

No. 14553

Supreme Court of Illinois

Aulger

vs.

Smith

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 120 90

J. W. Middleton & Co., Stationers, 196 Lake St.

Adler

vs

Smith

Deady

14553

STATE OF ILLINOIS,
SUPREME COURT.

} ss. The People of the State of Illinois,

To the Sheriff of Tazewell County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgments of a plea which was in the Circuit Court of Peoria County, before the Judge thereof, between

Charles Auger

plaintiff....., and

Asa S. Smith

defendant....., it is said that manifest error hath intervened, to the injury of the said

Charles Auger

as we are informed by his complaints the record and proceedings of which said judgments we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

Asa S. Smith

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April ~~next~~ ^{inst.} to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

Asa S. Smith

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this first day of April in the year of our Lord One Thousand Eight Hundred and Sixty-four



L. Deland

Clerk of the Supreme Court.

Charles Stulger

No. 120 VS.

Asa S. Smith

SCIRE FACIAS.

Filed April 18, 1864, A. D. 1864

Leah D. Clerk.

Served by reading to the within
named Asa S. Smith, this 6th day
of April A. D. 1864, in said Tazewell County,
Service — 25^{cts} Jas. S. Hawkins, Sheriff
Milage 1 00 pr A. L. Sargent, Deputy
Return — 10^{cts}
1.35

Return to

3.8.1864

Done as above.

STATE OF ILLINOIS,
SUPREME COURT,

} ss.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Peoria - Greeting:

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

Charles Auger

Complainant, and

Asa S. Smith

defendant....., it is said manifest error hath intervened, to the injury of the aforesaid

Auger

as we are informed by his

complaint..... and we being willing

that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April ^{next}, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Pinckney H. Mason

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this first day of April in the Year of Our Lord One Thousand Eight Hundred and Sixty four.

L. Seland

Clerk of the Supreme Court.



Charles Sulzer

No. *120*

vs.

Asa S. Smith

WRIT OF ERROR.

FILED

April 1st

A. D. 186*4*.

L. Siland

Clerk.



State of Illinois } Supreme Court
Third Grand Division } To April Term 1864

Charles Culger }
vs } Error to Record
Asa S. Smith }

The Clerk will
please issue a writ of error in
this case, directed to Sheriff of
Tazewell County to execute.

Robt. C. Culger

Ingersoll Bros. and
S. D. Butterbaugh

Attys for Plff.

¹²⁰
Charles Aulger
vs
Asa S. Smith

Præcipe

Filed April 1. 1864
L. Leonard Clerk

Ingersoll Bros
S. D. Fairbank
attys for Aulger

Pleas before the circuit Court, within and for
the county of Peoria, and state of Illinois, on
the Fourth day of March, in the year of our Lord
one thousand Eight Hundred and sixty-four.

Be it Remembered that heretofore, to-wit-
on the 5th day of February, A.D. 1864, there was
filed in the office of the clerk of the circuit
court of Peoria County, Illinois, a Transcript,
together with a precept, summons, declar-
ation, pleas and replication, in words and
figures following to-wit:-

Transcript =

At a regular term of the circuit court
held in and for the county of Tazewell in
the state of Illinois on the sixteenth day of
September A.D. 1862. The Hon. James Har-
riott, Judge of the 21st Judicial Circuit
of Illinois, composed of the counties of Ma-
son, Tazewell &c., the following proceed-
ings were had in said court in a certain
cause wherein Charles Hulger was
plaintiff and Asa S. Smith was de-
pendant, and entered of Record, to-wit:

Charles Hulger

v Trespass vi et contra
Asa S. Smith

This cause is ordered to be
continued.

And afterwards to-wit, on the seventh
day of February A.D. 1863, at the Feb-
ruary term A.D. 1863 of said court

the following further proceedings were had in said court in said entitled cause and entered of record, to wit:-

Charles Auger

v Trespass Vi et armis

Asa J. Smith

This cause is ordered to be continued.

And afterwards to wit ^{Tuesday,} on the eighth day of September AD 1863, at the September Term AD 1863 of said court the following further proceedings were had in said court in said entitled cause and entered of Record, to wit:-

Charles Auger

v Trespass Vi et armis

Asa J. Smith.

Now come as well the plaintiff by his attorney, Paterbaugh, as the said defendant by his attorney, Prettyman, whereupon come a jury of 12 good and lawful men to wit - C. W. Clark, J. Fisher, J. Champion, E. Vandusen, J. Walf, D. Britton, J. T. Milligan, J. McDermot, D. J. Bennett, N. A. Wilson, W. Milburn and E. Dillon duly elected and sworn who having heard the allegations and proofs of parties and argument of counsel thereon, and being unable to agree upon their verdict were thereupon by the court discharged.

(3)
And afterwards to wit: on Tuesday the second day of February AD 1864 at the February Term AD 1864 of said court the following further proceedings were had in said court in said entitled cause and entered of record to wit:

Charles Sulzer
v
Trespass Vi et armis
Asa S. Smith

Now comes the plaintiff by Puterbaugh and Ingersoll his attorneys, and now comes also the said defendant by Messrs Roberts and Ireland and B. F. Prettyman, Esq., his attorneys and moves the court upon affidavit filed for a rule requiring the plaintiff to give security for costs herein, whereupon the plaintiff in open court justified and the court being fully advised in the premises overrules said motion.

