New Jersey

COURT OF

ERRORS AND APPEALS

IN THE LAST RESORT IN ALL CAUSES.

NEW JERSEY SUPREME COURT.

PETER CASTNER, **Plaintiff in Error.** **vs.** **DANIEL SLIKER,** **Defendant in Error.**	Writ of Error To the Supreme Court.

J. G. SHIPMAN,
Attorney of Plaintiff in Error.

J. M. ROBESON,
Attorney of Defendant in Error.

BELVIDERE, N. J.:
JOURNAL OFFICE PRINT.
1869.

COURT OF ERRORS AND APPEALS.

DECLARATION.

Warren Circuit Court of the tenth day of February, Eighteen Hundred and Sixty Six.

WARREN COUNTY, SS:

Peter Castner defendant to this suit, was summoned by a writ of summons, issued out of said Court, against the said Peter Castner and one Jacob Coleman, and duly served on the said Peter Castner, by the Sheriff of the County of Warren, (the said Jacob Coleman being returned not found,) to answer unto Daniel10 Sliker, of a plea of trespass, and thereupon the plaintiff, by David A. Depue, comes and complains; for that the said defendant, Peter Castner, heretofore, to wit: on the nineteenth day of December, eighteen hundred and sixty-five, at the township of Mansfield, in said County of Warren, and within the jurisdiction of this Court, with force and arms, &c., assaulted the said plaintiff, and then and there, with great force and violence, seized and laid hold of the plaintiff, and then and there, with his fists, hands and feet, beat, kicked, bruised, wounded, maimed and ill treated him the said plaintiff. And also then and there, with great force and violence, cast and threw20 the plaintiff down, and with his fingers gouged the eyes of him the said plaintiff and cut and destroyed the sight thereof, by means of which said premises the plaintiff was then and there greatly hurt, bruised and wounded, and became sick, sore, lame and disordered, and so remained for a long space of time, to wit: Hitherto, during all which time the said plaintiff thereby suffered and underwent great pain and was hindered and prevented from performing and transacting his necessary affairs, and business, by him during that

time, to be performed and transacted, and also thereby the said plaintiff was forced and obliged to, and necessarily did pay, lay out and expend a large sum of money, to wit: The sum of five Hundred Dollars, to and about examining, to be cured of the bruises, wounds, sickness, soreness, lameness and disorder aforesaid, occasioned as aforesaid, and thereby and by reason of the said gouging, wounding and maiming, the said plaintiff entirely lost and was deprived of the sight of his said eyes, and has hitherto remained and continued entirely blind, to wit: At the Township of Mansfield, aforesaid.

10 And for that also the said Peter Castner on the day and year last aforesaid, at the Township of Mansfield aforesaid, again made an assault upon him, the said plaintiff, with force and arms, to wit: With his fists, hands and feet, and then and there beat, kicked, bruised, wounded, maimed and ill-treated him, the said plaintiff, so that his life was thereby greatly despaired of, and other wrongs to him, the said plaintiff, then and there did, to the great damage of the said plaintiff, and against the peace of the State; wherefore the plaintiff saith that he is injured and hath sustained damages to the amount of Ten Thousand Dollars, and therefore he brings suit, &c.

20 DAVID A. DEPUE,
Attorney of Plaintiff.

WARREN COUNTY.

Daniel Sliker, plaintiff in the said suit, puts in his place David A. Depue, his attorney, to prosecute for him his suit against Peter Castner, of a plea of trespass.

PLEAS, &c.

WARREN CIRCUIT COURT.

PETER CASTNER
ADS. } In Trespass.
30 DANIEL SLIKER

And the said Peter Castner, by J. G. Shipman, his attorney, comes and defends the force and injury, when &c., and says that he is not guilty of the said supposed trespasses above laid to his charge, or any part thereof in manner and form as the said Daniel Sliker hath above thereof complained against him. And of this he the said defendant puts himself upon the country, &c.

And for a further plea in this behalf, as to the said defendant's, with force and arms, &c., assaulting and beating the said plaintiff and then and there with great force and violence, seizing and laying hold of the said plaintiff and then and there with his fists, hands and feet, beating, kicking, bruising, wounding, maiming and ill-treating him the said plaintiff, and also with great force and violence, casting and throwing the plaintiff down and with his fingers gouging the eyes of him the said plaintiff and cutting and destroying the sight thereof, as in the first count of the plaintiff's declaration is mentioned, the said defendant by leave of the Court, here for this purpose first had and obtained according to the form of the statute in such case made and provided and saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said plaintiff just before the said time, when &c., in the said first count mentioned, to wit: On the day and year in that count mentioned, at &c., with force and arms, &c., made an assault upon him the said defendant, with great force and violence, and caught the said defendant by the leg, and tried to throw him down and would then and there have beat, bruised, gouged and ill-treated him the said defendant, if he had not immediately defended himself against the said plaintiff; whereupon he the said defendant, did then and there defend himself against the said plaintiff as lawfully he might for the cause aforesaid, and in so doing did necessarily and unavoidably a little beat, bruise, wound and ill-treat the said plaintiff and hurt the eyes of the said plaintiff, doing no unnecessary damage to the plaintiff on the occasion aforesaid, and so the said defendant saith that if any hurt or damage then and there happened to the said plaintiff, the same was occasioned by the assault so made by him the said plaintiff, on him the said defendant, and in the necessary defence of himself, the said defendant, against the said plaintiff, which are the same supposed trespasses in the introductory part of the plea mentioned and whereof the plaintiff hath above complained against him the said defendant. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

And for a further plea, as to the said assaulting with his fists hands and feet, and then and there kicking, bruising, wounding, maiming and ill-treating of him the said plaintiff, so that his life was thereby greatly despaired of, in the second count of the said declara-

tion mentioned, the said defendant by leave of the court, here for that purpose first had and obtained, according to the form of the statute in such case made and provided, saith the plaintiff ought not to have or maintain his aforesaid action thereof against him because he saith that the said plaintiff just before the said time, when &c., in the said second count mentioned, to wit: On the day and year in that count mentioned, at &c., with force and arms, &c., made an assault upon him the said defendant, and would then and there have beat, bruised and ill-treated him the said defendant, if he had not
10immediately defended himself against the said plaintiff, wherefore he the said defendant did then and there defend himself against the said plaintiff, as he lawfully might for the cause aforesaid, and in so doing did necessarily and unavoidably a little beat, bruise, wound and ill-treat the said plaintiff, doing no unnecessary damage to the said plaintiff, on the occasion aforesaid, and so the said defendant saith that if any hurt or damage then and there happened to the said plaintiff, the same was occasioned by the said assault, so made by the said plaintiff, on him the said defendant, and in the necessary defence of himself, the said defendant, against the said plaintiff, which
20are the said supposed trespasses, in the introductory part of this plea mentioned, and whereof the plaintiff, hath in the said second count of the said declaration complained against the said defendant. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him.

J. G. SHIPMAN,
Attorney of Defendant.

STATE OF NEW JERSEY, }
WARREN COUNTY, SS. }

30 Peter Castner the foregoing defendant, on his oath saith, that the pleas by him in this cause pleaded and about to be filed, are not intended for the purpose of delay, and that the said defendant verily believes he hath a just and legal defence to said action, on the merits of the case.

PETER CASTNER.

Sworn and Subscribed before me, this 7th day of April, 1866.

J. T. KERN,
Justice of the Peace.

REPLICATION.

WARREN CIRCUIT COURT.

DANIEL SLIKER,
vs
PETER CASTNER,
} In Trespass.
Replication.

And the said plaintiff as to the plea of the said defendant, by him first above pleaded, and whereof he has put himself upon the country, doth the like.

And the said plaintiff as to the said plea of the said defendant, by him secondly above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, saith that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action, thereof against the defendant, because he saith that the said defendant, at the said time when, &c., of their own wrong and without the cause by him in his said second plea, committed the said several trespasses, in the said plea attempted to be justified, in manner and form as the said plaintiff hath above in the said first count of his said declaration complained against the said defendant, and this the said plaintiff prays may be inquired of by the country, and the defendant doth the like.

And the said plaintiff, as to the said plea of the said defendant, by him secondly above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, for a second replication to that plea, by leave of the Court, here for this purpose, according to the form of the statue in such case made and provided, saith that the said plaintiff, by reason of anything 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 defendant, at the said time when, &c., in said declaration mentioned of his own wrong committed the said trespass in the introductory part of that plea mentioned, to a greater degree and with more force and violence than was necessary for the purpose, in that plea mentioned in manner and form, as the said plaintiff hath in and by the said declaration complained against the said defendant, and this the said plaintiff is ready to verify, wherefore the said plaintiff prays judgment, and his damages by him sustained, by reason of the committing of the said trespasses to be adjudged to him, &c.

And the said plaintiff as to the said plea of the said defendant by him thirdly above pleaded, as to the said several trepasses in the introductory part of that plea mentioned, and therein attempted to be justified, saith that the said plaintiff by reason of anything, by the said defendant in that plea alleged ought not to be barred from having or maintaining his aforesaid action thereof against the said defendant, because he saith that the said defendant, at the said time, when, &c., of his own wrong, and without the cause by him in his third plea alleged, committed the said several trespasses, in the said plea attempted to be justified, in manner and form, as the said plaintiff hath above in the said second count of his said declaration complained against the said defendant, and this said plaintiff prays may be inquired of by the country, and the defendant doth the like.

And the said plaintiff as to the said plea of the said defendant by him thirdly above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, for a second replication to that plea, by leave of the Court here for that purpose, according to the form of the statute in such case made and provided, saith that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having or maintaining his aforesaid action, thereof against the said defendant, because he saith that the said defendant, at the said time when, &c., in the said declaration mentioned, of his own wrong committed the said trespasses in the introductory part of that plea mentioned, to a greater degree and with more force and violence, than was necessary for the purpose in that plea mentioned, in manner and form as the said plaintiff hath in and by the said declaration complained against him the said defendant, and this the said plaintiff is ready to verify, whereupon the said plaintiff prays judgment, and his damages by him sustained, by reason of the committing of the said trespasses to be adjudged to him, &c.

DAVID A. DEPUE,
Attorney of Plaintiff.

REJOINDER.

WARREN CIRCUIT COURT.

