

No. 12395

Supreme Court of Illinois

Butler.

vs.

Mehrling.

17 To Devices. 17

Loren G. Butler

Henry R. Mehrling

1858

17

12395

798!

Lorin G. Butler

vs

Henry R. Merkle

In the Supreme Court of Missouri

On the third Grand division

Of the June term A.D. 1854.

And now comes the said Lorin G. Butler by Elisha W. Tracy his attorney and says that in the record of the proceedings and rendition of the judgments aforesaid manifest error hath intervened ~~in~~ to his prejudice and thus to wit.

1. Because it appears by the said record that the said Circuit Court erred in encompassing a jury to assess the damages for the detention by the said Butler of the goods and chattels in said writ of Replevin mentioned
2. Because it appears by the said record that the said Circuit Court erred in admitting improper testimony on the part of the said Merkle upon the requests aforesaid
3. Because it appears by the said record that the said Circuit Court erred in rejecting proper evidence offered by the said Butler upon the requests aforesaid
4. Because it appears from the said record that the said Circuit Court erred in overruling the motion of the said Butler to exclude from the jury the evidence of the said Augustus Crane

5 Because it appears from the record aforesaid that the said Circuit Court erred in overruling the motion of the said Butler to exclude the evidence given by the said George Baker from the jury aforesaid

6 Because it appears from the said record that the said Circuit Court erred in permitting the said Merchling to put improper questions to the said witnesses

7 Because it appears from the evidence that the said Circuit Court erred in admitting the record of the proceedings in the case of Loria & Butler against Henry R. Merchling as evidence on the instant aforesaid

8 Because ~~that~~ it appears from the record aforesaid that the said Circuit Court erred in overruling the motion of the said Butler to exclude from the said jury the evidence of the said George W. Atter Norton

9 Because it appears from the record aforesaid that the said Circuit Court erred in refusing to permit the said Butler to put proper and pertinent questions to the witnesses aforesaid

10. Because it appears by the said record that the said Circuit Court erred in refusing to permit the said Butler to read to the

may affirm the bill of sale executed
by the said clerk to the said
Butler

11 Because it appears from the record
aforesaid that the said Circuit
Court used in refusing proper
and legal instructions to the
jury on the request of the said
Butler.

12 Because it appears by the said
record that the said Circuit Court
used in modifying and giving
or modified instructions asked by
the said Butler.

13. Because it appears by the record
that the said Circuit Court used
in giving the instructions asked
by the said Weibling.

14. Because it appears by the record
that the said Circuit Court used
in ^{overruling} ~~refusing~~ the motion of the said
Butler to set aside the verdict
and grant a re-assessment of
the damage aforesaid.

15 Because it appears by the record
aforesaid that the said Circuit
Court used in rendering a judgment
upon the aforesaid aforesaid in
favor of the said Weibling
where by the law of the land
the said judgment ought to
have been rendered in favor
of the said Butler.

Whence and for other reasons in the
Record of the proceedings aforesaid
~~whereby the said Court & Butler~~

And thus the said Court & Butler is
ready to verify by the record aforesaid
Wherefore and for other errors
in the record and proceedings
aforesaid he prays that the
judgment aforesaid may be
reversed, annulled and for
nothing esteemed, and that he
may be restored to all things
which he may have lost by
reason thereof &c.

Elisha W Tracy
Attorney for the
Plaintiff in error.

Assignment of
errors —

Filed April 12 1854.
S. Leland Clerk.
By P. H. Leland atty.

And now at this day comes the
said Merkle and says that in the
Record and proceedings aforesaid there is no
Error, And that the same should be affirmed
in all things Wherefore he prays that said
Judgment may be affirmed &c

M G Johnson
& J P Stevens

Atty for Merkle

State of Illinois
Fourteenth Judicial Circuit
St Davids County

Pleas in the Circuit

Court began and held within and for the County of
St Davids aforesaid, on the fourth Monday of August
A.D. 1853 before the Judge of the said fourteenth
Judicial Circuit to-wit the Hon^{ble} Benjamin
R. Sheldon.

