

14620

No. _____

Supreme Court of Illinois

Clark

vs.

Lewis

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 267 32

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

Clark

7

June

14620

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

Argument and Brief for Defendant in Error.

ICHABOD W. CLARK, *Pl'ff in Error,*

vs.

SAMUEL LEWIS, *Def't in Error.*

} ERROR TO WOODFORD.

This was an action of replevin for the unlawful and wrongful detention of a horse, commenced before a Justice of the Peace of Woodford county, and appealed to the Circuit Court, from whence it came, by writ of error, to this Court on the following errors assigned by the plaintiff in error.

1. The giving of improper instructions by the Court below on behalf of the plaintiff.
2. The refusal of the Court to give certain instructions asked by defendant below.
3. The refusal of the Court to grant a new trial.

The several errors will be disposed of in the order in which they are presented.

It is said, on the part of the plaintiff in error, that there are three instructions that were given for the plaintiff below that were wrong and illegal, and incorrect, and well calculated to misdirect the jury.

It is further said that the second instruction to the jury, that if there is no evidence that the horse in controversy was running at large in the town of Minonk, then

they should find for the plaintiff. This instruction correctly states the same, as we understand. It is the well settled law of this State that no man is bound to keep his stock up on his own land, nor to keep his stock up; and that is, we understand, the crurent of the decisions of the Supreme Court of this State on that subject. There is no reason known to us why this cause should be an exception to the general rule, unless there is some local law of this State applicable to that town, and it is believed there is none. It is said that the town of Minonk is organized under the Township Organization Laws of this State. Now, the Court is asked to assume that fact, for there is nothing in the Record to prove the fact to exist. The Court is asked, in order to reverse this cause on that ground, to presume that the town of Minonk is in the county of Woodford, in the State of Illinois; that the county of Woodford has been legally organized under the Township Organization Laws of this State, and that said town has been set off and organized as the law directs, else the Court is bound to take judiciary notice of the facts named. We think that the fact of the organization is a fact that must be proved in the same manner as any other fact; unless so, how would it be? But if true, as insisted by the plaintiff in error, which we deny, the Court is asked to examine the first section of what purports to be an ordinance that appears in this Record on page 13, under which the plaintiff in error undertook to defend himself below, which, if law at all in this cause, authorizes the Court trying this cause below to give the second instructions, and we think that it is only necessary for the Court to read the same to come to the same conclusion, that the second instructions asked by the plaintiff below, and given, was the law in that case, and that it could not have misled the jury that tried the cause. On the assumption that was the law of that town, then the defendant was bound to know when he bought the said horse of the Pound Master, what the law was, and bound to take notice as to whether the law had been complied with. We insist that the Court stated the law correctly in the second instruction, and unless the defendant below had proved that the horse was running at large in said town when taken up by the Pound Master, the Pound Master had no right to take him up, or to sell him. Of this the Court may look into the Record in vain for any proof of that sort. And it is a well settled rule of the law that where a statute is in derogation of the common law that a party cannot be divested of his property unless the law has been strictly complied with, and all of its requirements complied with. As we understand this cause there were two questions for the jury to pass on first: Who was the owner of the horse, and was the defendant guilty of unlawfully detaining the said horse? Now, we submit that, as to the first point the jury was warranted by the evidence, as shown in this Record, in saying that the horse belonged to the defendant in error.

It is said that the fourth instruction is wrong, and was given without any evidence to warrant it. We insist, first, that it was given on evidence *prima facie*, at least that the defendant in error was evading the plaintiff. If not so, why could not the said plaintiff in error have left the horse at his residence in Minonk, if he had to go to Metamora on that day, as to have taken him with him to Metamora? He took said horse some twenty-five miles from Minonk, and that distance was that far out of the way of the plaintiff below. But suppose that was so, that he was not intending to evade the plaintiff, the instructions were still right, for the reason that he refused (as the evidence in this Record shows) to give him on demand by the plaintiff below, and that at a time when he could have done so and avoided the costs, and for the further reason that he had no right to refuse on the condition that if the plaintiff would pay him the amount of money he had paid for said horse, and one dollar in addition, that he would then give him up. If the plaintiff was entitled to the horse at all, he was entitled to him without having to pay anything to get him, and that was a circumstance, at least, that the jury had a right to take into consideration in determining the question of detention and ownership, it being a question that the jury might

have found. either way we think the Circuit Court did right in refusing the motion for a new trial. The Court is referred to

8 Blackford Ind. Rep., pp. 244, 245 and 246.
 3 Hill N. Y. Rep., p. 282; ~~do~~ p. 6.
 36 N. Y. Rep., p. 277.

It is said that the sixth instruction was wrong. The sixth told the jury that if they believed from the evidence that the said Pound Master had the horse from three o'clock P. M., on the 25th day of July, 1863, to the following Monday without giving notice that the law is for the plaintiff, so far as the legality of the sale is concerned. Now, we ask the Court to examine the ordinances in this Record commencing on the 13th page of this Record, and the Court will see that the ordinance required the Pound Master to advertise the horse within twenty-four hours from the time he ~~removed~~ ^{removed} him; and the evidence shows that he did not do so,—and the ordinance shows that he must advertise the sale ten days, and the evidence shows that he did not advertise the sale but about eight days; and then the evidence further shows that there was no person present at the sale except the plaintiff in error and the Pound Master, and that the Pound Master bid on the said horse against the said plaintiff in error, for the purchase of the said horse.

It is not necessary to demand the horse before bringing the suit, as it is clear that the defendant below was in the wrongful possession of the horse first, for the reason that there is nothing in this Record to show that the Pound Master had any right to impound the horse, and second, for the reason that there is nothing in the Record to show that the Pound Master complied with the ordinances in advertising the sale, or that he made the sale at any time when he had a right to make such sale; third, for the reason that if he had complied with the ordinance in advertising or selling, that he did not take any bond as required by the ordinance, nor in selling, for the reason that if he was making a sale as an officer of the law, then he had no right to bid at the sale of his own making, and he had no right to sell the two horses at one bid, and for a round sum of money, and to the said plaintiff in error. We submit that he had no right by the ordinance to dispossess the defendant in error of his title to the horse for the sum of three dollars and a few cents. The complaint shows that the horse was worth the sum of \$100.00. And the Court is asked to look into the ordinances in this Record, and in passing on the question in this case to give an opinion as to the legality of that ordinance, as there is a large amount of litigation in this and other counties growing out of that and like ordinances. While, perhaps, that question does not legitimately arise in this case, but as the Court could pass on that subject in this case without any violation of the rules of propriety, we submit as to whether it would not be a great public benefit to do so. And the defendant in error submits this question to the Court as being based by the bill of exceptions in this case.

We have already called attention to the fact that there is no proof in this Record to show that Woodford county had adopted Township organization.

