that you as Clerk can make it out &c

If not please bring the matter to the attention of one of the judges if you can & request that they or he may order the proper writ directed to J J Walker ~~Esq~~ Pulaski Co - This is a new question to me & I have had no time to investigate it - & I wish to get service in time by all means for

[9618-21]

This term of your Court —
I have directed the process suit —
already to be returned to you
Please attend to this at once

Yours Truly
G S Pedgrew

DOUGHERTY & PIDGEON,

Attorneys at Law,

Make Collections; Prosecute Claims against the Government for **Pensions, Bounty, Back-Pay, Loss or Damage;**

Attend promptly to Suits in the Courts of Alexander, and adjoining Counties, Pay Taxes, &c. &c.

Cairo, Ill. Oct 10th 1864

Noah M Johnson Esq

Dear friend

Your favour of 5th rec'd. The proceeds in Case of Robert or Buttison should be directed to the Coroner to serve. But if you will direct the letter containing the proceeds to the Clerk of the Circuit Court A M Smith at Caledonia Pulaski Co — the Coroner will get it sooner than if directed to him — this is what I meant by requesting you to send it to the Clerk — Please forward it at once I am your

Obt Servt

G S Pidgeon

Cairo

Ills

[P448-22]

2

Boston
vs
Baltimore

Recipe

Filed, Oct. 12. 1864
N. Johnston Clk

Noah Johnson Esq –

Dear Sir please find enclosed $11.00 also Record Abstracts & brief in Case Hiram Boren vs Aug C Bartleson – Please file & Dkt same & send Process to this County to be served – The defendant is the present Sheriff of this County – Enclose Process to the Clerk of Circuit Court – and it will be attended to

Acknowledge receipt of the within and oblige

Your Obt Servt &c

Geo S Pedigeon

Cairo Ills

~~Address~~

To Noah Johnson
Clk Sup Court
Mt Vernon
Jefferson Co
Illinois

[FLCB-23]

Born
in
Battlesn

Paulsp

Julia Oct. 5. 1864.
N. Johnston M.D.

Cairo Ills June 10/65

Noah Johnson

Dr Sir

Will you please issue an alias Writ in the Case of N Boren vs A C Bartleson - appeal from Pulaski Co -

Geo Minnich is Sheriff of said County -

N M Smith Circuit Clerk -

Send it to Clerk for the Sheriff to serve

Yours Truly

Geo S Pidgeon

[8668-24]

2

Bozen
vs
Battson

Precipe

Filed June 13. 1865
N. Johnston Cl

State of Illinois
Supreme Ct 1st Div
Nov Term 1864
Appeal from Pulaski

Hiram Boren aplt
vs
Augustus C Bartlison applee

George S Ridgeon being first duly sworn deposes and says that in the above styled Cause the said defendant is now the Sheriff of said Pulaski County and that the office of Coroner in said County is vacant as he is informed and verily believes Wherefore he prays that process against said defendant may be directed to Jesse Walker a citizen of said County to be served and returned as in other cases —

George S Ridgeon

State of Illinois
Alexander County } I Brazer Shannefey a notary public do hereby certify that this day before me personally appeared George who subscribed and was by me duly sworn to the foregoing affidavit In Witness whereof I have hereto affixed my name and official seal this 24th day of October A D 1864

B Shannefey
notary public

[8668-75]

~~22~~ - 2

Borum
vs
Battiste

Affdt of Pltffs
Atty.

Filed Oct. 27 - 1864.
N. Johnston Clk

SUPREME COURT—FIRST GRAND DIVISION,

SEPTEMBER TERM, 1864.

ARGUMENT AND BRIEF.

HIRAM BOREN, App't.
vs.
AUGUSTUS C. BARTLESON, } Appeal from Pulaski.

This was action of trespass vi et armies, brought by appellant who was the plaintiff below, to recover damages for an assault and battery. To the plaintiff's declaration alledging the assault and battery, the plaintiff's confinement, loss of health, and special damages by reason of the battery. The defendant plead the general issue, and son assault demesne; plaintiff taken issue on the first plea, and filed replication "de injuria" to second plea. Trial by jury and verdict "not guilty." On the trial, the court refused to permit the plaintiff to show the previous preparation and intention on the part of defendant, to provoke an assault and his design to use a deadly weapon. The preparation and declarations having been followed at the first interview with the plaintiff, by the matter in controversy, constituted a part of the res gestae of that transaction. and for that reason admissable, but also because such evidence was pertinent to the question as to the excess of force.

The testimony of Olmstead, et al, show that at the time of defendant's applying one of the most offensive epithets known, to the plaintiff; that plaintiff threw out his hand and either struck or caught the defendant in the breast, and there was no further effort to injure defendant, but that defendant then stepped back sufficiently far to have free use of his hands—drew his revolver, presenting and snapping it at plaintiff. The plaintiff retreating in an oblique direction, defendant then advanced and struck plaintiff over the head with the revolver, without any reasonable cause to suppose his life or limbs in danger. When advancing, the plaintiff said to him, "he was unable to fight;" and when struck and knocked down, called to have him taken off. The evidence shows that defendant acted solely for the purpose of gratifying his passions, and the pre-conceived purpose of killing the plaintiff, who owes his life to the providential circumstance of the pistol not bursting the cap. The evidence also shows that plaintiff was in feeble health and suffering from disease at the time of the assault, a circumstance giving a still more aggravated character to defendant's battery, and by reason whereof, plaintiff was confined to his bed, and in a very critical condition, for several months, and paid over $40 for medical attendance in consequence of his wounds and sickness. There being no evidence mitigating any of the defendant's acts, it does seem that there is not one particle of either law or evidence on which to hang the verdict and judgment in this case.