Wm. Mearns Esq.
Sheriff

Wm. H. Bradley Esq.
Clerk

Loren S. Butler Plaintiff

vs
Henry R. Muehling Defendants

Be it remembered
that heretofore to-wit on the 17th day of August
A.D. 1853, the said Plaintiff Loren S. Butler filed
in the Clerk's Office of the Circuit Court for
St Davids County aforesaid his affidavit &
process which are in the words and fig-
ures following to-wit;

State of Illinois
St Davids County
I, Loren S. Butler, of
lawful age being duly sworn
state that I am about to commence an
action of debt in the Circuit Court of
St Davids County and State of Illinois

Against Henry R. Marking to recover the
possession of the following property to wit:
One Bay Mare called Lady Almore. One Bay
horse called "Old Dad" One Bay horse called
"Old Dad's" Mate One Grey horse called "Ellis Bay"
a tick horse One Black horse called "Black
Hawk" one red and white spotted horse called
"Brilliant" One Black and white spotted horse
called Cleveland. Two horses called the
Harvey team. One Band Wagon. One Ticker
wagon. One Circus Pavillion or Canvaps. being
the tent or Canvaps with the ropes, Pulleys
poles seats fastenings and fixtures conne-
cted with and belonging to said Circus pavillion
One large Centre Pole, One fine Chandelier for
the ring. Eight small lamps. two lanterns
two spades two Crow bars Two sledges.
Two Circus pads Six set harness for
Band Wagon Four sets harness for
four horse team. Three Bitting rigging.
Seven Bridles for Ring. And one Lungie rein
Six fancy halters. ^{Two common} ^{in halters} One Lady Almore Blanket.
One Side Saddle
Five Common Pad Saddles Six Girths. One
Pedestal Box for Ring. One set of harness for
ring One Ladder Two common Trunks. One
Leather Treasures Box. Four Tin Boxes with
rings locks. sixteen Saddle cloths. Ten
head dreses for horses. One ring Whip. Three

ring dresses One Carpet for Sing and Seats
Two, Pin fluid Cans, a lot of Tickets and
Checks, One Bass Drum, One Box to hold Chandel-
ier, One lot tools and implements, all of
said Goods being now in the possession of said
Merchling. This Affiant states and on oath that
he is the owner of the property aforesaid
described in the writ and about to be
replevied, and that he is lawfully entitled to
the possession thereof and that the same
has not been taken for any tax ass-
essment or fine levied by virtue of any law
of this State nor seized under any exe-
cutions or attachment against the goods
and Chattels of such plaintiff liable to exe-
cution or attachment and that said goods
and Chattels are of the value of Two Thou-
sand dollars

Your affiant therefore prays
that writ of replevin may issue against
the said Henry W. Merchling according
to law &c

Sworn & subscribed to L. G. Butler
before me this 17th day of
August A.D. 1858

Wm H. Bradley Clerk

To the Clerk of the Circuit Court of Jo. Davis County Illinois
Upon filing the above affidavit issue a
writ of Replevin for the above described,

Property returnable &c.

Value of property \$2000.00 Loren L. Butler
damages \$4000.00 Henry R. Meskling Replevin

Hooper & Campbell
for Pff

Endorsed Filed August 17th 1853
Wm. H. Bradley Clerk

And thereupon on the same day to wit on
the 17th day of August a writ of Replevin iss-
ued out of the Clerk's office of said Court
in said entitled case which together with the return
of the Sheriff thereon is in the words and
figures following to wit;

State of Illinois
To Danvers County
The People of the State of Illinois to the Sheriff
of said County greeting
Whereas Loren L. Butler Plaintiff complains
that Henry R. Meskling defendant unlawfully
and wrongfully does detain from him said
Butler the possession of the following described
property to wit: One Bay Mare called Lady

2 Elmore; One Bay horse called old Dad. One Bay horse called Old Dads Mate, One Gray horse called Ellis Gray, a trick horse. One Black horse called Black Hawk. One Red & White spotted horse called Brilliants. One Black & White spotted horse called Clearland. Two horses called the Harvey Team, One Band Wagon, One Ticket Wagon, One Circus Pavillion curvaps. being the Tent or Curvaps. with the ropes pulleys, Poles, Seats, fastenings & fixtures belonging to the Circus pavillion. One Centro. Pole. One tin chandelier for the ring, eight small lamps, two lanterns, two Spades, two Crow Bars, two Sleds, two Circus Pads six sets of harness for the Band Wagon four sets of harness for 4 horse team three bitting rigging. Seven Bridles, one lunge reign. six fancy halters two common halters, one lady Elmore blanket, one side saddle five common pad saddles, six Girths. ^{one set of harness for Ring} pedestal Box for ring, One ladder, two common trunks. One treasurers Box 4 tin boxes with locks 16 saddle cloths, ten head dreses for horses, One ring Whip, three ring dreses, One Carpet for Ring & seats, Two tin fluid Cans, a lot of tickets & checks, One Bass drum, One Box to hold chandeliers one lot tools & implements of the value of two thousand Dollars