Second, We call the attention of the Court to the sixth section of the seventh article of the Constitution of the State of Illinois, 1848, which is supposed to be the only power in said instrument under which the Legislature could provide for that manner of transacting the business of a county. Now we submit that the article don't give the Legislature power to pass laws by which a township in any county can adopt ordinances and become law-makers in any manner, and that especially in such a manner, as to create confusion in society. If the Legislature has the power to authorize the inhabitants of a township to pass ordinances to prevent stock running at large in that town, and to say by ordinance that there shall be no fences around the cultivated lands in said town, they have equal power to authorize the voters of a town to say

what shall be the punishment inflicted in that town for the crime of larceny, or murder, or any other crime. Now, we take it that it won't be claimed that the Legislature can grant any of those powers, and if not, can it be claimed that they can grant the right to one town, or a number of towns, to pass the kind of ordinances that are set out in this Record. If they can, then no man's property is safe. If his horse gets out of his stable, or pasture, and escapes to some adjoining town in some adjoining county, and the Pound Master gets him and puts him in his pound, and sells him, (no matter for what price) the owner has lost him, for if the law-making power is given to the voters, if it can be so given, then their powers are without limit.

Now, we submit that the Court should lay down some rule of action in relation to the power of the Legislature under the sixth section of the seventh article of the Constitution of the State of Illinois, of 1878.

Now, we submit that in this case that under the instructions and the evidence in this cause, that the jury could find the facts in favor of either of the parties; and as it was their province to find the facts, and they did so find, that this Court will not reverse this cause.

For we submit that substantial justice has been done by the jury in this cause between the parties, as we think will appear from an examination of the full Record in this cause; and we ask the Court to look over the whole Record. And knowing that the Court will decide this cause in accordance to the law in the case, we submit this cause to your Honors in confidence:

CLARK & KELLER,
Attorneys for Defendant in Error.

5-267 32
Isabod W. Clark
vs

Samuel Lewis

Argument & Brief of
Defendants in Error

Filed May 4, 1864
L. L. Linnard Clerk

Proceedings in the Circuit Court of Woodford County Illinois
and in the Court below in a certain cause wherein Samuel Lewis
was Plaintiff and Ichabod W Clark Defendant

Affidavit

State of Illinois }
Woodford County }

Samuel Lewis being duly sworn says he is
the owner of and is now lawfully entitled to the possession
the following described property, namely, one grey horse nine months
young old supposed to weight 12 hundred of the value of 100 hundred
dollars and that the same is unlawfully and wrongfully detained
from him by one I W Clark and that the same have not
been taken for any tax assessment or fine levied by virtue
any law of this State nor seized under any execution or
process against the goods and chattels of said Samuel Lewis
liable to execution or attachment

Sworn to and subscribed
before me this 11th day of
August 1863

R J Evans J.P.

(Filed August 29th 1863
James D Perry Clerk)

Writ of Replevin

State of Illinois }
Woodford County }

The People of the State of Illinois }
Constable George

Whereas Samuel Lewis Plaintiff complains on oath before

(2) the undersigned R. J. Evans a Justice of the Peace in and for said County that J. W. Belark defendant unlawfully and wrongfully has taken and does detain the following described property which the said Samuel Lewis is the owner and is now entitled to the possession thereof to wit one grey horse nine or ten years old supposed to ~~weigh~~ 12 hundred pounds of the value of \$100.00 dollars Therefore we command you that if the said Plaintiff shall give you bond with good & sufficient security in double the value of the said goods & chattels as required by law, to prosecute his suit in this behalf to effect & without delay & to make return of the said goods & chattels if return thereof shall be awarded & to save & keep you harmless in replevying said goods & chattels you ~~can~~ cause the said goods & chattels to be replevied & delivered to the said plaintiff without delay & also that you summon the said defendant to be and appear before me at my office in Paola in said County on Monday 17th of August at one O'clock to answer said plaintiff in the premises & have you then & there this writ with an endorsement thereon in what manner you have executed the same together with the bond which you shall have taken from the said plaintiff as before commanded herein before executing this writ Witness my hand and seal this 11th day of August 1863

R. J. Evans J. P.

(on which is the following endorsement viz)

The within writ personally served by reading the same to J. W. Belark and the within property returned to the said plaintiff at Metamora on the 12th day of August A.D. 1863

My fees \$2.00

J. M. Wheeler Deft. C. W. C.

(3)

I hereby certify that I deputized Wm Wheeler Constable
(Filed August 29th 1863)
James D. Perry Clerk

(Copy of Replevin Bond)

To know all men by these presents that we Saml. H. Lewis and
Wm Wheeler are held and firmly bound unto Wm Wheeler a
Constable ^{Deputized by me} of the County of Woodford in the State of Illinois and
to his executors administrators and assigns in the penal sum
\$20,000 dollars lawful money of the United States for the pay-
ment of which sum we hereby jointly and severally bind ourselves
our heirs executors and administrators

The condition of this obligation is such that whereas on the 11th
day of August in the year of our Lord one thousand eight hundred
and sixty three the said Samuel Lewis sued out before R. F.
Evans a Justice of the peace of Woodford County a writ of Replevin
against J. M. Clark Defendant for the recovery of the following
described property one grey horse nine or ten years old supposed
to weigh 12 hundred now if the said Samuel Lewis plaintiff shall
prosecute his said suit to effect and without delay and make
return of the said property if return thereof shall be awarded and
save and keep harmless the said Constable in replevying the said
property then this obligation to be void otherwise to remain in
full force and effect Witness our hands and seals this 11th
day of August 1863

Witness

(Signed)

Saml H Lewis
Wm Wheeler

(Filed August 29th 1863)
James D. Perry Clerk

~ ~ ~ ~ ~

(4)

(Copy of Transcript)

August 11th 1863.

Samuel Lewis

vs

Schebor W Clark

In justice ~~before~~ before R J Evans
A Justice of the Peace

August 17th 1863

Justices	.80	affidavit being filed by Samuel Lewis pff
Deft.	.25	in the above case and writ of replevin issued upon
Ben	.25	said affidavit to replevin a certain horse
J H Mit	.25	handed to Wm Wheeler to serve
J Jony	.30	17 th Returned by replevying said horse and deliv
J Leon	.5	same to Samuel Lewis + Summoned said J W
order	.25	Clark to appear before R J Evans August 17 th
Justice	21 5	1863
Jury	1.50	1 O'clock court calls parties present Jury summoned
Transcript	1.00	witness examined Cross sworn to take charge of
Wheeler		Jury, Jury retired and brought in a verdict and
Leon	2.00	find the horse in defendant and against pff
J H Woods Const.	.65	Costs of present suit taxed at
Witness fees	2.00	

The above named pff with Valentine Wheeler as his
Security filed their bond and was granted
I do certify that this a true copy of the proceedings.
had before me

R J Evans a Justice of the Peace

(Filed August 29th 1863
James D Perry Clerk)

(5)

(Copy of Official Bond)

Know all men by these Presents, That We Samuel Lewis & Valentine Wheeler of the County of McLean in the State of Illinois, are held and firmly bound unto Schabod W Clark of the County of Woodford & State of Illinois in the penal sum of Two hundred & fifty dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally, and firmly by these presents. Witness our hands and seals, this 18th day of August A.D. 1863

The condition of the above obligation is such, That whereas the said Schabod W Clark did on the 17th day of August A.D. 1863 before R J Evans a Justice of the Peace for the said County of Woodford recover a judgment against the above bounden Samuel Lewis for the sum of Ten dollar & thirty cents from which judgment the said Samuel Lewis has taken appeal to the Circuit Court of the County of Woodford and State of Illinois. Now, if the said Samuel Lewis shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered by the Court upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect

Approved by me at my office,

this 18 day of August 1863

R J Evans

Justice of the Peace

(Signed)

Saml Lewis

Valentine Wheeler

Seal

Seal

(Filed August 29th 1863

James D Perry, C.R.)

