

8803

No. _____

Supreme Court of Illinois

Thomas P. Ayres

vs.

Robert R. Kelly

71641  7

Be it remembered that heretofore to-wit, on the 22^d day of January 1849 Robert R. Kelly made and filed in the Clerk's office of the Williamson County Circuit Court the following affidavit to-wit,

Robert R. Kelly }
 vs }
 Thomas P. Agnes } Jurseps vs Amos Damage \$1000.

April Term of the Williamson
 Circuit Court 1849

Be it known that on this day January 22^d AD 1849 personally appeared before the undersigned Clerk of the Circuit Court in and for the County of Williamson and State of Illinois Robert R. Kelly and after being duly sworn according to law made oath that he is about commencing an action of Jurseps vs Amos against Thomas P. Agnes of the County and State aforesaid for that the said Thomas P. Agnes did on the 18th day of January AD 1849 at the County of Williamson and State of Illinois without any just Cause or Provocation make divers assaults upon the person of the said Robert R. Kelly and then and there with his fists and a large and dangerous knife did inflict various bruises wounds and lacerations upon the person of the said Robert R. Kelly and then and there with the said knife did cut stab and wound the said Robert R. Kelly in a most brutal and shocking manner in so much that the said Robert R. Kelly's life was for a long while almost despaired of. This deponent further states that he expects to recover of and from the said Thomas P. Agnes in said suit for the wrongs aforesaid a large amount of damages to-wit the sum of one

Thousand dollars and further states that he fears and believes that the benefit of whatever Judgement he may recover in the said action for the wrongs and injuries aforesaid will be lost unless the said Thomas P. Byrnes be held to bail as the law directs in such cases and further this Deponent doth not

Sworn to and subscribed
before me the day and year
above written

Robert R. Kelly

John J. Hudson Clerk circuit court

And afterwards to wit, on the 22nd day of January 1849 the said Robert R. Kelly sued out of the Clerks office of said County the following writ of Capias Adrespondendum which is in the words and figures following to wit,

State of Illinois }
Williamson County } Set

The People of the State of Illinois,
to ~~any~~ the Sheriff coroner or any Constable of said County Giving the command you to take the body of Thomas P. Byrnes if he be found in your County and him safely keep so that you have him before our Circuit Court on the first day of the next Term thereof to be commenced and holden at the Court House in the Town of Marion on the 2nd Monday in April next then and there to answer Robert R. Kelly of a plea of Trespass Vi et Armis to the damage of the said Plaintiff of one thousand dollars as he alleges and herein fail not at your peril and hereof make due return to our said Court as the law

Records from
Williamson

Kelly
u
Agnes }

Directs

Witness John T London Clerk of
Said Court and the Judicial seal thereof at
Marion this 22^d day January AD 1849

John T London clk

It is ordered that the Defendant may be held to
bail in the sum of five hundred dollars

John T London clk

And afterwards to wit on the 24th day of January 1849
Joel Hufstutter Sheriff of said County of Williamson
made the following return upon the aforesaid writ
to wit, Execute the within by arresting the within
D V Ayres and taking bail for the amount
Specified this January 24th 1849
J Hufstutter Sheriff

And afterwards to wit on the 24th day of January
1849 Joel Hufstutter Sheriff filed in the Clerks office
of said County the following Bond to wit,

State of Illinois }
Williamson County } ss

Be it remembered that on the 24th day
of January AD 1849 before the subscriber Sheriff of
said County of Williamson personally appeared J. D.
Ayres J. V. Goddard James Morgan B. H. Ludong and
John Lewis who severally acknowledged them selves to
owe to Robert R. Kelly the sum of \$500 to be levied
upon their goods and chattels lands and tenements to the
use of said Kelly if default be made

in the conditions following to-wit
 Whereas the said Sheriff has this day arrested the said
 T P Byrns who is now in custody upon a writ of
 Capias ad respondendum issued from the Circuit Court
 of said County in a plea of Trespas Vi et Armis
 pending in said Court against him Now therefore if
 the said T P Byrns shall well appear on the first day
 of the next term of said Court then and there to answer
 unto said plea and abide the order of the Court and
 not depart ^{the Court} without leave then this Recognizance to be
 void and of none effect otherwise to be in full force
 and virtue