Therefore we command you, that if the
said plaintiff shall give you bond, with
good and sufficient security, in double
the value of said goods and Chattels, as
required by law, to prosecute his suit in
this behalf to effect, and without delay,
and to make return of the said goods
and Chattels, if return thereof shall be
awarded, and to save and keep ^{your} ~~your~~ ^{your} ~~your~~
self in replevying said goods and Chattels
^{you release the said goods and Chattels}
to be replevied and delivered to the said
plaintiff without delay. And also that
you summon the said defendants
to be and appear before the Circuit
Court of Davidson County, on the first
day of the next term thereof, to be holden
at the Court house in Galena, in said
County, on the 1st Monday of August Instant
to answer unto the ^{said} plaintiff in the premises,
and have you then and there this writ
with an endorsement thereon in what
manner you shall have executed the
same together with the Bond which
you shall take from the said plaintiff as
before commanded, before executing this
writ.

Witness William H. Bradley, Clerk of
our said Court, and the Seal thereof at
Galena ^{in said County} the 11th day of August A.D. 1853.
Attest Wm H. Bradley, Clerk

Endorsed

The within named Loren Butter
first having given Bond. (which is herewith
returned), I then did on this 17th day of
August 1853 put the said Loren Butter
in possession of the within described property
except perhaps some few articles of inconsiderable
comparative value, and I also did on
the 18th day of August 1853 summon the
within named Henry R. Merkle to appear
to me by reading to him the within writ
Wm. Merghen Sheriff D.C. Ill

The Bonds taken by the Sheriff in the above
entitled Cause and referred to by him
^{in his return last aforesaid}
is in the words and figures following
to wit.

3 To Now all men by these presents
That we, Loren G. Butler & George Tyler
are held and firmly bound unto
Wm. Meighen Sheriff of St. Davids County
and State of Illinois, and to his
Successors in Office in the penal
sum of four thousand Dollars for
the payment of which well and truly
to be paid we bind ourselves, our heirs, exe-
cutors, Administrators and Assigns, jointly
severally and firmly signed with our names
and sealed with our Seals, this 17th day of
August 1853. The Condition of the above
obligation is such, that Whereas the Above
bound Loren G. Butler, has commenced
an action of Replevin against Henry
R. Meskley in the Circuit Court of said
County, for the taking and unjustly detaining
of the following goods and Chattels, to wit,
An inventory of which is herewith annexed
One Bay mare called Lady Elmore, One Bay
horse called, Old Dad, One Bay horse called
Old Dads Mate, One Gray horse called, Ellis being
a trick horse, One Black horse, called
Black Hawk, One red & white spotted horse

212295-77

called Brilliant One Black & White
Spotted horse called Cleveland Two
horses called the Starry Team. One
Band Wagon, One ticket Wagon One
Circus Pavillion, ^{Canvass} being the tent or Canvass
with the ropes Pulleys seats poles fastenings
and fixtures belonging to the Circus
pavillion. One Centre pole. One tin
Chandelier for the ring eight small
lamps, two lanterns. two Spades two
Crow bars. two Axes, two Circus pads,
Six set of harness for the Band Wagon,
four set of harness for a four horse
team, three Bitting Sizing. Seven Bridles
one lunge rein Six fancy halters, two
common halters, One Lady Elmore Blunder
One Side Saddle. five common pad
saddles. Six Girths. One Pedestal Box for
ring. One set of Garters for Ring. One Saddle.
Two common trunks, One treasury box four
tin Boxes with locks Sixteen Saddle cloths
ten head dropses for horses One Ring Whip
three ring dropses. One Carpet for ring and
seats two tin fluid Cans a lot of tickets and
checks One Bass drum One Box to hold
Chandelier and a lot of tools and
implements. of the value of Two thousand
dollars. The property of him the said
Loren S. Butler. as he saith.

Now if the said Loren G Butler shall personally
appear before the said
Circuit Court on the first day of
the next ~~month~~ term thereof to be holden
at the Court-house at Galena, on the
fourth Monday in the month of August
Inst and shall then and there prosecute
his said suit to effect, and without delay,
and doth make a return of the said property
to the said Henry R. Muskhing if a return
thereof shall be awarded by the said
Circuit Court, and shall save and
keep harmless the said Sheriff in pay-
ing the same, then this obligation to be
null and void, otherwise to remain
in full force and effect -