DANIEL SLIKER,
vs
PETER CASTNER,
} *In Trespass.*

And the said defendant as to the said second replication of the said plaintiff, to the said second plea of the said defendant, saith, that the said plaintiff ought not by reason of anything by him in that replication above alleged, to have or maintain his action against the defendant, in respect to the said supposed trespasses, in the intro-10 ductory part of the said second plea, and in the said declaration mentioned; because he saith that he did not to a greater degree, or with more force and violence than was necessary, for the said purpose in the said second plea mentioned, commit the said supposed trespasses, in the introductory part of the said second plea mentioned in manner and form as the said plaintiff hath in his said second replication in that behalf alleged. And of this the said defendant puts himself upon the country and the plaintiff doth the like.

And the said defendant as to the said second replication of the said plaintiff, to the said third plea of the said defendant, saith that the said20 plaintiff, ought not by reason of anything by him in that replication above alleged, to have or maintain his aforesaid action against him the said defendant, in respect of the said supposed trespasses, in the introductory part of the third plea, and in said declaration mentioned; because he saith that he did not to a greater degree or with more force and violence than was necessary for the said purpose, in the said third plea mentioned, commit the said supposed trespasses, in the introductory part of said third plea mentioned, in manner and form as the plaintiff hath in his said replication in that behalf alleged.— And of this the defendant puts himself upon the country and the30 plaintiff doth the like.

J. G. SHIPMAN,
Attorney of Defendant.

BILL OF EXCEPTIONS.

WARREN COUNTY CIRCUIT COURT.

PETER CASTNER,
ADS
DANIEL SLIKER,
} IN TRESPASS. *Bill of Exceptions.*

Be it remembered that at a Circuit Court holden at Belvidere, in and for the County of Warren, on the eleventh day of February, A. D., eighteen hundred and sixty seven, this cause came on to be tried, before the Hon. Mercer Beasley, a Judge of said Court, upon the issue joined in the said cause, (and at the same,) before a Jury of the country duly impannelled and sworn, to try the said issues joined between the said parties, and a true verdict to give according to the evidence in the said cause. The plaintiff in order to maintain and prove the issue upon his side to be maintained, called as a witness

Daniel Sliker, the plaintiff in the said suit, who being duly sworn according to law, did depose as follows: I reside in Hunterdon County, in this State; I have lived there about 31 or 32 years; I will be 66 years old if I live till the 15th day of March next; I know the defendant and have for thirty years; I recollect going to Hackettstown on the 19th day of December, 1865; I started from home between 10 and 11 o'clock in the morning; George W. Beatty went with me from his place; he lives two miles from me; it is about 11 or 12 miles from my place to Hackettstown; we did stop at Peter Petty's; at that time he kept Tavern on the road to Hackettstown; got to Pettey's pretty well to 12 o'clock; drank there and went from there to Hackettstown; we met Jacob Coleman and Castner, the defendant as they went through Hackettstown; Coleman said they were going home; Castner did'nt speak to me; I suppose it was between 12 and 2 o'clock when they left; we went up to Churchfield's and they had just gone in to dinner when we got through; I went to to Hackettstown to get a wagon repaired; I got my wagon; I left near sundown; Beatty returned with me; stopped at Petty's on the way back; I saw some one go from the front of the house in the barroom; I don't recollect who it was. The man who went in the house went from a team which was standing by there. I don't remember

seeing anybody. I went in, but Beatty went in with me; and Castner and Coleman, when I first went in I saw leaning against the bar; and I thought I would have to treat before I went out, and I said boys let us take a drink. Then I turned around and said Peter come take a drink with us. He said no, I don't drink with any such a damned black perjured villain as you are. They may not be just the words, but as near as I can tell. I can't tell you what occurred; we got together then some how or other; I don't know how. The next recollection I have, he was sitting straddle of me, gouging my eyes out. I was down on the floor; how I got there I don't know; I got hold of his hands and pulled them out of my eyes, and told them to take him away. He was not then taken away. He said kill, but I don't know whether he said he would kill me, or who he said. He struck me then twice, once on my left temple and once in my mouth. The mark is there yet. Somebody then pulled him off and as they pulled him off he kicked me in the small of my back; I feel the effects of that kick yet whenever I get a cold; I feel it more or less every day. I never saw any after I fell on the floor, after I pulled his hands out of my eyes twice. I can't give the jury much of my condition. They put me to bed. The condition I was in I know very little of. George Beatty drove me to his place, and then one of his boys drove me home; I had my own conveyance. I was about 6 or 8 weeks in bed, and attended by Dr. Servis, a physician; I think he was there every day for six weeks, except one day and one day there twice. I don't know what the physician bill is; I paid him $50 once; I don't see to get about much and I never have settled with him. I was very sore at first for awhile, but it wore away. I could not tell you much about it, for it was 10 days or 2 weeks before I could recollect much about it. I have not been able to see to any business since that time. I have done a little settling up since, by having my son with me to do the settling; I can't go round at all without some one with me, except around my own buildings. I can go round them a little, where I am so used to them. I have never seen a particle since that night. The sharpest lightning in the world I can't see a glimpse of it.

Cross-Examined.—I live from Mr. Castner, to go round, I suppose in the neighborhood of 2 miles. I have lived there 32 years in March. I had known him that long; I have known him since I was a boy; I resided in another County, but then I knew the

family. He is quite a little younger. I started to Hackettstown between 10 and 11 o'clock, on that day. George W. Beatty, did not go from my place. He went from his place with me. I stopped at his place and took him with me; I was alone and he was standing on the stoop and I asked him if he did not want to go along and he said yes and he got in the wagon and went along. Peter Petty's Tavern is 9 miles from my house; we stopped there on our way to Hackettstown; we got there between 11 and 12 o'clock that day; we stayed there and got 3 drinks there; stayed around there some
10 little time. I went off. I believe it is 2 miles from his place to Hackettstown. Petty was at home and he and his little boy waited on us. Isaac Wire was there that day when we went there; when I left there Beatty went with me; we went to several places in Hackettstown; went to Churchfield's Tavern and Decker's Shop. I forget whether we went to Churchfield's and to Decker's shop first; we were not at Decker's but a little; but just enough to leave the wagon, and tell him what we wanted done with it. I don't know whether we went from Churchfield's and Decker's to the Hackettstown Depot. We were not there a great while; we went there on
20 foot; we went there a good while before we left Hackettstown. It is a quarter of a quarter of a mile may be from Churchfield's to Decker's to the Depot of the Morris and Essex Rail Road; short distance any how. It was very near sundown when we left Hackettstown. If my memory serves me right, saw Coleman and Castner on the walk going down the street, and we were in the wagon going up near the Bank. I spoke to Coleman a few words. I stopped a moment to speak to Coleman; I did not speak to Castner; I think he walked on. Coleman told me that he had started home. I waited 'till my wagon was repaired that day. I went down and I
30 think helped me hitch up. I think it was between sundown and dark like, when we got to Petty's that night. I did intend to go on to my own home that night. We stopped at Petty's, I suppose because we were getting dry. I suppose we were both pretty well spiked. Beatty did not want to go by Petty's. Beatty wanted to go up by Taylor's to see about some brooms he had. I think Castner's name was not mentioned from the time I saw him at Hackettstown, and did not think of seeing him again, neither after I got back to Petty's. The first thing I saw of Castner was, he was standing by the bar. I don't recollect seeing Castner 'till I
40 saw him in the bar room. Horses I saw there by the post I sup-

posed were his. I did not speak to Castner when I went in the room 'till I asked him to drink with me. I did not think any body was in the room when I went in but me and Beatty and Coleman and Castner and a little boy 13 or 14 years of age. I suppose Castner and Coleman were standing in the room; can't say if by the bar. I did not hear Coleman ask Castner to drink before I invited any body to drink; if Coleman did invite Castner up to drink before I invited any body, I don't remember it. I did not take a drink before the fight began. I did not say there on that occasion that I could lick the name of Castner. I asked him in this way, Pete come take a 10 drink with us. I did not think any sneer about it. He replied he did not drink with perjured persons. I did not say he was a damned liar. I stood leaning against the bar when I called him up to drink. I think Castner stood pretty close to me, not far off. I don't remember that I moved anyway either toward him or from him, when he said that. I don't recollect whether when Castner made this remark to me, that I made any reply to it. I don't remember raising my hand at Castner, that day at all; it strikes me that he kicked me and I caught his foot before we fell on the floor; it has always struck me that way; I can't remember anything that took 20 place from the time I caught his foot until he kicked me. I caught his foot. I am not clear of that; I can't tell which of his feet I caught; I can't tell how I came to let go if it; I am not certain I had hold; I do not remember I caught him by the leg and threw him down on the floor, was where he sat straddle of me gouging my eyes. I don't remember being on the floor at one time and having him by the leg; I don't recollect having him by the leg and saying let us alone now. I don't recollect any one saying take us off; I was lying on my back when I found him straddle of me. I could not tell where I was in the room. I don't know how I came to 30 know it, only by his having his fingers in my eyes gouging my eyes out. Before Castner told me this no other person there, I have already said. Coleman was there too in the bar-room. Beatty was in the bar-room. It is a middle sized bar-room. I think Peter Petty took me up. I said take him off or take him away. Castner did not go away He struck me on the temple and on the mouth. He sat straddle of me. The first stroke was a pretty good stroke and the other nothing but a tap like in the corner of my mouth. He did not leave me 'till some of them took him off of me. I don't remember anything 'till he put his thumbs in my eyes, and he 40

kicked me and struck me 3 or 4 times. I could'nt see any at all when I got up. I believe my eye balls were in then. I don't recollect what I asked, for ten days or two weeks. Once in awhile I would remember some body being there. I dont recollect telling anybody that Castner did not gouge me at all. I recollect saying that I did not blame Beatty any. I said I blamed myself because Castner would not have tried it if he had not known I was drunk. I did not say I had nobody to blame for it but myself. I don't remember no such talk as telling three or four persons that he never gouged me at all. I never said I meant to give Castner a damned licking. I did not tell John A. Anderson that I had licked him and I'd be damned if I would'nt lick him again. I don't know that I did tell Castner that I would lick him. That's ten years ago since we spoke together. I have never said I would lick him and I did not want to fight him. I had no knowledge that Castner was in Peter Petty's bar-room that evening when I went in.