Same day to wit: Tuesday February 2^d AD 1864

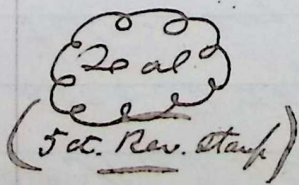
Charles Sulzer
v
Trespass Vi et armis
Asa S. Smith

This cause having been this day called for trial, now comes the plaintiff by Messrs Puterbaugh and Ingersoll his attorneys and now comes also the said defendant by Messrs. Roberts &

(4) Ireland and B. F. Prettyman, Esq., his attorneys, and the said plaintiff, by his attorney, moves the court upon affidavit filed for a change of venue in this cause to Peoria county, and the court having heard the arguments of counsel upon said motion and being fully advised in the premises, doth order that the venue in this cause be changed from this county to the county of Peoria and that the clerk of ^{this court transmit to the clerk of} the circuit court of Peoria county all the papers on file in this cause together with a complete Transcript from the records of all the proceedings had in this court in this cause.

State of Illinois, Tazewell County - ss.:

I, George H. Harlow, clerk of the circuit court in and for said county do hereby certify the foregoing to be a full and correct transcript from the records of said court of all the proceedings had in said court in a certain cause wherein Charles Fulger was plaintiff and Asa J. Smith was defendant and I do further certify that the papers herewith transmitted numbered from 1 to 80 inclusive are all the papers on file in and pertaining thereto. Witness my hand and the seal of said court at Pekin in said county this 3^d day of February 1864. Geo. H. Harlow, Clerk
By W. W. Clemen, deputy



Precipe

State of Illinois, Tazewell county, ss =
In circuit court, September Term 1862.
Charles Fulger }
" } Trespass vi et armis
(5) Asa S. Smith } damages \$5000
The clerk will please issue
as above in a plea of Trespass vi et ar-
mis
Roberts & Ireland
for plaintiff

Summons = State of Illinois }
Tazewell County } ss. The People of the State of Illinois,
To the Sheriff of said County - Greeting -
We command you that you summon, Asa
S. Smith, if he shall be found in your county,
personally to be and appear before the circuit
court of said Tazewell County, on the first
day of the next term thereof, to be holden
at the Court house in Pekin, in said Taze-
well County, on the first Monday of Sep-
tember 1862, to answer unto Charles Fulger
in a plea of Trespass vi et armis to the
damage of said plaintiff as he says
in the sum of Five thousand dollars -
And have you then and there this writ, with
an endorsement thereon, in what manner
you shall have executed the same.

Witness, George H. Harlow, Clerk
of our said court, and the seal
thereof, at Pekin aforesaid
this 12th day of August AD 1862.
Geo. H. Harlow, clerk
per A. P. Miswood, deputy.

Return

State of Illinois }
Jezewell County }

I have duly served the within by
reading the same to the within named
Asa J. Smith this 13th day of August
1862 as I am therein commanded,

(6)

C. Williamson, Sheriff, T.C.

By William Gaither, Deputy.

Declaration

State of Illinois } In Circuit Court
Jezewell County }^{ss}

September Term 1862.

Charles Fulger, the plaintiff in
this cause by Roberts & Ireland his attor-
neys complains of Asa J. Smith the de-
pendant in this cause of a plea of trespass,
For that the said dependant on the first
day of July A.D. 1862 at to wit Jezewell
county aforesaid, with force and arms
xc., made an assault upon plaintiff
and beat bruised, wounded and ill-
treated him and staked the said plaintiff
in the left side of him the said plaintiff
with a Knife, which Knife said dependant
had and held in his the said dependants
hand and thereby then and there with said
Knife struck, cut, staked and wounded
the said plaintiff, in so grievous a man-
ner that his life was by means thereof
greatly endangered, and by reason of such
wounding the said plaintiff became lame
sick and disordered and continued so lame

sick and disordered for a long time to wit- for the space of four weeks from thence hitherto, and was during all that time thereby rendered incapable of follow- ing and transacting his necessary af- fairs and business, by him during that time to be done, and also thereby the said plaintiff was forced to and did necessa- rily lay out and expend a large sum of money to wit- the sum of five hun- dred dollars in and about endeavoring to be cured of the bruises, wounds, sick- ness, soreness, lameness and disorder aforesaid occasioned as aforesaid to wit at Tazewell county aforesaid, and other wrongs to the said plaintiff then and there did to the great damage of the said plaintiff, and against the peace of the People of the state Illinois, where- upon the said plaintiff saith that he is injured and hath sustained damage to the sum of five thousand dollars, where- fore he sues &c

Roberts & Ireland
attys for plaintiff.

Pleas

State of Ills }
County of Tazewell } Of the Sept. Term of
Asa S. Smith } the Tazewell County Circuit
at } Court, A.D. 1862
Chas. Alger } Trespass Vi et armis

And the said defendant by Proctor
Tyrman his atty comes & depends the

force & injury when he & says actio non
because he says that he is not guilty
of said supposed trespasses in the said
plaintiffs declaration named, or any
part thereof and of this he puts himself
upon the country A. J. Smith

by Prettyman, atty

(8) And plaintiff doth the like

Roberts & Ireland.

And for further plea in this be-
half the said defendant says actio
non because he says that the said plain-
tiff just before and at the said time when
i.e., to wit - on the day and year in that
count mentioned, at the ^{State &} County aforesaid,
with force and arms, made an as-
sault upon the said defendant and would
then and there have beat bruised and ill
treated the said defendant if he had not
immediately defended himself against
the said plaintiff, as he lawfully might
as for the cause aforesaid, and in
so doing necessarily and unavoidably
stab & wounded the said plaintiff, and
defendant avers that said plaintiff
is & was at the time when he committed
the assault on said defendant a large,
stout, vigorous & desperate young man
and said defendant is an old man - and
unable to keep said ^{plaintiff} ~~defendant~~ off of him
except by the use of a weapon of some kind

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in his defense - and so said defendant sayeth
that if ~~if~~ any hurt or damage then & there
happened to the said plaintiff in any
manner, the same was occasioned by
the said assault so made by said
plaintiff on him the said defendant
and in the necessary defense of him-
self the said defendant against the
said plaintiff, which are the same sup-
posed trespasses in the introductory
part of this plea mentioned and where-
of the said plaintiff has above com-
plained against the said defendant
and this he is ready to verify whereof
he prays judgment &c.