T P Byrns CD

J J Goddard CD

Taken and acknowledged before James Morgan CD

on the day and Year aforesaid B H Hartong CD

J Hufstutter Sheriff John Davis CD

And be it remembered further that W A Allen the attorney
 for the Plaintiff in this suit filed in the Clerk's Office of
 Williamson County and State of Illinois on the 22^d day
 of January AD 1849 the following Declaration in the
 words and figures following to-wit,

State of Illinois } April Term Williamson
 Williamson County } Circuit Court AD 1849

Robert R. Kelly the Plaintiff in
 this suit complains of Thomas P. Byrns the Defendant in this
 suit who has been arrested &c of a plea of Trespas Vi et
 Armis For that Whereas the said Defendant heretofore
 to-wit on the eighteenth day of January in the year of our
 Lord one thousand eight hundred and forty nine with force

And be it remembered further that on the day and Year last
aforesaid and at the Circuit aforesaid Thomas P. Ayres the
Defendant in the aforesaid cause by Allen & Daugherty his
Attornies came and filed his Pleas in this behalf in the
words and figures following to wit

Thomas P. Ayres

vs

Robert R. Kelly

Trespas

1st And the said Defendant by Allen & Daugherty
his Attornies comes and defends the force and injury
where &c and says that he is not guilty in manner
and form as the said Plaintiff hath above thereof
in his Declaration herein complained against him and
of this he puts himself upon the Country &c

And the Plaintiff doth the like

And Allen for Plff

2nd And the said Defendant for further Plea in
this in this behalf as to the Slabbing Cutting assaulting
beating bruising wounding and ill Treating the said
Plaintiff as in his said Declaration as Specified and
mentioned and as to the Tearing the clothes rending dam-
aging and Spoiling the wearing apparel of the Robert
R. Kelly as in his Declaration mentioned doth
avow here because he says that the said Robert R.
Kelly first before the said Times when &c in said
Declaration mentioned. To wit on the day & Year
there mentioned at &c aforesaid with force and
Arms &c made an assault upon him the said Defen-
dant and would then and there have beat-bruised
wounded and ill treated him the said Defendant

if he had not immediately defended himself against the said Robert R. Kelly. Wherefore he the said defendant did then and there defend himself against the said Plaintiff as he lawfully might for the cause aforesaid and in so doing did necessarily and unavoidably, a little beat bruise wound and ill treat said Plaintiff and rend tear damage and spoil the said apparel in said declaration mentioned doing no unnecessary damage to the said Plaintiff on the occasion aforesaid and so the said Defendant saith that if any hurt or damage then and there happened to the said Plaintiff (Robert R. Kelly) or his said wearing apparel the same was occasioned by the said assault so made by the said Plaintiff on him the said Defendant and in the necessary defence of himself the said Thomas P. Byrnes against the said Plaintiff Robert R. Kelly which are the same supposed trespasses in the introductory part of this plea mentioned and whereof the said Kelly hath above thereof complained against him the said Defendant. And this he is ready to verify &c

Allen & Daugherty for
T. P. Byrnes Deft-

And afterwards to wit on the Eleventh day of ~~Sept~~^{September} 1849 and at the ~~Sept~~^{September} Term of the Williamson Circuit of said year the following motion was entered to wit

Robert R. Kelly }
vs }
Thomas P. Byrnes } Trespass Vi et Armis

And now on this day came the

Thomas P. Ayres defendant in the above entitled cause being first-duly sworn deposes and says that he caused one Joseph Bingham who was in Williamson County in the State of Illinois but who resides as he is informed in Morgan County State of Ohio to be subpoenaed in this cause to attend at this term of this Court - to testify on his behalf. That the said witness is not-in attendance at this term of this Court. He expects to prove by said witness that this ~~affiant~~ ^{affiant} in the several alleged supposed trespasses in Plaintiffs Declaration herein, that he this affiant acted in self defence and what he did was in necessary self defence against the said Kelly Plaintiff and that he knows of no other witness by whom he can so fully prove these facts. He expects to be able to procure the evidence of said witness by the next term of this Court & further he swears not-