And being examined again said:

I was tight when I went in and could hardly keep my feet. I drove my own horse from Hackettstown to that place. I did hitch him up. I led the horse from the tavern to the wagon. I don't remember whether I got him out of the stable. I got in the wagon myself I expect; I don't know. I drove up to the hotel for Beatty to get in. I went in and got another drink. I don't remember how often I drank in Hackettstown that day and what I drank in the tavern. I remember drinking Lager Beer, and also drinking in the tavern. I believe I got off the wagon at Peter Petty's myself, and tied the horse myself and went into the bar-room myself. I remember being in the bar-room. I believe we did not stop between Hackettstown and Peter Petty's. We went right off as soon as we got the horse hitched up. I don't remember whether I paid for getting the wagon fixed or not. I have not seen Decker since. I don't remember seeing Decker there when I went there. I don't remember whether I ever saw the man who helped me or not before. Beatty went into the bar-room while I went after the wagon. I remember very well seeing Castner that day and asking him to drink. I think must I have tied the horse. I drove her and Beatty did not bother himself with her. I don't recollect any body coming out at the time. I told you I don't remember whether I tied it or not, but suppose I did tie it. I recollect being in the bar-room. I don't recollect walking there.

The next witness that was then called on the part of the Plaintiff was

Peter Petty, who being duly sworn according to law, did depose as follows; I live in Newburgh 1½ miles from Hackettstown. My business in 1865 was keeping hotel. I am acquainted with Daniel Sliker and George W. Beatty and Jacob Coleman and Peter Castner. Sliker and Beatty were at my house on the 19th of December. I think middle of the day or close to it. They were there only a short time. Sliker had a one horse wagon and Beatty was with him. They went towards Hackettstown from my place. Sliker and Beatty re- 10 turned toward dark. Castner was there about the middle of the day; I don't know when he did return, it was sometime in the afternoon. Sliker and Beatty were gone some time when Castner and Coleman came. It was along in the middle of the afternoon or later when they came back. Castner had his horse put out. It was sundown or very soon after when Castner went out to get his horses. He went out before Sliker came in. I was in the bar-room when Sliker came in. I could not say if Castner was in when I left. I would not say if Castner was in when I went out. I went out to get a light to light the bar-room. I went in the kitchen part of 20 the house. I went through the dining room and hall to the kitchen. I was gone but a very short time, a very little while only. I found Castner, and Sliker, and Coleman, and Heath, and Wire, and Vannatta, and George Beatty in the bar-room. I saw Castner and Sliker yoked together when I first went in the bar-room. They were clutched fast together; they where on their feet when I came in, and Castner seemed to have the better of Sliker, and was pushing him towards the stove and he caught the stove, and Castner jerked his right arm loose and struck Sliker, and Sliker fell on the floor and Castner on the top of him. I then grabbed hold of Castner to get 30 them apart, and I could not do it myself and I called for assistance and Heath assisted me, and got them apart, and Sliker laid still on the floor, and did so 'till me and Heath put him in a chair. Mr. Castner went away from the place after the fight. When Sliker fell Castner was on the top of him. I cannot tell how he used his left hand. I thought he had him by throat and he used his right fist. Cannot tell how often, and also kicked him when down.

The plaintiff's counsel then asked the following question:

What did Coleman say?

Which was objected to by the defendant's counsel, on the ground that Coleman's declarations were not evidence, but was admitted by the Court.

And to this opinion of the Court a Bill of Exceptions is prayed by defendant's counsel and is allowed and sealed accordingly.

M. BEASLEY, [SEAL.]
Chief Justice.

Coleman said let them be, or let him hollow enough, and I said stand back or I'll knock hell out of you quick. Coleman did not 10aid me in taking them apart. I threw my coat off before I took hold to take them apart. Sliker said two or three times take him off. Castner seemed to be rather excited I thought. I think I did not make but one attempt to get them apart. I don't know if I made two efforts or not. I had hold of them and they were clutched and Castner kicked, whether he hit him in the side or where he hit him I don't know. Sliker was in a very bad condition. Sliker did not get up himself. Heath and I helped him up. He moaned and went on in the night. I wanted a doctor and he objected to it. We wash-20ed him off and I took one thumb and finger and opened his eyes and saw his eye was bad. He threw up in the night and was light headed. He threw up blood and slime. There is a mark of a hand on the wall, a mark of blood. I think it was Mr. Castner's hand made that blood. The mark was right on the wall where they lay. They lay so close together that when I went to take them off, he threw his hand against the wall. Considerable blood was on the pillow of the bed and on the floor.

Cross-Examined.—Sliker's lip was cut in one place that bled a considerable. All the reason I have to think it was Castner's hand was 30when I was pulling Castner off, he kind of threw up his hand like when I tried to get him off. Castner and Sliker were clutched fast together when I went in. They were about in the middle of the barroom. I could not tell exactly as to that. I could not answer as to how Sliker had hold of Castner, nor how Castner had hold of Sliker. He had not Castner by the leg 'till the time when he was going to fall, or after he was down I think he had Castner by the leg. I don't remember which leg he had him by. Sliker did not say in my hearing let us alone now, if he said it I did not hear it. No doubt a great deal was said which I did not hear, as I was anxious to

get them apart. Others no doubt heard more than I did. I don't know what they did while they were wrestling or after Sliker was down. I did not try to get them apart 'till after they were down. Until Castner pulled his hand loose and struck him. That is the first striking I saw. They had both hands engaged when I went in and Sliker had both of Castner's hands fastened, 'till Castner jerked one loose, and I think struck him about the face somewhere, I cannot say whereabouts. He went down right on his back. I took hold of them as soon as they went down on the floor. I took hold of Castner. I don't recollect Sliker saying let us alone now. 10 I recollect Sliker saying take him off. I understood him. Whether Sliker hallowed take him off. Castner did not get off of him of his own accord. I told Mr. Castner I should always respect him, but not because he came off of Sliker when he said take him off. I told him I would respect him because I had always thought well of him as a man and never had any reason to think any other way. I can't say if I was loose from Castner after I grabbed him and they fell down, any more than to take my coat off. I took my coat off when I called for assistance to take them apart. When I first took hold I had my coat on. I stood right by the side of them when I threw off my 20 coat. I on one side and Coleman on the other. Immediately on taking off my coat I took hold of Castner. I could not tell what hold they had of each other; I paid no attention to that. When I raised up to pull off my coat, I think they were both clutched, at least they were both on the floor. I was considerably excited. They were on the floor a very short time fighting together. I could not tell you how often Sliker said take him off; he said take him off two or three times I think; I had hold of Castner when he said take him off the first time; I had hold of Castner when Sliker said so the second time. I was trying to get him off; I could not pull him off. 30 Heath assisted me, I could not do it. I think I spoke to Castner and told him to let go or something. What I exactly said to him I don't know. After I got Castner off he might have stayed at my house 10 or 15 minutes. I had been keeping hotel there a year. I don't know what reply Castner made to me when I told him to quit. Castner was on the top when I stepped back to take my coat off.

George W. Beatty, being sworn deposed as follows: I have known the parties 30 years. I recollect that on the 14th of December, 1865, on Tuesday, he asked me to go. We stopped at Peter Petty's on the

way up. It was between 9 and 10 o'clock when we left home, and got to Petty's between 10 and 11 o'clock. As we went in Hackettstown, we met Castner and Coleman; we went to Churchfield's; we left there before sundown a little while. We stopped at Petty's on the way back. We saw a team there. I thought I saw some one tying his horses. I went in the bar-room first. Heath and Wire were in the bar-room. Castner came in; I was standing by a stove; coal stove warming my hands when Sliker came in. He walked up to the bar and invited us up to take a drink, and motioned to the gentlemen, Heath and Wire to come up. When we come to the bar Castner stood at the upper end and Coleman stood next, and I think Castner was about to treat Coleman or something like that, and Sliker said Peter take a drink with us. Castner said I drink with no perjured villain or something like that. Daniel Sliker said Peter do you say that? and he said I do, and then Sliker said it is a dod dashed lie; with that Sliker went round behind me, going this way with his fists, and saying, I can wip you or the name of Castner, or anybody that says that. As he went around Sliker knocked Castner's hat up and made a pass at him, and then Castner made a pass at Sliker and neither one hit, and then they clinched and scuffled back and forward over the bar-room, and came near throwing the stove down, when I put up the stove and then they got down. I could not see; the others came up. I called for some of them to take them off. I understood Sliker to say let us alone now. I understood it was Sliker said that. It appeared that Sliker was kind of chocked and he said take him off. I heard Castner say to him hollow enough. I suppose it was him by his voice. I think after Sliker said the second time take him off, Castner said hollow enough or I'll kill you. I did not interfere to take them apart, any more than I called out to others to do it. I thought others were there stronger than I to take him off. He jumped off the wagon on one side and I on the other. I cannot say he was drunk. I tied Sliker's horse and put the blanket on. I could not see that Sliker was out of the way with drink. If he was I saw nothing of it. As soon as I got the horse tied I went in the bar-room. Sliker took the blanket out of the wagon himself. Sliker came in in a moment or two. As I went in I saw Coleman, and when called up to drink, (Sliker called me up,) pretty soon, he did not set down. The first I heard pass between Castner and Sliker was when Sliker invited Castner to take a drink. When Sliker said it was a dod dashed lie he started around towards Castner be-

hind me and Jacob Coleman, and when he started he had his fists going over one an other this way, and began to say I can lick you or the name of Castner. He did not start off on a little kind of pace. Sliker passed me and Coleman in order to get to Castner. Sliker struck Castner's hand up with his left hand, and aimed a blow at him with his right hand. I guess Castner warded it off and as he warded it off, he struck at Sliker. They both had their over coats on, and they pulled back and forth through the room, and Castner tried to get his hand loose to strike Sliker. Quite a little scuffle they had before they got down; after they got down I could not see how they were; they were down before I saw Petty. I did not know Petty was in there 'till I saw him throw his coat off, pretty soon after they got down. I thought I heard Sliker say let us alone now, a little spell after they were down. Sliker spoke and I thought he spoke choked like as if a hand was on his throat. He said take him away and then some little time after said take him away. I could not just exactly tell whether Castner got up, when he said take him away the last time. When he said take him away the second time Castner said hollow enough or I'll kill you. I did stay all night with Sliker that night. I did want to go another way home that day. Sliker said it is getting late and he wanted to get to Petty's and get something to drink and did not say he wanted to go to Petty's and give Castner a dod dashed licking or whipping. I went to bed at Petty's that night.