4 3 3 3 3 3 2 2 3 4 3 3 3

(Copy of Summons on appeal)

State of Illinois, 393
Woodford County, 3

Fifty cent Revenue
Stamp affixed & cancelled

The People of the State of Illinois, to the
Sheriff of said County, Greeting

Whereas, in a certain cause lately pending before R J Evans
Esquire one of the Justices of the Peace, within and for said County,
wherein, Samuel Lewis was plaintiff, and Schabod W Clark
defendant, judgment was rendered by said Justice against the
said Samuel Lewis from which judgment the said Samuel
Lewis has appealed to the Circuit Court of said County

We Therefore Command You, That You Summon the
said Schabod W Clark to be and appear before said Circuit
Court, on the first day of the next term thereof, to be held
at the Court House in Metamora, on the Second Monday
in December A.D. 1863 at ten O'clock in the forenoon, and abide
by, and perform the judgment of said Court in the premises.

And have you then and there this writ, with an endorsement
thereon, in what manner you have executed the same

Seal

Witness, James D Perry, Clerk of our said
Court, and the Seal thereof at Metamora,
this thirty first day of August A.D. 1863
James D Perry Clerk

(on which is the following endorsement)

State of Illinois 3
Woodford County 3 I have duly served the within writ by reading
the same to the within named Schabod W Clark on this 20th
day of October 1863, as I am therein commanded
I returned this writ on the 14th day of December 1863
L H Bullock Sheriff

(7)

Filed in Circuit Court this 14th day of December 1863
James D Perry Clerk

(Copy of Verdict)

We the Jury find that the Plaintiff owns the horse in controversy And we further find Defendant guilty of detaining the same and assess plffs damages at one cent

^{Signed}
Thos J Stivers

Edward Nichol

George Painter

David H Trummel

Amos Ellis

Horace Hazen

Ransom Rathbone

Thomas Rander

Frank Sharp

A J Egbert

Charles Rich

Peter Bloomhart

Filed December 23rd 1863

James D Perry Clerk By W Summer Dpty

United States of America

State of Illinois

Woodford County

}
}
}

At a regular term of the Circuit Court of the twenty third Judicial Circuit of the State of Illinois began and held at the Court House in the Town of Metamora within and for the County of Woodford and State aforesaid on the second Monday of December in the year of our Lord one thousand eight hundred and sixty three, being the fourteenth day of said month

Present the Honorable Samuel L Richmond Judge

James D Perry Clerk

Attest James D Perry Clerk

Louis A Bullock Sheriff

James St L Boal State Attorney

(8)

Monday December 14th AD 1863

Samuel Lewis
vs
Schabod W Clark } Appeal No 673

On this day comes the said Plaintiff by S P Shope his Attorney and moves the Court for leave to amend appeal bond herein filed, which motion is on consideration by the Court overruled

Wednesday December 23rd 1863

Samuel Lewis
vs
Schabod W Clark } Appeal No 673

Now on this day this cause coming on to be heard comes the Plaintiff Samuel Lewis by S P Shope his Attorney and the Defendant Schabod W Clark by John F Need his Attorney and issue being joined a jury came to wit Amos Ellis David C Trummell Thomas J. Stivers Peter Bloomhart Frank Sharp George Painter A J Egbert Charles Rich Thomas Rander Ramson Rathbone Edward Nichols and Horace Hazen who are duly empanelled and sworn the truth to speak upon the issues joined. And now again come the said Plaintiff by S P Shope his Attorney and enters his motion for leave to release William Wheeler security on the replevin bond in this cause, and file new bond with Lealeb Horn as security, which motion on consideration is by the Court allowed and leave is given the Plaintiff to file said bond. And thereupon the Plaintiff files said bond with Lealeb Horn as security which

(9)

is by the Court approved, and William Wheeler security on former bond is released. And the jury having heard the evidence in the case and the arguments of counsel, retire to consider of their verdict and again come into Court and say "We the jury find that the Plaintiff owns the horse in controversy and we further find Defendant guilty of detaining the same and assess ~~the~~ Plaintiff damages at one cent" And now comes the said Defendant by John J. Weed his Attorney and enters herein his motion for a new trial.

Monday December 28th 1863

Samuel Lewis	}	Appeal	No 673
vs			
Schabod W Clark			

This day come the Parties the said Plaintiff by S P Shupe his Attorney and the said Defendant by John J. Weed his Attorney, and this cause came on to be heard on the motion of the Defendant for a new trial, entered herein on the ninth day of the present term of this Court and the Court being fully advised in the premises does order that the said motion be, and the same is overruled, It is therefore ordered and adjudged by the Court that the Plaintiff retain possession of the property in controversy to wit, one grey horse nine or ten years old, It is further ordered and adjudged by the Court that the Plaintiff Samuel Lewis have and recover of the Defendant Schabod W Clark the sum of one cent damages for the detention thereof, also his costs and charges by him in this behalf expended and that he have execution therefor.

(Bill of Exceptions)

State of Illinois } In the Circuit Court,
 County of Woodford } of said County To the
 December Term A.D., 1863

Samuel Lewis

vs

Appeal

Ischabod W Clark

Be it remembered, that on this Twenty Third day of December A.D., 1863, it being one of the days the said Term of said Court this Cause coming on for hearing, a jury having been called and sworn, The Plaintiff to maintain the issues on his ~~own~~ called one - Samuel H Lewis, who being duly sworn on his oath stated, that he was a son of the Plaintiff, and had seen the horse described in the Replevin writ on file in this suit, and identified the horse as the property of the Plaintiff - Witness further testified, that he went to Minouk to get the horse, and learned that Defendant had gone with the horse to Metamora, That the Plaintiff sent word to the Defendant that he was coming to get his horse - When he got to Minouk he found that Defendant, had gone to Metamora, and that Defendant left word that he had waited for Plaintiff to come, and that he didn't come, when he (Plaintiff) agreed to - said witness on his cross examination stated, that he saw Defendant at Metamora, the second day of the August Term of Court for 1863 - That he had never seen said Defendant previous to that time, That before he came to Metamora,

(11)
he went before Esqr Evans a Justice of the Peace of the County of Woodford and procured a writ of Replevin, and that said writ was issued the day before he saw the Defendant in McKinnon.