A. J. Smith

by Prothon

Replication
to 2^d plea State of Illinois } Circuit Court of
 Tazewell County } ^{2^d} said county, February Term 1868.
Charles Hulger

11 In Trespass

Asa J. Smith

And the said plaintiff as to the
said plea by him secondly above pleaded
as to the said trespasses in the introduc-
tory part of said plea mentioned, and
therein attempted to be justified, saith
the said plaintiff, by reason of any thing
by the said defendant in that plea alleged
ought not to be barred from having
and maintaining his aforesaid action

thereof against the said defendant because he saith that the said time when &c of his own wrong, and without the cause by him in said second plea alleged, committed the said several trespasses in said plea attempted to be justified in manner and form as the said plaintiff hath above in said declaration complained against the said defendant and this the said plaintiff prays may be inquired of by the country &c

Roberts & Ireland for
Defendant

Proceedings at a term of the circuit court begun and held at the court house in ^{and for} the city and county of Peoria, ^{and state of} Illinois, on the first Monday in the month of February, in the year of our Lord one thousand eight hundred and sixty-four, ~~the same~~ it being the first day of said month. Present - the Honorable Marion Williamson, Judge of the 16th Judicial circuit in said state, John A. J. Murray, Sheriff, and Enocky Loan, Clerk to wit: -

Tuesday, March 1st A.D. 1864.

Charles Auger

vs
Trespass vi et armis

Asa S. Smith

This day came the plaintiff by Paterbaugh and Ingersoll his attorneys,

(11)

and the defendant by Grose by Grove and Roberts his attorneys, and it is ordered that a jury be impanelled to try this cause, whereupon came a jury of twelve good and lawful men to wit: John Waugh, Joseph Warner, Wm. McDougal, Jas. B. Neff, A. V. Flegler, James Craig, J. G. Maxwell, T. H. Antcliff, Jas. Martin, Wm. May, Com. Hick, & Robt. Truby, who were duly chosen, tried and sworn to well and truly try this cause and a true verdict give according to the evidence. And the said jury not having heard all the case, are adjourned to meet the court at 9 o'clock to-morrow morning.

Wednesday, March 2^d 1864.

Charles F. Alger

4 *Frepas metastans*

Asa G. Smith

This day come the parties to this cause by their attorney, and also come the jury impannelled and sworn to try this cause. And the said jury having heard the evidence &c in the case, upon their oaths aforesaid do say, we the jury find the defendant not guilty. The Plaintiff by his attorney moved the court for a new trial.

Friday, March 4th AD 1864.
Charles Hulger
" Versus Vietarunis
Asa S. Smith

12) This day come the parties to this suit by their respective attorneys, and this cause come on to be heard on plaintiffs motion for a new trial, and the court being fully advised in the premises, do overrule said motion. Therefore it is considered by the court that the said Asa S. Smith have and recover of the said Charles Hulger his costs and charges by him about his defense in this behalf expended and that he have execution therefor.

And afterwards to-wit- on the 12th day of March AD 1864, there was filed in the office of the clerk of the circuit court of Peoria county, aforesaid, a Bill of Exceptions in words and figures following to-wit:

3) State of Illinois Circuit Court
Peoria County } February Term 1864
Charles Hulger }
" } Bill of Exceptions
Asa S. Smith }

Be it remembered that on the trial of this cause the plaintiff to maintain the issue on his part, called James Mitchell,