The court should have given the instruction asked by plaintiff; for if, from the language used, and accompanied by looks, gestures, or other circumstances, denoting an intent coupled with a present ability to use violence on the part of defendant, the plaintiff was not guilty of making the first assault, although he may fiast have struck or touched the person of defendant, but had a right to anticipate defendant's battery; and this being a question of fact to be collected from the evidence, was a matter for the jury to pass upon. The jury might reasonably have befieved from all the evidence in the case, that the acts of the defendant was but the certain prelude to physical force.—See Russell on crimes, vol 1, page 750, note and cases cited.

The first instruction on the part of defendant, may have mislead the jury, because it may be read so as to leave the impression that if plaintiff made the first assault, and defendant acted under a justifiable apprehension of danger, that then defendant did nothing more than any other prudent man would have done, assuming as true a fact of which the jury should have been the judges.

Defendant's second instruction was liable to the same objection, and otherwise improper, because there was no evidence having any tendency to show that defendant would have been justified in shooting plaintiff, however honest he might have been in his apprehensions of a repetition of the assault already made by plaintiff, because the assault of plaintiff, who was then in feeble health, and wholly unarmed, could not, in any just sense, be said to endanger defendant's life or limb, and therefore the repetition of it could not do so, and defendant could not justify an assault and battery likely to produce death, to prevent the repetition of an assault of less danger to defendant, and in no way endangering life or limb. The jury have no right to draw an inference wholly unsupported by evidence.

The Defendant's third and fourth instruction, even if such was the law, by dwelling with so much particularity upon, and repetition of substantially the same thing, was well calculated to lead the jury to suppose the plaintiff had not made out his case, and that it was necessary to prove by *the opinion* of the witnesses that the force was excessive, instead of leaving the fact of excess to be deduced from the circumstances attending the case, as shown by the testimony.

But the plaintiff insists that the instructions are neither technically nor substantially correct; that under the second plea and replication the burthen of showing that the force was justifiable was upon the defendant.

In the case of Ayres vs. Kelly, 11th Ills., the Court says that "it is insisted that under the issue formed in this case the defense was complete on proof that the plaintiff committed the first assault," the inference being that the Court did not think so; if then the defense was not complete, whose business was it to complete it? certainly not the plaintiff's. The assault being admitted by the plea, and the defense being incomplete, would not the plaintiff be entitled to recover at least nominal damages?

The Court continues, that although some authorities favor that view, yet the better opinion seems to be that the plaintiff may, under the replication "de injuria," show that defendant's battery was excessive, the authorities cited 2 Greenleaf, Sec 95, state the law to be that under the plea of "son assault demesne" with the replication "de injuria," the burthen of proving that what was done was in necessary self-defense, is upon the defendant, which of course involves the necessity of showing that the force used was not excessive, for if so, it could not be in necessary self-defense; when the defendant thus makes out his defense the plaintiff may disprove the truth of the defense and show that the force was excessive; but until that is done the plaintiff may rest, and plaintiff submits that the filing of this plea, which admits the assault is not of itself a defense by simply showing that the plaintiff committed the first assault, and shifting without more the burthen of the proof. "A material averment of the plea is that no more force was used than was necessary to repel the assault; if that degree of force was exceeded the averment fails, and with it the defense," the onus of proving the material averments of the plea is with the defendant, who must show that what was done was done in self-defense, or that no more force was used by defendant than was necessary; the proof of the first necessarily involves the proof of the other, as it is but the same proposition, the force being necessary, it follows that it could not be, in legal contemplation, excessive.

JOHN DOUGHERTY,
G. S. PIDGEON, } Attorneys.

Boone
vs
Battleson

Argument & Brief

Filed Oct. 5. 1864.
W. Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Pulaski Greeting:

Because, *In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of* Pulaski *county, before the Judge thereof between*

Hiram Boren *plaintiff and*

Augustus C. Battleson *defendant it is said manifest error hath intervened to the injury of the aforesaid* Plaintiff *as we are informed by* his *complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given; you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid; with all things touching the same; under your seal, so that we may have the same before our Justices aforesaid at* **Mount Vernon,** *in the County of Jefferson, on the* 1st Sunday after the 2d Monday in November *next, that the record and proceedings, being inspected, we may cause to be done therein; to correct the error, what of right ought to be done according to law.*

WITNESS, *the Hon.* P. H. Walker *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* twelfth *day of* October *in the year of our Lord one thousand eight hundred and* sixty four.

Noah Johnston
Clerk of the Supreme Court.

[8469-28]

2

SUPREME COURT.

First Grand Division.

Hiram Boren

Plaintiff in Error,

VS.

A. C. Battleson

Defendant in Error.

WRIT OF ERROR.

Issued & FILED. Oct. 12. 1864.