The Plaintiff further to maintain the issue on his part called William Wheeler who upon his examination on his "voir dire" stated that he signed the Replevin Bond in this suit. The Plaintiff then presented Replevin Bond with the name of said witness, omitted which said Bond the Court received and released said Wheeler, from said Bond - to all of which said Defendant then and there by his Attorney objected. The Plaintiff then called said Wheeler as a witness, but the Defendant then and there objected to said Wheeler being sworn as a witness - for the reason following to wit; Because said witness was interested in the result of this suit. But the Court overruled said objection and permitted said witness to testify, to which Defendant, by his Attorney then and there accepted said witness being duly sworn testified that he was present at the time Plaintiff demanded the possession of the horse in controversy from said Defendant and that Defendant refused to give up the horse unless the Plaintiff would pay him the amount he had paid for the horse when he bought him out of the pound in Minork, and one dollar besides, being Six dollars, This witness upon his cross examination testified that at the time the Plaintiff demanded the horse of the defendant he (the witness) had a writ of Replevin, against said Defendant, and that he served said writ about fifteen minutes, after Defendant had refused to deliver up the horse. That the writ upon which he took said horse

(12)

said Defendant had been issued, the day before he sued it and that it was issued by Esqr Evans, at Penola, that this was the only time Plaintiff ever demanded said horse so far as he knew

The Defendant To maintain the issues on his part ~~The Defendant~~ then called J. T. Taylor who being duly sworn testified that he was then Town Clerk of the Township of Minouk in the County of Woodford, and that a certain book, then produced and shown to him, was the Town Record of said Town of Minouk; Defendant, then offered in evidence certain resolutions passed at the annual Town meeting holden in said Town of Minouk, on the 1st day of April 1862, but said Plaintiff objected to said resolutions being read to the jury for the reasons following to wit

1st Because, Defendant had not yet proved that Woodford County had adopted Township organization or that Minouk was organized as a Township

2nd Because said Township had no right or power to pass such resolutions as those offered in evidence - But the Court overruled said objections, and permitted said resolutions to be read to the jury, to which decision and ruling of the Court the said Plaintiff then and there excepted. said witness Taylor then and there also testified that he posted copies of said Resolutions in ~~front~~ of the most public places in said Town of Minouk, and that he delivered a copy of said Resolutions to the Editor of of the Metamora Sentinel, and requested the publication of said resolutions in said paper. The Defendant then offered Proof of Publication of said resolutions in the "Woodford Sentinel" - Defendant then offered J^{ms} B Whiffin who testified that he was the proprietor

(13)

Publisher of the "Woodford Sentinel" and that said paper was a paper of general circulation in the County of Woodford and that he published said Resolution in said Newspaper three successive weeks, the first of which publications, was on the 10th day of April A.D. 1862, The Defendant then offered and read to the jury said Resolution

Resolutions Passed at the Town Meeting in Minouk
The following resolutions for the impounding horses, mules, asses, neat cattle, sheep and hogs, and the disposing of them, was passed at the annual town meeting held in the town Minouk, April 1st, A.D. 1862, after the hour of two O'clock P.M., by unanimous vote, and ordered to be published in the Woodford Sentinel three times, and that five copies be posted in five most public places in the town, this law to be in force from and after its passage;

1st Resolved, That Cattle, horses, mules, asses, hogs, sheep, and goats, shall be permitted to go at large, in said town from the first until the fifteenth of February, in each year and at no other time; and if any such animals shall be found in said town, going at large, at any other time than is above permitted, then it may be the duty of the Pound Master or Pound Masters of the town wherein such animals shall be found going at large, to take up and impound every such animal, in the nearest Pound of the town, where the same may be found, and any other person not a Pound Master, may take up such animals and deliver them to such Pound Master, who is hereby required to receive them,

2^d Resolved, That the Pound Masters of said town, who may take up or receive any such animal into such Pound, shall within twenty-four hours from the time of receiving any such animal or animals, give notice thereof by posting up in

three places in said town notice of the time when the same will be taken up, and a description thereof, and that the said animal or animals, will be sold at such Pound at public auction, on a day to be therein named, not less than ten, nor more than twelve days from the day said notice shall be given, between the hours of one and four o'clock in the afternoon, of said day. For which notice and sale, if any be made, the Pound Master shall be entitled to receive the same fees, and compensation as are by law allowed to constables, for like service upon executions.

3d. Resolved, That the owners of any such animals going at large at any other time, than above allowed in said town, shall be liable to the party impounding for any damage done by said animals, so unlawfully going, or being at large in said town.

4th. Resolved, That the Pound Master in said town shall be bound to feed, keep, and maintain, such animals, as may be impounded and shall receive for so doing, a reasonable compensation, which together with the compensation allowed for taking up said animal and his other fees, compensation, and charges, shall be paid by the owner or claimant of said animals before they shall be delivered up by said Pound Master; or in case of sale of such animal or animals he may retain the same, out of the money bid therefor. The Pound Master shall also be allowed, for his fees and services for taking into the Pound and discharging therefrom, every horse, ass, mule, and all neat cattle, ten cents each; for every sheep, or lamb, three cents each; for every hog, large or small, five cents.

5th. Pounds in Town three. — One in the village of Minouk; one on the North-West quarter of Section 1; one on the North-East quarter of Section 33.

6th. Resolved, That there shall be allowed to any person taking

(15)

up, or driving to the Pound the following compensations, to wit: For each head of cattle, horses, mules, asses, fifty cents; for every hog, or sheep, large or small ten cents.

7th. Resolved, That the several Pound Masters in making sale of any animals impounded, shall keep an account of all such sales, with a description of the animals sold, and the gross amount of charges, fees, costs, or expenses, of taking up, keeping impounding and selling the same, and after deducting such amount from the price for which sale was made, he shall report the same to the Supervisor of said Town, on the Tuesday before the annual town meeting in each year, and pay the same to said Supervisor if the same shall not have been previously paid to the owner or owners of said animals.

8th. Resolved, That the owner of any animal sold as above provided, may at any time before the money shall be paid over to the Supervisor, as above, upon proof of property to the satisfaction of the Pound Master, be entitled to receive from him the amount of money paid for such animal, after deducting the charges aforesaid, he giving said Pound Master a receipt for the same, and after said money shall be paid, to the Supervisor, the owner shall be entitled in like manner to receive the same from him at any time within one year from the time such payment to said Supervisor

9th. Resolved, That the owner of any horse, mule, ass, or any head of neat cattle, may redeem the same from such sale so made as above provided at any time within one year from the day of such sale, by proving property, and paying to the purchaser, the amount of his bid, with ten per cent, interest and the reasonable expenses of keeping the same over and

above, the value of the use thereof.

10th. Resolved, That the money that shall come to the hand of the Supervisor, if not claimed by the owner within the time above provided, shall be forfeited to the town.

11th. Resolved, That any person purchasing any horse, mule, or ass, or neat cattle, impounded and sold, in any of the Pounds in this town, shall give good and sufficient security to the Pound Master, for the keeping of said property purchased in the County one year from the time of said purchase.

