

13925


No. _____

Supreme Court of Illinois

Hardin.

vs.

Ornsley

71641  7

Supreme Court---Second Grand Division.

ABSTRACT.

JANUARY TERM, 1860.

THOMAS OUSLY, sr., and
WILLIAM OUSLY, jr.,
vs.
VICTOR M. HARDIN. } *Appeal from Adams.*

This is an action of trespass commenced to the Sept. term, 1857, of the Pike Circuit Court, by appellee against appellant and four others.

The declaration charges the defendants with an assault and battery on plaintiffs. Service on appellants only, who appeared and pleaded the general issue. The venue was subsequently changed to Adams, where the cause was tried at the March term, 1859; verdict and judgment against appellants for \$600.

The bill of exceptions shows that on the trial plaintiff produced evidence tending to show that defendants charged him with having stolen, from one of the defendants, money and a watch, and that they tied him up and whipped him to get the same back.

The plaintiff proved, on the trial, by three witnesses that before and about the time of said whipping he was out of his right mind, and at times wild and crazy.

Defendants proved, by one witness, that he knew plaintiff about that time and frequently conversed with him and found him rational and intelligent as ordinary persons, and did not discover any weakness of mind or insanity. It was also in proof that plaintiff had some relatives in the neighborhood where defendants resided, and came there about five or six months before the whipping, and that Thos. Ously, sr., sometime prior to the whipping, said that plaintiff was not as crazy as he let on to be, and that a good licking would do him good. Plaintiff, when whipped, admitted he had stolen the money and watch. This was all the evidence to show appellant's knowledge of plaintiff's condition of mind. The court, at the instance of plaintiff, among other instructions, gave the jury the following:

To the giving of which last instructions the defendants at the time excepted.

There was no other instructions on either side in any manner qualifying, the sixth instruction being the one last above copied.

Defendants moved for a new trial for the reason that the court gave for plaintiff improper instructions. The motion was overruled and defendants excepted, and now assigns for error that the court gave improper instructions for plaintiff, and that the court erred in refusing a new trial.

C. L. HIGBEE,

Attorney for Appellant.

BRIEF FOR APPELLANT.

The plaintiff's intellect ought not to influence the jury in the amount of damages they should assess against defendants for the assault and battery. Jurors should not be governed in assessing the damages in a case like this, either by sympathy for plaintiff or prejudice against defendants, and the last instruction tended to excite both. Even if it was proper for the jury to consider the weakness of plaintiff's intellect, the instruction should have been so qualified as to require the jury to believe from the evidence that such fact was at the time known to defendants.

McNamara v. King, 2 Gil., 435; Blanchard, *et. al.*, v. Morris, 15 Ill., 45; Cockran v. Ammon, *et. ux.*, 16 Ill., 317; 4 Cush., 274.

C. L. HIGBEE,

For Appellant.

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Quisly

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SUPREME COURT, JANUARY TERM, 1860.

THOMAS OWSLEY,
vs.
VICTOR M. HARDIN. } Appeal from Adams.

Brief of points for Appellee.

The judgment in this case was rendered upon the most abundant evidence that appellant, with others, had committed a very brutal assault and battery, in cool blood upon appellee. The battery was perpetrated on a hot day in July by beating appellee and attempting to hang him. Its severity was evidenced by the gangrened mark of a rope around appellee's neck and similar gangrened marks on other parts of his person remaining plainly visible for weeks after the battery.

The case was tried before a jury in a county where the parties were all strangers.

The only point made as we understand it, is that it was error in the circuit court to instruct the jury that if they found from the evidence that appellee was insane or of weak mind, that was proper to be taken into consideration in assessing damages. The evidence shows that appellee was insane and that one of defendants below had said that he was not as crazy as he let on, and that a whipping would do him good.

We refer to following authorities on the question raised by this instruction. Peoria Bridge Co. vs. Loomis, 20 Ills. 251. Blanchard vs. Morris, 15 Ills. 35. McNamara vs. King, 2 Gill. 632, 18 Ills. 336, 11 Maryland 536, 18 Ills, 416.

Mental anguish and wounded feelings to be considered. West et. ux. vs. Forrest, 22 Mo. 345.

Right to prosecute criminally is not to affect amount of damages. McWilliams vs. Bragg, 3 Wisconsin 430.

WILLIAMS, GRIMSHAW & WILLIAMS.
For Appellee.

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Hardin

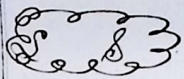
adv

Owsley

Grief

Filed Jan 16. 60
Wm H. H. H. H.
cll

in Pittsfield on the first Monday in the month of
September next. to answer to Victor M. Gardin in an
action of Trespass to his damage two thousand dollars
as he says. and have you then and there this writ:
Witness Wm. R. Archer clerk of said Court, at the Court
house this 22d day of July A. D. 1857. the seal of said
Court being hereunto affixed.



Wm. R. Archer clerk

and afterwards said summons was returned
into said court with the following endorsements thereon

Served the within by reading the same to
the within named Thomas Owsley the 30th day of July
1857

W. S. Dennis Sheriff P. C. Ill.

By Geo. Carrol Deputy

I cannot in my county find the within named
Thomas Owsley. Dors. William Owsley Henry Spires
William Owsley or Joseph Johnson. this 8th day of August
1857

W. S. Dennis Sheriff P. C. Ill

By George Carrol Dept

And afterwards to wit. on the 27th day of
August A. D. 1857. comes said Plaintiff by his attorney
and files his declaration herein in the words and
figures following to wit:

In the Circuit Court of Pike County
Illinois, of the September Term A. D.
eighteen hundred and fifty seven.

Thomas Owsley Dr. Thomas Owsley Dr. William Owsley

Wm. R. Archer Clerk

provided

Wm. Sibley Esq

The said bill of Exceptions has been submitted to us
is correct and may be signed by Judge Sibley & when
signed filed as of day of rendering Judgment
13 May 1859

Williams Grimshaw & Williams

for plff

And afterwards, to wit on the 7th day of May
A.D. 1859 come said defendants by their attorneys
and file their Appeal Bond in the words and
figures following to wit:

Know all men by these presents, that we Thomas
Owsley sen. and William Owsley, and Martin Wapps
and Samuel Wapps of the County of Pike and State of
Illinois are held and firmly bound unto Victor M.
Heardin of the County of Mc Donough and State of
Illinois in the penal sum of one thousand dollars
current 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 at the Clerks office in Quincy this seventh
day of May A.D. 1859. The condition of the above obli-
-gation is such, that whereas the said Victor M. Hear-
-din did on the 25th day of April in the year of our
Lord one thousand eight hundred and fifty nine,
in the Circuit Court, in and for the County of Adams
and State of Illinois, recover a judgment against

the above bounden Thomas Owsley sen and William Owsley for the sum of six hundred dollars damages and costs from which said judgment of the said Circuit Court, the said Thomas Owsley sen, and William Owsley have prayed for and obtained an appeal to the Supreme Court of said State. Now if the said Thomas Owsley sen, & William Owsley shall duly prosecute their said appeal with effect, and shall moreover pay the amount of the judgment, costs, interest, and damages rendered and to be rendered against them, in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

Taken and entered into, } Thomas Owsley *TD*
before me, at my office in } William Owsley *TD*
Quincy this 7th day of } Martin Kapps *TD*
May A. D. 1859- } Samuel S. Kapps *TD*
Attest, Thos. W. Macfall, clerk.