Subscribed and sworn
to before me this 10th day of
April 1849

J. P. Ayres

John T. London clerk

And afterwards to-wit on the same day this the following order was made and entered of Record to-wit;

Robert R. Kelly }
vs } Trespass vi et armis
Thomas P. Ayres

And now on this day came the parties by their Attorneys and the Defendant Thomas P. Ayres having filed his Affidavit herein, that he cannot safely proceed to trial for the want of material evidence. It is therefore ordered by the Court - that this Cause be continued to the next term of this Court - at the Defendants cost

And also the said Plaintiff was forced and
 obliged to and did necessarily pay lay out
 and expend a large sum of money to wit,
 the sum of one hundred dollars in and about
 endeavoring to be cured of the cuts bruises Stabs
 Soreness wounds and lameness and disorder
 last aforesaid occasioned as aforesaid to wit
 at the County and State aforesaid And
 other wrongs the said Defendant then and
 there did to the said Plaintiff Contrary to
 the form of the Statute in such case made
 and provided and against the peace
 and dignity of the people of the ~~people of~~
 State of Illinois and to the damage of the
 said Plaintiff of one thousand dollars
 and therefore he sues &c

Wm J Allen

Atty for plff

State of Illinois }
 Williamson County }

Set

Williamson Circuit Court
 April Term AD 1849

Plas before the Circuit Court within and for the County of
 Williamson and State of Illinois on the tenth day of Apr
 ril in the Year of our Lord one thousand Eight
 hundred and forty nine

Be it remembered that on the day and Year above
 mentioned and at the Circuit aforesaid the following
 affidavit was made and filed in the words and
 figures following to wit

Thomas D. Ayres }
 Ads }
 Robert R. Kelly }
 Subscribed 2nd day April Term 1849

and prevented from performing and transact-
ing his necessary affairs and business by
him during that time to be performed and
transacted and also thereby the said Plaintiff
was forced and obliged to and did necessa-
-rily pay lay out and Expend a large sum of
Money to wit the sum of one hundred Dollars in
and about endeavoring to be cured of the bruise
Cuts Stabs wounds Sickness Soreness lameness
and disorders aforesaid occasioned as
aforesaid to wit at the County and State aforesaid

And whereas also the said
Defendant with force and arms at the County
and State aforesaid on the day and year
aforesaid made another Assault on the
said Plaintiff and then and there did
beat bruise wound and ill treat him
and also with a certain large and dangerous
Knife did Cut and Stab the said Plaintiff
on divers parts of his body and then and
there Cut Stabbed and wounded the said
Plaintiff in so grievous a manner that
his life was by reason thereof greatly dispa-
-red of And by reason of said Cutting Stab-
-bing beating & wounding the said Plaintiff
then and there became Sick and disordered
and so continued for a long Space of time
to wit, for the Space of four weeks thence next
following and was during all that time thereby
rendered incapable of following and transact-
ing his necessary affairs and business by him
during that time to be done

and arms at the County of Williamson and State of Illinois assaulted the said Plaintiff and then and there with Great force and Violence seized and laid hold of the said Plaintiff and then and there with a certain large and dangerous Knife and with his fists gave and struck the said Plaintiff a great many violent strokes and blows on and about divers parts of his body and then and there with the said large and dangerous Knife severely stabbed and cut the said Plaintiff on and about divers parts of his body. And also with Great force and Violence shook and pulled about the said Plaintiff and cast and threw the said Plaintiff down to and upon the ground And then and there violently kicked the said Plaintiff and gave and struck him a great ^{many} other blows and strokes And also then and there with Great force and Violence rent toward and damaged the clothes and wearing apparel to wit one coat one waist coat one pair of breeches an cravat one shirt one pair of stockings and one hat of the said Plaintiff's of Great value to wit of the value of fifty dollars. Which the said Plaintiff then and there wore and was clothed with By means of which said several premises the said Plaintiff was then and there greatly hurt cut bruised and wounded and became and was sick sore lame and disordered and so remained and continued for a long space of time to wit for the space of four weeks thence next following during all of which time the said Plaintiff thereby suffered and underwent Great pain and was hindered

parties by their Attornies and the Council
for the plff moved the court - to strike
the 2nd plea filed herein from the files which
motion is by the court overruled