Taken and entered into
before me this 17th day of
August 1853

Wm. Meighan Sheriff

Do Davis County Ill

L. G. Butler *LS*
George Tyler *LS*

And afterwards, to wit on the 22^d day
of August in August Term of Circuit
Court for said So. Davis County AD 1853
the said Defendant by his Attorney filed
in Open Court his Motion and Affidavit
which said Motion is in the words and
figures following to wit:

Loren L Butler

Replevin

Circuit Court of So
Davis County

vs
Henry R Merkle

Aug Term AD 1853

And now at this day comes the
defendant and moves the Court to quash the
writ sued out in this case, and order a return
of the property on the following Affidavits and
Causes herein set forth

1st Because the affidavit is insufficient in
substance

2nd Because said affidavit does not show
that the property about to be replevied, was
taken or detained by the defendant

3^d Because said affidavit does not
claim or show a claim to any property
whatever But describes the property
about to be replevied, as the property des-
cribed in the writ, not then in existence

4th Because no property was named in the writ
as no writ had issued when the affidavit was made

- 2nd Because the writ was irregularly & illegally
sued out by the Plaintiff.
- 3^d Because this was a Re-replevy of Property
then in the Custody of the Law
- 4th Because it was an abuse of the process of
this Court in violation of Law
- 5th Because it creates a Multiplicity of Suit
at the same time about the same property
and between the same parties & variations
- 6th Because in permitting a replevy an abuse
of the process of the Court is had, that will
defeat the rights of the parties, and prevent
the Court from enforcing its own orders and
Judgments in regard to the property.
- 7th And for other sufficient reasons appa-
rent on the record I pray that the writ may
be quashed and a return of the property
replevied

Stevens & Johnson
Attys of Deft

Endorsed

Filed Aug. 22^d 1853

Wm H. Bradley Clk

The affidavits referred to in the last
recited motion of the defendant & atty.
have either been mislaid or lost. and
after a careful search I have been
unable to find them. Wm L Bradley
clerk

5
And afterwards to wit on the 23^d day of August A.D. 1853 in said August term of said Court in the Record of the proceedings thereof in said Cause is the following entry, to wit;

Loren G Butler
vs
Henry R. Merkle

} Replevin

The plaintiff by his Attorney comes & moves the Court for leave to amend his Affidavit in this Suit. And now come on to be heard the motion of the defendant heretofore filed on Affidavit to quash the writ and return the property replevied. Which motion after argument of Counsel is taken under advisement by the Court.

And afterwards to wit on the 24th day of August A.D. 1853 in said August term of said Court in the record of the proceedings thereof ^{in said cause is the} following ^{proceeding} to wit

Loren G Butler
vs
Henry R. Merkle

} Replevin

The court having fully considered and being fully advised upon

The motion of the defendant heretofore filed by his Attorney to Quash the writ and order a return of the property replevied overrules the same. on the ground that the objection should have been presented by a plea in abatement - to which ruling of the Court the defendant by his Attorney excepts

And afterwards to wit on the 1st day of September as yet of the August term A.D. 1853 of said Court the said defendant by his Attorneys filed in open Court his motion in the words and figures following to wit

L G Butler Re Replevin
vs In Circuit Court
Henry R Marking of Davidson County - August
Term A.D. 1853

And the said defendant earnestly moves the Court to vacate the order of this Court entered in this case heretofore, and to grant the relief asked for by said defendant in the former motion made in this case.

First Because the mode of obtaining relief was not argued before the Court -
Second Because in this case there has been an abuse of the process of this Court which

will always be rectified upon motion
Third, Because it is the mode of relief estab-
lished in this Court by a rule of Practice
for the past 15 years

And for other good reasons

J J Stevens &

M J Johnson

Attys for deft

Endorsed

Filed Sept 1st 1853

Wm H. Bradley Clerk

And afterwards to wit on the 9th day of Sep-
tember as yet of the said August term A D
1853 of said Court in the record of the proce-
dings thereof in said Cause is the following
entry, to wit;

Loren G Butler

vs

Replevin

Henry R Morkling

Now at this day came on to
be heard the motion of the defendant heretofore
filed by his Attorney, to vacate the order
of this Court heretofore entered in this
Cause & to grant the relief asked for by
said defendant in the former motion made herein
which motion after argument by counsel is taken
under advisement by the Court

And afterwards to wit on the next day
to wit on the 10th day of September AD 1853
as yet of the said August term of said
Court in the record of the proceedings
thereof in said cause is the following
entry to wit

Loren G Butler 3
vs 3 Replevin
Henry R Merkle 3

The Court having fully
considered and being fully advised upon
the motion of the defendant heretofore filed
by his Attorneys to vacate the order heretofore
entered in this case & to grant the relief
sought for in the former motion overrules
the same to which ruling of the Court the
defendant by his Attorneys excepts

And Afterwards to wit on the 25th day of
November AD 1853 the said Plaintiff by his
Attorney filed in the Clerk's office of the
said Circuit Court his declaration against
the said defendant which is in the
words and figures following to wit

State of Illinois 3 In Circuit Court to
St Davids County 3 November Term AD 1853

Loren G. Butler

vs

Henry R. Muehling

Henry R. Muehling was
summoned to answer Loren G. Butler of a plea
in Replevin.