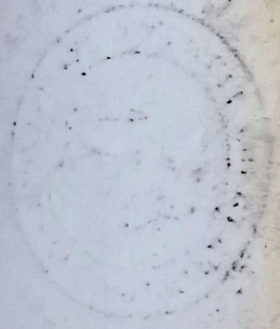
State of Illinois }
Adams County }
I Thomas W. Macfall clerk of the Circuit Court of said County do hereby certify that the within and foregoing is a true, full, perfect and complete Transcript of the record and proceedings in the above entitled cause in said Circuit Court. Witness my hand and the seal of said Circuit Court, at Quincy, this 15th day of December A. D. 1859
Thos. W. Macfall, clerk.



And the said appellant now comes and
for assignment of error in the above
case says there is manifest error
in said record in this

- 1 The Court admitted improper evidence
on the trial of said case against
appellant
 - 2 The Court gave improper instructions
to the jury in behalf of appellee
 - 3 The Court refused to give proper
instructions for appellant
 - 4 The Court erred in refusing a
new trial
- 5 The judgment is informal and
insufficient - By reason of which
several errors appellant prays
that said case may be removed
in this Court
- C. L. Higbee
Atty for appellant

Thomas Cusly
148 vs.
Victor M. Hordie
Appeal from Adams



13925

Filed Jan 5: 00
Wm. E. Murray
at

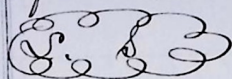
1/27/00

Henry Spires, William Cowsley, and Joseph Johnson were summoned to answer Victor M. Gardin, in a plea of Trespass, and thereupon the said Plaintiff by Gilmer & Weed, his attorneys complains, for, that, the said defendants heretofore to wit on the 5th day of July A. D. 1857 at and within the County of Pike and State of Illinois, with force and arms, in and upon the body of him the said Plaintiff did then and there make an assault, and him then and there beat, strike, wounded and bruised, and then and there with great violence, did throw the said Plaintiff upon the ground, and him then and there did grievously beat and bruise, as well by striking the said Plaintiff with the hands as with the feet of the said defendants, and then and there with great cruelty and violence, did hang the said Plaintiff by the neck, until his life was greatly despaired of, and other wrongs to the said Plaintiff then and there did, to the great damage of the said Plaintiff and against the peace and dignity of the people of the state of Illinois - wherefore the said Plaintiff saith he is injured and hath sustained damage to the amount of two thousand dollars, and therefore he brings his suit to,
Gilmer & Weed & M. Kay p.p.

And afterwards to wit on the 26th day of January A. D. 1858 an alias summons, was issued out of the office of the clerk of said Court, in the,

words and figures following to-wit:

State of Illinois
Pike County ^{3⁰⁰}
The People of the State of Illinois
do the Sheriff of said County Greeting
We command you, as we have before commanded you
to summon Thomas Owsley senior, Thomas Owsley Junior
William Owsley, Henry Spires, William Owsley and
Joseph Johnson, if to be found in your county, person-
ally to be and appear before the Circuit Court of said
county, on the first day of the next term thereof, to be
holden at the Court House in Pittsfield, on the second
Monday in the month of March next, to answer to
Victor M. Gardin in Trespass, damages two thousand
dollars, as he says, and have you then there this
writ, and make return thereon in what manner
you execute the same. Witness Wm R. Archer Clerk
of our said court, at Pittsfield, this Twenty sixth day
of January 1858.



Wm. R. Archer, Clerk

and afterwards ~~to~~ with said summons
was returned into said court with the following
endorsements thereon, to-wit
I have served the within summons by reading the
same to the within named Thomas Owsley sen &
William Owsley. February 22^d. 1858.

W. S. Dennis Shff P. C. Ill

By Geo. Barrel Dep

I cannot in my county find the within named William
Owsley & Joseph Johnson March 2^d. 1858.

W. S. Dennis Shff P. C. Ill

at return this writ without service as to Thomas
Owsley Sr. & Henry Spires. by order of Plaintiffs atty
March 2d. 1858 W. S. Dennis Sheriff P. Co. Ill

And afterwards to writ on the 15th day of
March A.D. 1858 come the said defendants Thomas
Owsley Sr. and William Owsley Jr. by their attorneys
and file their plea herein in the words and figures
following to wit:

And now comes the said defendants
Thomas Owsley Sr. and William Owsley Jr. by their
attorneys and defend the force and injury when &c
and say the Plaintiff his action aforesaid ought not
to have and maintain against them because they
say that they are not guilty of the said supposed
trespasses above complained of in manner and form
as said plaintiff in his said declaration hath
complained against them and of this they put them-
selves upon the country.

Highlee & Heaps

And ptff doth the like

Gilmer & Hay

and afterwards, to writ on the 11th day of Sep-
tember A.D. 1858, ^(a petition was filed and) an order was entered of record in
said Circuit Court of Peire Co. which ^(petition & order) order is in words
and figures following to wit:

To the Honorable
Circuit Court of said County -

Your Petitioners Thomas Owsley Jr. and William Owsley respectfully represent that they fear they will not receive a fair trial in said county in said cause on account that the inhabitants of said county are prejudiced against these petitioners so that they cannot and do not expect a fair trial in said county. Petitioners therefore pray that the venue of said cause may be changed to some county where said cause does not exist. your petitioners further state that the knowledge of the existence of such prejudice so that they cannot receive a fair trial in said cause has come to the knowledge of petitioners and of each of them for the first time since the commencement of the present term of this court, and petitioners state that they make this application with the consent of all the parties defendants to this suit;

Thomas Owsley
William Owsley

State of Illinois
County of Pike William Owsley & Thomas Owsley
being first duly sworn doth severally depose and say each for himself that the above and foregoing petition and the matters therein stated are true in substance and in fact
subscribed and sworn to
before me this 11th day of
Sept 1858. Wm. R. Archer clerk.