And afterwards again on the
same day came the Defendant Thomas P
Agus and made & filed the following affida-
vit to wit,

Robert Kelly }
as } Juror
Thomas P Agus }

Thomas P Agus being
first duly sworn deposes and says that the
Plaintiff Robert Kelly is so unsettled as to
endanger the officers of this Court with respect
to their legal demands and also he fears that
he said plff is unable to pay the costs
of this suit & further he with not - he
subscribed and sworn
to before me this the 11th day of September 1849

J. P. Agus

John T. Gordon CLERK

And afterwards again on the same day this the follow-
ing rule was entered To wit,

Robert R Kelly }
as } Juror
Thomas P Agus } Vict Armis

And now again on this day

Came the parties by their attorneys and upon affidavit of the Defendant a rule nisi is granted to give security for cost or show cause

And afterwards again to wit on the same day the following order was made to wit,

Robert R. Kelly }
 Thomas P. Ayres } Juspro & et alius

And now again on this day came the parties by their attorneys and upon hearing of the rule nisi filed herein to give security it is considered by the Court that sufficient cause is shown and the rule discharged

And afterwards again to wit on the same day came the Plaintiff Counsel and filed ^{his} application herein (to wit)

R. R. Kelly }
 T. P. Ayres } Juspro
 Sept-Term Western Circuit Court AD 1829

And the said plff by his attys as to the plea of the said Plaintiff by him secondly above pleaded says per claudi non because he says that the said Defendant at the time when &c in said plea mentioned committed said assault upon him the said Plaintiff and then and there stabbed cut assaulted beat bruised and tore the clothes and wearing apparel of him the said Plaintiff

without this that he the said Plaintiff at the time when &c in said plea mentioned, with force and arms made an assault upon him the said Defendant and would then and there have beat bruised wounded and ill treated him the said Defendant if he had not immediately defended himself against the said Plaintiff and of this he puts himself upon the country &c

And the Defendant }
doth the like }

Montgomery Allen
for self

Allen & Daugherty }

And afterwards to wit on the same day this the following order was made to wit

Robert R. Kelly }

Thomas P. Ayres }

Leopold Viet Arms

And now on this day came as well the Plaintiff by W. I. Allen & Montgomery his Attornies and the Defendant by Allen & Daugherty his Attornies and issue being joined upon the several pleas filed herein let a Jury come and there upon came the Jurors of the Jury to wit John K. Dillard John C. Norris William B. Cram H. R. Hendrickson J. C. Parks Thomas L. Davis George W. Russell Hugh Hicks Isham Fuller John Phillips Lewis Calvert and Caswell Russell twelve good and lawful men of the County who being elected tried and sworn the truth to speak upon the issues joined do say we of the Jury find the defendant ^{Guilty} and assess the Plaintiffs damages at \$55.33 cents

Motion for new trial entered

Robert R. Kelly }
 vs }
 Thomas P. Ayres } Trespas Vt Arms

And now on this day came
 the Defendant by Daugherty & Allen his attys
 And moved the Court for a new trial and
 arrest of Judgement herein

Motion withdrawn

Robert R. Kelly }
 vs }
 Thomas P. Ayres } Trespas Vt Arms

At this day the counsel
 for the Defendant withdrew the motion herein for
 a new trial &c It is therefore considered by the
 Court that the Plaintiff recover of the Def-
 endant the sum of \$ $55 \frac{55}{100}$ in manner and
 form as asseped by the Jury together with
 his proper costs and Charges by him about
 his suit in this behalf expended and
 the Defendant in murey &c

And afterwards to wit on the same day
 the following order was entered To wit

Robert R. Kelly }
 vs }
 Thomas P. Ayres } Trespas Vt Arms

And now on this day came
 the parties by their attorneys and the Counsel for
 the Defendant prayed an appeal to the Supreme Court
 which said prayer is allowed by the Defendant entering
 into bond within twenty days with James Morgan or B. A.
 Furlong securities in the sum of one hundred dollars