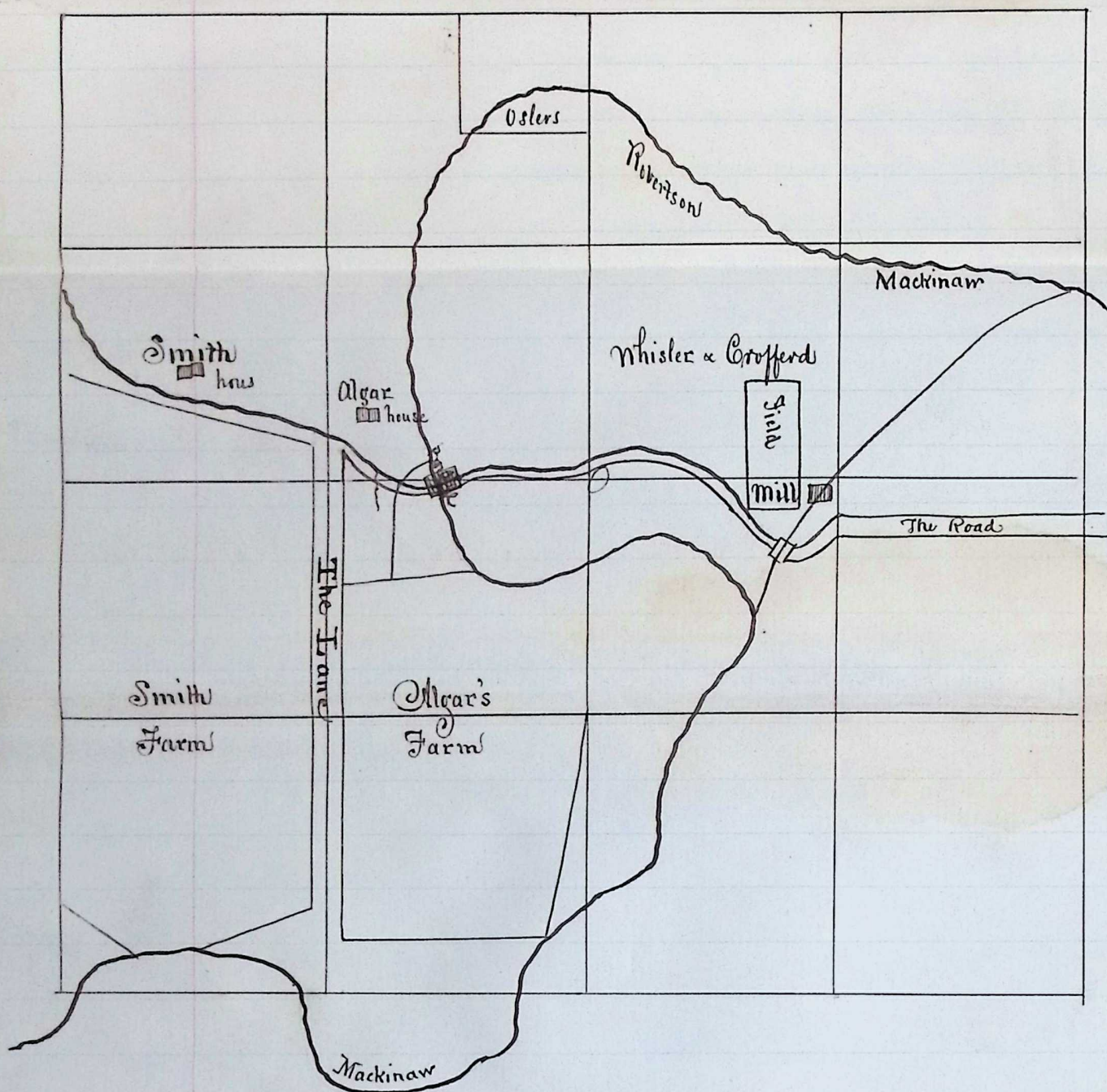
who being duly sworn, testified that he knew the parties, and had a conversation with Smith about the difficulty; That on the 1st of July 1862, I called on Mr. Smith. He related to me the trouble he had had with Fulger. He was much excited, and said that he expected he had killed Charles Fulger. I asked him how it happened. He said Fulger had been dogging his cattle, that he went to see him and got no satisfaction, and that on July 1st (the day before) about 12 o'clock he heard the dog on his cattle again, and that he got up from dinner with the determination to put a stop to Fulger, dogging his cattle. His wife asked him where he was going. He said he was going to put a stop to the dogging of his cattle. She said he had better not go - that he would get into a difficulty with Fulger if he went. He said that it was Fulger he wanted and not the cattle. He started. Some of the children became excited and followed him. When he got near the bridge he saw Fulger cross the road going away; and he and the children went to the bridge and stopped on it and called loudly to Fulger, so that if Fulger was any where near he would hear him, and Smith and the children

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Stayed some two minutes and then started
towards home; but as they came off the
bridge, he saw Aulger coming back
leading his horse. Smith said "Charley
I want you to ^{stop} quit dogging my cattle."
Aulger replied. "Smith you take great
pains to drive your cattle down here
to break in to my field." Smith said he
did not do it. Aulger said he did. Smith
replied, he did not. Aulger said he did.
Smith said "You lie." Aulger let go
his bridle rein, and said to Smith. You
d - d old rascal you call me a liar
and I will lick you," and Aulger pushed
his sleeves up and rushed toward him.
He (Smith) then drew out his knife
and told Aulger not to come on
him or he should defend himself.
Aulger advanced to within a few
feet of him and stopped. Smith again
told him not to come on or he would
defend himself. Aulger then made
a plunge at him and struck at him
as he came. As Aulger struck he Smith
dodged his head and his fist just graz-
ed the skin on his cheek bone, grazing
off some of the skin. And then Smith
stepped a little one side and thrust
his knife into him ^{up} to the handle. Then
Aulger clapped his hand over the place
and started away. The blood ran over

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his shirt. Smith said Charley I am afraid I have hurt you, but you would run on to me and make me do it. Auger replied "If this dovt kill me I shall remember you for it." This is all I recollect. It was in Fagewell Co. I had another conversation with Mr. Smith in which Smith said - no this was in the same conversation - I said to Mr. Smith, Auger is a young man very stout and athletic, and that I did not think that either myself or Smith even capable of resisting an attack from Auger, single handed. Mr. Smith replied. Either that he had had a hitch, or if it come to a hitch that he believed he was as good a man as Auger. The bridge is about $\frac{1}{4}$ of a mile from Smith's house. Smith said it was about noon. I know the situation of Auger's place in relation to the bridge etc. (Here the following plat was shown to the witness.)

North



Aulger waters his horses at or near the bridge going home to dinner. I saw Mr. Aulger on the evening of the 4th of July. He was at Benj. Whistless in bed. He was in a stupid or torpid state. He did not recognize me at first. After a little while he opened his eyes and knew me. He breathed very heavily. I stayed with him all night. He was in great pain and agony and seemingly suffering intensely. The wound was on the left side I think. The wound was a long smooth cut. The doctor showed it to me. The wound seemed to have been made with a sharp instrument and was about one half inch long. I saw the knife that Smith said he cut him with. It was a large Jack Knife, blade about four inches long, and the blade was from $\frac{1}{2}$ to $\frac{3}{4}$ of an inch wide, and sharp at the point. It was an unusually wide blade for a pocket knife. On Sunday when I saw Aulger he appeared some better and could speak easier. When I first saw him he was only rational part of the time. On Sunday he appeared in his right mind. Some three weeks after I saw him again. He was then able to sit up, but not able to do any business. The fourth time I saw him he was in bed and very poorly. I think