Thomas Owsley
William Owsley

This day came Thomas Owsley

senior and William Owsley two of the defendants herein and entered a motion upon petition verified by affidavit praying a change of venue herein with the consent of the other defendants, which motion being heard is sustained by the court and by consent the venue in this cause is changed to the county of Adams to the circuit court of which county of Adams the clerk of this court is ordered to certify a transcript of the record and files herein

And afterwards to wit: on the 8th day of April A. D. 1859 an order was entered of record in the circuit court of Adams county in the words and figures following to wit

And now this day came the plaintiff by his attorneys, and the defendants Thomas Owsley senior and William Owsley by their attorneys, the other defendants not having been served with process, and to try the issue joined on the plea of said Thomas Owsley senior and William Owsley, came a jury, to wit: Thomas McLintock, Joshua Rice, Samuel P. Church, William Murphy, James Howard, Christoph Dickhut, Simpson Ormer, Daniel Pile, William Davidson, George Newmann, ^(William Bernard) and John J. Reeder, who being duly sworn well and truly to try the issues joined in said plea, and having heard the evidence and arguments of counsel, retire to consider of their verdict and by consent of parties are permitted after agreeing upon a verdict to seal the same, and separate

and meet the court with such verdict on the morning ensuing the trial of said cause,

and afterwards to wit, on the 9th day of April A.D. 1859 an order was entered of record in said cause in the words and figures following to wit

And now this day again came the plaintiff by his attorneys, and also defendants Thomas Owsley senior, and William Owsley by their attorneys and the said Jury coming into court, upon their oaths do say that they find the issue joined for plaintiff, and that said defendants are guilty of the trespasses alleged in plaintiffs declaration in manner and form as therein is stated and set forth, and that they assess plaintiffs damages by reason of the commission of that trespass at six hundred dollars, whereupon said defendants enter a motion for a new trial—

And afterwards to wit: on the 25th day of April A.D. 1859 an order was entered of record in said cause in the words and figures following, to wit

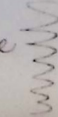
This cause now came on to be heard on said defendants motion for a new trial herein, whereupon all and singular the premises being seen and by the court here now sufficiently understood, said motion is overruled: It is therefore considered that said plaintiff recover of said Thomas Owsley sen. and William Owsley his damages aforesaid in form

aforesaid assessed, besides his costs in this behalf, expended, and that he have execution therefor — and hereupon defendants pray an appeal to the Supreme Court of the State of Illinois, which is allowed on condition that said defendant enter into bond with Samuel Kapps and Martin Kapps as securities in the penal sum of One thousand dollars, conditioned according to law within thirty days from this date — and by consent it is ordered that the bill of exceptions herein may be signed within two weeks from this date and filed as of to-day —

and thereupon said defendant files his Bill of Exceptions signed and sealed, in the words and figures following to-wit,

Be it remembered that on the trial of this cause at the March Term of the Adams Circuit Court A. D. 1859, the said Victor M. Gardin, to maintain the issue on his part gave in evidence to the Jury:—

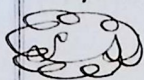
Napoleon B. Gardin being first duly sworn deposes and says that he is the agent of said plaintiff in relation to the prosecution of the aforesaid suit, affiant states that Henry Dickles, William Steele and William Stewart are necessary witnesses for said plaintiff on trial of said cause, and affiant states that said Henry Dickles, William Steele and William Stewart reside in the county of Pike and State of Illinois, wherefore he makes this affidavit for the purpose of taking the depositions of said witnesses.

Subscribed & sworn to before me  N. B. Gardin

this 25th day of February

1859.

Wm. H. Williams



Notary Public.

Depositions of Witnesses, taken on the 14th day of March A. D. 1859, between the hours of ten o'clock A. M. and — o'clock P. M. in the town of Pittsfield in the County of Pike and State of Illinois by Reuben W. Scanland a Justice of the Peace, and by virtue of the within and attached notice, to be read in evidence in a certain suit now pending in the Circuit Court of Adams County in the State of Illinois—described in said notice wherein Victor M. Stardin is plaintiff and Thomas Owsley sr. Dal. are defendants.—

Deposition of William Steele, the said William Steele being first duly sworn doth depose and say in answer to Interrogatory.

Ques. 1. What is your name, age, and place of residence—

Ans. 1 my name is William Steele, about forty eight years old. I reside in Pleasant Hill Township (T. 4 N.) in Pike County, Illinois—

Ques. 2 Are you or not acquainted with Thomas Owsley Sr. Thomas Owsley Jr. William Owsley, Henry Spires and Joseph Johnson, if yea—state where each of them resided in the month of July 1857.

Ans. 2 Yes, I know them all. Thomas Owsley Sr. lived on Six-mile Creek in Pike County Illinois.— Thomas Owsley Jr. lived on six-mile Creek Pike County Illinois. Henry Spires, if it is the Spires that was concerned in that whipping matter, that's the man that I have reference

to. he said on the day of the trial that he was under the employment of Mr. Thomas Owsley, the oldest of the Owsleys. - the old Gentleman's son, William, lived there on the place, the other William Owsley said he lived in Calhoun - I do not know where Joseph Johnson lived

The above answer No 2. objected to by defendants counsel for the reason that it is not the witness answer but that of plaintiffs attorneys -

Ques. 3 Are you or not acquainted with Victor M. Hardin - if yea. state how long you have been acquainted with him -

Ans. 3. As well as I recollect the winter before the July last a year ago. it was the winter before the whipping scrape -

Ques 4. In what month and year did that whipping scrape take place -

Ans. 4. On the year 1857 in July - the above question and interrogatory objected to by defendants attorney

Question 5 State whether you saw the said Victor M. Hardin in the month of July 1857. if so on what day of the month and where -

Ans 5 It was the 6th day of July at Squire Balloways in Pike County. that I see him -

Ques 6 Was or was not Thomas Owsley Sen present at the time

Ans. 6. Yes -

Ques. 7 Did you or not examine the person of said Victor M. Hardin, if yea, state fully what examination you made and what was the appearance of the parts examined -

Ans. 7 I examined his arms and his legs and his breast, his arms had a number of black and blue marks, his arms and legs was very badly abused, as tho he had been badly whipped, and his breast had marks of violence and his neck had red and blue marks on it as tho, it had been abused -

Ques 8 State whether those wounds had the appearance of being recent or not -

Ans 8 They did -

Cross Examination

Question 1 About what age was the Spears that you have reference to in your answer to Interrogatory No 2.

Ans. 1 I should think he was between the age of twenty and twenty five -

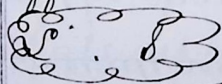
William Steele.

State of Illinois)
County of Pike) I Reuben W. Scanland an acting Justice of the Peace within and for said county and State, do hereby certify that the said witness William Steele, prior to the taking of said deposition and on the 14th day of March A. D. 1859, was by me duly sworn to testify in relation to the matter in controversy in the suit mentioned in the caption of these depositions, so far as he might be interrogated in relation thereto, and that the said deposition was on the said 14th day of March A. D. 1859 at my office

in Pittsfield, taken and reduced to writing by John V. Colvard in my presence and signed and sworn to by said witness in my presence. Given under my hand and seal the 14th day of March 1859-

Reuben W. Scanland J. P.