Daniel Wire, the next witness for the plaintiff, having been duly sworn according to law, testified as follows: I reside in Hunterdon County, two miles from Hackettstown. In December, 1865, I lived in Hackettstown. I recollect being at Petty's hotel about the 19th December, 1865. I went there between sundown and dark. Coleman and Castner were in when I went in. Sliker and Beatty passed me and got a head and just as they were going I went in. Castner or Coleman went out of the house, I don't know which. Sliker and Beatty came in after I came in; I can't be sure whether Heath was in. I did not see that Sliker did or said anything when he first came in; the first I heard him say was boys take a drink and said Castner take a drink. Castner said he drank with no perjured man. I don't know if Sliker said anything. I saw Sliker make a motion that way and knock Castner's hat up with his open hand. Castner grabbed hold of him then and they clinched then. Then Castner ran Sliker back and struck him and kept striking him and running him back

'till he got him down. They were down there and it was kind of dark there. I did not see as Sliker did anything much. They were down more than once. Sliker raised up partly with him once and they got against the stove, and I got hold of the stove and kept it from falling down. I heard Sliker say once or twice take him away and Castner said hollow enough or he would kill him. I saw Castner strike and kick him. Petty came in when they got up the last time and was going down again. After Petty came in Castner did not quit fighting him, but said hollow enough or I'll kill you. They
10 were down some little time after that. I could not see where Castner kicked Sliker when they were pulling him off. His eyes were both shut. I could not tell what had been done to the eyes. I saw marks of a bloody hand on the wall. I don't know whose it was. I looked into his eyes, the balls did not look right. They looked very dim, whitish like after the blood was washed off. He bled a good deal and raised blood a good deal. His head was swollen a good deal. After they said take him off, I saw Castner kick at him. I don't know how long they were in this fracas. It might have been 15 or 20 minutes from the time they first began; may be not so long;
20 I don't know, after they got down the second time; I did not see Sliker do anything. I thought Sliker did well enough.

The following question was then asked by the plaintiff's Cousel.

How did Mr. Sliker appear ? Did he appear sober or otherwise?

To the question the Counsel for the defendant objected, on the ground that the question asked for the opinion of the witness. The objection was overruled by the Court and question allowed to be put, and to this opinion of the Court a Bill of Exceptions is prayed by defendant's counsel and is allowed and sealed accordingly.

M. BEASLEY, [SEAL.]

30 *Chief Justice.*

Answer.—He did not walk right straight I thought.

Cross-Examined.—I lived in Hackettstown at the time of this occurrence. I have been at the tavern before. I knew Peter Petty before that. I got in the bar-room before Sliker and Beatty. They got in soon after. I don't remember whether Castner was in when I got in. When I first saw Castner particularly he was in the bar-room. He was standing by the bar and I think when I first saw him, Coleman was standing by him. They were in the act of taking something to drink. Petty's son was waiting on them.

He came in and walked up to the bar and Beatty with him. I could not say if Beatty and Coleman stood below Castner and Sliker. I stood back behind the stove; Mr. Heath was by me. He came there awhile after I was there. He came in after the fracas begun. I could not tell how long after I was in. Heath came in twenty minutes after I was there. I could not say he came before or after Petty came in with the lights. I spoke to Petty when he came in. I could not say where Castner and Sliker were when Heath came in. I could not say what they were doing when Heath came in. They had begun the fracas. I sat down 10 some part of the time behind the stove. I did not move while they were fighting. I moved up towards them. I kept the stove from going over. Sliker I think came back against the stove. It was kind of dark in the room; I could not see very well; Castner had Sliker down; I could not say whether he had hold of Castner with both hands or not; I was not excited; I kept perfectly cool; I remember seeing him go up to Castner and throw up his hands and hit his hat; I saw Sliker up by Castner; was the first I saw of him; he struck up with his right hand; I can't say if Castner warded off the blow with his hand; I can't be sure whether Castner's 20 hat went off or whether it did not; I did not notice that his hand hit him on the cheek; I did not take much notice whether his hand went close to his cheek or not; I can't say whether his fingers were entirely open or partly shut; they were not clinched; there was no candle in the room then and I was standing behind the Stove; I did not hear Sliker invite Castner to drink with him; he stood then rather on the other end of the bar, and the next I saw of him he was at Castner's end of the bar; I did not see him go till I saw him there; I don't recollect hearing him say he could lick the name of Castner. I did hear the reply Castner made to Sliker when he asked 30 him to drink. He said he would not drink with no perjured man or perjured villain or something like that. I don't recollect anything being said or done by either party, not just at that time. The first thing I recollect after that was seeing Sliker round by the side of Castner knocking up his hat. When Sliker did this to Castner, he rather had his back to me. I think when Sliker did this to Castner I think Castner grabbed Sliker and Sliker Castner. They did tussle for some time on the floor; some little time; for a little while on the floor it was a pretty even tussel; not long. I could not say while they were in the tussle whether Castner got on his knees or 40

not. They stood by the bar when they clinched. Sliker was down pretty soon after they left the stove. I won't be certain whether it was before or after they had been on the stove, that Peter Petty came in with the candle. I saw Peter Petty trying to get Castner off. I can't say whether Peter Petty did pull Castner entirely off. I don't recollect Peter Petty going behind the bar. I don't recollect where Petty was when the fight was over. I don't recollect hearing Sliker say anything at all. I did not go up 'till Heath went up and then I went up pretty close to them, and then I stepped back afterwards, 10pretty soon, and did not go up again, not while they were fighting. I don't recollect Petty going behind the bar before Castner went away. Castner went away pretty soon after that. I never saw Sliker before that day that I know of, and the first I saw of him that day, I thought he did not walk straight. Before he had hold of Castner, he was walking around the bar room a little. The first I saw of him was when he stood at the bar, and the next at Castner's side when they clinched right away.

Second Examination in Chief.—I don't recollect hearing Sliker say anything before he invited them up to drink. I thin kHeath was 20in when the fight began. I though Castner had the advantage of the tussle; the way I seen them on the floor. I did mean to say I heard Sliker say nothing.

Second Cross Examination.—I am not sure Heath was in before the fracas began. I had not been drinking any that day at all. I stayed at Peter McCracken's all night. I was going to help McCracken kill hogs.

Howard Servis, M. D., was then called and sworn on the part of the plaintiff, his testimony was as follows: I reside in New Hampton; have been a physician seven or eight years; I have been at New 30Hampton since the spring of 1862; know the plaintiff; was sent for to attend him in December, 1865; I did not go on the first call; I was ill and could not go. I went on Christmas day. I found his eyes very much inflamed. His vision entirely gone. He was extremely nervous; depressed in spirits and appeared extremely ill. I made a critical examination of the eyes. His right eye had an incision in it, appeared to be in the eye ball. The ulcers were at first superficial or seemed to be; both eyes had ulcers on the cornea.

The left eye had an ulcer surrounding the cornea. So much so that in a few days the cornea dropped out. The cornea is the black portion of the eye. I could not tell how deep it was. The ulceration surrounded the lower part of the verna of the left eye, the upper side bear and nothing but the cut, except the ulceration. The left eye seemed to be distorted as if pressed out of shape. There was ulcerations covering nearly half the cornea. I think the right eye was in the worst condition. There was no bruising about the eyes; no discoloration.

Question.—How could such injury be produced? 10

This question was objected to by the defendant's counsel, but it was allowed by the Court. A bill of exceptions is prayed by defendant's counsel and is allowed and sealed accordingly.

M. BEASLEY, [SEAL.]
Chief Justice.

Answer.—It might have been done by gouging.

I attended him 'till February 8th, 1866. That is my bill for services. That includes all services from December, 25th, 1865, to February 8th, 1866. The bill is fifty ($50) dollars. It includes no services but those for the eyes. He could not see any when I was 20 first called in to see him. In my judgment he will never regain his sight in any degree whatever. One of the eyes seemed gradually to ooze out or recede and the other receded. I think they sent for me two days before I did go.

Cross-Examined.—They sent for me on the 23d, and I went on the 25th; I think the eye had been suffered to run into inflammation for want of medical attendance sooner; an inflammation of the eye is not an uncommon thing; ulceration of the eye is not a very common thing; it happens occasionally; ulceration might terminate in recovery without medical treatment; it would not be very natural 30 for it to do it without medical treatment where a person has been in a violent struggle; I don't know if it could take place without a blow; just a mere struggle would not produce it; I have seen inflammation result from very slight causes; it is possible, but not probable, that inflammation and ulceration would result from accidentally thrusting a child's finger in the eye; it is a fact that the loss of the eye has occurred from the scratching of the eye ball with a little

briar; this little incision was in the white of the eye, and in a pretty straight line from the cornea; it was not the eight of an inch; I could see it was of some depth; I did not probe it to see; such a scratch as that might easily have been made when the two men were scuffling and one scratched the other with a thumb nail; the left eye was distorted; that receded and dried up; seemed to absorb; the inflammation was so great when I went there that he could not see.