N. Johnston Cl

[ABSTRACT.]

Supreme Court, First Grand Division, November Term, 1864.

HIRAM BOREN, Plf.,
vs.
AUGUSTUS C. BARTLESON, } Appeal from Pulaski.

Page – Line

1 – 17 This was an action of trespass vi et armis. Plaintiff below and in this Court filed, March 26, 1862, his declaration, with two counts, for Assault and Battery of plaintiff. On 26th March summons to defendant issued, and returned served.

7 – 20 At the April term defendant entered motion to quash writ. Cross motion to amend. Writ amended and motion to quash overruled. On the 10th day of said term defendant filed general demurrer, which was overruled. Defendant ruled to plead.

8 – 22 On the 11th day of said term defendant filed his plea of the general issue and son assault demesne.

9 – 4 To the first plaintiff joined issue to the country, and to the second filed the replication de injuria, upon which defendant joined issue, &c.

The cause then continued generally.

At the April term of said Court, A. D. 1863, cause continued by plaintiff, on affidavit.

At the September term cause again continued.

17 – 10 At the April term 1864 said cause coming on for trial, a jury was empanneled, &c., and thereupon the plaintiff offered the following evidence:

19 – 8 Geo. E. Olmstead testified that in November 1861 he was standing near the Court House and heard the defendant call Boren, who came up, when Bartleson read a letter to him, and then said "if you (Boren) say that is true, you are a God damned infernal liar." Boren then struck at or caught Bartleson on the breast. Bartleson then stepped back a few steps and drew a revolver and snapped it at Boren. Bartleson then advanced on Boren and struck him over the head with the pistol. Boren came to his knees. Both fell, Boren being under-neath. Were then seperated. Saw but one blow with the pistol. Could not say whether Boren struck or pushed Bartleson with open hand. At that time they were standing with a post 12 inches diameter, 4 feet high between them. Bartleson stepped back and Boren moved in an oblique direction from Bartleson, then about six feet apart. The language used to Boren was the commencement of of difficulty. Saw Boren after the fight; saw the wound on side of his head. From the post to where they fell was about ten or twelve feet. Did not hear Boren say any thing after the fight began.

20 – 24 Cross Examined.—The first words were "you are God-damned infernal liar." Boren stood still until Bartleson drew his pistol. After Boren was struck he came to his knees first, then fell backwards. Did not recover from the first blow. Boren stepped back when pistol was drawn.

Re-examined. The first words witness heard was Bartleson call to Boren. Did not see Boren have any thing.

21 – 12 Thomas B. Worthington testified that himself and others were present. Bartleson came up and read a letter to Boren, and said "if you say that the statement in said letter was true, you are a God-damned liar, or a damned stinking liar." Boren then pushed or struck Bartleson, who staggered back a few steps and drew his pistol and snapped it at Boren. Bartleson then struck him with pistol. While they were down Boren said take him away, don't let him hurt me. After they were parted Davidge said he had pistol, and none of them should have it. Bartleson said dam the pistol. Did not hear him say it had never fooled him before. Pistol would weigh a pound or more. After the fight saw blood running down Boren's coat. Think his hat was on when struck.

Page — Line

22 — 13 Cross Examined. Did not hear Bartleson call Boren. Think Boren was at the post and Bartleson in the middle of the street coming towards him. When Bartleson was advancing with pistol, Boren said mind what you are about. When they fell Bartleson went over him. Boren was near Court House, in leaning position and looking at Bartleson.

30 — 13 E. B. Watkins testified, saw Boren on two occasions after the fight—the night after. He was in a delerium. Plaintiff then asked witness if the day before the difficulty he had a conversation with Bartleson about the loan of a pistol, and what Bartleson said about it. Question objected to. Objection sustained, and plaintiff then and there excepted. Was present at the fight. Pistol was a revolver, with a five or six inch barrel. Would weigh two or three pounds; might weigh more.

23 — 4 Wm. Hathaway testified—I am a physician; was called to see Boren after the fight. Found Boren with a bad wound on the left side of the head; scalp swollen—wound one-third of an inch deep and down to the bone—about the size of an eight-penny nail—seemed to have been made with blunt instrument. A lick with such an instrument would produce an irregular fracture. Boren had high fever. Plaintiff's illness lasted several months. He paid me one dollar for my visit.

23 — 24 Cross Examined. Did not see any other wound on the head. Recommended linament and some constitutional treatment.

24 — 4 H. D. Riddle testified.—I am a physician. Visited Boren after the difficulty. Found him with a good deal of fever and a wound just above the left ear, half an inch long and as deep—scalp swollen. Was inflicted by some blunt instrument. Boren had high fever and complained of pain in the head and body, and general indisposition. I recommended sending for Dr. Bratton of Vienna. Consulted with Dr. Bratton, who borrowed a probe from me. Found slight depression of the skull. The depression of the skull from a blow often produces extravasation of blood and inflammation, and is dangerous. Boren paid me eighteen dollars for my services.

24 — 27 Cross Examined. Boren had been unwell before the difficulty with a bilious attack. Think the fever Boren had excited by the wound.

25 — 10 Frank Boren testified—Was in Cairo at time of difficulty. Came up the next day. Saw Boren at his house, in bed, confined from a wound on his head. It was three months before he was able te get about. His general health not so good since as before the fight. Was with plaintiff during his sickness—waited on him. He complained of his head, and passed blood and corruption through his nose for several weeks.