State of Illinois
County of Pike ^{Co.} I, Strother Grigsby Clerk of the County Court within and for said county, do certify that Reuben W. Scanland Esq whose genuine signature appears to the foregoing and attached certificates was at the time of signing the same, to wit on the 14th day of March A. D. 1859, an acting Justice of the peace, in and for said county, duly elected, qualified and commissioned, and that as such full faith and credit should be given to all his official acts - Given under my hand and seal of said court at my office in Pittsfield this 18th day of March A. D. 1859.



Strother Grigsby clerk

To Messrs Wamont & Wheak

Attorneys for defendants.

you are hereby notified that on the 14th day of March A. D. 1859 the depositions of Henry Sierles, William Steele, and William Stewart will be taken before R. W. Scanland Esq a Justice of the peace in and for Pike county Illinois, between the hours of 8 o'clock A. M. and 9 o'clock P. M. and to continue from day to day until completed, when taken to be read in evidence on behalf of plaintiff in above cause.

Williams Grimshaw & Williams
attys for plff.

Service by Copy accepted this 25th Feb. 1857.

Warren & Wheak

attys for defn

To the introduction of which said deposition and evidence to the jury, the said defendants Thomas Cowsley Sr. and William Cowsley Sr. by their attorneys then and there objected, but the court overruled the said objection and permitted the said deposition to be read in evidence to the jury, to which said opinion and decision of the court in overruling said objection to the introduction and reading of said deposition in evidence to the jury, and in allowing the reading of the same to the jury, the said defendants by their attorneys at the time excepted and still do except.

And be it further remembered, the further to maintain the issue on his part, the said plaintiff offered in evidence the deposition of Henry Dickles.

Depositions of Witnesses, taken on the 14th day of March A. D. 1859, between the hours of ten o'clock A. M. and — o'clock P. M. in the Town of Pittsfield in the county of Pike and State of Illinois by Reuben W. Scanland a Justice of the Peace, and by virtue of the within and attached notice, to be read in evidence in a certain suit now pending in the Circuit Court of Adams County in the State of Illinois described in said notice, wherein Victor M. Hardin is Plaintiff, and Thomas Cowsley Sr. et al are defendants.

Deposition of Henry Dickles. The said Henry

Sicles being first duly sworn, doth depose and say in answer to Interrogatory one-

Ques. 1 What is your name age, and place of residence,

Ans. 1 Henry Sicles is my name. nineteen years old. Six-mile Creek near Mr. Cowsley.

Ques 2 Are you or not acquainted with the parties to this suit, viz: Victor M. Gardin, Thomas Cowsley Sr. Thomas Cowsley Jr. William Cowsley, Henry Spires William Cowsley and Joseph Johnson.

Ans. 2 Yes, I am acquainted with all of them, but Henry Spires I don't know any body by that name-

Ques. 3 State as near as you can what is the age of Thomas Cowsley Sr. and where he resided in the month of July 1857

Ans. 3 I do not know his age, I should think he was about fifty years old; he resided on Six-mile Creek, Pike County, Illinois, Pleasant Hill Township I believe-

Ques 4. State separately where Thomas Cowsley Jr. William Cowsley, Jas. Johnson and William Cowsley resided at that time, and what relationship they bear to Thomas Cowsley Sr. -

Ans. 4 Thomas Cowsley Jr. lived on Thos. Cowsley Sr. place, one of the William Cowsleys lived in Calhoun County, so he said, and the other lived with the old man his father Thomas Cowsley Sr. Jas. Johnson lived I think with William Cowsley in Calhoun. Thomas Cowsley Jr is nephew of Thomas Cowsley Sr. so said to be. Young William Cowsley Jr. is a son of Thomas Cowsley Sr. the other William Cowsley is a nephew of Thomas

Owsley Sr. Jos Johnson I think is a brother-in-law to William Owsley Sr.

Ques 5. State whether or not you were at the residence of Thomas Owsley Sr. in the summer of 1857. if yea. State the month and the day of the month, as near as you can, and how you happened to be there-

Ans 5. Yes sir. I was there on the 5th day of July 1857. I had been home to get my clothes and coming past there I stopped-

Ques 6 State what persons you saw near the residence of Thomas Owsley Sr-

7 I saw Thomas Owsley Jr. and William Owsley Jr. William Owsley Sr. John Spires. Joseph Johnson, Victor M. Hardin James Sicres. I believe that was all.

Ques 8 Did you or did you not see Thomas Owsley Sr. on that occasion, and if yea, where was he-

Ans. 8 He was in his house when I first saw him. I saw him that day-

Ques 9 Now state whether you saw any person on that day whip the said Victor M. Hardin -

As 9 Yes sir I did -

Ques 10. State who were participating in whipping him.

Ans. 10 Wm Owsley Sr. Thomas Owsley Jr. were by, Joseph Johnson & John Spires were by, and I was also present

Ques 11. State whether or not the said Victor M. Hardin was tied at the time the said whipping was being given.

Ans 11 He was not tied when they were whipping him - not as I saw - his hands were tied behind him after they whipped him -

Qnt 12 If you know, state with what he was tied and who tied him -

Ans 12 He was tied with a whiplash. William Owsley Senr. tied him -

Qnt 13 Who furnished the whiplash?

ans 13 I dont know. the first I saw of it they were tying him with it -

Qnt 14. Was or was not, Thomas Owsley Sr. present at the time or near the time of said whipping: if so what did he do -

Ans. 14. I did not see Thomas Owsley at the commencement of the whipping. after they tied him I saw Thomas Owsley Sr. take him and lead him up the road. I did not see the commencement of the whipping and at the time that I first saw the whipping I did not then see Thomas Owsley Sr.

Qnt 15. When you first saw this whipping, how far were said parties from the residence of Thomas Owsley Sr.

Ans 15- They were about fifty yards from the house of Thomas Owsley Sr. when I first saw them -

Qnt 16 Was or was there not anything to obstruct the view from the dwelling house to the place where they were whipping the said Gardin -

ans 16 There was not -

Qnt 17 Did you or not hear Thomas Owsley Sr. instructing William Owsley Sr. how to proceed with said Victor M. Gardin - If you state all the particulars, state fully what he said.

This question objected to by S. M. Hays Esq

Ans 17 Yes Sir. I did. He said get six hickory withs, and wear out five of them on him and against the sixth one was worn out. that he would get the money + watch

Int 18 State whether they did whip him any more after this instruction -

ans 18 I saw William Owsley senr. hit him twice with a switch -

Int 19 When you first got there. were they or not whipping said Victor M. Hardin:

answer They were not

Int 20 what were they doing with him when you first got there

ans 20 William Owsley senr. was holding him by the hand. with a hickory in his hand

Int 21 Did you see Thomas Owsley senr about that time -

ans. I did not.