Wherefore he took the property, goods
and Chattels of the said Plaintiff and unjustly
detained the same against ^{sureties} ~~sureties~~ &
pledges until &c. and thereupon the said
Loren G. Butler by Hooper and Campbell
his Attorneys complains, for that whereas
the said defendant Henry R. Muehling on
the seventeenth day of August in the
year one thousand eight hundred and
fifty-three in the City of Calusa County of
La Garup and State of Illinois, took
the property goods & Chattels of the said
Plaintiff. To wit one Bay mare called Sad,
Almore one Bay horse called Old Dad
one Bay horse called Old Dads Mute, one
Grey horse called "Ellis Gray" a sick horse
one Black horse called Black Hawk, one
Red & White Spotted horse called Brilliant
one White and Black Spotted horse called
Charland, one Band Wagon, one Sicks Wagon
one Circus Pavillion, or ^{being the tent or canopy} ~~canopy~~, with the
ropes, pulleys, poles, seats, fastenings &
figures connected with and belonging to

said Circus Pavillion, One large Centre
Pole One Tin Chandelier for the Ring,
^{Eight small Lamps} Two Lanterns, Two Spades Two Crow-
bars, Two Shovels, Two Circus Pads, Six
Sets of Harness for Band wagon, Four
Sets of Harness for four horse team
Three Bitting Rigging, Seven Bridles
for Ring, and one lunge rein, Six
Gypsy halters, Two Common halters, One
Lacy Elmore Blanket, One side saddle,
Five Common Pad saddles, Six Girths
One pedestal Box for ring, Cueses of Garters
for ring, One Saddle, Two Common trunks
One leather Treasurers Box, Four tin Boxes
with locks, sixteen saddle cloths,
Ten head dresses for horses, One Ring
Whip, Three Ring dresses One Carpet for
ring and seats Two tin fluid cans, a lot
of tickets and checks, One Base Drum,
One Boy to hold Chandelier, One lot tools
and implements

of him the said Loren G Butler of great
value To wit; of the value of Two thousand
dollars and unjustly detained the same
against sureties and pledges and contin-
ues to detain the same.

Wherefore the said Loren
G Butler saith that he is injured, and

hath sustained damage to the amount
of Four Thousand dollars and therefore
he brings this suit &c

Hooper & Campbell
Atty for Plff

Endorsed

Filed Nov 25th 1853

Wm H. Brady CLK

And afterwards to wit on the 29th day of
November AD 1853 in the November term
AD 1853 of said Circuit Court in the record
of the proceedings thereof in said Cause is
the following entry to wit

Loren G Butler

vs

Henry R Merckling

Replevin

On Motion of the defen-
-dant by his Attorney. It is ordered by the
Court that this Cause be dismissed at the
costs of the Plaintiff, for want of a
declaration on the part of the Plaintiff.
It is thereupon considered by the Court
that the defendant have return of the property
replevied and that a writ of Return
Habenda issue for that purpose together
with a fieri facias for the cost herein
& the defendant by his Attorney moves

the Court for a Jury to assess the damages sustained by him for the detention of the property replevied

And afterwards to wit on the 16th day of December as yet of the said November term of said Court AD 1853 in the record of the proceedings thereof in said Cause is the following entry to wit;

Loren Butler
vs
Henry R. Meckling

Replevin

Now at this day
Came on to be heard the motion of the defendant heretofore made by his Attorney for a Jury to assess the damages of the defendant for the detention of the property replevied by the plaintiff, which motion is resisted by the Plaintiff by his Attorney. And the Court sustains the motion and orders a jury to be empannelled to assess said damages. to which ruling and decision of the Court the Plaintiff by his Attorney excepts and now came a jury of good and lawful men, to wit H. D. Seidner, David Rogers, Orange Gray, George Robinson, William Graves, Isaac W. Mop, John McQuillen, John S. Smith, L. H. H. Cowan, Joshua Bailey, J. H. Forbes & Thomas S. Belden who

were duly elected tried and sworn and after hearing the evidence the arguments of Counsel are postponed until to morrow morning.