25 — 25 Cross Examined—I am not a physician; it was my opinion plaintiff was suffering from the wound in his head. Defendant objected to witnesse's opinion. Objection sustained, and plaintiff excepted, etc.

26 — 4 George Bratton deposed—I am a physician residing in Vienna. Saw plaintiff 23d October 1861. Had wound on left side of head from a blow with some hard substance, so as to depress and fracture the outer plate of parietal bone. Wound was not very large, had lacerated edges, contusion and swelling round the wound. There was also fracture of parietal bone, with depression. The danger resulting from the wound was the shock to nervous system and inflammation. All scalp wounds are dangerous, and particularly wounds of the cranium. When last saw wound it had no indication of healing. Such wounds generally require longer to heal than others. My charge for services was $25, which Boren paid me. Boren was confined to his bed—don't know how long.

29 — 1 H. M. Smith testified—I saw Boren after the difficulty with Bartleson—was in bed. Saw his wound. Was reduced and in feeble health a long time afterwards—looked bad—was formerly a strong-minded man.

29 — 14 Louis Jaccard testified—Was at plaintiff's house in the fall of 1861. He was in bed and suffering from a wound on head. Was there one night, sat up with him and dressed his head, &c. Am acquainted with Bartleson. He was clerking in a store ten years ago, afterwards elected sheriff. Is reputed to be well off. Claims a farm in this county.

Page Line

29 — 26 Cross Examined—Don't know who Boren's physician was.

30 — 3 Robert T. Calvin sworn, testified that Bartleson claims a farm of 160 acres, worth twelve dollars and fifty cents per acre. Don't know how much he is worth. Said to be in good circumstances. Bartleson is now Sheriff of Pulaski County. Was Sheriff once before, and once Deputy. Plaintiff closed.

The Defendant then offered the following testimony.

31 — 5 James M. Davidge testified that Bartleson and several others were standing near the Court House. Boren was passing. Bartleson called him and commenced reading a leter, when he came to a certain part of letter, said if Boren was the author he was a damned stinking liar. Boren then struck or pushed him back a step or two. Bartleson drew a revolver and snapped it at Boren, and then struck him. Boren was in a stooping position watching Bartleson as I thought, with one hand extended towards the ground. Bartleson advanced towards Boren. Boren said he was unable to fight defendant. I took the pistol to A. C. Huet's store, where I suppose it belonged. I would know the letter; think it was written by Frank Boren, who was deputy Post Master. The substance of what was read to Boren, was that a letter containing $8 had come to the post office to the collector, and had been delivered to the person to whom it was directed.

32 — 12 Dr. H. D. Riddle testified that he was present at the time when Dr. Bratton examined wound; only made slight examination. Don't think blow would have produced same effect if Boren had been in good health. Boren had billious attack before difficulty.

32 — 26 Cross Exemined. Don't know that Bratton made no other examination.

Defendant closed.

33 — 1 Plaintiff's attorney furnished defendant's council with brief of authorities. Plaintiff in concluding argument offered to read authorities cited in brief furnished defendant. Objected to. Objection sustained, and plaintiff then and there excepted, &c.

33 — 12 The plaintiff then asked the following instructions to the jury:

The Court instructs the jury that it is not necessary there should be a direct attempt at violence to constitute an assault; and that if they believe, from the evidence, that Bartleson made the first assault, or that being assaulted he used more force than was necessary to protect himself from injury, they will find for the plaintiff. Which was refused, and plaintiff then and there excepted, &c.

The Court then gave the following instructions asked for by defendant:

34 — 2 The Court instructs the jury that if they find from the evidence that Boren made the first assault, and that Bartleson then acting under an honest apprehension of receiving serious bodily harm, and if he was justified, under all the circumstances, in having such apprehension, did nothing more than any other prudent man would have done, under the same circumstances, to avert such impending danger, the verdict must be not guilty.

34 — 16 The Court instructs the Jury that if they find from the evidence that Boren, the plaintiff, made the first assault, and that afterwards the defendant, Bartleson, for the purpose of defending himself, did nothing more than necesary, taking all the circumstances into consideration, to prevent a repetition of the assault by Boren, the verdict must be not guilty.

34-26 The Court instructs the jury in this case that in order to entitle the plaintiff to recover, he must prove all the material allegations in his declaration; and also that defendant used more force in assaulting and beating the plaintiff than was necessary for his self-defense, and if you believe from the evidence that the plaintiff has proved all the material allegations charged in his declaration, and also that defendant used more force in assaulting and beating the plaintiff than was necessary for defendants self-defense, you should find for the plaintiff.

Page Line

35-16 The Court instructs the jury that under the pleading in this case it is the law that if it appears from the evidence that the plaintiff made the first assault on the defendant, it then devolves on the plaintiff to show affirmatively by evidence, that the defendant used more force in repelling such assault than was necessary for his self-defense, and unless the plaintiff in this case has offered such evidence, the jury should find the defendant not guilty.

To the giving of each of said instructions the plaintiff then and there excepted.

17-20 And thereupon the jury returned a verdict of not guilty.