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this was about six weeks after he was
stabbed. I did not see the wound the
fourth time. Mr. Aulger was un-
able to do anything on his farm du-
ring the season. During the fall
he hobbled about some on crutches.
He was unable to do anything all the
next winter and spring. Dr. Terrell
who is now dead, was attending him.
The doctor had to go about two miles
and a half. I know nothing about
any other doctor attending Aulger
except Terrell. The farm that
Smith lives on, is I think, worth
between six and ten thousand dol-
lars. In this estimate I include all his
property. He told me that he owned
three hundred acres in all. The land,
I think the improved land, is worth about
35 dollars per acre. He also owned
40 acres over the Mackinaw. He
has about 1 dozen head of horses
and colts and about 25 head of cattle.
If Mr. Smith drove the cattle over the
bridge he drove them on Aulger's
land. In the same conversation Smith
said he expected that Aulger would
die. And he further said it would give
him a good deal of trouble whether
he died or not, and that he (Smith)
believed it would be better for him

(Smith) if he would die, witness further stated Smith was a man from 45 to 50 years old had family of 11 or 12 children. The plaintiff then offered to the court the affidavit of George H. Harlow, clerk of the circuit court of Tazewell county to prove the loss of the depositions of Cicero L. Burns and John Speck, which affidavit was as follows:

State of Illinois }
Tazewell county } ss

George H. Harlow, being duly sworn according to law, on oath states, that he is, and has been during the past three years, clerk of the circuit court for and in said county of Tazewell, and further states that there was filed in the said circuit court, in the case of Charles Sulzer against Asa S. Smith now pending in the circuit court of Peoria county by change of venue from said Tazewell county about or during the month of September A.D. 1862, a deposition taken by the plaintiff of Cicero L. Burns and John Speck, which said depositions were used in evidence at the trial of said cause, at the September term A.D. 1863 of the circuit court of said Tazewell county, and was up to that time among the papers of said cause on file in my office. Affiant further states that said depositions have been lost or taken from

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the files of said cause since the September term A.D. 1863, without the knowledge or consent of affiant. Affiant further states that he has made diligent search in the office of the clerk of the circuit court of said Tazewell County where such papers are usually kept for said depositions, and cannot find the same. Affiant further states that said depositions are and have been lost since the September Term A.D. 1863 of said Tazewell County circuit court.

Subscribed and sworn to before me this 26th day of February 1864
 Wm Don Maus,

Judge of the County Court of Tazewell Co. Ills.

The plaintiff then called A. E. Burns, who testified to the court that he was the brother of Cicero L. Burns, and that his brother Cicero L. Burns was dead. The witness also testified that John Speck was dead. The court then permitted the plaintiff to give parol evidence of the contents of the depositions of Cicero L. Burns and John Speck, to which the defendant then and there excepted. James Mitchell then testified to the jury, that he was present at the trial of this cause at the September term (1863) of Tazewell Circuit Court,

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and heard the depositions read on that trial and could testify as to the contents of the same substantially from having heard them read, that the defendant was present at the said trial and made no objection to the depositions as read to the jury. Witness had not read the depositions himself - that the depositions were read on the trial of this cause by Mr. Grove - on cross examination witness said it might be that the depositions were read in the criminal cause - might be that they were not read by Grove but was not mistaken as to the contents or about them being read in some case - was not sure what case (that Cicero L. Burns testified in his deposition that a day or two after the difficulty he had been to see Auger while he was lying at Whistler, and that he left Auger to go to Mackinaw and that in going he met the defendant. They got into a conversation. Defendant asked how Auger was. Burns said he was worse, and Smith replied "I am glad to hear it." In the cross-examination they asked Burns, "Did you not tell Smith that Auger was better and then Smith said he was glad to hear it?" Burns answered "No" I said he was worse and Smith said he was glad to hear it.")

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~~It was then agreed that said deposition contained substantially the same matter as the witness Mitchell had testified to which is as follows:~~

James Mitchell testified that the substance of John Speck's deposition was a conversation between Smith and Speck about the difficulty. Speck testified that the dependant came to where he Speck was at work, on the day of the stabbing, and told Speck that he expected he had killed Charley Aulger. It was then agreed that said deposition contained substantially the same matter as the witness Mitchell had testified to & which is as follows:

He said Aulger had been dogging his cattle, that he went to see him and got no satisfaction, and that on July 1st about 12 o'clock he heard the dog on his cattle again. He got up from his dinner with the determination to put a stop to Aulger dogging his cattle. His wife asked him where he was going. He said he was going to put a stop to the dogging of his cattle. She said he had better not go, that he would get into a difficulty with Aulger if he went. He said that it was Aulger he wanted to see and not the cattle. He started. Some of the children he-

came excited and followed him. When he got near the bridge he saw Aulger cross the road going away, and he and the children went to the bridge and stopped on it, and called loudly to Aulger, so that if Aulger was any where near he would hear him. Smith and the children stayed some two minutes and then started towards home; but as they came off the bridge, he saw Aulger coming back leading his horse, Smith said "Charley I want you to stop dogging my cattle." Aulger replied, "Smith you take great pains to drive your cattle down here to break into my field." Smith said he did not do it. Aulger said he did. Smith replied "You lie." Aulger let go his bridle rein, and said to Smith. "You d-d old rascal, you call me a liar and I will lick you." and Aulger pushed up his sleeves and rushed towards him. That he Smith then drew out his knife and told Aulger not to come on him or he should defend himself. Aulger advanced to within a few feet of him and stopped. Aulger then made a plunge at him and struck at him as he came. As Aulger struck he dogged his head and Aulgers fist just grazed the skin on his cheek bone. He Smith

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then stepped a little one side and thrust his Knife into him up to the handle. Aulger clapped his hands over the wound and started away. The blood ran down over his shirt. Smith said "I am afraid I hurt you, but you would run on to me and make me do it." Aulger replied "If this don't kill me I will remember you for it. Smith showed the Knife to Speck covered with blood. The blade of the Knife was three or four inches long. Smith said it was the same Knife with which he stabbed Aulger.