E. D. Davison Moderator

Attest J. T. Taylor, Town Clerk

April 10-35

Defendant then offered and read to the jury the following Resolution which was passed at the annual Town Meeting held in the Town of Minonk in said Woodford County on the 7th day of April A.D. 1863, To-wit "Resolved, that the Resolutions passed at the last annual Town meeting, in relation to allowing animals to go at large, in said Town, and impounding the same be in force for and during the year 1863". Defendant further to maintain the issues on his part called N. O. Longworth, who being duly sworn testified that he was acting Pound Master in the Town of Minonk and that such Pound Master he received into his keeping and custody, (and placed him in the Pound of which he was the keeper) the horse in controversy. That said horse was driven to the Pound by two little girls named Ryan, whose Father lived on a farm in said Town of Minonk, and about a half mile from the residence of Witness; and that when said horse was brought to the Pound he

(17)

had nothing on him neither saddle, bridle nor halter; That he saw said girls driving said horse to the Pound when about one-fourth of a mile from the Pound; That he received said horse (and another one, which was placed in his custody at the same time) on the 25th day of July A.D. 1863, and that he advertised said horses for sale on the next Monday, as required by the provisions of the Resolutions in regard to Pound Sales - That said Notices of the sale of said horse, were posted on the 27th day of July A.D. 1863, and sold said horses to the Defendant on the 4th day of August 1863. That at the time said horses were sold there was due to him as Pound charges the sum of Three Dollars and sixty cents, for each of said horses, That he sold the horses together, to the Defendant ~~and~~ Five dollars each; and that ~~that~~ ^{he} bid against said Defendant at the sale of said horses and that he and Defendant were the only persons present at said sale and that said Defendant paid the amount of his Pound charges, and took said horses into his possession, and took them away with him - Witness was here shown a Bond which Defendant ^{had} executed; and said witness stated that he directed said Defendant to go to E. D. Davison, and have a bond drawn, and he supposed that was the Bond he had directed Defendant to execute - which said Bond is in the words & figures following

Know all men by these presents that we J. W. Clark and Asa^{el} Clark of the Town of Minork County of Woodford and State of Illinois, are held and firmly bound unto W. O. Langworthy Pound Master of the Town of Minork County

and State above named in the penal sum of one hundred and seventy Dollars to which we bind ourselves our heirs and assigns firmly by these presents - as witness our hand and seals this 4th day of August AD 1863.

The conditions of the above obligation is such that if the said J. W. Clark shall keep and properly use and not abuse the following property to wit one grey Horse nine or ten years old, one brown Horse ten or eleven years old, And hold them subject to redemption according to the Laws & regulations of Pounds and Sales therefrom of Horses and Cattle &c as established by the above mentioned Town of Minionk then this obligation to be void otherwise to remain in full force and effect - Given under our hand and seals the day and year above written

Twenty five Cent Revenue
Stamp affixed and
Cancelled

(Signed)

J. W. Clark

Seal

Asahel Clark

Seal

which said Bond was here offered and read in evidence to the jury - to the reading of which said Bond, to the jury the said Plaintiff by his Attorney then and there objected. Said witness also stated, that he had never approved the Bond, but that Defendant told him who he would give as security; and that he thought the security was good. Defendant here offered and read in evidence to the jury the original writ of Replevin issued herein, by the Justice of the Peace, before whom this suit was commenced and tried; This was all the evidence in the case -

And the Court at the instance and request of the Plaintiff instructed the jury as follows to wit;

1 The jury are instructed that notice of the sale must not be less than ten days and if they believe from the

- (19) evidence that the horses in controversy was sold in less than ten days notice the sale is void
- 2 If there is no evidence showing that the horse in controversy was running at large within the Town of Minouki and if the jury find this fact they will find for Plf
3. If the jury believe from the evidence that the Pound Master did not advertise the property within 24 hours after the same was in his possession and sold in less than ten days after so advertising, the sale is void and Defendant acquired no title by such sale
- 4 If the jury believe from the evidence that defendant was running the horses off then plff had a right to obtain his writ and pursue said Defendant with the writ and if such was the case a demand was not necessary
- 5 If the sale is void as made by the Pound Master then belark Deft had no right to demand a return of money nor any compensation
- 6 The jury is further instructed that if they believe from the evidence that the said Pound Master had the horse from three O'clock P M on the 25 day of July 1863 to the following Monday without giving notice that the law is for the Plaintiff, so far as the legality of the sale is concerned
7. The jury is further instructed that if they believe from the evidence that the said Pound Master did not advertise the said sale till the Monday following the 25 day of July 1863 and that he sold the horse on the 4 day of August 1863 then he could not have given ten days notice and the sale (if these are the facts) passed no title of the horse to the Defendant

(20) 8. The jury is further instructed that if they believe from the evidence that the Pound Master sold the said horse at the same time he sold the other horse and at the same bid and for a round sum then the said sale could not pass title to the Defendant

Given

(Filed December 23rd 1863)

(James D Perry clk By W Sumner Dpty)

To the giving of which said instructions and each of them, the said Defendant by his attorney then and there objected. The Defendant by his attorney then and there asked the court to give the following instructions to the jury; but, the court refused to give said instructions and each of them

2nd

Refused

The court further instructs the jury that a purchaser of property at a Pound Masters Sale, in the absence of all proof that he acted in collusion with the Pound Master or some other person, or that he acted in bad faith is an innocent purchaser

3rd

Refused

The court instructs the jury that although the Pound Master had no right to sell the horses together, still if they believe defendant purchased at said sale in good faith, then he the said defendant would be an innocent purchaser & the taking of the horses by said defendant was not wrongful and the jury should find the Deft not guilty

4th

Refused

If the jury from the evidence believe that the property in question was the property of the Plaintiff and also believe from the evidence that defendant was an innocent purchaser then the jury should find the property to be the property of the Plaintiff, and should also find the defendant not guilty

(Filed December 23rd 1863)
(James D Perry clk)

(21) to which said refusal to give said instructions the said Defendant then and there by his Attorney excepted —
The Court at the instance and request of the Defendant instructed the jury as follows to wit —

The Court on the part of the Defendant instructs the jury

1st The Court instructs the jury that under the laws of this State, the People of a Township when Township organization has been adopted, have the right to pass laws to prevent horses running at large in such township, and to provide for the impounding, advertising and sale of the same for the payment of charges for such impounding, advertising & sale

2nd The commencement of this suit was the issuing of the writ of Replevin — and if the jury believe from the evidence that the defendant was in the rightful possession of said horse, then it is necessary for the Plaintiff to make a demand for said horse before the commencement of the suit, and unless the jury from the evidence believe that such demand was made before the commencement of this suit — then the jury should find the defendant not guilty. —

3rd That if the jury believe from the evidence that the Defendant (Clark) purchased the horse in controversy at the sale made by the Pound Master, and that in pursuance and by virtue of such sale said Defendant took possession of said horse, then such possession of said horse by, said Defendant, was not in itself wrongful — unless said horse was wrongfully taken up and the Defendant (Clark) had notice thereof, unless a demand for the horse was made before suit brought —

4th That before the jury can find the Defendant guilty of

Given

wrongfully detaining the horse in controversy they must either believe from the evidence, that the original possession of said horse by the Defendant, was wrongful, or that if such possession was not wrongful, the Plaintiff before the issuing of the writ in this case by the Justice of the Peace, demanded the possession of the horse, and that the Defendant refused to deliver up said horse in pursuance of such demand

5th

Given

Although the jury may believe from the evidence that the Plaintiff (Lewis) is the rightful owner of the horse in controversy; yet he can only recover a judgment for the ownership thereof, unless, he, demanded the possession of the horse from the Defendant (Clark) before the issuing of the writ by the Justice of the Peace, and that after such demand, the Defendant (Clark) wrongfully and unlawfully detained said horse from the possession of said Plaintiff (Lewis). But if the horse was wrongfully taken up and sold, and if the jury believe from the evidence that the Defendant (Clark) had notice of those facts then no demand would be necessary.