And plaintiff entered his motion for new trial. Motion overruled, and plaintiff then
17-22 and these excepted to the ruling of said Court.

ASSIGNMENT OF ERRORS.

The Court erred in refusing to admit proper testimony.

The Court erred in admitting improper testimony.

The Court erred in refusing instructions asked by plaintiff.

The Court erred in giving improper instructions asked for by defendant.

The Court erred in overruling plaintiff's motion for a new trial.

The verdict was contrary to the law.

The verdict was contrary to the evidence.

JOHN DOUGHERTY, }
G. S. PIDGEON, } Attorneys.

Sup Court Mon West

Hiram Boren Aplnt

vs

Augustus C Bartlett

Abstract

2

Filed, Oct. 5 1844.

N. Johnston Clk

SUPREME COURT—FIRST GRAND DIVISION,

SEPTEMBER TERM, 1864.

ARGUMENT AND BRIEF.

HIRAM BOREN, App't.
vs.
AUGUSTUS C. BARTLESON, } Appeal from Pulaski.

This was action of trespass vi et armies, brought by appellant who was the plaintiff below, to recover damages for an assault and battery. To the plaintiff's declaration alledging the assault and battery, the plaintiff's confinement, loss of health, and special damages by reason of the battery. The defendant plead the general issue, and son assault demesne; plaintiff taken issue on the first plea, and filed replication "de injuria" to second plea. Trial by jury and verdict "not guilty." On the trial, the court refused to permit the plaintiff to show the previous preparation and intention on the part of defendant, to provoke an assault and his design to use a deadly weapon. The preparation and declarations having been followed at the first interview with the plaintiff, by the matter in controversy, constituted a part of the res gestae of that transaction, and for that reason admissable, but also because such evidence was pertinent to the question as to the excess of force.

The testimony of Olmstead, et al, show that at the time of defendant's applying one of the most offensive epithets known, to the plaintiff; that plaintiff threw out his hand and either struck or caught the defendant in the breast, and there was no further effort to injure defendant, but that defendant then stepped back sufficiently far to have free use of his hands—drew his revolver, presenting and snapping it at plaintiff. The plaintiff retreating in an oblique direction, defendant then advanced and struck plaintiff over the head with the revolver, without any reasonable cause to suppose his life or limbs in danger. When advancing, the plaintiff said to him "he was unable to fight;" and when struck and knocked down, called to have him taken off. The evidence shows that defendant acted solely for the purpose of gratifying his passions, and the pre-conceived purpose of killing the plaintiff, who owes his life to the providential circumstance of the pistol not bursting the cap. The evidence also shows that plaintiff was in feeble health and suffering from disease at the time of the assault, a circumstance giving a still more aggravated character to defendant's battery, and by reason whereof, plaintiff was confined to his bed, and in a very critical condition, for several months, and paid over $40 for medical attendance in consequence of his wounds and sickness. There being no evidence mitigating any of the defendant's acts, it does seem that there is not one particle of either law or evidence on which to hang the verdict and judgment in this case.

The court should have given the instruction asked by plaintiff; for if, from the language used, and accompanied by looks, gestures, or other circumstances, denoting an intent coupled with a present ability to use violence on the part of defendant, the plaintiff was not guilty of making the first assault, although he may fiast have struck or touched the person of defendant, but had a right to anticipate defendant's battery; and this being a question of facts to be collected from the evidence, was a matter for the jury to pass upon. The jury might reasonably have believed from all the evidence in the case, that the acts of the defendant was but the certain prelude to physical force.—See Russell on crimes, vol 1, page 750, note and cases cited.

The first instruction on the part of defendant, may have mislead the jury, because it may be read so as to leave the impression that if plaintiff made the first assault, and defendant acted under a justifiable apprehension of danger, that then defendant did nothing more than any other prudent man would have done, assuming as true a fact of which the jury should have been the judges.

Defendant's second instruction was liable to the same objection, and otherwise improper, because there was no evidence having any tendency to show that defendant would have been justified in shooting plaintiff, however honest he might have been in his apprehensions of a repetition of the assault already made by plaintiff, because the assault of plaintiff, who was then in feeble health, and wholly unarmed, could not, in any just sense, be said to endanger defendant's life or limb, and therefore the repetition of it could not do so, and defendant could not justify an assault and battery likely to produce death, to prevent the repetition of an assault of less danger to defendant, and in no way endangering life or limb. The jury have no right to draw an inference wholly unsupported by evidence.

The Defendant's third and fourth instruction, even if such was the law, by dwelling with so much particularity upon, and repetition of substantially the same thing, was well calculated to lead the jury to suppose the plaintiff had not made out his case, and that it was necessary to prove by *the opinion* of the witnesses that the force was excessive, instead of leaving the fact of excess to be deduced from the circumstances attending the case, as shown by the testimony.

But the plaintiff insists that the instructions are neither technically nor substantially correct; that under the second plea and replication the burthen of showing that the force was justifiable was upon the defendant.

In the case of Ayres vs. Kelly, 11th Ills., the Court says that "it is insisted that under the issue formed in this case the defense was complete on proof that the plaintiff committed the first assault," the inference being that the Court did not think so; if then the defense was not complete, whose business was it to complete it? certainly not the plaintiff's. The assault being admitted by the plea, and the defense being incomplete, would not the plaintiff be entitled to recover at least nominal damages?