The plaintiff then read the following agreement in evidence of Benjamin Whistler testifying:

State of Illinois } In circuit court
Revia county } To Feby Term 1864

Charles Auger }

Asa L. Smith }

Charles Auger the above named plaintiff being duly sworn according to law on oath states that he cannot safely proceed to the trial of the above entitled cause at the present term of court, on account of the absence of one Benj. Whistler, a material witness on the part of deponent; and that said witness is a resident of Tazewell county Illinois, distance about 18 miles from the place of holding this court, and that he expects to prove by the said witness, that on or about the 1st day of July A.D. 1862, the said plaintiff came from the place of difficulty, with deponent, to the mill of witness a distance of about a ^{1/2} mile, that he was badly hurt and bleeding from his wound and that plaintiff was taken from witness mill a few rods distance to witnesses house and remained at witnesses house for the space of about 8 or 10 days during which time he suffered from the wounds received at the hands of deponent, and was taken care of and nursed at

witness house during that time - and that plaintiff paid the wife of witness ten dollars for nursing during that time, that plaintiff was compelled and did send for Dr. J. P. Terrill a practicing physician to attend on plaintiff in consequence of the wounds received from defendant, and that Dr. Terrill did make 6 to ten visits to plaintiff while suffering from the wounds and that plaintiff became liable to pay him therefor. And that during that time the plaintiff suffered great pain and distress from the wounds received from the hands of the defendant. Affiant further states that since that time the said Dr. Terrill died, and affiant knows of no other witness by whom he can so fully prove the above facts - and affiant further states that on the day of February A.D. 1864 he procured to be issued a subpoena for said witness directed to the sheriff of Izewell county where said witness resides, and that on the 27th day of February A.D. 1864 said subpoena was duly served on said witness, and his fees paid him, that on the 27th day of February A.D. 1864 an attachment was issued by this court against said witness directed to the sheriff of said Izewell county, and that the sheriff went after said witness and found him unable to attend in consequence of sickness - That affiant has made due diligence to be ready for trial at this term, and that this application is not made for delay but for the purpose of justice.

It is admitted that the witness Benj. Whistler will testify to the facts contained in the foregoing, and that the same may be used in evidence subject to such contradiction or explanation as the defendant might have been able to show if witness was on the stand, March 1, 1864

Ingersoll & Putnam atty for plff
Grove & Roberts attys for deft.

Dr. J. C. Terrell being called by the
plaintiff testified as follows. I am a
physician by profession. I saw the
plaintiff the second day after he was
wounded, I was called in by Dr. Terrell
the attending physician. The wound
was between the sixth and seventh
rib on the left side. It was about
 $\frac{3}{4}$ of an inch long. Plaintiff seemed
to be laboring under stupor. He
was expectorating some blood.
It was immediately over the lower
part of the heart and I thought the
wound was about four inches out-
side of the wound to the heart. I
think the knife entered the lung. It
would be about $2\frac{1}{2}$ inches through to the

cavity & knife must have entered the cavity and into the lung for he was expectorating blood. The spitting of blood might have been produced by some other cause possibly. I saw him again in about two weeks. He was then considerably better and was able to ride to Mackinaw town in a buggy which was about three miles distant. He was wholly unable to attend to his business that season, I mean by that season, from the time he was stabbed till the next spring. Dr. Lervell was waiting on him at the same time. The usual charge was two dollars per visit.

Dr. John Murphy, called by the plaintiff, testified that he was a physician, and heard the testimony as to the plaintiffs wound. This was about $\frac{1}{2}$ inch below the heart. These wounds are very dangerous. Sometimes persons thus wounded recover but generally they will always suffer in convenience.

H. A. Short being called by the plaintiff, testified that Auger that season had in some oats about 5 acres about 20 acres of corn. The service of a man was worth 18 dollars per month and his board which was worth two dol-

can her week from July through the summer, fall, and winter. The plaintiff then offered to prove by this witness the loss of crops sustained by the plaintiff in consequence of the wound received, which the court refused to allow, to which ruling of the Court the plaintiff by his counsel then and there excepted. The plaintiff here rested his case. The defendant then moved the court to exclude from the jury the testimony of Mitchell in regard to the contents of the depositions of Cicero L. Burns and John Speak. The court thereupon excluded the testimony of Cicero L. Burns on the ground of irrelevancy, to which the plaintiff then and there excepted. Sanford Smith, called by defendant, testified that he was the son of the defendant. About noon on the 1st of July 1862 they were at dinner. They heard dogs on the cattle. His father got up from the table and started down to get Aulger to stop dogging his cattle. He and his two brothers went along with his father. They met the cattle and drove them back across the bridge. They started back from the bridge, and saw Aulger coming from his field leading his horse.

They stopped, waited till he came up. Father said to Auger that he had come down to tell him not to dog his cattle. Auger said father had driven his cattle down there. father said he did not. Auger said he did, father again said he did not & Auger said he did, and father said he lied. Auger said dont you call me a liar you d-d old son of a b-h. Auger brushed up his sleeves and started at father. Father took out his knife and told Auger that he would defend himself. Auger came within a few feet of and stopped. Then rushed at and struck at father - father dodged the blow and struck Auger with the knife. I am 22 years old. After the difficulty we started home. Auger went alone towards Whistlers across the bridge. When Auger first started at father he was two or three rods off.