Israel Heath was the next witness called by the Plaintiff, and test-
10ified as follows:

I reside in Morris County; in December, 1865, I lived where I do now; I reside near ½ mile from Peter Petty's; I do know Sliker and Castner now; not then; I was at Petty's on the 19th of December, 1865, between sundown and dark; met Castner and Coleman there; I recollect Sliker and Beatty coming there; I had been there 15 minutes; Daniel Wire came about that time; Castner and Coleman had gone out; they all came in about the same time; Wire came in near me; when Sliker came in he walked right along between the stove and bar; Sliker said he was pretty tight but he
20guessed he could stand another drink; he did not speak to Castner then any more than to the rest; Castner stood by the bar; Castner said he would not drink with any perjured man; I understood him that; I don't recollect Sliker saying anything; he just began to draw his coat off and then put it on and said: "I can lick the name of Castner;" Castner said: "Dan, I can lick you, and have not got a son but can lick you; Dan, I can shit on you, and I have not got a son but can;" He said: "You can, eh?" and with that Sliker knocked up his hat, and then Castner struck; Castner's blow staggered him back, I think, and then he caught him and pushed him;
30they had a little tussel and ran against the stove; I think Sliker came against the stove; then they went from the stove to the end of the bar, and then Castner got Sliker down; he had Sliker by the neck with his left hand and struck him with his right, and then Petty came in and took hold of Castner to take him off, and then Castner called for help, and Petty said: "For God's sake men, help take these men apart; they are killing one another here; I caught Castner by the right arm, when he was striking him, and held on to that, and then he went to kicking him, and I caught his leg and held on to that all I could; then we got them apart and got Castner on his

back and Coleman said damn it, let them alone, let them fight; I'll knock hell out of you if you don't let them alone; Coleman took me by the neck and I let go of Castner and then Petty got them off after Castner hit Sliker 2 or 3 times again; after I let go of them Castner got back pretty much in the same position, and after he had hit Sliker 2 or 3 times then Petty got them off; I thought Sliker had been drinking some when he came in; from what little I knew of the man, I thought he had when he came in some; I saw marks of a hand on the wall; it could have been made by the right hand; it was towards Sliker's head; Sliker laid up from the wall 10 where this impression was; I stayed there 5 minutes after they got apart; all I heard Castner say was Sliker had his hands over his face and Castner shoved up the light and said: Dan, lets see your face; I did not examine his eyes; he was a good deal swollen about the eyes; his face was pretty bloody; Castner's face was not hurt; he had a cut on his knuckles; where he got that I don't know—whether on the corner of the bar or where; he knocked Castner's hat off on one side; he did not knock it off all the way; on one side like; I didn't see Sliker strike Castner any after he struck his hat; Sliker was close to Castner when Coleman said let them alone. 20

Cross-Examined.—I had never saw Castner before, and I had never seen Sliker but once before, and never before to speak to him; I think I had seen him about 6 or 8 months before; I thought from the way he said he was pretty tight; he had been drinking too; I was sitting down when they came in the room; Beatty and Sliker came in the room about one time; I think Sliker was ahead of Beatty; it strikes me that Sliker came in the room before Beatty; Beatty stood at the stove, but Sliker went right to the bar; I did not take it as an invitation for me to go up and drink when Beatty went up to the bar; I was sitting rather by the side of the stove at that 30 time; Castner stood at the upper end of the bar; Beatty was between Sliker and Castner, but am not sure about Coleman; there was a boy behind the bar when Sliker went up to the bar; Sliker did not say, Castner come and drink with us, when he said in that general way, boys come up and drink; Castner said he did not drink with perjured persons; all I recollect was, you can eh; all I heard him say just at that time; it was just after that Sliker said, I can lick the name of Castner; when Sliker said I can lick the name of Castner he pitched the coat off his shoulders; he

was right behind Beatty; he went close up to Castner; then he knocked his hat up, when Castner said I can lick you Sliker; Sliker did not have hold of Castner at all till they got on the floor, and Castner had Sliker down at or near the bar; they got down at the end of the bar before Petty came in; Petty did take hold of Castner right away; he said, for God's sake help take them apart; when we went to pull Castner off of Sliker, Sliker had hold of Castner, when we pulled Castner off; then Sliker still kept his hold and they kind of turned off and and we did not break their hold; Petty
10 stood still to pull off his coat; Petty had hold of Castner when Sliker said take him off; it was the second time when Petty took hold of him after he had thrown his coat off; he said, take him, and in fifteen or twenty seconds he said, take him off again; it was but a little while when Castner said, hollow enough; but Sliker said he would not hollow enough, but said take him off; Sliker only hollowed once that he would not hollow enough, and that was after Castner's hand was cut pretty well; I believe he did go up and pour some whisky on his hand; I believe Petty was there; Beatty got on the far side of the house six or eight feet; he might have risen once from
20 his chair and set right down again.

Hagar S. Beatty, was then called and sworn, testifying as follows:

I live in Beattystown; I'll be 18 years old the 5th day of December next; I don't know Sliker and had no personal acquaintance with Castner. I saw Castner on the wagon. I saw a wagon coming down the road, and I went and got in the hind part of the wagon; and Mr. Castner was in the wagon and the other man was driving. Castner came back to me. He said he had had a fight up to Peter Petty's; I asked him who whith; he said he wished to God they
30 had left him alone; he would have killed him, and he said I did punch his damned eyes out as it was. Nothing further passed.

Cross Examined.—I am a son of W. Beatty; I thought Castner had been drinking; at least his breath smelt of liquor.

Andrew Vannatta, was the next witness called on the part of the plaintiff, who being sworn testified as follows:

I live in Hunterdon County; am some little acquainted with the plaintiff; I lived in sixty-five in Warren County; I passed by Peter

Petty's on the 19th of December, 1865; I went in when I went back. I heard a great noise in the bar room; when I first went in I saw Jacob Coleman. He stood up by the bar. I did'nt see any body else 'till I walked around and saw Mr. Heath and George Beatty and a couple of men down on the floor fighting. Beatty stood on the other side of the men five or six or seven feet or something like that. I know Daniel Wire. I don't think I saw him 'till I turned round to come out, then I saw him. I heard one man say take him off, and the other said make him hollow enough. I thought he had the man by the throat. I could see his elbow come back, but I could not see 10 him hit him and it sounded as if his head went on the floor. I won't be sure whether Petty was in or not. When I saw Petty he stood right at the head of the bar and Petty said this won't do. I won't have this in my house and with that somebody said something and Petty made and threw off his coat and took hold of the man on top and pulled him off, and the man on top kicked the other in the side, as he lay on the floor, and with that he and Petty had some talk and I picked up my hat and went off.

Cross Examined.—I did not know either Sliker or Castner. I heard the man under hollow once or twice. I think the man still 20 lay on the floor or else was set up kind of against the bar.

Eliz. Osmun, was then called on the part of the plaintiff, who being sworn deposed as follows:

I lived at Castner's at the time. I lived there five months. I have been away from there better than a year. I have lived at Mr. Sliker's since then. I did see Mr. Castner come home that night. Mrs. Castner and I were in the house. Westly Castner is about 24 years of age. I was at work sewing. Castner did talk rather boastfully about it. I did not think he was intoxicated. I did not observe a bruise on his cheek. His hand was cut a little. I have talk 30 ed to my mother about the matter.

George K. Bird, sworn.

I live at Changewater; I lived there in 1865; I am acquainted with Castner and Sliker. I saw Castner the next day or the second day after the fight. I don't recollect which. He told me he had been having a fight with "old Bully." He said he had pretty hard work of it. He said they met in a hotel, and Sliker had asked him to

drink and he refused. He said Sliker then came up and struck at him, and then he struck Sliker and knocked him down nearly, and Sliker caught him by the leg, and he was afraid he (Sliker) would hurt him bad and I think he said he doubled himself down and hit him in the side and told him if he did not hollow enough he would kill him. But Sliker said he would not hollow enough but spoke to some of them to take him away. He said he put his thumbs in his eyes and he very soon hollowed take him away again. Then he said he got up and left him, when he hollowed take him away. He said Sliker told him he would fight him some other time; he was ready for him. Castner seemed to be boasting because he had whipped the bully.

Cross Examined.—Castner had a black eye and his nose was skinned some. He looked some like a man who had been fighting. He told me how he had got the black eye. He told me Sliker had hit him. He told me Sliker had walked around toward him and had struck at him once or twice. I think he did say he had warded it off, that he did not hit him the first blow. He said Sliker said he could lick the name of Castner. He said Sliker did say to them let us alone now; and he said they did let them alone then. He said when Sliker asked to take him off, he raised right up off of him himself and let him alone. He said that Petty told him he should respect him forever for getting off the manner he did.

Thomas Bowman, was then sworn on the part of the plaintiff, when he testified as follows:

I live in Hunterdon County; I know both of these parties. The next day I saw Peter Castner; I heard him talking. He told me that Geoffry Hardy had told him if he would lick "Hog Eye" he would treat him to all the Ale he could drink. He said I did that good lost night and after this any child can whip him. He said he had been up to Hackettstown, he and Coleman and to Petty's and that they had fed their horses, and one had said to the other lets have a drink. Sliker said Peter you come up and take a drink and I told him I would drink with no damned perjured villain. He said Sliker said, you are a damned liar and came up to strike him and he knocked it off, and Sliker got him by the leg, and somebody was going to take him off, and Sliker said damn you let us alone, and he said they did let them alone and he said Sliker held on to his leg. I

saw him in the face but I saw no mark; if he had any mark the color had not changed yet and I did not see a mark.

Cross Examined.—John Mr. Hight, Peter, his son Peter and Daniel Castner. This circumstance took place at a frolic about 10 o'clock in the morning; these persons were present during all the conversation. He said when he told him he would not drink with a perjured villain, Sliker came around Coleman and Beatty and struck him. He said he warded off the blow by throwing up his arm. He said Sliker got him by the leg and some one tried to get them apart, and Sliker said damn you let us alone, and they did let them alone and after they got through, Peter Petty said he would respect Castner the longest day he lived, for coming off as he did. In the first place he was talking to John ; there were four or five present.

George Banghart, was sworn on the part of the plaintiff, who deposed as follows:

I reside in Hunterdon County; know the parties; have known them about seven years. I had a conversation with Mr. Castner soon after this difficulty. I was going along in a wagon and he threw up his hand for me to stop, and he asked me how Sliker was getting along; I told him he was pretty bad, and at last he had called a physician, and then commenced talking about the fight and how it took place. When he and Coleman were at Petty's, Sliker had come up to Petty's and Sliker said come up boys and take a drink with me, and Peter you come up and take a drink with us, and he replied I'll drink with no such perjured son of a bitch, and he said Sliker ran up to him and said do you say that, and Castner said I do and he said Sliker knocked up his hat, and struck at him and he knocked it off, and struck at Sliker and missed him, and then I got him down and some one pulled me off and Sliker raised up and got me round the leg and Sliker was in the act of getting up with me, as they pulled me back, and I threw all my weight on one leg, and made a desperate effort to get loose, and then Sliker said as he was raising up my leg, let us alone now, and he said they all stepped back and let them alone, and no one touched him after that 'till he got off himself. He said he had kicked and struck him several hard blows on the body, and he had kicked him somewhere about the stomach, and he made no resistance after that, and then he told him to hollow enough and he still refused to do so, and then he concluded he

would gouge him a little, and then he clapped his thumbs in his eyes, and gouged him pretty well, and then he hollowed take him off, and then he thought he had hurt him bad enough and he jumped right off, and no man touched him. He said Peter Petty, had said to him, Castner I'll respect you forever. I think he said he gouged him 'till he felt his eye balls come out, but I could not be positive about that.