The Court continues, that although some authorities favor that view, yet the better opinion seems to be that the plaintiff may, under the replication "de injuria," show that defendant's battery was excessive, the authorities cited 2 Greenleaf, Sec 95, state the law to be that under the plea of "son assault demesne" with the replication "de injuria," the burthen of proving that what was done was in necessary self-defense, is upon the defendant, which of course involves the necessity of showing that the force used was not excessive, for if so, it could not be in necessary self-defense; when the defendant thus makes out his defense the plaintiff may disprove the truth of the defense and show that the force was excessive; but until that is done the plaintiff may rest, and plaintiff submits that the filing of this plea, which admits the assault is not of itself a defense by simply showing that the plaintiff committed the first assault, and shifting without more the burthen of the proof. "A material averment of the plea is that no more force was used than was necessary to repel the assault; if that degree of force was exceeded the averment fails, and with it the defense," the onus of proving the material averments of the plea is with the defendant, who must show that what was done was done in self-defense, or that no more force was used by defendant than was necessary; the proof of the first necessarily involves the proof of the other, as it is but the same proposition, the force being necessary, it follows that it could not be, in legal contemplation, excessive.

JOHN DOUGHERTY,
G. S. PIDGEON, } Attorneys.

Born
in
Butler

Argument & Brief

Filed Oct. 5. 1864

N. Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division. } SS

The People of the State of Illinois,

To Jesse J. Walker, ~~To the Sheriff of~~ Clerk, of Pulaski County, Illinois.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Pulaski county, before the Judge thereof between

Hiram Borem plaintiff and

Augustus C. Battleson defendant it is said that manifest error hath intervened to the injury of said Plaintiff as we are informed by his complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mount Vernon, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Augustus C. Battleson

that he be and appear before the justices of our said Supreme Court; at the next term of said Court, to be holden at **Mount Vernon**, in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Augustus C. Battleson notice together with this writ.

WITNESS, the Hon. P. H. Walker Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this twenty-seventh day of October in the year of our Lord one thousand eight hundred and sixty-four

Noah Johnston
Clerk of the Supreme Court.

[8618-35]

2

SUPREME COURT.

First Grand Division.

Hiram Boren

Plaintiff in Error,

VS.

A. C. Battison

Defendant in Error.

SCIRE FACIAS.

FILED.

Nov 12 1864
this writ is Executed
by Reading to the
within Named A C Battison
D. W. P. Walker SOB
fees 50

State of Illinois,
SUPREME COURT,
First Grand Division. } SS

The People of the State of Illinois,

To the Sheriff of Pulaski *County.*

Because, *In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of* Pulaski *county, before the Judge thereof between*

Hiram Borm *plaintiff and*

Augustus C. Bartlesm *defendant it is said that manifest error hath intervened to the injury of said* Plaintiff *as we are informed by his complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at* Mount Vernon, *before the justices thereof; to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said* Augustus C. Bartlesm

that he *be and appear before the justices of our said Supreme Court; at the next term of said Court, to be holden at* **Mount Vernon,** *in said State, on the first Tuesday* ~~after the second Monday~~ *in November next, to hear the records and proceedings aforesaid, and the errors assigned, if* he *shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said* Augustus C. Bartlesm *notice together with this writ.*

WITNESS, *the Hon.* P. H. Walker *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* Fifteenth *day of* June *in the year of our Lord one thousand eight hundred and* Sixty five.

Noah Johnston
Clerk of the Supreme Court.

[8668-36]

2

SUPREME COURT.

First Grand Division.

Hiram Born

Plaintiff in Error,

VS.

A. C. Bartleson

Defendant in Error.

Ac. SCIRE FACIAS.

FILED.

Served on within named Defendant A. C. Bartleson by leaving within copy at his place of abode in Mt. Sterling this 14th day of June A.D. 1865

Geo. Harriel Sheriff
Adams Co Ills

Clerk 75
Mil. 10th 1.00
Return 10
$1.85

[ABSTRACT.]

Supreme Court, First Grand Division, November Term, 1864.

HIRAM BOREN, Plf.,
vs.
AUGUSTUS C. BARTLESON, } Appeal from Pulaski.

Page — line

1 — 17 This was an action of trespass vi et armis. Plaintiff below and in this Court filed, March 26, 1862, his declaration, with two counts, for Assault and Battery of plaintiff. On 26th March summons to defendant issued, and returned served.

7 — 20 At the April term defendant entered motion to quash writ. Cross motion to amend. Writ amended and motion to quash overruled. On the 10th day of said term defendant filed general demurrer, which was overruled. Defendant ruled to plead.

8 — 22 On the 11th day of said term defendant filed his plea of the general issue and son assault demesne.

9 — 4 To the first plaintiff joined issue to the country, and to the second filed the replication de injuria, upon which defendant joined issue, &c.

The cause then continued generally.

At the April term of said Court, A. D. 1863, cause continued by plaintiff, on affidavit.

At the September term cause again continued.