Int 22 How long after that time before you did see him the said Thomas Owsley senr.

ans 22 I dont know exactly how long it was I think about half an hour -

Int 23 Where did you first see him on that occasion and how far was it from where this transaction took place

ans I first saw him in his dwelling house in the hall where they were tying him -

Int 24 How far was the farthest of these transactions of which you were speaking. from the dwelling house of said Thomas Owsley senr.

Ans 24. About two hundred and fifty or three hundred yards -

Qnt 25 when they first whipped him about how many licks did they give him in your presence and with what kind of an instrument -

Ans They struck him twice with a switch about three or four feet long -

Qnt 26 How far were they at that time from the dwelling house of said Thomas Owsley senr.

Ans 26 They were about one hundred and fifty yards as near as I can guess

Qnt 27 State if you were present at any time after said transactions, when the body of said Victor M. Hardin was examined, if so, state when and where, and state fully the appearance of the body and also of the members of the body -

Ans I was. I saw his legs on the sixth day of July 1857 - at Esq Galloways there were red and blue marks on his legs and thighs. I did not see his body
Examination in chief closed

Qnt 1 Please state, the nature of the difficulty between said William Owsley senr. and the said Victor M. Hardin, or what was he whipping him for.

Ans 1 I do not exactly know what they were whipping him for. They said he had stolen some money and a watch -

Qnt 2 Did or did not said Victor M. Hardin say that that was what they whipped him for, for stealing money + a watch -

Ans 2 He did,

Int 3 At the time you speak of Thomas Owsley senr. leading said Victor M. Hardin up the road. was it or not by the request of the said Victor M. Hardin.

Ans 3 It was -

Int 4. Did or did not said Thomas Owsley senr. refuse several times to go up the road with said Victor M. Hardin before he did go and state for what purpose they went up the road -

Ans I did not hear said Thomas Owsley senr. refuse to go up the road. Victor M. Hardin said he would get the watch and money -

Int 5. Please state if you know the christian name and the age as near as you can of the Spire that was present at the time of the whipping spoken of by you. and for whom did he work at that time -

Ans 5- John Spire is the name he goes by and he must be about twenty three or twenty four years old. I should guess - I think he worked for Thomas Owsley senr.

Cross Examination closed
and Examination in chief resumed

Int 1. What time of the day was it that you got there. when the whipping spoken of by you took place -

Ans It was some time in the afternoon

Int 2 Did you hear those persons who said that Victor M. Hardin had stolen some money and the watch say that they had previously whipped said Victor M. Hardin -

This question is objected to by Mr Keys

Ans 2 I did —

Int 3 State what those persons told Victor M. Gardin they would do with him if he did not tell them where the money and watch were —

This question objected to by Mr Hays
Ans 3 William Owsley senr. said that he would kill him if he did not get the watch and money —

Int 4 Who was present when William Owsley senr. said this to Victor M. Gardin —

ans 4. Thomas Owsley Jr. John Spies. Joseph Johnson. James Sicles and myself and also William Owsley senr.

Int 5 Was this threat made to Victor M. Gardin before he said he would find the watch and money —

Ans 5 No. it was after he said he had taken them —

Int 6 Had the said Victor M. Gardin been whipped or otherwise mistreated before he made that acknowledgment —

ans 6. I cannot say positively that he had, but I think he had been —

Int 7 Do the James Sicles you speak of a brother of yours and did you and he go to Thomas Owsley senr. to participate in said affray, or were you accidentally present —

answer he is — we did not go to said Thomas Owsley senr to take any part in that affray, we just happened along there —

Int 8 Did said Victor M. Gardin state at the time he said he had taken the money and watch that they had,

been whipping him & had hung him, and that he then begged of them not to do so again -

ans 8

Yes sir he said that they hung him three times, and that he had begged them not to do so any more

Ink 9

Now state all that Victor M. Gardin said when he said that they had whipped him and hung him for stealing money and a watch -

ans

He said that he would get the money and the watch if they would not whip him any more

Ink 10.

How far was the dwelling house of Thomas Owsley sen from the place where this conversation took place last mentioned by you -

ans

Not more than twenty yards from his house -

Henry Sickle

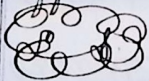
State of Illinois

County of Pike I Reuben W. Scanland an acting Justice of the Peace within and for said county and State, do hereby certify that the said witness Henry Sickle prior to the taking of said deposition and on the 14th day of March A.D. 1859 was by me duly sworn to testify the truth in relation to the matter in controversy in the suit mentioned in the caption of these depositions, so far as he might be interrogated in relation thereto, and that the said deposition was on the said 14th day of March A.D. 1859, at my office in Pittsfield in said County, taken and reduced to writing by me in part and by John J. Collard in part, in my presence, and signed and sworn to by said witness in my presence. Given under my hand

and seal the 14th day of March 1859-

Reuben W. Scanland J.P.

State of Illinois
County of Pike ^{3rd} ss. I Strother Grigsby Clerk of
the County Court within and for said County, do certify
that Reuben W. Scanland Esq whose genuine signa-
-ture appears to the foregoing and attached certificate
was at the time of signing the same, to wit: on the 14th
day of March A.D. 1859, an acting Justice of the Peace
in and for said County, duly elected, qualified
and commissioned, and that as such full faith
and credit should be given to all his official acts -
Given under my hand and Seal of said Court at my
office in Pittsfield this 18th day of March A.D. 1859.



Strother Grigsby Clerk

Edw Mearns & Wm W. W. W. W.

Attorneys for defendants.

You are hereby notified that on the 14th day of March
A. D. 1859 the depositions of Henry Sicles, William
Steel and William Stewark will be taken before
R. W. Scanland Esq a Justice of the peace in and for
Pike County Illinois, between the hours of 8 o'clock
A.M. and 9 o'clock P.M. and to continue from day to
day until completed, when taken to be read in evidence
on behalf of plaintiff in above cause -

Williams Grimshaw & Williams

Attys for plffs

Service by copy accepted this 25th Feb 1857

Mearns & W. W. W.

attys for depts.

to the reading of the interrogatories numbered six, eight, nine, fourteen, seventeen, and twenty one, and the respective answers thereto, in said deposition, to the Jury the said defendants by their attorneys at the time objected, which said objection was overruled by the court, and the said several interrogatories and the answers thereto were permitted to be read and were read by said plaintiffs attorneys to the Jury - to which decision of the court in overruling said objection to, and permitting the reading of said interrogatories and the answers thereto to the jury, the said defendants by their attorneys at the time excepted and now except - and be it further remembered that the further to maintain the issue on his part the said Plaintiff offered to read in evidence to the Jury interrogatories numbered two, three, and eight of plaintiffs re-examination of said witness Henry Seales and of the respective answers thereto in said deposition contained, and that the defendants by their attorneys there at the time objected to the reading of the same to the jury, but the court sustained said objection as to Question + answer Eight and overruled the said objection as to said interrogatories and the answers thereto, designated in said deposition number two and three, and permitted the same to be read to the Jury, to which said ~~objection~~ decision of the court in overruling the said objection, and permitting the said interrogatories two and three and the answers thereto to be read in evidence to the Jury, the said defendants

by their attorneys at the time excepted and now do except - The Plaintiff next read in evidence the deposition of William Stewart, signed Wm. H. H. Stewart without objection -

Depositions of Witnesses, taken on the 14th day of March A.D. 1859, between the hours of ten o'clock a.m. and o'clock p.m. in the Town of Pittsfield in the County of Pike and State of Illinois, by Reuben W. Scandland, a Justice of the peace, and by virtue of the within and attached notice, to be read in evidence in a certain suit now pending in the Circuit Court of Adams County in the State of Illinois described in said notice, wherein Victor M. Gardin is plaintiff and Thomas Owsley Sr. & al are defendants.