Cross Examined.—This conversation took place at Changewater in the road. He began by asking how neighbor Sliker was. He had his hand tied up. When Sliker came round he rolled his fists over and said he could lick the name of Castner. He said Sliker struck at him and after that he struck at Sliker but missed the first time and struck again; then they clinched and were being parted when Sliker was getting up. Sliker called out to let them alone, and they were left alone, and when they were through Castner got off himself without any help; after Castner stepped back from him, Peter Petty said he would respect him forever.

Lawrance Hann, being called and sworn on the part of the Plaintiff, gave the following testimony:

I know Sliker and Castner. I had a conversation with Castner about the fight about three weeks after it took place. It was the first time I had seen him since the fight. He said he had been up to Hackettstown and come back to Peter Petty's; he said Sliker said Peter Castner take a drink, and made a sign, and he said Sliker hopped up at him and struck at him and he warded it off, and then he struck at Sliker and he warded it off handsomely, and he said they clinched and went towards the stove, and he felt afraid of Sliker and he got a blow, and knocked Sliker off and then he said he knew Sliker was his man, and he said he went to Sliker, as Sliker was getting up and Sliker caught him by the leg and he then turned round and got one foot loose and used that, and he said he pinned in eight or ten times pretty sharp, and Sliker then hollowed take him off and he replied hollow enough or I'll kill you; Sliker made no reply and he stepped back then like a little man. He said he came away when Sliker said take him off.

Cross Examined.—This was two or three weeks after the fight.—This was the first I had seen of Peter; afterwards we were walking

along the road; we were going fishing; it was nine or ten in the morning. When he made this remark to Sliker, Sliker came round behind Beatty and Coleman, and whether he said he could lick the name of Castner or not, I can't say. I think he rolled his fists. Sliker then struck and grazed Castner's face; when he struck at Castner he stopped it very nicely, but he struck him afterwards, and knocked him back in the corner, and then he thought that Sliker was his man. Then he was about getting up and he got hold of him, and turned him over and struck him.

The Plaintiff then rested their cause, and the Defendant to prove the issue on his part, called Peter Castner, as a witness, who being sworn, deposed as follows:

Peter Castner, I live in Lebanon, in Hunterdon County; I am in my 59th year; I am defendant in this suit; I am a farmer; I had been to Hackettstown with clover seed; I think I had 23 bushels. Jacob Coleman wanted to take it up and sold it all at Hackettstown. I think we were there 3½ hours. I met Mr. Sliker and Geo. W. Beatty going about two rods ahead; I drove on through town. We concluded to drive to Petty's and feed, because I knew Petty. I think it was about two o'clock when we left Hackettstown, and about the middle of the afternoon when we got to Petty's; went in the house. We drank twice going up and three times when we came back. I think we were there two hours. I did not see Sliker come; we had drank and hitched up my horses, and tied up the horses and went to the door to ask Coleman to come, when Mr. Coleman asked me to drink, when I told him I had enough. I think Mr. Sliker was in the bar room. I had been drinking; I felt pretty merry; as I got to the bar to take a drink with Coleman, Sliker came round the bar rolling his fists saying, I can lick the name of Castner, I can lick the name of Castner, and as he came up to me he squatted down and said in very sneering way, take a drink with me. I had not spoken to him yet. Then I said I don't drink with perjured folks. Then he said I was a God damned liar and struck at me; I threw up up left arm but he struck me on the cheek here, enough to graze the skin and black my eye a little. Then I turned round and he got right under me, and I struck at him but he dodged it and I raised him. Then he got away and gave me a twist, and I got down on my knee. Then I got him by the left shoulder with my left hand, and gave him one with my right in the face and then I downed him on

the floor; as I got him down Petty got round me to take us apart; when Sliker got me by the right leg, then Mr. Petty pulled pretty hard. Then Sliker hollowed let us alone now. Then Petty let loose of him and then I grabbed him with both hands right side of the neck. Then he tried to get my leg. I was afraid he would bite my ears or nose off and as I got him down he hollowed take him away. Then I stepped back three or four feet of my own accord. Then I told them not to take me away yet for he had not hollowed enough. Then Petty raised up his head from behind the bar, and said he would respect old Peter Castner forever. Petty was inside the bar when I left Sliker. He poured some spirits on my hand. My hand was hurt a little on the back knuckle. I struck at Sliker and hit the floor. When Sliker had me by the leg we were near the middle of the room. When Petty was taking me away I jerked my my leg up and then struck him, and thus liberated myself. Petty could not get us apart; when I had him down on the floor; then Sliker said take him away and after I had got my foot loose. I did not gouge Sliker that I know of. It did not take more than one minute for the whole fracas. I had no expectation of meeting Sliker at Petty's. I did not remain their helping to see to him. I think Mr. Sliker was about as merry as I was on this occasion. I don't think he was any more so.

Cross Examined.—Sliker was not down on the floor and I straddle of his body; I don't know as I did see Mr. Heath there in the room; I was not on the body of Sliker; at no time was I straddle of him; I had him by the cuff here, when he hollowed on the floor; I was afraid of him while I was fighting him. My fear had got over then when I had got him down. I might have told him to hollow enough but I don't recollect; I can't recollect my saying I would kill him. I remember I did say Sliker the next time you fall on me that way, I'll give it to you worse than ever. After I stepped away from him I stepped up to the bar; I don't think I gouged him at all. I did tell different persons I gouged him. I did it on a bragging score. I did it for the sake of bragging; I told it to several; I think I did tell some of them. I did not want it to spread out, after Sliker was going to try to do something with me. I think I did tell Coleman not to say any thing about it. I know Mr. Parker; I don't know as I did tell him so. I don't know that I told him not to tell anything about it. I think I did tell Parker I had gouged him. I

think I also told I. P. Force so. I said I did not drink with perjured folks or perjured people; my memory is clear, it was one or the other. I think it was perjured folks. I know Jacob Dernberger. I told him something about the gouging, but not that he should say nothing about it. He was grabbing to catch my leg; I had him and I kicked him several times when he was lying. I could not kick hard in the position I was; he bothered me too much; I think I did kick him hard. I think some one said let them fight it out. I think Sliker said let us alone now; and then I heard some one say let them fight it out and then Petty let loose of me. 10

The Defendant by his Counsel offered to prove,

That two or three different persons in the course of two years and within two months of this occurrence told the Defendant that he must take care of plaintiff; that he (plaintiff,) threatened to whip him, and that he could kill him in two minutes. That defendant had on several occasions left places to avoid meeting with plaintiff; that defendant expected to show further that plaintiff had declared to several persons, that he could whip defendant with a hand tied behind his back, and could kill the rascal; that he first used his threats three or four years ago, and that he had repeated them 20 until within two or three months of the occurrence; would further prove that plaintiff was a fighting man of great prowess; that people were afraid of him, and in consequence of the defendant being afraid of him he did not want to fight.

The Plaintiff's counsel objected to this evidence as irrelevant and the Court sustained the objection and refused to let the evidence be given, and the Defendant by his counsel excepted to this opinion of the Court, and prayed a bill of exceptions and it is allowed and sealed accordingly.

M. BEASLEY, [SEAL.] 30
Chief Justice.

Jacob Coleman was the next witness called on the part of the Defendant and his testimony was as follows:

I live in Hunterdon County; I am acquainted with the parties; I have known them ever since I have been big enough to know them. I am a farmer. Remember the fight. Mr. Castner took up some clover seed for me to Hackettstown; I went with him; Mr. Castner

lives about eight miles from Peter Petty's. It was about the middle of the afternoon when we had sold our clover seed at Hackettstown. Going up to Hackettstown we took two drinks at Petty's; when we got back it was about an hour from sundown; we sold our clover seed; we went up to the Depot; we where coming down towards home when we met Sliker and Beatty. We then went to Petty's. We took three drinks at Petty's. Mr. Castner went to get the horses hooked up; when he came back, I asked him to take a drink. Sliker and Beatty came, and Sliker asked us to take a drink with him. I said I did not drink with perjured men. Sliker then came round to Castner and struck him in the face; Castner then struck at Sliker but missed him; he then struck at him again, this time he hit him. They clinched and they fell on the floor, when Sliker caught him by the leg, and said let us alone now. They let them alone 'till the tussle was about ended. After Sliker said take him away Castner did not hit him. When Sliker said take him away, Castner said let us alone 'till he hollows enough. When Sliker went up to Castner the first time, he said I can lick the name of Castner. I saw Castner's cheek the morning after the fight; the hide was somewhat cut. The whole thing took a very short time. We come over home after the fight. I did not see a boy get in the wagon that night on the way home. I saw the boy in Court to-day, but I did not see him get in the wagon. I did not hear any such conversation as that. Castner did not say anything about such a talk to me.

Cross Examined.—I stood back there and did not say anything during the fracas; I do not know Mr. Heath. I know Andrew Vannatta. He was there. I did not notice Mr. Wire. I suppose he was there. I did not take any part in the fracas; of course I did not do anything. Castner said I do not drink with perjured men. Sliker said Jake and Pete come up and take a drink. We two were between them, when he asked us to drink. Sliker ran round and struck him and it grazed his hat, and knocked it up. I felt my whiskey a little, but did not feel out of the way. I don't think I interfered. I cannot say certainly about it. I saw them down on the floor. Castner had hold of Sliker by the collar; Sliker was kind of down on his butt like. Towards the last part of it he was down on his back. Castner stood up by the side of him. I do not know on which side it was he stood. I think though that Castner stood on the left side of him. I heard Sliker say take him away. I suppose he was

hurt considerable by being kicked and struck. Castner kicked him before he took himself away. It was towards the last part of the time that he kicked him; he did kick him when he was down. Sliker while he was down was reaching out his hands to catch Castner's legs. Castner stood about over him. I did not see Castner astraddle of Sliker. Sliker said take him away twice. He said take him away right in succession. Castner then stopped striking and kicking him. After he stopped striking and kicking him, he laid on the floor; I saw Petty there during the fracas; he had a candle in his hand; I saw him after it; I think he said these men10 must come apart; I do not recollect that I said anything to Petty; I do not remember that Petty did anything; I am not sure whether he had his coat on. I drove all the way from Petty's to my house. It was a big two horse wagon.