17 — 10 At the April term 1864 said cause coming on for trial, a jury was empanneled, &c., and thereupon the plaintiff offered the following evidence:

19 — 8 Geo. E. Olmstead testified that in November 1861 he was standing near the Court House and heard the defendant call Boren, who came up, when Bartleson read a letter to him, and then said "if you (Boren) say that is true, you are a God damned infernal liar." Boren then struck at or caught Bartleson on the breast. Bartleson then stepped back a few steps and drew a revolver and snapped it at Boren. Bartleson then advanced on Boren and struck him over the head with the pistol. Boren came to his knees. Both fell, Boren being under-neath. Were then seperated. Saw but one blow with the pistol. Could not say whether Boren struck or pushed Bartleson with open hand. At that time they were standing with a post 12 inches diameter, 4 feet high between them. Bartleson stepped back and Boren moved in an oblique direction from Bartleson, then about six feet apart. The language used to Boren was the commencement of of difficulty. Saw Boren after the fight; saw the wound on side of his head. From the post to where they fell was about ten or twelve feet. Did not hear Boren say any thing after the fight began.

20 — 24 Cross Examined.—The first words were "you are God-damned infernal liar." Boren stood still until Bartleson drew his pistol. After Boren was strnck he came to his knees first, then fell backwards. Did not recover from the first blow. Boren stepped back when pistol was drawn.

Re-examined. The first words witness heard was Bartleson call to Boren. Did not see Boren have any thing.

21 — 12 Thomas B. Worthington testified that himself and others were present. Bartleson came up and read a letter to Boren, and said "if you say that the statement in said letter was true, you are a God-damned liar, or a damned stinking liar." Boren then pushed or struck Bartleson, who staggered back a few steps and drew his pistol and snapped it at Boren. Bartleson then struck him with pistol. While they were down Boren said take him away, don't let him hurt me. After they were parted Davidge said he had pistol, and none of them should have it. Bartleson said dam the pistol. Did not hear him say it had never fooled him before. Pistol would weigh a pound or more. After the fight saw blood running down Boren's coat. Think his hat was on when struck.

Page Line

22 – 13 Cross Examined. Did not hear Bartleson call Boren. Think Boren was at the post and Bartleson in the middle of the street coming towards him. When Bartleson was advancing with pistol, Boren said mind what you are about. When they fell Bartleson went over him. Boren was near Court House, in leaning position and looking at Bartleson.

20 – 13 E. B. Watkins testified, saw Boren on two occasions after the fight—the night after. He was in a delerium. Plaintiff then asked witness if the day before the difficulty he had a conversation with Bartleson about the loan of a pistol, and what Bartleson said about it. Question objected to. Objection sustained, and plaintiff then and there excepted. Was present at the fight. Pistol was a revolver, with a five or six inch barrel. Would weigh two or three pounds; might weigh more.

23 – 4 Wm. Hathaway testified—I am a physician; was called to see Boren after the fight. Found Boren with a bad wound on the left side of the head; scalp swollen—wound one-third of an inch deep and down to the bone—about the size of an eight-penny nail—seemed to have been made with blunt instrument. A lick with such an instrument would produce an irregular fracture. Boren had high fever. Plaintiff's illness lasted several months. He paid me one dollar for my visit.

23 – 24 Cross Examined. Did not see any other wound on the head. Recommended linament and some constitutional treatment.

24 – 4 H. D. Riddle testified.—I am a physician. Visited Boren after the difficulty. Found him with a good deal of fever and a wound just above the left ear, half an inch long and as deep—scalp swollen. Was inflicted by some blunt instrument. Boren had high fever and complained of pain in the head and body, and general indisposition. I recommended sending for Dr. Bratton of Vienna. Consulted with Dr. Bratton, who borrowed a probe from me. Found slight depression of the skull. The depression of the skull from a blow often produces extravasation of blood and inflammation, and is dangerous. Boren paid me eighteen dollars for my services.

24 – 27 Cross Examined. Boren had been unwell before the difficulty with a bilious attack. Think the fever Boren had excited by the wound.

25 – 18 Frank Boren testified—Was in Cairo at time of difficulty. Came up the next day. Saw Boren at his house, in bed, confined from a wound on his head. It was three months before he was able to get about. His general health not so good since as before the fight. Was with plaintiff during his sickness—waited on him. He complained of his head, and passed blood and corruption through his nose for several weeks.

25 – 25 Cross Examined—I am not a physician; it was my opinion plaintiff was suffering from the wound in his head. Defendant objected to witnesse's opinion. Objection sustained, and plaintiff excepted, etc.

26 – 4 George Bratton deposed—I am a physician residing in Vienna. Saw plaintiff 23d October 1861. Had wound on left side of head from a blow with some hard substance, so as to depress and fracture the outer plate of parietal bone. Wound was not very large, had lacerated edges, contusion and swelling round the wound. There was also fracture of parietal bone, with depression. The danger resulting from the wound was the shock to nervous system and inflammation. All scalp wounds are dangerous, and particularly wounds of the cranium. When last saw wound it had no indication of healing. Such wounds generally require longer to heal than others. My charge for services was $25, which Boren paid me. Boren was confined to his bed—don't know how long.

29 – 1 H. M. Smith testified—I saw Boren after the difficulty with Bartleson—was in bed. Saw his wound. Was reduced and in feeble health a long time afterwards—looked bad—was formerly a strong-minded man.