Deposition of William Stewart, the said William Stewart being first duly sworn doth depose and say in answer to the following interrogatories.

Int. 1

What is your name, age, and place of residence -

Ans 1

my name, William H. H. Stewart, my age is eighteen years, and I reside in Pike County and State of Illinois -

Int 2

Are you acquainted with Victor M. Gardin, Thomas Owsley senr., William Owsley, Thomas Owsley jr. John Spiro, William Owsley and Joseph Johnson - If you state how long you have been acquainted with all of them

Ans 2

I am acquainted with them. I have been acquainted with Victor M. Gardin about two years - with Thomas Owsley senr. six or seven years or more - with William

Owsley the son of Thomas Owsley senr. six or seven years - with Thomas Owsley junior three or four years with John Spears about two years - with Tom Owsley (who is Thomas Owsleys nephew) about four or five years - and with Joseph Johnson about two or three years or more -

Qnt 3 State whether you were in company with any of those persons named in your former answer. on the fourth day of July 1857. If yea. state which of them and where you were -

Ans 3 I was in company with all of them except Thomas Owsley senr. at Martin Fumbar house in Pleasant Hill Township about one mile and a half south of Pleasant hill -

Qnt 4. State what those persons in whose company you say you were. did with, or to the said Victor M. Gardin -

Ans 4 They did not do any thing with him that day that I know of.

Qnt 5 Did you hear them on that occasion. at that time and place make any arrangements to do any thing with said Gardin - and if so what were those arrangements -

Ans 5 I heard William Owsley. that is the son of Thos. Owsley. say or tell the other William Owsley. that if he would get the money he should be well paid for it and that he could take his pay out of the money. the other William Owsley told Thomas Owsleys senr. son William Owsley that he would get the money or thrash Victor

M. Hardin nearly to death -

Qnt 6 was any thing else agreed upon at that time, if so what was it

Ans 6 I do not know of any thing else -

Qnt 7. was Victor M. Hardin present, at the time that said conversation was going on -

Ans 7 He was not -

Qnt 8 after this conversation where did the parties you have spoken of, go -

Ans They went to Thomas Cowsley senior -

Qnt 9 What day of the month and about what hour of the day did they go up to Thomas Cowsley's senior -

ans 9 On the 11th day of July 1857 and they got there about between one and two o'clock in the afternoon

Qnt 10 Did they to your knowledge tell, or did Victor M. Hardin know of the plans they had formed against him -

Ans 10 They told me not to tell him. I do not know whether he knew or not -

Qnt 11. Did or did not said Victor M. Hardin go along with them of his own accord or did they invite him to go with them -

ans They invited him to go with them. I do not think he went with his own accord. He stopped in Pleasant Hill and they stopped and called him and told him to come on -

Qnt 12 How far is the house of Martin Swinbo, from the house of Thomas Cowsley senior.

ans 12. I should think about two and one half miles or three

miles —

All the foregoing questions objected by Mr Hays.

Wm. H. H. Stewart

State of Illinois

County of Pike

I Reuben W. Scanland an acting Justice of the Peace within and for said county and State. do hereby certify that the said Witness Wm. H. H. Stewart prior to the taking of said deposition and on the 14th day of March A. D. 1859. was by me duly sworn to testify the truth, in relation to the matter in controversy in the suit mentioned in the caption of these depositions so far as he might be interrogated in relation thereto, and that the said deposition was on the said 14th day of March A. D. 1859. at my office in Pittsfield, in said county, taken and reduced to writing by me and signed and sworn to by said Witness in my presence — Given under my hand and seal the 14th day of March 1859.

Reuben W. Scanland J. P.

Fees for taking this Deposition.

J. P. fees inclusive \$ 10.38

Constable fees on Sp 2.70

Witness Fee .50

Colver's fees .35

\$ 13.93

Reuben W. Scanland J. P.


State of Illinois

County of Pike

I Reuben W. Scanland an acting

Justice of the Peace within and for said County and State, do hereby certify that the said Witnesses William Steele, Henry Dickles and Wm. H. H. Stewart, prior to the taking of said deposition and on the 14th day of March A. D. 1859, was by me duly sworn to testify the truth in relation to the matter in controversy in the suit mentioned in the caption of these depositions and in the enclosed notice, so far as they might be interrogated, in relation thereto, and that the said depositions of the said witnesses were on the said 14th day of March A. D. 1859, at my office in Pittsfield in said County between the hours of 8 o'clock a.m. and 9 o'clock P.M. of said day taken and reduced to writing by me in part, and by John J. Ballard in part in my presence, and signed and sworn to by said witnesses in my presence.

Given under my hand and seal the 14th day March 1859

Reuben W. Scanland J.P. 

State of Illinois SM
County of Pike ³⁰⁰ J. Strother Briggsby clerk of the County Court within and for said County, do certify that Reuben W. Scanland Esq. whose genuine signature appears to the foregoing and attached certificate was at the time of signing the same, to wit: on the 14th day of March A. D. 1859, an acting Justice of the Peace in and for said County, duly elected, qualified and commissioned: and that as such, full faith and credit should be given to all his official acts.
Given under my hand and seal of said Court at my

Office in Pittsfield. this 18th day of March A.D. 1859.

20

Strother Briggsby clerk

To Messrs Warren & Wheak.

Attorneys for Defendants

you are hereby notified that on the 14th day of March A.D. 1859. the depositions of Henry Sicles William Steele. and William Stewart will be taken before R. W. Scanland Esq a Justice of the Peace in and for Boone county Illinois. between the hours of 8 o'clock A.M. and 9 o'clock P.M. and to continue from day to day until completed when taken to be read in evidence on behalf of plaintiff in above cause.

Williams Grimshaw & Williams

Attys for Plffs

Service by copy accepted this 25th Feb 1857.