(Filed December 20th 1863
James D. Perry Clerk By W. Sumner Dpty)

To the giving of which said instructions and each of them the said Plaintiff by his counsel then and there objected -

The jury having retired returned into court the following verdict to wit; "We the jury find that the Plaintiff owns the horse in controversy, And we further find Defendant guilty of detaining the same and assess plff. damages at one cent"

(Signed by the jury)

Whereupon the Defendant by his attorney entered herein

(23)

his motion to set aside the verdict and for a new trial
In the Circuit Court of Woodford
County Illinois To the December
Term A.D. 1863

Samuel Lewis

v. Appeal

Isabou W Clark

And now on this day comes the
said Defendant by John J Weed his Attorney and enters
herein, this his motion for new trial in said suit and
for causes of said motion shows to the Court the following
to wit:

- 1st That the verdict is against the evidence
- 2nd That the verdict is against the law
- 3rd That the Court refused proper instructions asked on
the part of the Defendant
- 4th That the Court gave improper instructions on the part
of the Plaintiff
- 5th other reasons

John J Weed atty for deft
(Filed December 25th 1863)
James D Perry Clerk

But the Court overruled said motion, to which said decision
of the Court in overruling said motion the said Defendant then
and there excepted, The Defendant then and there entered a
motion in arrest of judgment.

(No written motion in arrest of judgment on file)

To which decision of the Court in overruling said motion in
arrest of judgment the said Defendant then and there excep-
ted. Whereupon the Court rendered judgment upon the

Verdict. To all of which rulings and decisions of the Court, the said Defendant, then and by his attorney excepted. And inasmuch as the matters and things ^{herein} stated and set forth do not appear of record, the said Defendant prays that this his Bill of Exceptions be signed and sealed by the Court, and made a part of the record herein all of which is accordingly done -

(Signed) J L Richmond Judge ^{Comm}

(Filed December 29th 1863)
James D Perry Clerk

State of Illinois 3 ss
Woodford County 3 } I James D Perry Clerk of the Circuit
Court in and for said County and State
do hereby certify that the above and foregoing on pages one
to twenty four inclusive contains as true copy of the
proceeding in the Circuit Court of said County and in
Court below in the cause therein mentioned wherein Samuel
Lewis was Plaintiff and Ichabod W Clark Defendant as
appears of record and on file in my office

In Testimony whereof I have hereunto set
my hand and affixed the seal of said Court
at my Office in Metamora in said County
of Woodford this Sixteenth day of March
A.D. 1864



James D Perry Clerk

State of Illinois } In the Supreme
Third Grand Division } Court to the
April Term AD 1864

Charles H. Clark, Plaintiff in Error

vs Error to Woodford Circuit Court

Samuel Lewis Defendant in Error

And now comes the
said Plaintiff in Error, and says
that in the recent said proceedings
aforesaid manifest error hath
intervened, in this to wit:

I. The Circuit Court erred in giving
the instructions asked on the
part of the Plaintiff.

II. The Circuit Court erred
in refusing instructions to
2, 3, & 4, ^{asked} on the part of the Defen-
dant below.

III. The Circuit Court erred
in overruling the Motion for a
New Trial - made by Defendant
below.

IV. The Circuit Court erred in
rendering judgment in favor
of the Plaintiff upon the verdict
of the jury -

By reason whereof the said
Plaintiff in Error prays that said
judgment be in all things re-
versed &c.

John S. Weed
Att'y for Plaintiff in Error

267
Charles W. Clark

27
Samuel W. Lewis

Exor to Woodford
Circuit Court

Rec'd assign-
ment of errors

Filed Apr. 21. 1864.
L. Leland
Clerk.

Once the Defendant say that is,
the Record and Pleading and said
Judgment there is no error as alleged
in said assignment

Charles E. Ellis
Att'y for Deft

STATE OF ILLINOIS. SUPREME COURT.

Third Grand Division.

APRIL TERM, A. D. 1864.

ICHABOD W. CLARK, PLAINTIFF IN ERROR,

vs.

SAMUEL LEWIS, DEFENDANT IN ERROR.

ERROR TO WOODFORD.

ARGUMENT AND BRIEF FOR PLAINTIFF IN ERROR.

This was an action of Replevin, for the unlawful and wrongful detention of a horse, commenced before a Justice of the Peace of Woodford County, and appealed to the Circuit Court, from whence it comes by Writ of Error to this Court.

The Plaintiff assigns for error.

1st. The giving of improper instructions by the court below, on behalf of the Plaintiff.

2d. The refusal of the Court to give certain instructions asked by Defendant below.

3d. The refusal of the Court to grant a new trial.

These several errors will be discussed in the order, in which they are here presented.

There are three instructions which are illogical and incorrect, and well calculated to misdirect the jury. The second instruction tells the jury "that if there is no evidence that the horse in controversy was running at large in the Town of Minonk then they should find for the Plaintiff." This does not correctly state the conclusion at which the jury should arrive. This was an action for the wrongful detention of the property, and the jury might well find that the property replevied was the property of the Plaintiff. Was this all they were to do under the issues

and evidence? Clearly not. They were to pass upon the question of the *wrongful detention* of the property by the Defendant. This was the real and only question in the case, and it is upon this question that this case comes here for re-hearing. While the fact that the property was not found running at large at the time it was impounded, was proper to be considered by the jury in passing upon the question of the *rightful* sale of the property by the Pound Master, yet it was in no sense proper to be considered by the jury, unless they should find from the evidence that the Defendant below, who purchased the horse at the Pound Master's sale, had actual knowledge of the fact, that the horse was not going at large at and before the time it was delivered to the Pound Master. All these questions were very proper for the consideration of the Jury in determining the question as to whether the horse in controversy had been rightfully sold, and the title to the property transferred to Defendant by virtue of such sale. If the sale was regular and authorized by the Township ordinance, then the owner could only defeat the title acquired by the purchaser at the Pound Master's sale in the manner pointed out in the ordinance. If the sale was not regular and legal then the purchaser at such sale, only became a trespasser from the time of a demand made upon him and a refusal to deliver up the property in pursuance of such demand. The mere fact that the horse was not going at large would not warrant the jury in finding the Defendant guilty of *wrongfully detaining* the property.

The fourth instruction is still more flagrantly erroneous than any of the others, and I am quite sure that this Court will look in vain for the *slightest evidence or circumstance* in the case upon which to base such an instruction. I find no fault with the general proposition of law announced in that instruction. The difficulty is that there is not anywhere in the record the least particle of evidence to authorize it. The only possible effect of such an instruction would be to mislead and confound the jury. No right minded man could say that the conduct of the Defendant below was such as to lead him to believe that he was endeavoring to avoid the Plaintiff, who claimed the horse. The Defendant was a constable, and he left word where the Plaintiff would find him in case he should come for the horse. That instruction was based upon the principles laid down in the case of *Johnson vs. Howe*, 2 Gilman 344, where the party having the property in possession was absolutely absconding at the time the writ was issued. Here the party having possession of the property had made an appointment with the owner, and stayed untill called away by the demands of his business; and when he did go he left word where he might be found. This Court has repeatedly decided that instructions announcing only abstract propositions of law should not be given, unless they were warranted by the evidence in the case.