In resistance of the motion of the defendant for an assessment of the value of the use of the property replevied the Plaintiff by his Attorneys filed in Open Court the following Affidavit, to wit;

Loren G Butler

vs

Henry R Muehling

In the 10th District Circuit

Court of the November Term 1883

On a petition of damages in the action of Replevin

Loren G Butler being first duly sworn on his oath deposes & says that he bought of ^{said} Henry R Muehling on the 14th day of May last all of the property & effects described in the writ & affidavit in this case & that the said Muehling sold and delivered all of said property & effects to this affiant & that this affiant paid him in full for the same & took a written Bill of ^{sale} of the same duly attested by a witness & took full possession of the said property & effects which said written bill of sale this affiant has now in his possession ready to be produced if this Hon. Court shall so direct. This affiant further says that the said Muehling

being largely indebted in the City of Chicago where the property was then situated. his Creditors sued out an attachment & laid upon the said property to satisfy said attachment and that to release the said property & effects therefrom this Affiant replied the same & took the possession thereof again by virtue of said Replevin Suit so instituted by him as aforesaid to recover the possession of said property. Affiant further says, that he brought said property to Galena, and that while in Galena said Merchants without any right or title whatever & without in any manner procuring any right or having any right. Whatever either of property, or possession, replevied the said property & effects & took the same from the possession of this affiant giving no sufficient security to indemnify this Affiant against the very great injury & loss which he would thereby sustain This Affiant further says that to prevent the almost irreparable injury which he would sustain by reason thereof & by reason of the insolvency of said Merchants who this Affiant says is utterly insolvent & worthless this Affiant believed he was wholly without redress as he was advised that the sureties in the appeal bond were not liable

for the damages recovered in the
Replevin Suit, but only for the return
of the property & for failing to prosecute
the said to effect & without delay & to
hold the Sheriff harmless and this affiant
then believed that under the circumstances
he had a legal right to prosecute & main-
tain an action of replevin against
said Mesking and was so advised
by his Counsel. And this affiant further
says that he accordingly instituted a second
action of replevin to recover again the
possession of said property. And that
in consequence of an expression of
opinion by this Honorable Court that a
second action of Replevin could not
lie under the circumstances; this
affiant's Counsel neglected to file a dec-
laration ten days before the second term
of this Hon Court & that for this cause the
said action of replevin was dismissed
and that Defendant now claims the
right to go on & reap damages for
the use of said property by reason of
said failure to prosecute said second
action although said property belonged
before any of said Replevin Suits to this
affiant and ever since has belonged to
him and that since the said first

Replevin Suit. the said Muehling never
was entitled to the possession of said
property & never owned the same. This
affiant further states that the said Muehling
now refuses to go on & prosecute his said
Replevin Suit or to further proceed with
the same until the said property is returned
to him & this Court has expressed an opin-
ion that the said Plaintiff might have
a stay of proceedings until the said prop-
erty was returned to said Muehling.
This affiant further says that it is entirely
out of his power ever to return said
property & says that three of the said Horses
the most valuable ones were replevied from
him in the State of Wisconsin by Wilson
who claimed under said Muehling by
purchase from him & that said Horses
have never been returned to him this affiant
nor can he in any manner get the possession
of the same. & that one of said Horses
is sick in the South part of this State
and could not be got here & and that a
portion of the harness was lost in replevying
the same. Among other things six bridles
& parts of several harnesses & some of
the poles, seats & ropes. and this affiant
states that it is impossible for him to return
said property & further says that whatever.

Amount of damages he may recover against said Merchling, ^{on the assessment of damages} in the Case in which this Affiant is defendant will be entirely worthless. And that any Judgment which this Affiant may get against said Merchling for damages sustained by him by reason of the wrongful suing out of said Replevin Bond by said Merchling against this Affiant as aforesaid will be entirely worthless unless this proceeding to assess damages may be stayed until the trial on assessment of damages in the Case of Merchling's Counter in Replevin aforesaid so that the assessment of damages in the one Case may be set off against the assessment of damages in the other of said Cases. This Affiant further states that he is himself fully and entirely responsible for and able to pay whatever amount of damages may be assessed in said Case against him, & that he is willing to give such proper and necessary Security as this honorable Court may require of him for the payment of whatever damages may be assessed against him in said Case.