Second Examination in Chief.—I saw Petty in the bar after the fight was over. He was in the bar before the fight was over. He gave Castner some whiskey. He raised up his hand and said he would respect Peter Castner forever.

Second Cross Examination.—I did not see Castner strike his hand on the floor. 20

Peter Castner Recalled.—Young Beatty did not get in my wagon that night.

Andrew Crater, was the next witness called on the part of the defense and being sworn deposed as follows:

I live in Lebanon Township; Saw Sliker in January; saw him in bed; I lifted up the cloth from his eyes. He asked me what I thought. I said I thought it looked doggish. His son said he looked pretty well gouged. He said Stewart he did'nt gouge me; I told you so before and he did'nt. I then asked him how his eyes where hurt, if Castner had kicked him; he said he thought not; he said30 he laid on the floor and felt two powerful blows and that was all he knew. He gave a groan and said he had no one to blame but himself. He said if he had stayed away from that drunken George Beatty, there would have been nothing of it.

Cross Examined.—This conversation was three weeks from the fight. Think it was about that; condition of Plaintiff very bad I

considered; looked very pale; had cloths over his eyes; I looked where the eyes ought to be; could not see the eyes for the swelling; so swelled that I could not see the eye; swelled over from above; could not see the eye itself. Might have been last of December. Think it was in January.

Joseph Creveling, was next called by the Defendant and his testimony was follows:

I live in Lebanon Township; know Daniel Sliker; saw him after the fight; had a conversation about his eyes. I asked him if Peter
10 Castner gouged him; he said he did not. He said he kicked him. I asked him why he did not hollow enough before you were hurt so badly. He said he would not do that for any man. Then he said there was no one to blame but himself; if he had left that George Beatty at home he would not have got drunk, and would have come home all right. Then he said as soon as my eyes get well we will have it over.

Cross Examined.—His condition was bad; talked very natural; can't say how long after the fight.

Josiah Apgar was then called and sworn and deposed as follows:

20 Live in Lebanon Township; know these parties; saw Daniel Sliker after the fight; came in my mill; had a conversation with him. Asked him how these men stood by and let him gouge his eyes out. I understood him to say, that he did not gouge my eyes; struck me with his fists. He said it was his impression he caught at Peter's legs; that was the cause of his falling; that he was tight and could not help himself.

Cross Examined.—Could not tell the exact time he was at my mill; it was warm weather. It must have been in May, after suit was begun. He said he did not gouge me at all. He struck me with
30 his fists. Something was said about kicking. I don't think I am mistaken. Don't know that I ever said to Sliker that he was mistaken. I said to some one may be mistaken. It was always my impression that he said there was no gouging.

Butler Jarrard, the next witness for the Defendant was then called, and after being sworn, he testified as follows:

I live in Lebanon Township; know Daniel Sliker; I was there the last day of March; Mrs. Sliker was there and Anderson. He asked how he felt; he said he was getting along pretty well now. His wife said it was hard to have our eyes gouged out. He (Sliker) said mammy my eyes were not gouged out.

Cross Examined.—That was all that was said. I stayed 'till 12 o'clock. That was all that was said.

George Banghart, the next witness called on the part of the defense, was sworn and deposed as follows:

Saw controversy between George Banghart and Mr. Sliker. Geo. 10
Banghart had his thumb in his eye, in the spring of 1865, at Town Meeting. I pulled him away. It made a very sore eye. I noticed a scar or mark in that eye for some time afterwards. There was a scratch nearly across the middle of the eye-ball; noticed it for some length of time after. I think it was the left eye.

Cross Examined.—I saw the mark about three or four months after. I think it got well.

Daniel C. Anderson, was then called on the part of the defense, who being sworn, testified as follows:

I live in Hunterdon County; am acquainted with the parties. I 20
know George Banghart; saw him in 1865; I saw the eye of Mr. Sliker at White Hall on Town Meeting day. They were in a fight; Sliker was gouged in his left eye; I saw his eye was bloody when Banghart was taken away; the ball looked all red.

Cross Examined.—I never examined his eye; after that it got well; never examined closely.

John Woolfinger, was next sworn on the part of the Defendant and deposed as follows:

I live at Oxford; I know Sliker; saw him last Court; talked with him; asked him about his eyes; he said it was very bad; he had 30
no one to blame but himself and the whiskey and was caused by liquor or it would never have happened. He said he did not know whether it was done by gouging or how it was done; might have been done in the fight by falling or some other way; he did not think it was gouged.

Cross Examined.—I am a puddler by trade; I told him it was a bad thing to have lost his eyes; but he had no one to blame but himself and whiskey; he did not know exactly how it came. It might have been done by gouging or falling on the floor in the scuffle.

Henry Lance was then called by the defense and being sworn deposed as follows:

I live in Hunterdon County near Changewater; I know Daniel Sliker; saw him a week or ten days after the fight; asked him if Castner had gouged him. He said no he had struck him a heavy blow with his back knuckles. I asked him if he was hurt any other way. He said no. He had three ribs broken once, and Castner had kicked him on these, and he had a very sharp pain there. He said Castner he expected would crow because he had whipped him, a drunken man. But he said if he did not get blind, that it must come over again. Then he said that he wished Castner would have killed him. Then he said I and you are old enough to quit fighting. Then I went back again a few days after this with George Creveling. Creveling asked him particularly if Castner had gouged him. He said no he had kicked him.

Cross Examined.—He was up stairs in the room, when I went in the first time. The second time he was in the same room and same bed. He said he felt good. Did not complain of being sick. There was nobody in the room but his woman. I live about a mile from Castner. Don't visit him.

Charles Meyers, was then called and sworn on the part of the defendant and deposed as follows:

I live in Hunterdon County. Know Peter Castner. Have known him 45 years. Heard of the fight as soon as it took place; saw him after the fight the second morning at William Bird's Cooper Shop; saw a little mark where the skin was taken off by the left eye on his left cheek.

Cross Examined.—This eye was a little black; could see the color was altered. I could see that it was a little black on the same eye, and some place the skin was broken. The blow was on the cheek bone.

The Defendant here offered to prove that George W. Beatty one of the Plaintiff's witnesses had told the Defendant, by whom the Defendant offered to prove it, that the said Geo. W. Beatty told him, that on there way to Peter Petty's, that day back from Hackettstown, Beatty asked him (Sliker) to go the other way and not by Peter Petty's. He said no, he wanted to go by Peter Petty's and give Pete Castner a dod-dashed licking.

The Court over-ruled this evidence, and the Defendant's Counsel excepted to the opinion of the Court and prayed a bill of exceptions and it is allowed and sealed accordingly. 10

M. BEASLEY, [SEAL.]
Chief Justice.

The Defendant here rested his cause and the Plaintiff offered as rebutting testimony the evidence of the following witnesses:

Daniel Sliker was then called and gave the following rebutting testimony:

I know John Woolfinger by sight. I was at Court at last December term here. Woolfinger came to see me. Rufus came in too; I don't know if any body else. I did hear him speak just now. I don't know if I had no one to blame but myself and rum. I did 20 not tell him I was not gouged, for if I told him that, it would have been a lie. I did not tell him they might have been knocked out by falling on the floor. I don't recollect any talk about the fight; only I said it was bad to be blind and nobody knows how bad it was to be blind 'till they had tried it. I know Andrew Crater. I saw him after the occasion. I don't think it was over three days after the matter took place. It was the first time my daughter came home. Andrew Crater brought my daughter home. I rather think she can't be here. It seems to me a little like a dream, Mr. Creveling being there. I came to Belvidere to counsel Mr. Depue 30 in March. My son Rufus came with me. I remember in the summer after that being at Apgar's mill, and talked a little about my blindness, but I don't recollect anything else. I don't think I told Mr. Apgar, that I didn't think he gouged me. He was talking about my eyes and he said how much money he would give if it would put my eyes as they were. Flumerfelt or somebody struck me in the eye, was the way the blood came in the eye. I got his fingers in my mouth and he scratched my face. Did not hurt me much. That

scratch on my eye has always been there. I think my youngest son has such an one on his eye. My eye was not injured in that fracas at all. I recovered entirely from it.

Cross Examined.—Mr. Banghart had his thumb about my eye on that occasion. George Banghart had loosed his hold and took him away. I don't recollect Daniel C. Anderson. I don't remember Banghart. He had his thumb in my eye, but not to hurt it, at least it got well in a very few days. It might have made my eye a little sore for a while. That eye has not been weak ever since.

10 *Jacob Lanning,* was the next rebutting witness called on the part of the plaintiff and deposed as follows:

I know Daniel Sliker and George Creveling. I remember about the time of this fight. I was there when George Creveling was there; Henry Lance was in the room besides Mr. Creveling and me; Lance and Creveling went up to see how he did and he said he felt right well only he felt a little sore. Creveling asked him how he thought his eyes got hurt. He said he didn't know, but he did'nt think he had gouged him. He thought probably he might have kicked him in the eyes. Creveling said, Uncle Dan, I guess he 20gouged you, and he said he did'nt think he did. Creveling said, by hell, I think Uncle Dan he gouged you.

Peter Osmun, was called by the Plaintiff and deposed as follows:

I have known Daniel Sliker between 25 or 26 years. I observed this scratch on his left eye. He built a house for me.

Cross Examined.—It was no scratch it was a blot on the eye. It was rather larger than a good sized shot grain. I don't know how he got it. I think it was a size larger than that.

Both parties here rested.

And the Court among other things, charged the Jury as follows:

30 But I must think the more important and perhaps you may deem the decisive matter in dispute, is the second point insisted on by the plaintiff, namely, that the loss of the plaintiff's eye sight was the result of an intentional act on the part of the Defendant. If you believe this I cannot perceive how you can hesitate to find in favor of the Plaintiff. To take away the eyesight of an adversary could only be justified by imminent danger of great bodily harm. It is

difficult to imagine how under any of the ordinary conditions of a private combat such extreme violence could be justified. The consequences of such an act are so truly appalling, we instinctivly shrink from their contemplation. It is an act which reduces the subject of it to such utter helplessness and misery, that it would seem that the thought of inflicting such a calamity on a fellow being, could enter only into the mind of the most savage and brutalized of our race. In this case there does not appear to be the faintest excuse for resorting to so dire a necessity, and if consequently you agree with me, that none of the necessities of self defense existed at the occurrence in question to justify a resort to such an act, and that the Defendant wilfully and knowingly inflicted that incurable wound, you will find a verdict against him, and make him bear so far as you reasonably can the consequences of such barbarity.