Coughlin vs. The People, 18 Ill. 266.

Dishon vs. Schorr, 19 Ill. 59.

Hosley vs. Brooks, 20 Ill. 165.

Brown vs. Graham, 24 Ill. 628.

Calhoun County vs. Buck, 27 Ill. 440.

Atkinson vs. Lester, 1 Scam. 407.

Humphreys vs. Collier et al, 1 Scam. 53.

Chicago, Burlington & Quincy R. R., vs. George, 19 Ill. 570.

The *sixth* instruction announces that if the Pound Master neglected to give notice, within *twenty-four* hours after the property came into his possession, then the sale by the Pound Master was *void*. Would this neglect of the Pound Master invalidate the sale if all the other proceedings of the Pound Master were legal and regular? The general law regulating these sales by a Pound Master provides that they shall be conducted as nearly as may be in the same manner as constable sales are conducted under *Executions*. This taking up of an animal going at large, by the Pound Master is in some respects similar to the making of a levy by a constable. In both instances, the property comes into the actual possession of the officer, and I apprehend that it would hardly be pretended that a delay of *twenty-four* hours by a constable, in giving notice of a sale would render void a sale made by him subsequent to that time. There are some questions presented by the instructions, asked on the part of the Defendant below, and refused by the Court, to which we now ask your attention; and we do so not so much, because they are essential to a correct understanding and decision of this case, but rather because these questions are becoming more frequent each day, and are of growing importance to the people who have under the Constitution adopted Township organization. Is the sale made by a Pound Master under an ordinance such as exists here, in the nature of a *judicial sale*, if it is, then is a purchaser at such sale chargeable with notice, (in the absence of proof) of the irregularities in sales of this kind. Need the purchaser at such sale make any inquiry except that the officer has power to make the sale, under the law. If the officer have such authority then the purchaser will not be affected by irregularities committed by the officer in making the sale.

Giles v. Pratt, 1 Hill, (S. C.) 239.

The last error assigned, is the refusal of the Court below to grant a new trial. This the Defendant was entitled to.

- 1st. If the verdict was against the evidence.
- 2d. If the verdict was against the law.
- 3d. If the Court, by improper instructions misdirected the jury.

The complaint charges the Defendant below with "*unlawfully, and wrongfully, detaining from the Plaintiff the possession of a certain horse*." This was the issue, this was the question, the jury were to try. There was no other, and by this complaint the Plaintiff must stand or fall. It was not the *possession* that was wrongful, it was only the *detention* that was complained of. Now to constitute a wrongful detention, there must have been a demand for the property, and a refusal to deliver it up in pursuance of such demand. Here the demand was necessary in order to entitle the Plaintiff to a verdict, and there is no pretence that any

demand was ever made until after the writ had issued. It is insisted therefore that the jury should have found the defendant *not guilty* of the wrongful detention.

Amos vs. Sinnott, 4 Scam. 449.
 Ingalls vs. Buckley, 13 Ills. 317.
 Woodward vs. Woodward, 14 Ills. 467.
 Pringle vs. Phillips, 5 Sandf. 157.

The argument of the Court in the case of Woodward vs Woodward above cited is entirely applicable to this case, for there is nothing here to show that the Plaintiff might not have obtained his property without resorting to legal process. And it would seem to be in the highest degree unjust to require the Defendant below to pay a large bill of costs when it might all have been avoided, if the Plaintiff had only demanded the property before the commencement of the suit.

The verdict is not only against the evidence, but the law. The 3d, 4th, and 5th instructions asked and given on the part of the Defendant below, stated the law as applicable to this case, and unless the jury had wholly dis-regarded those instructions, they must have found the Defendant *not guilty* of *wrongfully detaining* the property in controversy.

It is insisted therefore, that for all these reasons, the Court below should have awarded a *new trial*. It is impossible to escape this conclusion in any view of this case, for it comes within the principles announced in all the cases, which have ever been decided by our own and other Courts, in relation to the granting of new trials. Nor will the *old plea*, that "substantial justice" has been done, avail the Defendant here, because the suit is for a "*wrongful detention*," when there is not the slightest evidence of any detention at all; and it would be difficult to see the "*justice*" of compelling the Plaintiff here to bear the burden of this suit, merely because the Defendant *neglected to demand* the property before the commencement of his suit. It is hoped that some of the questions presented here will receive the considerate attention of the Court, because they are of the utmost importance to those portions of the State which have from necessity adopted these pound *regulations*, under the Township Organization law. It will be a source of great relief to the people so situated, to be definitely advised of their rights, powers, and duties in regard to the exercise of the authority given them under the Township Organization law, to pass laws and regulations in regard to the running at large of domestic animals in their respective Townships. While the expression of any opinion upon these questions is not essential to the determination of the questions presented in this case, it is hoped that they may not be entirely ignored by this Court,

JOHN J. WEED,

Attorney for Plaintiff in Error.

267 32
Schobbs W. Clark

107

Samuel Lewis.

Argument & Briefs
for Plaintiff in Error

Filed April 21, 1864
J. C. Lewis CME

STATE OF ILLINOIS. SUPREME COURT.

Third Grand Division.

APRIL TERM, A. D. 1864.

ICHABOD W. CLARK, PLAINTIFF IN ERROR,

vs.

SAMUEL LEWIS, DEFENDANT IN ERROR.

ERROR TO WOODFORD.

ABSTRACT.

Page
Record

This was an action of Replevin, commenced by Defendant in error, against the Plaintiff in error, before a Justice of the Peace, of Woodford County, and taken by appeal to the Circuit Court of said County.

1 & 2

Complaint made and summons issued, August 11th, 1863.

10

Samuel H. Lewis testified that he had seen the horse described in the Complaint and Writ of Replevin, and that was Plaintiff's horse. That he went to Minonk to get the horse, and learned that Defendant had gone with the horse to Metamora, to attend Court. That the Plaintiff sent Defendant word that he (Plaintiff) was coming to get the horse. When he got to Minonk he found Defendant had gone to Metamora; and that Defendant left word that he had waited for Plaintiff to come, but that he, (Plaintiff,) did not come when he agreed to.

Said Samuel H. Lewis, on his Cross Examination, testified. That he saw defendant at Metamora, the second day of the August Term of Court for 1863. That he never saw Defendant before that time. That before he went to Metamora, he went before Esq. Evans, a Justice of the Peace, of Woodford County, and
11 procured a writ of Replevin. That said writ was issued the day *before* he saw Defendant at Metamora.

WILLIAM WHEELER being sworn, testified. That he was present when Plaintiff demanded the horse of the Defendant. That Defendant refused to give up the horse, unless Plaintiff would pay him six dollars, being one dollar besides the

amount Defendant had paid for the horse at the Pound sale, in Minonk. On his cross-examination, witness testified that at the time Plaintiff demanded said horse of Defendant, he, (witness,) had a writ of Replevin for said horse, and that he served said writ and took said horse out of the possession of the Defendant, about fifteen minutes after said demand was made. That the writ was issued and delivered to him, the day *before* said demand was made.