The counsel for the Defendant filed in the cause
 herein this his following bill of exceptions (to-wit),

Robert Kelly)
 vs)
 Thomas D Ayres) Indorsed

Be it remembered that
 on the Trial of this cause at Marion
 in the State of Illinois on the 11th day of
 September 1849 before the Hon^{ble} Mr A. Dening
 Judge. the Defendant Thomas D Ayres by
 his Attorney before the commencement of
 the trial in this cause. entered his motion
 to withdraw his plea of not guilty filed herein
 which motion the court overruled, and would
 not allow him to withdraw his said plea of
 not guilty. To which opinion of the court
 in overruling his motion to withdraw his said
 plea of not guilty filed herein.. the defendant
 by his Attorneys excepts. and prays that
 this his bill of exceptions may be signed
 sealed and made a part of the record
 in this cause all of which is ~~done~~
 accordingly done &c

W A Dening Deal

And again on the same day
 and at the filing of the above, the following
 was also filed as follows (to-wit)

Robert Kelly }
 vs }
 Thomas D. Agnes } Ind. pass

Be it remembered that on the trial of this cause before the Honorable Mr. a Senior Judge, at Marion in Williamson County State of Illinois on this the 11th day of September 1849 The defendant by his attorneys asked the Court to instruct the Jury, as follows to wit

" That if the Plaintiff committed the first assault, the verdict should be not guilty "

" That if Kelly assaulted Agnes as is alleged in defendants 2nd plea the verdict should be not guilty "

Which said instructions the Court, refused to give to the Jury to which opinion of said Court in refusing to give said instructions to the Jury the defendant by his attorneys excepts;

That, on the Trial of this cause, the defendant asked and obtained from the Court, the following instructions to the Jury in this cause to wit;

" That although the Jury may believe
 " from the testimony that Kelly committed
 " the first assault, Yet if they further
 " believe from the evidence that Agnes carried
 " his resistance further than was necessary for his
 " self defence he was not justified in

"So doing, and if the Jury so believe
 "they will find a verdict for the
 "Plaintiff

That the said last above
 mentioned instruction so asked by
 said Plaintiff was upon the trial
 of this cause given by the Court, to the
 Jury. To the opinion of the said Court,
 in giving said instruction, the Defendant
 also by his attorney's excepts. and
 prays the Court to sign seal and make
 this his bill of exceptions a part of the
 record in this cause all of which
 is accordingly done &c

W^m A. Fleming Clerk

And afterwards again on the fifteenth
 day of September AD 1849 The Defendant
 Thomas P. Ayres executed and filed in
 the Circuit Clerk's office of Williamson
 County the following bond (to wit)

Know all men by these presents
 that we Thomas P. Ayres principal
 and James Morgan and B. H. Hurlong
 security are held and firmly bound unto
 Robert R. Kelly in the penal sum
 of one hundred dollars for the
 payment of which well and truly
 to be made we bind our selves our heirs

Executors and administrators Jointly and severally firmly by these presents, signed with our hands and sealed with our seals this 13th day of September AD 1849

The condition of the above obligation is such that whereas the said Robert R. Kelly did at the September Term of the Williamson Circuit Court in the year of our Lord 1849 before the Hon^{ble} William A. Lening Judge of said Court receive a Judgment against the above bounden Thomas P. Ayres in an action of Trespas, for the sum of thirtythree and thirtythree Principal and Costs of said and whereas the said Thomas P. Ayres hath prayed an appeal to the Supreme Court of the said Cause which hath been granted Now if the said Thomas P. Ayres shall well and truly pay the Judgment Costs interest and damages in case the Judgment shall be affirmed in the supreme court and shall duly prosecute his said appeal then this obligation to be void otherwise to remain ~~in force~~ in full force and virtue