To this charge of the Court, the Defendant by his Counsel excepted and prayed a bill of exceptions, and it is allowed and sealed accordingly.

M. BEASLEY, [SEAL.]
Chief Justice.

The Court further charged the Jury, that if the Plaintiff lost his sight by the wilful act of the Defendant, the damages should be very heavy.

To this charge of the Court the Defendant by his Counsel excepted and prayed a bill of exceptions and it is allowed and sealed accordingly.

M. BEASLEY, [SEAL.]
Chief Justice.

SUPREME COURT.

PETER CASTNER,
vs
DANIEL SLIKER.
} *In Error to Warren County Circuit Court.*

Argued before the CHIEF JUSTICE and Justices ELMER, VREDENBURG, and WOODHULL, by *Mr. Shipman* and *Mr. Vannatta*, for the Plaintiff in Error, and by *Mr. Robeson* and *Mr. Runyon* for the Defendant.

The opinion of the Court was delivered by ELMER, J.

10 The action was trespass for an assault and battery, and the defendant below having besides the general issue pleaded *son assault demesne.* The plaintiff replied that the defendant was guilty of excess, and upon this last issue the case was mainly defended. Bills of exception having been taken to several rulings of the Court, errors were assigned upon them and have been insisted on in argument, making it proper to notice them in their order.

First, it was insisted that the judge erred in permitting a witness to be asked, when detailing the particulars of the fight, "What did Coleman say?" It appeared that the affray occurred in the room 20of a tavern, where both parties had been drinking and where the witness as well as Coleman, who came to the place in company with the defendant were present, and where of course there was much confusion and tumult. It is too plain I think to admit of reasonable doubt that under the circumstances in which all the witnesses of the combat were placed, what any of them said or did, while it was in progress was a part of the *resgestae*, and was calculated to throw light on and aid the jury in forming a correct judgment of the facts of the case. Coleman's declarations were not a narative of past occurrences but were concomitant with the principal act, and so con-30nected with it, as to be regarded as the mere result and consequences of the co-existing motives. It appeared that he was taking some part in the affray, by calling to the person who attempted to interfere, to let him alone, let him hallow enough.

1 *Green'l Ev. Sec.* 108, 110.

Secondly it was objected that a witness was permitted to be asked, How did Sliker appear, sober or otherwise? The ground of this objection was that it did not appear that the witness was an expert in the matter of intoxication, or that he had had any such previous

knowledge of Sliker's habits and conduct as to enable him to judge. Whether a man is sober or intoxicated is matter of common observation, not requiring any special knowledge or skill, and is habitually and properly asked of witnesses, who have occasion to see him, and whose means of judging correctly, must be submitted to the jury.

Thirdly, Dr. Howard Service, the physician called upon to proscribe for the defendant, who examined his eyes and described the injuries they had received, by which the plaintiff was rendered permanently blind, was asked how could such injury be produced, to which he answered, "by gouging." This question was objected to on the ground that it did not appear that the witness was a surgeon or was an occulist, and that he was not such an expert as was competent to answer such a question. Who is entitled to be considered as an expert in regard to any question of science or skill, cannot be determined by any precise rule, but from the nature of the case, must be left very much to the discretion of the judge. That this discretion was ever used wisely and in accordance with the usual practice, in permitting a regular physician, attending a patient to express his opinion in regard to the nature of a disease or wound, which he treated professionally, I see no reason to doubt.

Fourthly, the defendant offered to prove "that two or three different persons in the course of two years and within two months of this occurrence, told the defendant that he must take care of the plaintiff and that the plaintiff threatened to whip him, and that he could kill him in two minutes; that the defendant had on several occasions left places to avoid a meeting with plaintiff; that defendant expected to show further, that plaintiff had declared to several persons, that he could whip defendant, with a hand tied behind his back and could kill the rascal; that he first used these threats three or four years ago, and that he had repeated them until within two or three months of this occurrence, and would further prove that plaintiff was a fighting man of great powers, that people were afraid of him, and that in consequence of the defendant's being afraid of him, he did not want to fight." This evidence thus offered was objected to, and being overruled by the Court, as incompetent and irrelevant, the defendant excepted to this decision.

It was insisted on the argument that the evidence was proper and relevant, to show that the defendant was entitled to use more force

and violence than would otherwise have been allowable and in mitigation of damages. In my opinion it was not competent or relevant for either of these purposes. What third parties had said, with whose declarations it was not alleged the plaintiff had any connections, was simply hearsay, entitled to no influence. The plaintiff's own acts and declarations, were not stated to have occurred more recently than within two or three months of the affray in which the plaintiff was injured. Such acts and declarations could only be admitted, where they had been so recent, as to afford a presumption that
10the defendant acted at the time under the heat of passion, wrongfully excited, and which had not passed away. *Green'l Ev. Sec.* 93. *Note and cases.*

Upon the issue formed by the replication, it was assumed that the plaintiff was the aggressor in commencing the conflict, and the question submitted to the jury was, whether the defendant used more force and violence, than was necessary for his defence. It must be presumed that the Court properly instructed the Jury on this subject. He had undoubtedly a right to use blows or other force, so far as they were necessary for his protection, but not for the gratification
20of malice or revenge. The previous threats or the character of the plaintiff, could not authorize him to do more than defend himself.

Lastly, It was objected that the Judge charged the Jury, that if they believe the loss of the plaintiff's eyesight, was the result of an intentional act on the part of the defendant, he could not perceive how they could hesitate to find in favor of the plaintiff, and that this took from them the decision of one of the questions at issue, namely, whether under the circumstances the defendant was not justified in putting out the plaintiff's eyes. In my opinion this is not the fair interpretation of the charge. The Judge went on to remark
30"that to take away the sight of an adversary, could only be justified by imminent danger of great bodily harm. It is difficult to imagine how under any of the ordinary conditions of a private combat such extreme violence could be justified." From this as well as from other parts of the charge as contained in the bill of exceptions; the most that can be said to this part of the charge is, that it amounted to an expression of his opinion upon the weight of the evidence, which it is well settled is not error.

In my opinion the Judgment must be affirmed.

A true copy,

CHAS. P. SMITH, *Clerk.*

New Jersey Court of Errors and Appeals.

PETER CASTNER, *Plaintiff in Error*,
vs
DANIEL SLIKER, *Defendant in Error*, } *Writ of Error to Supreme Court.*

Afterwards, that is to say, on the seventeenth day of November A. D., 1868, before the Court of Errors and Appeals in the last resort in all cases, comes the said Peter Castner by J. G. Shipman his Attorney, and says that in the record and proceedings aforesaid and in the giving of judgment aforesaid, there is manifest Error in this to wit: that judgment was rendered by the Supreme Court of the 10 State of New Jersey, against the said Peter Castner, whereby the law of the land judgment should have been rendered in favor of the said Peter Castner.

There is also Error in this that the said Supreme Court did adjudge, that the Judge on the trial of the said cause did not admit illegal evidence in allowing Peter Petty, a witness to be asked "what did Coleman say?" whereas in truth and in fact the said Judge did err in permitting the said question to be asked and answered, wherefore in this there is manifest error.

There is also Error in this, that the said Supreme Court, did ad- 20 judge that the Judge on the trial of the said cause, did not commit an Error in allowing the following question to be put to and answered by one Daniel Wire, a witness for said Daniel Sliker, "How did he appear, did he appear sober or otherwise?" whereas in truth and in fact the said Judge did commit an Error in allowing the said question to be asked and answered.

There is also Error in this, that the said Supreme Court, did adjudge that the Judge on the trial of the said cause, did not commit an Error in allowing the following question to be put to and answered by Howard Servis, a withess for the plaintiff below, "How could 30 such injury be produced?" whereas the said Judge did commit an Error in allowing the said question to be asked and answered.

There is also Error in this, that the Supreme Court did adjudge that the Judge on the trial of the said cause, did not commit an Error in rejecting the evidence of the said Peter Castner, which he offered to prove that two or three different persons in the course of two years and within two months of this occurrence, had told the said defendant, Peter Castner, that he must take care of the plaintiff, that the plaintiff threatened to whip him, and had said that he could kill

him in two minutes, that the defendant below had on several occasion left places to avoid a meeting with plaintiff and that the plaintiff had declared on several occasions, that he could whip the defendant with one hand tied behind his back and could kill the rascal, that he first used his threats three or four years ago, and had repeated them until within two or three months of this occurrence, and that the plaintiff was a fighting man of great prowess, that people were afraid him, and that in consequence of the defendant's fear of of him he did not want to fight.

10 There is also Error in this, that the Supreme Court did adjudge that the Judge on the trial of the said cause did not commit an Error in charging the Jury as follows: "But I must think the more important and perhaps you may consider the decisive matter in dispute, is the second point insisted on by the plaintiff, namely: that the loss of the plaintiff's eye-sight was the result of an intentional act on the part of the defendant. If you believe this, I cannot perceive how you can hesitate to find in favor of the plaintiff. To take away the sight of an adversary could only be justified by imminent danger of great bodily harm. It is difficult to imagine how under 20any of the ordinary conditions of a private combat, such extreme violence can be justified. The consequences of such an act are so truly appalling, that one instinctively shrinks from their contemplation. It is an act which reduces the subject of it to such utter helplessness and misery, that it would seem that the thought of inflicting such a calamity, on a fellow being, could enter only into the mind of the most brutalized and savage of our race. In this case there does not appear to be the faintest excuse for resorting to so dire a necessity and if consequently you agree with me, that none of the necessities of self defence existed at the occurrence in question, to justify a re-30sort to such an act, and that the defendant willfully and knowingly inflicted that incurable wound, you will find a verdict against him and make him bear as far as you reasonably can the consequences of such barbarity."

There is also Error in this, that the Supreme Court adjudged that the Judge on the trial did not commit an Error in charging the Jury, "that if the plaintiff lost his sight by the willful act of the defendant, the damages should be very heavy."

And the said Peter Castner, for the Errors aforesaid and other Er-

rors in the record and proceedings aforesaid prays that the judgments aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost, on account of the judgment aforesaid.

J. G. SHIPMAN,
Attorney of Plaintiff in Error.