- 12 Defendant then called J. T. Taylor, who being duly sworn, testified that he was Town Clerk of the town of Minonk, in Woodford County, that the book produced and shown him, was the Town records of said Township. The Defendant, then offered and read in evidence, certain resolutions, adopted at the annual Town meeting in said Town of Minonk, on the 1st day of April, A. D. 1862.

- That he pasted Copies of said Resolutions in five of the most public places in each town of Minonk*
12 Wm. B. Whitlin testified that he published the Resolutions shown him for three successive weeks in the "Woodford Sentinel," and that at the time said resolutions were published, he was publisher and proprietor of said newspaper.

The following resolutions were then offered and read in evidence,—being resolutions unanimously passed, at the annual Town meeting held in the Town of Minonk, on the 1st day of April 1862. Said resolutions were adopted after the hour of two o'clock on said day, and to be in force on and after their passage.

- 13 The 1st Resolution provides that cattle, horses, mules, asses, hogs, sheep and goats shall be permitted to go at large in said Town from the 1st to the 15th of Feb'y in each and every year, and at no other time; that if any such animals shall be found going at large in said Town at any other, then, it shall be the duty of the Pound Master, or Pound Masters, of said Town, to take up and impound the same in the nearest Pound, and any person not a Pound-Master may take up such animals, and deliver the same to the Pound Master, who is required to receive them.

- 14 Section 2d. Provides that any Pound-Master receiving any such animal shall, within four hours thereafter, give notice thereof, by posting up the same in three places in said Town, stating when the same were taken up, and a description thereof, and that such animals will be sold at the pound on a day to be therein named, not less than ten nor more than twelve days from the day said notice shall be given, between the hours of one and four o'clock P. M., and that said Pound Master shall be allowed the same fees for said service as constables are allowed by law upon Execution.

Section 3d. Provides that the owners of any stock going at large, shall be liable for any damage done by any animals unlawfully going at large in said Town.

Section 4th. Provides that Pound Masters shall feed, keep and maintain such animals, and for so doing shall receive a reasonable compensation, which together

other fees, shall be paid by the claimant out of the proceeds of sale, before they shall be delivered up by the Pound Master. That Pound Masters shall be allowed for receiving and discharging therefrom, every horse, ass, mule, and all neat cattle ten cents each;—for every sheep or lamb three cents each, for every hog, large or small, five cents *each*.

Section 5th. Provides for the establishment of three Pounds in said Town of Minonk.

Section 6th. Provides that any person bringing any horses, mulcs, asses or cattle to the pound, shall be paid fifty cents each : for every hog or sheep, large or small, ten cents each.

- 15 Section 7th Provides that the several Pound Masters, in making sale of any animals impounded, shall keep an account of all such sales, with a description of the animals sold, with the amount of his fees and charges, and after deducting the some therefrom, shall pay the balance to the Supervisor of the Town.

Section 8th. Provides that the owners of any animals sold, may receive the money for which the same was sold, from the P'nd Master, upon making proof of property to the satisfaction of Pound Master, and that the owner of any animal may, in like manner, recover from any Supervisor, the amount for which any animal has been sold, if applied for within one year from the time it is paid to such Supervisor.

Section 9th. Provides that the owner of any such animal may redeem the same from such sale, by proving property, and *paying to the purchaser the amount of his bid, with ten per cent interest and reasonable expenses for keeping the same over and above the value* of the use of such animal.

- 16 Section 10th. Provides that all moneys that shall come into the hands of the Supervisor, as provided in Section 8, shall be forfeited to the Town if not claimed in one year.

Secteon 11th Provides that any person purchasing any animals impounded shall give Bond, with sufficient security, for the keeping of such animals in the County of Woodford one year after the same are sold.

Defendant then offered and read to the jury the following resolutions, passed at the annual Town Meeting of said Town of Minonk, on the 7th day of April 1863, viz :

Resolved that the resolutions passed at the last annual Town Meeting, in relation to allowing animals to go at large in said Town, and impounding the same be in force, for and during the year 1863.

Defendant then called W. G. Langworthy, who being duly sworn, testified. That he was an acting Pound Master in the Town of Minonk, and that as such, Pound Master be received into his keeping and custody the horse in controversy. That said horse was driven to the Pound by two little girls by the name of Ryan whose father lived on a farm about half mile from the Pound. That when the horse was driven into the Pound he had neither saddle, bridle or halter on him. That he advertised said horse for sale on the 29th of July, and sold him on the 4th day of August 1863. That there was due him as Pound Master, at the time said horse was sold, three dollars and sixty cents. That said horse was sold to Defendant who paid him his Pound Charges, and that he delivered said horse to Defendant, who took him away with him.

Defendant then offered and read in evidence, the Bond executed by Defendant to said Langworthy, which Bond was in compliance with section eleven of the ordinances offered in evidence.

18 Defendant then offered in evidence, the Writ of Replevin, with the return, thereon, showing the time said writ was issued: and the time of service.

The Court, at the instance of the Plaintiff, gave the following among other instructions,

If there is no evidence showing that the horse in controversy was running at large within the Town of Minonk, and if the Jury find this, they will find for the Plaintiff.

If the Jury believe from the evidence that Defendant was running the horse off, then the Plaintiff had a right to obtain his writ, and pursue said Defendant with his writ, and if such was the case, a demand was not necessary.

The Jury are further instructed, that if they believe from the evidence, that the said Pound Master had the horse from three o'clock p. m. on the 25th day of July 1863 to the following Monday, without giving notice, that the law is for the Plaintiff, so far as the legality of the sale is concerned.

The Court refused the following instructions.

1st. Amongst other instructions asked on the part of the Defendant.

20 The Court instructs the Jury, that although the Pound Master had no right to sell the horses together, still, if they believe that the Defendant purchased said horse at said sale, in good faith, then he, the said Defendant, would be an innocent purchaser, and the taking of the horse by the Defendant, was not wrongful, and the Jury should find the Defendant not guilty.

- ²¹ The court gave the instructions numbered 1, 2, 3, 4, 5, asked on the part of the Defendant.

The Jury found the Property in the Plaintiff, and Defendant guilty of wrong-
²³ fully detaining the same. Defendant entered a motion for a new trial, for the following reasons :—

- 1st. Because the verdict is against the weight of evidence.
- 2d. Because the verdict is against the law.
- 3d. Because the Court refused proper instructions asked on the part of the Defendant.
- 4th. Because the Court gave improper instructions on the part of the Plaintiff.
- 5th. Other general reasons.—

Which motion the Court over-ruled.

ASSIGNMENT OF ERRORS.

- 1st. The Court below erred in giving improper instructions on the part of the Plaintiff.
- 2d. The Court below erred in refusing to give proper instructions on the part of the Defendant.
- 3d. The Court below erred in over-ruling Defendant's motion for new trial.
- 4th. The Court below erred in rendering judgment upon the verdict.

JOHN J. WEED,
 Atty' for Plaintiff in Error.

Schoob²⁶⁷ H. Clark³¹

of

Samuel Lewis

Abstract

Filed April 21, 1864
J. L. Lewis CTR