Warren & Wheak

attys for Defs

Whereupon the Plaintiff further to maintain the issue on his part. introduced James Balloway who testified that he lived a mile and a half from Thomas Owsley Sr. and had lived there 26 years - said Owsley had lived there some twelve years - has a sawmill and keeps a good many hands - William Owsley Jr. lives with Thomas Owsley Sr. his father. knows the plaintiff Hardin is a small man the defendants are all large men but Spiros - had known plaintiff four or five months - he had relations in the neighborhood of witness & the Owsleys. He plaintiff was deranged at the time - I saw him

on the 6th July the day after the whipping - I examined him and found his legs much cut - one thigh black and blue - badly injured all over. - there was a red stripe around his neck - on the 9th of July, 3 or 4 days afterwards, it had turned green and showed the mark of a rope & the knot - the worst bruise on his thigh looked like it was made with a rick - I discovered a large wound extending from his hip to testicles, across his belly - there is no question as to the welts being made with some kind of stick or whip and mark round his neck with a rope - but don't know what any of the bruises or welts were made with. the skin was nowhere broken - but was discolored under the skin -

The Plaintiff further to maintain the issue on his part introduced Henry Loren, who testified, that he lived one mile and a quarter from Thomas Owsley Sr. who has mills, shops and many hands, that in July 1857 defendant Spies lived with Thomas Owsley Sr. and was in his employ - and William Owsley lived in Calhoun County Ill. William Owsley Jr. lived with said Thomas Owsley Sr. his father. Knew the plaintiff - he had relations living in a mile or two from Thomas Owsley Sr. he worked for me and my Brother - He was crazy - I saw him on sixth July day after the whipping. I saw a welt near an inch broad from his left thigh down to his knee across to the other leg - both legs were striped badly - the mark on his

neck looked like it was made with a rope and sign
of a knot. - saw him on the 9th afterwards - the bruise
had become purple - then saw the mark on his belly
for the first time - I supposed the mark round his
neck was made with a rope. I saw him again on
the 15th of July, and the marks still showed - some
were before the whipping Thomas Owsley Sr said to me
that a good licking would do the plaintiff good -
that he was not as crazy as he let on to be - witness
said he agreed with said Owsley if what Owsley said
was true, that he had been stealing -

Be it further remembered that the said plaintiff fur-
ther to maintain the issue on his part, introduced
William Ferguson who testified that he lived in
McDonough County Ills. - had known plaintiff from
his infancy - the plaintiff offered to prove by this witness
that plaintiff had been all his life & up to time of
whipping, a person of very weak mind - not of sufficient
mind to be responsible for what he said or did.
defendants Thomas Owsley Sr & William Owsley Jr.
objecting, the court refused to permit witness to testify.

Here the Plaintiff rested his case -

Whereupon the said defendants to maintain the issue
on their part, introduced Mrs Margaret Owsley who
testified that she is sister of Thomas Owsley Sr. that
she was at her house, about 70 yards from Thomas Owsley
when the plaintiff was whipped and in full sight of

his house. my Brother Thomas Owsley was in his house when plaintiff was whipped - my son William Owsley sr did the whipping - he only struck two licks - I saw all that was done. Thomas Owsley sr. said he did not want any whipping done about his house - only two licks with a switch were struck - I did not see plaintiff taken away - the whipping was on Sunday in July in the afternoon - I saw Henry Sikes there in the yard Thomas Owsley sr. was in his house all the time writing in his house - I was in my house which is about 70 or 80 yards from his and between the houses where the whipping was done - when I first saw plaintiff. he was with Sikes. Spires and William Owsley sr. Hardin eat dinner at our house that day before the whipping I do not know where he was after the dinner was over up to the time of the whipping. witness lives with her son Thomas Owsley jr one of defendants -

The said defendants next introduced as a witness Fleming House. who to sustain further the issue on their part. testified. that he was acquainted with plaintiff. and had been for nearly a year - I did not see his wounds - I was in Calhoun Co. at the time of said whipping - Before the whipping was done. the plaintiff told me he had stolen Owsleys money - I told him he had better return it - after the whipping was done plaintiff told me the reason they whipped him was because he stole the \$20. gold piece and a gold dollar. and ninety cents in small change from William Owsley jr. He said when he told me this. that he wished he had taken my

advice and given up the money - I never told the defendants what plaintiff said about his taking the money until after the whipping - I saw said plaintiff some five or six days after the whipping, not over that, but I saw no marks on him - I had seen the plaintiff several times at parties and on different occasions, and he talked as sensibly as any common raised boy, and when he told me about the taking of the money from Cowsley - he was not crazy but appeared sensible as anybody -

The defendants then introduced George House, who being duly sworn, testified on behalf of said defendants as follows - I have known plaintiff for over two years - I saw him before the whipping - I saw him the next Sunday after he was whipped - he went in swimming with me and several other boys - when he was stripped I noticed there was no marks on him - he said nothing about the taking of the money nor the reason of their whipping him - He said they did not hurt him a damn bit - there were 12 or 13 others present -

Here the defendants rested -

Thereupon the plaintiff recalled Henry Gokern, William Ferguson, and Esquire Galloway, and also called Ezekiel Martin in rebuttal by all of whom plaintiff offered to prove that the plaintiff before and after the said whipping was and had been wild unsettled in his mind, flighty and insane, to the introduction of which said testimony, the said defendants by their attorneys

objected - but the court overruled the objection and permitted the said witnesses to testify - and they did thereupon testify and prove that the said plaintiff had for years before said whipping and about that time and for some time thereafter been out of his right mind, and wild at times and crazy -

To which said opinion of the court in overruling the said objection of said defendants, to the introduction of said evidence by said plaintiff, and permitting the said evidence to be given to the jury, the said defendants at the time excepted, and still do except -

And the foregoing is all the evidence that was given to the jury in this cause by either and both of said parties -

And be it remembered that the said plaintiff thereupon asked the court to instruct the jury on behalf of said Plaintiff as follows, to wit:

1 The court instructs the jury that if they find from the evidence that defendants committed the battery alleged in the declaration, they should find defendants guilty and assess plaintiffs damages.

2 That in assessing damages in this case, if the jury from the evidence find the defendants guilty, the jury may give plaintiff vindictive damages, or smart money, and that in assessing damages they are not confined

to any amount of damages actually proved to have been sustained by plaintiff. but may assess damages in their discretion not exceeding the amount claimed in the declaration.

3 That if the Jury find from the evidence that some of the persons named as defendants beat and ill-treated the plaintiff as alleged in the declaration. and that Thomas Owsley senior or the other defendant William Owsley aided abetted or assisted in beating and ill-treating said plaintiff or procured such persons to beat said plaintiff then the court instructs the Jury that said Thomas Owsley senior or said other defendant William Owsley + if the Jury find from the evidence that both or either of them did aid. abet. assist or procure such beating to be done. are equally guilty with those who did the beating -

4 That the charge of larceny on plaintiff whether he was guilty of such larceny or not is no justification for the commission of a battery on plaintiff. and if the Jury find from the evidence that defendants did beat plaintiff as alleged in the declaration. they should find defendants guilty and assess plaintiffs damages.