Archibald Smith, called by the dependant, testified as follows. I am the son of the dependant. Went with father and my brothers. We drove the cattle towards the bridge. We started back. Saw Auger coming from his field, leading his horse. We stopped till he came up. Father told Auger to stop dogging his cattle. Auger said father took a good deal of pains to drive

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his cattle down on him. Father said he did not. Auger said he did - father said he did not, Auger said he did - Father called him a liar. Auger pushed up his sleeve and said, I will ~~like~~ lick you, and came within 6 or 8 feet of father and then stopped. Father said he would defend himself. Auger called father a d-d old rascal and made a lunge at him. Father dodged and then struck the knife into him. Auger ~~said to father~~. Auger said to father you run on me, father said he did not. Auger said that if it did not kill him he would remember father for it. When father was on the bridge he said Auger was a sneaking in the brush like a snake egg dog, this was said to us in ordinary tone of conversation. I am 18 years old.

F. W. Wiles called by the defendant testified as follows. I was on the jury when the defendant was tried criminally for same assault and heard Auger's testimony. Auger testified that when the difficulty commenced he made at Smith and saw his knife, but thought he could knock him down before Smith could use his knife. Auger said that Smith struck at him with the knife and that he tried to ward off the blow with his left arm, and struck at Smith with his right hand.

The plaintiffs counsel on cross-exam-

1291 use any more force than was necessary in self-defense? And if the jury believe from the evidence that the plaintiff did make the first assault, and that the defendant, in his defense, used ^{an} reasonable and excessive and more force than was necessary to repel the assault or protect himself means, the jury will find for the plaintiff.

2 The court further instructs the jury that although the plaintiff might have given the first blow, yet if the defendant used not only more force than was necessary for self-defense, but had unnecessarily and vindictively stabbed and abused the plaintiff, then he would be a trespasser, and if the jury so believe from the evidence they will find for the plaintiff.

3 The court further instructs the jury, that if they believe from the evidence that the defendant could have avoided the attack of the plaintiff, or repelled it, without the use of a knife, he would not be justified in stabbing the plaintiff.

4 The jury are further instructed that, if they believe from the evidence that the defendant was able, or believed himself able, to defend himself from the attack of the plaintiff, without using a deadly weapon, he would not be justified in using such weapon, and would

be liable if he used it under such circumstances.

- 5 The court further instructs the jury, that the same strictness of proof is not required to entitle the plaintiff to recover in this action, as would be required to convict the defendant in a criminal prosecution. And that the jury in this action are to be governed entirely by the preponderance of the evidence in the case.

- 6 The court further instructs the jury, that if they believe from the evidence, that the plaintiff first struck the defendant with his fist, and that the defendant thereupon unreasonably, cruelly and revengefully assaulted and stabbed the plaintiff, with a deadly weapon, then the jury will find for the plaintiff, unless the jury further believe from the evidence that such defense was necessary and not revengeful, ^{and} that he could not avoid it ^{with personal safety} - and that it was necessary to protect his own life, or to protect himself from such serious bodily harm.

- 7 The jury are further instructed that if they believe from the evidence that the defendant used toward the plaintiff menacing and insulting

given

language for the purpose of inviting or provoking an assault from the plaintiff, then the jury have a right to take such conduct into consideration in assessing plaintiffs damages, if they find the defendant guilty.

8

(31)

given

The court further instructs the jury, that if they find for the plaintiff, they have a right to take into consideration in assessing damages, the following facts, if proven - The suffering, pain and distress of the plaintiff occasioned by the wound and injuries inflicted by the defendant - The effect of the injuries upon the health of the plaintiff both past and future; the loss of time by the plaintiff occasioned by the injuries; The immediate damage to the plaintiff by reason of his being unable to attend to his lawful affairs and business; The expenses incurred by the plaintiff for physicians, nursing, board and care during the time he was suffering from injuries received by the hand of the defendant, The situation in life and pecuniary conditions of the parties to this suit.

9

The court further instructs the jury, that if they find for the plaintiff, and believe from the evidence, that the

Given

(32)

defendant assaulted and stabbed the plaintiff in an excessive and aggravated manner, then the law is, that the jury are not confined in their verdict to actual damages proven, but may give exemplary and punitive damages, not only to compensate the plaintiff, but to punish the defendant for such wanton injury, and as an example to others.

10

Given

The jury are further instructed that if they find for the plaintiff they will assess his damages in a sum not exceeding five thousand dollars as claimed in the declaration.

11

Given

If the jury believe from the evidence that three of the defendants were with him at the time of the difficulty, and were then and there able to resist or to assist in resisting any attack made by the plaintiff (if the jury believe from the evidence that the attack was made by the plaintiff) It is a fact for the consideration of the jury in determining the right of the defendant to use a knife or deadly weapon. And if the jury believe from the evidence that defendant under the circumstances did unnecessarily use a knife, ^{and not in self defense} they will find for the plaintiff.

(33) which the court gave after modifying the 6th and 11th instruction by interlining the same - inserting after the words "avoid it" these words "with personal safety," and the 11th instruction after the word "knife" these words, "and not in self defense" to the modifying of the instructions, the plaintiff then and there excepted. The court at the instance of the defendant then instructed the jury as follows:

The court instructs the jury as follows:

1. Actual and positive danger is not indispensable to justify self-defense.
2. If one is pursued or assaulted in such a way as to induce in him a reasonable and well grounded belief that he is in danger of receiving great bodily harm under the influence of such apprehension he will be justified in defending himself whether the danger was real or only apparent.
3. Men when threatened with danger must determine from appearances and the actual state of things surrounding them as to the necessity of resorting to self defense and if they act from reasonable and honest convictions they cannot be punished for a mistake in the extent of the actual danger when other judicious men would have been alike mistaken.