Signed sealed and delivered
in presence of me this
September 15th AD 1849

John T. Loudon Clerk

T P Ayres Seal
James Morgan Seal
B F Hurlong Seal

State of Illinois
Williamson County

I John T. Loudon Clerk of
the Circuit Court in and for the County of

Williamson and State of Illinois do hereby
 Certify that the above and foregoing is a true
 and perfect copy of the Record and Proceedings
 in the of Robert R Kelly against Thomas J
 Ayres as appears by ^a reference to the files
 and records of my office

Given under my hand
 and official seal at
 Office in Marion this
 19th day of October A.D. 1849

John J. Loudon *clerk*
J. J. Loudon

4

Wm. P. Rogers

as

Robert R. Key

Ever from Williamson

8803

849

Box 20
Southern

Frid 25th Oct 49

A. L. Croston

CLR

At a Supreme Court, began and held at *Mt. Vernon* Springfield, on Monday the *12th* day of *December*, in the year of our Lord one thousand eight hundred and *forty nine*, to wit: On *Wednesday* the *21st* day of *November* in the year of our Lord one thousand eight hundred and *forty nine*

Present, the Honorable SAMUEL H. TREAT, Chief Justice.
" " JOHN D. CATON,
" " LYMAN TRUMBULL,

Thomas P. Agnes

vs.

Robert R. Kelly

Error to Williamson

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion, that in the record and proceedings aforesaid, and in the rendition of the *judgment* aforesaid, there is manifest error: Therefore it is considered by the Court, that for that error and others in the record and proceedings aforesaid, the *judgment* of the Circuit Court in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Circuit Court for such other and further proceedings as to law and justice shall appertain. The whole with the costs against the said

Opinion of the Court by Chief Justice Treat.

This was an action of trespass for an assault and battery. The defendant pleaded not guilty, on which issue was taken; and on assault demerise, to

which the plaintiff replied de injuria. previous to the trial the defendant asked leave to withdraw the plea of not guilty, which the Court denied. On the trial, the Court refused to instruct the jury, "That if the Complainant committed the first assault, the verdict should not be guilty" but instructed them, that if the defendant carried his resistance further than was necessary, in self defence they should find for the plaintiff. It is insisted that, under the issue formed in the case, the defence was complete on proof that the plaintiff committed the first assault, although the defendant may have used more force than was necessary to repel it. There are some authorities that favor this view of the case, but the better opinion seems to be that the plaintiff may, under the application of de injuria to the plea of non assaut de mense, and without a special application or a new assignment, show that the defendant's battery was excessive. It is so laid down in 2^d Greenleaf, Ev., Sec. 95. 1st Stephens' N.P. 216, and 1st Chitty, pl. 626, 10. American Edition and expressly decided in the cases of Fisher vs. Bridges 4 Blackford, 518, and Curtis vs. Carson 2, New Hampshire 539, in Burnet vs. Appleton, 25th Wendell, 378 it was held in an action of assault and battery where Walter Marmis impersonis was pleaded, that the plaintiff could under the application de injuria recover damages for an excess of force on the part of the defendant. In Harmen vs. Eeles, 15 Massachusetts, 327 when the defendant to an action for an assault and battery, that as a Master of a vessel he moderately chastised the plaintiff one of the crew of the ship, for a wilful disobedience of orders, to which the plaintiff replied de injuria, the Court held that it was competent for the plaintiff to prove that the beating

was excessive and beyond all proportion to the offence committed; These Cases are not distinguishable in principle from the one before us. The replication *de injuria* is a general traverse of the whole plea, and undia it, the plaintiff is at liberty is at liberty to adduce any proof that tends to disprove any of the facts alleged in the plea. It is only when the plaintiff seeks to introduce new matter which shows that the facts stated in the plea, though true do not justify the trespass, that he is required to apply specially or *new assign*. 2^d Greenleaf's Ev. L. 533. The plea in this case, pursuing the form in 3^d Chitty's pl., 1168, alleges that the defendant committed the act complained of in self defence, "necessarily and unavoidably", and did "no unnecessary damage to the plaintiff." 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 executed the averment fails, and with it the defence, there was no error in the instructions of the Court. We think however that the Court erred in not allowing the defendant to withdraw his plea. The plaintiff has an unqualified right to dismiss his whole Case or any Substantive Cause of action stated in his declaration. The rights of the parties should be reciprocal. The defendant should be permitted to abandon his whole defence or any distinct part of it. This is a matter of Course. The Court has no discretion over it. Now the plaintiff can be injured by the Unconstitutional withdrawal of a plea, we are at a loss to conceive. In this Case it removed the burden of proving his Cause of action. It was insisted on the argument,