Sworn to & subscribed before me L. G. Butler
this 16th day of Dec^r 1853

Wm H. Brathley Clerk

Endorsed

Filed Dec 16th 1853

Wm H. Bradley Clerk

And afterwards to wit on the next day
to wit the 17th day of December in the
records of the proceedings of said Ci-
vil Court in said Cause is the fo-
llowing entry to wit-

Loren O. Butler

vs

Replevin

Jury R. Merckling

3

The jury heretofore

empaneled herein to

enquire of the defendants damages for
the use of the property replevied by the
plaintiff. this day returned into Court

and after hearing the arguments of Counsel
the jury retired to consider of their verdict
and report. And after a short absence

they returned into Court with the following
to wit; We the Jury find and report the
damages of the defendant at the sum

of Twenty two hundred dollars. and
the plaintiff by his attorney moves the
Court to set aside the finding of the

jury & for a new trial or new assessment
of the value of the property replevied

And afterwards to wit on the 18th
day of December as yet of said
November Term A.D. 1853 the said
Plaintiff by his Attorney filed in open Court
his motion & reasons in these words and
figures following to wit

Loren G Butler } In the DoDawsep Circuit Court
vs } of the November Term A.D. 1853
Henry R Merkling } In Replevin on the Appsement
of the value of the use of the property

And the said Butler comes by his Attorneys
& moves the Court to set aside the finding
of the Jury herein & for a new trial or new
assepment of the value of the use of the
property herein for the following among
other reasons to wit; Because the Court permit-
ted an assement of the damages by a jury
when the Law requires the damages to be asseped
by the Court.

"Second Because the Court admitted improper
testimony

"Third Because the Court allowed evidence of
the opinions of witnesses based upon the
supposed profits of O'ens establishments

"Fourth. Because the Court allowed testimony
of the value of the use of the property when
the witnesses improperly stated they were

- unacquainted with the value of the use of the property in the state of Illinois & based their opinions entirely upon what they supposed a circus could make as profits
- " Fifth Because the Court refused to exclude the Testimony of Mr Crane
 - " Sixth because the Court refused to exclude the testimony of Mr Barker
 - " Seventh Because the Court refused to exclude the testimony of Mr Mutter
 - " Eighth, because the Court refused to admit proper evidence testimony
 - " Ninth Because the Court allowed improper questions to be put to the witnesses
 - " Tenth, Because the Court refused to allow proper questions to be put to the witnesses
 - " Eleventh Because the Court refused to give proper instructions
 - " Twelfth Because the Court gave improper instructions
 - " Thirteenth Because the Court refused the instructions as asked & gave them as qualified
 - " Fourteenth: Because the Court refused to give instructions numbered & gave instead thereof the one given by the Court
 - " Fifteenth Because the Court refused to stay the proceedings on the affidavits filed

11. Sixteenth Because the amount found by the Jury was excessive the value of the use of the property as found was grossly excessive & outrageous
12. Seventeenth Because the finding of the Jury was contrary to Law
13. Eighteenth: Because the finding of the Jury was contrary to the evidence
14. Nineteenth Because ^{is not supported by the evidence} the finding of the Jury is against the instructions of the Court and also for divers other good and sufficient reasons

Van A Higgins
Hooper & Campbell
Atty for L G Butler

Endorsed

Filed Decr 14th 1853

Wm L Brady Clerk

And afterwards to wit on the 24th day of December as yet of the said November term AD 1853 in the record of the proceedings of said Court in said cause is the following entry to wit:

Loren G Butler

vs

Henry R Merkle

Replevin

Now came on to be heard the motion of the plaintiff heretofore filed

by his Attorney for a new assessment
of the value of the use of the property
replevied by the plaintiff which motion
after argument by Counsel is overruled
by the Court and to which ruling and
decision of the Court the plaintiff by
his Attorney excepts. And on motion
of the defendant by his Attorney for judg-
-ment upon the report of the jury here-
-before found & returned it is thereupon
considered by the Court that the defend-
-ant have and recover of the plaintiff
the sum of Twenty two hundred
dollars as aforesaid found and
reported by the jury together with his
costs by him about his defence in
this behalf expended and that he have
execution therefor. And the plaintiff
by his Attorney prays an appeal to the
Supreme Court which is granted him by
the Court Conditioned that he enter into
bond in the sum of Three Thousand
dollars within sixty days from this date
with

And afterwards to wit on the 28th day of
December as yet of the said November
term of said Court in the record of
the proceedings thereof in said Cause

is the following entry, to wit;

Loren G Butler

vs

Henry R Merkling } Replevin

The appeal heretofore
prayed for by the plaintiff by his Attorney
is granted upon the said plaintiffs ex-
-isting Entering into bond as herein before
entered with Ira Couch or Stephen Hale,
or Isaac Cook & Vane Higgins, as security
the appeal bond to be made payable in
To Davie's County.