4 The jury are further instructed that if they believe from all the evidence that the plaintiff at the time the difficulty took place was a young, athletic, strong man, and that the defendant at the same time was advanced in life and unable to physically to defend himself successfully without danger of great bodily injury - Then if the jury further believe from the evidence that the plaintiff advanced upon the defendant in a violent passionate manner and struck the defendant for the purpose and with the intention of whipping the defendant & upon being so assaulted the defendant did use a knife for the purpose of self defence and did cut the plaintiff once only & such cutting was necessary to protect the person of the defendant from great bodily harm the verdict should be for the defendant.

5 The court instructs the jury that if they believe from the evidence that the plaintiff began the assault then they will find for the defendant, unless they further believe from the evidence that the defendant used more violence to repel the same, than a reasonable or judicious man would have done under the same circumstances.

6 The jury are further instructed that if they believe from the evidence that Smith told

Given

Given

Given
(35)

Aulger that he ~~did~~ lied or that it was a lie that Aulger charged on him - this would be no excuse or justification in law for Aulger to assault Smith

7

The jury are further instructed that if they believe from the evidence that Aulger made the first assault & that he knew at the time that the defendant had the knife in his hands it is for the jury to say whether Aulger brought on the injury by his own wrongful act these facts if proven ^{are} all proper to be considered by the jury in determining the case.

8

All the evidence as to what Burns testified to is excluded from the jury.

9

If the jury believe from the evidence that some of the defendant's sons were present at the time, their being present gave the plaintiff no legal or lawful right to strike or assault the defendant.

10

And the jury are further instructed that if the defendant's sons were present, such presence did not and cannot deprive the defendant of the right to protect his person from injury.

So the giving of the defendant's instructions plaintiff then and there accepted. And thereupon the jury brought

in a verdict for the defendant. Whereupon the plaintiff filed a motion for a new trial as follows:-

Charles Auger }

^{vs}
Asa J. Smith }

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Plaintiffs move the court for a new trial and assigns following grounds.

I. The court admitted improper evidence.

II. The court erred in not permitting witness Short to testify in regard to loss of crops occasioned by the injuries received

III. The court erred in ruling out the evidence in regard to contents of Burns deposition as given by Mitchell.

IV. The court erred in modifying plaintiffs instructions.

V. The court gave improper instructions for debt.

VI. The verdict of the jury was contrary to the law and evidence.

General error &c.

Ingersoll & Paterbaugh

March 3, 1864.

for Reff

The court overruled said motion, and give judgment on said verdict for the defendant to which the plaintiff then

(37)

and there excepted. And inasmuch as the matters aforesaid do not appear of record, the plaintiff presents this bill of exceptions and prays that the same may be signed and sealed by the court and made a part of the record in said cause; and it is accordingly done.

M. Williamson 
Judge

State of Illinois
Peoria county

I, Eruck D. Sloan, clerk of the circuit court in and for said county and state do hereby certify that the foregoing is a full, true and complete transcript of the papers in the cause wherein Charles Sulzer is plaintiff and Asa S. Smith is defendant and of the proceedings of said court appertaining thereto, as the same appears of Record and on file in my office.

Given under my hand and seal of said court at Peoria
this 22^d day of March A.D.
1864 Eruck D. Sloan, clerk



State of Illinois } In Supreme Court.
Third Grand Division } To April Term A.D. 1864.

Charles Aulger }
vs } Assignment of Errors.
Asa S. Smith }

And now comes the said Charles Aulger, by Ingersoll Brod. and S. D. Puterbaugh his attorneys, and says, that in the record and proceedings aforesaid, there is manifest error in this, to wit,

- I. The Court erred in excluding from the jury the evidence of the contents of the deposition of Cicero L. Burns, deceased,
- II. The Court erred in not allowing witness Short to testify as to the loss of crops occasioned to the plaintiff by reason of the wounds received at the hands of defendant.
- III. The Court erred in permitting the witness Wiles to testify as to part of the testimony of plaintiff in the trial of the defendant in the criminal prosecution, without allowing the witness to give the whole of the testimony of plaintiff on that occasion about the same matter.
- IV. The Court erred in modifying the 6th and 11th instructions asked by the plaintiff.
- V. The Court erred in giving the 2nd and 8th instructions asked by the defendant.
The Court erred in overruling the

motion for new trial.

V II. The court erred in rendering a judgment for defendant.

By reason whereof the plaintiff prays that said judgment may be reversed, &c, &c.

By Ingersoll Bros. and
S. D. Puterbaugh, attys for
Plaintiff in error.

And now comes the said defendant
by C. A. Rohrer his attorney & says
that in the record and proceedings
aforesaid and in the ^{judgment} ~~proceeding~~
aforesaid no such error as is
above set forth hath intervened
and this he prays may be assigned
of by the court. ~~and that said~~
~~defendant is happy~~ Asa Smith
by C. A. Rohrer his
att'y

Charles Aulger

vs
Asa S. Smith.

Record.

Recd of plaintiff by
Peter Laugh his atty,
the sum of nine $\frac{50}{100}$
dollar my fees for
making this Record
E. J. Sloan, cl

120 90

In the Supreme Court,

APRIL TERM, A. D., 1864.

CHARLES AULGER,

vs.

ASA. S. SMITH.

Record.

Emery & Andrews, Printers and Blank Book Manufacturers, Peoria, Ill.

Filed April 1. 1864

L. L. Lane clk