that the defendant was not prejudiced by the refusal of the Court. That may be otherwise. His object in withdrawing the plea, may have been to dispense with the further attendance of the witnesses, relied on to prove the cause of action, and thereby diminish the amount of costs which he might be adjudged to pay.

The judgment of the Circuit Court is reversed with costs; and the Cause is remanded for further proceedings.

Caton, Justice, said:

I am not prepared to concur in reversing this judgment —

I, Timothy D. Preston, Clerk of the Supreme Court of the State of Illinois do hereby Certify that the foregoing is a true Copy of the final order and opinion of the above entitled Cause of record in my office.

In Testimony Whereof I have hereunto set my hand and affixed the Seal of the said Supreme Court at the Court room in St. Vernon on the 20th day of January, A.D. 1850.

Timothy D. Preston, Clerk
Sup. Court. —

Supreme Court.

Thomas J. Ayres

W. M. Everett Williamson

Robert R. Kelly

Amel order to opinion

49

8803

Thomas T Ayers

vs

Robert H Helly

} appeal from Williamson

This was an action of trespass
assault & battery. The defendant, pleads pleas not guilty
2nd law assault - time before the trial of this cause
defendants - moved the Court for leave to withdraw his
plea of not guilty, refused by the Court. That verdict and
judgment, for \$33.33. damages for plaintiff.

Error assigned

1st The Court erred in refusing to allow deft to withdraw
his plea

2nd The Court refused proper instructions for deft

3rd The Court gave improper instructions for plff

1st Error assigned

The Motion to withdraw a plea is a motion
of course see 1st Lidds Traction p 674

2nd & 3rd Errors assigned

see 2nd Greenleaf Evidence p 533, p 534,
p 534, p 539

If the defendant justifies in an action of trespass and
the plaintiff relies on any fact or circumstance
which either depreciates the defendant of the justification
or the plaintiff must reply it - especially instead of replying
de injuria sua &c because such fact or circumstance
cannot be given in evidence under the plea de injuria

see also 2nd Starkie Evidence p 825

1 Chittypin Thady p 592 593. and 414

2nd Campb. 529

15- Massachusetts Rep 347.

Thomas J. Lyons

pro

Dr. W. W. W. W.

admission.

803

Thomas T Ayers
vs
Robert H Kelly

appeal from Williamson

And the said Thomas T Ayers by Danyshy his atty comes into Court and says that in the record and proceedings - aforesaid as also in the rendition of Judgment there is manifest error in this to wit: 1 That the Court erred in giving the instructions following to us:

"That although the jury may believe from the testimony that Kelly committed the first assault, yet if they further believe from the evidence that Ayers carried his resistance further than was necessary for his self defense his case was justified in so doing & if the jury so believe they will find a verdict for the plaintiff"

2nd There is also error in this, that the Court refused to give for D^{ft} the following instructions viz That if the plaintiff committed the first assault, the verdict should be for the defendant.

That if Kelly assaulted Ayers as is alleged in defendants 2nd plea the verdict should be for the plaintiff.

3rd There is also error in this that the Court overruled defendants motion for a new trial motion to withdraw the plea of not guilty in this case by them filed herein.

found in error I Danyshy atty for T T Ayers
R Fox Wright atty for d^{ft} in error

1 Lidd Instruction 576 & 488

2 Greenleaf Ev p 589 D 653 page 590 & 634

2nd 2: 2 Starkes Evidence p 1534 note A.

1 Chetty on Pleading pag 392. & 673 - 414

15 Map Rep p 349

Agnes }
as }
Kelly }
Williamson }

Agnes
Error,

Filed 15th Nov. 1849

F. D. C. Preston, Clerk

1849