5 That if the jury find from the evidence that plaintiff was a person of unsound mind before and at the time when the battery was committed. then the court instruct the jury that any thing that may have been offered in

evidence as to statements of plaintiff about his having taken money belonging to any of defendants ought not to be taken into consideration by the Jury in mitigation of damages in this case -

6. That if the Jury find from the evidence that at the time of the alleged battery and before that time, the plaintiff was a person of feeble intellect or unsound mind, that his state of mind may be taken into consideration by the Jury in assessing damages in this case if from the evidence they find defendants guilty of the alleged battery -

7. That if the Jury believe from the evidence that the plaintiff in this suit was beaten or otherwise ill-treated in manner and form as alleged in the declaration by any of the persons therein named as defendants, at the instigation, procurement, direction or request either Thomas Owsley senior or William Owsley - they will find the one at whose instigation, procurement, direction or request they so find said beating to have been done, guilty, and if they find from the evidence that said beating was done by the procurement, instigation, direction or request of both said defendants, Thomas Owsley senior + William Owsley - the Jury will find them both guilty -

And that the defendants by their attorneys then objected to the giving of the said instructions numbered

1. 5. 6 + 7. to the Jury - but the court overruled the said objection except as to instructions 5 + 7. and gave to the Jury said instructions numbered one and six. together with the said instructions numbered two, three and four - and refused instructions nos. 5 + 7 - to which said opinion of the court in overruling said objection, and the giving to the Jury said instructions numbered one and six of those asked for by said plaintiff. the said defendants by their attorneys at the time excepted and still do except.

whereupon the said defendants by their attorneys asked the court to instruct the Jury on behalf of the said defendants as follows to wit:

1. Defendants

The court instructs the Jury on behalf of the defendants Thomas Owsley senr. and his son William Owsley Jr.

1st That unless they believe from the evidence that said defendants are guilty of the assault and battery complained of. by their own hands or by participating therein. directing it to be done. or aiding and abetting the same by their counsel. presence and encouragement if present; or by the encouragement and advice if absent. at the time said assault and battery was committed. they should find the defendants aforesaid not guilty - and even in the event of the Jury believing from the evidence that the defendant Thomas Owsley senr. did say "it would do the Plaintiff good to whip him. if he refused to give up the stolen goods" and

Given

that this was said only to the witness Goreau. this is not of itself sufficient evidence of the said defendants guilt to justify a verdict against them -

2nd That in the event of the Jury believing from the evidence that the other defendants in this cause are guilty as charged. the fact that William Owsley Junr. may have said that he would pay or satisfy. out of the property taken from him when found the person that should get the property for him. and the further fact. that the said Thomas Owsley senr. said "get six hickory withs and wear out five of them on him. and against the sixth one was worn out that he would get the money and watch" if the whipping complained of was not committed by or under the influence of this language. but had been done before. or was thereafter done. against the expressed will and wish of the said Thomas and his son William. they should be acquitted -

3. The Court further instructs the Jury on behalf of said defendants Thomas Owsley senr. and William Owsley Jr. that any admissions made by a party to a suit against his interest in such suit. are to be taken as evidence against him - if therefore the Jury believe from the evidence. that Victor M. Gardin the plaintiff in this suit. after the alleged whipping took place said. that they (meaning the defendants) did not hurt him a bit. then this is to be taken as evidence against him (Plaintiff) unless they should further

from the evidence that said plaintiff was insane at the time of such admission -

4 The Court further instructs the Jury on behalf of said defendants that the statement of counsel prejudicial to the character of the defendants, touching the habits and reputation of the witnesses of the defendant, or any other matters not predicated upon the testimony of witnesses should be wholly discarded as evidence and not be permitted to influence their minds to the prejudice of the defendants -

5th That in case the jury shall believe from the evidence that the defendants are guilty as charged, it is competent for them to take into consideration anything that was said or done by the plaintiff at the time to prove the said assault, and that if the Jury believe from the evidence that the assault and battery complained of was provoked by the stealing or wrongful taking of twenty one dollars and ninety cents by said plaintiff of said defendant William Cusley Jr. from the house of his father, the said Thomas Cusley dwelling, the jury are at liberty to take the fact into consideration in mitigation of the amount of damages they shall assess against the said defendants, if any.

Which said instruction numbered two the court refused to give, and did not give to the Jury, to which said decision of the court, in refusing to give said

instruction numbered two, and to the said refusal, of the court to give the same to the Jury, the defendants by their attorneys at the time excepted and still excepted,

and the Jury aforesaid gave their verdict against the said defendants Thomas Owsley Sr and William Owsley Jr. for six hundred dollars, in the words and figures following

"And now this day again came the plaintiff by his attorneys, and also defendants Thomas Owsley senior and William Owsley Jr. by their attorneys and the said Jury coming into Court, upon their oaths do say that they find the issue joined for plaintiff and that said defendants are guilty of the trespasses alleged in plaintiff's declaration in manner and form as therein is stated and set forth, and that they assess plaintiff's damages by reason of the commission of that trespass at six hundred dollars" whereupon said defendants enter a motion for a new trial -

whereupon the said defendants by their attorneys at the time of the coming in of said verdict moved the court for a new trial upon the issue aforesaid for the reasons following -

- 1st Because said verdict was contrary to the evidence.
- 2nd Because the said verdict was contrary to the instructions of the court, and the law.
- 3rd Because there was no evidence to justify any verdict against said defendant William Owsley Jr.
- 4th Because the damages found by the Jury were ^(Excessive)

5th. Because the Court by the said instructions asked by said plaintiffs attorneys, and given by the Court, misdirected the Jury as to the law, to the injury of said defendants

6th Because the Court erred in withholding from the Jury the said instruction asked by said defendants attorneys, numbered two -

But the Court overruled said motion for a new trial and refused to grant the same, and gave judgment upon said verdict against said defendants, whereupon the said defendants by their attorneys then excepted to the said opinion and decision of the Court in overruling said motion and refusing to grant a new trial of the issue aforesaid, and still -

whereupon the said defendants by their attorneys made their exceptions to the said several opinions and decisions of the Court in that behalf - and inasmuch as the matters aforesaid do not appear upon the record of the said motions, the Counsel on behalf of said defendants Thomas Cusley sr. and William Cusley Jr. prayed that the Judge of said Court would sign and seal this bill of exceptions containing the several matters so proved and given in evidence as aforesaid, and the several opinions, decisions, and matters aforesaid, according to the statute in such case made and provided - and thereupon the Judge aforesaid, at the request of the said Counsel of said defendants did sign and seal this bill of exceptions pursuant to the aforesaid statute in such case made and