29 – 14 Louis Jaccard testified—Was at plaintiff's house in the fall of 1861. He was in bed and suffering from a wound on head. Was there one night, sat up with him and dressed his head, &c. Am acquainted with Bartleson. He was clerking in a store ten years ago, afterwards elected sheriff. Is reputed to be well off. Claims a farm in this county.

Page - Line

Cross Examined—Don't know who Boren's physician was.

30 — 3 Robert T. Calvin sworn, testified that Bartleson claims a farm of 160 acres, worth twelve dollars and fifty cents per acre. Don't know how much he is worth. Said to be in good circumstances. Bartleson is now Sheriff of Pulaski County. Was Sheriff once before, and once Deputy. Plaintiff closed.

The Defendant then offered the following testimony.

31 — 6 James M. Davidge testified that Bartleson and several others were standing near the Court House. Boren was passing. Bartleson called him and commenced reading a leter, when he came to a certain part of letter, said if Boren was the author he was a damned stinking liar. Boren then struck or pushed him back a step or two. Bartleson drew a revolver and snapped it at Boren, and then struck him. Boren was in a stooping position watching Bartleson as I thought, with one hand extended towards the ground. Bartleson advanced towards Boren. Boren said he was unable to fight defendant. I took the pistol to A. C. Huet's store, where I suppose it belonged. I would know the letter; think it was written by Frank Boren, who was deputy Post Master. The substance of what was read to Boren, was that a letter containing $8 had come to the post office to the collector, and had been delivered to the person to whom it was directed.

32 — 12 Dr. H. D. Riddle testified that he was present at the time when Dr. Bratton examined wound; only made slight examination. Don't think blow would have produced same effect if Boren had been in good health. Boren had billious attack before difficulty.

Cross Exemmed. Don't know that Bratton made no other examination.

Defendant closed.

33 — 1 Plaintiff's attorney furnished defendant's council with brief of authorities. Plaintiff in concluding argument offered to read authorities cited in brief furnished defendant. Objected to. Objection sustained, and plaintiff then and there excepted, &c.

The plaintiff then asked the following instructions to the jury:

33 — 12 The Court instructs the jury that it is not necessary there should be a direct attempt at violence to constitute an assault; and that if they believe, from the evidence, that Bartleson made the first assault, or that being assaulted he used more force than was necessary to protect himself from injury, they will find for the plaintiff. Which was refused, and plaintiff then and there excepted, &c.

The Court then gave the following instructions asked for by defendant:

34 — 2 The Court instructs the jury that if they find from the evidence that Boren made the first assault, and that Bartleson then acting under an honest apprehension of receiving serious bodily harm, and if he was justified, under all the circumstances, in having such apprehension, did nothing more than any other prudent man would have done, under the same circumstances, to avert such impending danger, the verdict must be not guilty.

34 — 16 The Court instructs the Jury that if they find from the evidence that Boren, the plaintiff, made the first assault, and that afterwards the defendant, Bartleson, for the purpose of defending himself, did nothing more than necesary, taking all the circumstances into consideration, to prevent a repetition of the assault by Boren, the verdict must be not guilty.

34 — 26 The Court instructs the jury in this case that in order to entitle the plaintiff to recover, he must prove all the material allegations in his declaration; and also that defendant used more force in assaulting and beating the plaintiff than was necessary for his self-defense, and if you believe from the evidence that the plaintiff has proved all the material allegations charged in his declaration, and also that defendant used more force in assaulting and beating the plaintiff than was necessary for defendants self-defense, you should find for the plaintiff.

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35 — 16 The Court instructs the jury that under the pleading in this case it is the law that if it appears from the evidence that the plaintiff made the first assault on the defendant, it then devolves on the plaintiff to show affirmatively by evidence, that the defendant used more force in repelling such assault than was necessary for his self-defense, and unless the plaintiff in this case has offered such evidence, the jury should find the defendant not guilty.

To the giving of each of said instructions the plaintiff then and there excepted.

17 — 20 And thereupon the jury returned a verdict of not guilty.

And plaintiff entered his motion for new trial. Motion overruled, and plaintiff then

17 — 22 and these excepted to the ruling of said Court.

ASSIGNMENT OF ERRORS.

The Court erred in refusing to admit proper testimony.

The Court erred in admitting improper testimony.

The Court erred in refusing instructions asked by plaintiff.

The Court erred in giving improper instructions asked for by defendant.

The Court erred in overruling plaintiff's motion for a new trial.

The verdict was contrary to the law.

The verdict was contrary to the evidence.

JOHN DOUGHERTY,
G. S. PIDGEON, } Attorneys.

Sup. Court Nov. 1864

Hiram Boren appellee

vs

Augustus C Bartleson

Abstract

22

8668

Filed Oct. 5. 1864.

N. Johnston Clk

2 — 3

H. Boren

vs

A. C. Bartleson

Error to Pub.

Nov 5th 1862

Opinion

[illegible]

[illegible]

[illegible]

[illegible]

No bill of exc.

file —

Nov [illegible] 1865 —

(Reported)

Reversed

2 - 3

22

Hiram Boren

vs

A. C. Bartleson

1864

Error to P.

Opinion, Reid, C.J.

Abst & argument of

counsel & Reporter

April 2d 1866 —

8668