On the trial of the above entitled Cause
the following exceptions were made
and allowed in three several Bills
of exceptions to wit: 1st Bill of Exceptions

Loren G Butler

vs

Henry R Merkling }

On Assessment of Damages
in the Circuit Court to the
Nov Term 1853

Be it remembered on this the fifteenth day
of December One thousand eight hundred
and fifty three after the defendants Merkling
had introduced and read his evidence
in this cause to the Jury. The said Butler
introduced the affidavit of H R Merkling

State of Illinois
Do Daviess County 3/4 Henry R. Murphy
of lawful age ^{after} being duly
sworn according to Law states that he
is about to commence an action of
Replevin in the Circuit Court of Daviess
County against Loren G. Butler to recover the poss-
ession of the following property to wit:
One Bay Mare called "Lady Elmore" One
Bay Horse called "Old Dad" One Bay Horse
called "Old Dads Mute" One Grey horse called
Ellis Gray a Trick Horse, One Black Horse
called "Black Hawk" One Red and white
spotted Horse, called "Brilliant" One Black
and white spotted Horse called "Cleaveland"
Two horses called the "Harvey Team"
One "Band Wagon" One "Ticket Wagon" One
Circus Pavillion or Currap, being
the Tent or Currap, with the ropes
pullies, Poles, Seats fastenings and
fixtures, connected with and belong-
ing to said Circus pavillion, One
large Centre pole, One Tin Chandelier for
the ring Eight Small Lamps, Two
Lanterns - Two Spades, Two Crow bars
Two Sledges, Two Circus Pads, Six
set of Harness for "Band Wagon", Four
sets of Harness for Four Horse team -
Three Bitting Rigging - Seven Bridles for

101
Ring, and one Lunge cin. Six fancy halters,
Two common Halters, One (Lady Elmore)
Blanket. One side Saddle. Five common
Pad Saddles. Six Girths. One Pedestal
Box for Ring, One set of Garters for Ring.
One Ladder. Two common Trunks
One Leather Dressing Box. Four Tin Boxes
with Locks. Sixteen Saddle cloths. Ten
head Dresses for horses. One Ring Whip.
Three Ring dreses. One Carpet for Ring and
seats. Two Tin finished Cans. a Lot of
Tickets & Checks, One Bass Drum, One
Box to hold Chandelier One Lot of Tools
and implements all of said property
Goods & Chattels being part of the Acre
and now in the possession of said
Butter aforesaid. This affiant states
he is the owner of and lawfully entitled
to the possession of all and singular
the above described property goods &
chattels and that said Loren & Butter
unlawfully and without right on his
part took and detained and withholds
the possession thereof from this af-
fiant, who is now lawfully entitled to
the possession thereof and that
the same has not been taken for any
tax assessment or fine levied by
virtue of any Law of this State: nor

Seized under any execution or attachment against the goods and chattels of this plaintiff liable to execution or attachment and that said property Goods and Chattels above mentioned is of the value of Fifteen Thousand hundred Dollars

Your Affiant therefore prays that a writ of replevin may issue against the said Loren G Butler according to Law. And further faithfully Subscribed Sworn to before me this the 17th day of Aug 1853
J R Meshling
Wm H Bradley Clerk

To The Clerk of the Circuit Court of
La Davis County Ill

On filing the above Affidavit you will issue a writ of Replevin for the above described property against the defendant returnable to next term, value of the property \$15000, Damages \$3000
Stevens & Johnson
Plff Atty

Henry R Meshling Plff
vs
Loren G Butler Deft

Endorsed Filed Aug 17th 1853
Wm H Bradley Clerk

which was objected to by the said
Merkling on the ground that it was
not a paper in this cause. and
that said Butler has no authority
to introduce the same as evidence
which objection was overruled by the
Court and said affidavit was read
to the Jury as evidence and the said
Merkling then and there excepted and
prays that his exceptions may be
signed and sealed in pursuance of
Law which is accordingly done

Benj R Sheldon *Deputy*

Endorsed

Filed Dec 16th 1853

Wm H Brady Clerk

By W R Rowley Deputy

Loren D. Butler
vs
Henry R. Merkle

In the D. Davis County
Circuit Court of the Mo.
September term A.D. 1883

In replevin on a prement of
Damages of the value of the use
of the property repleved in this case

Be it remembered that on the calling
of this case for the apearance of the dam-
ages for the use of the property repleved
herein the defendants Merkle's Counsel
asked for a Jury to apear said damages
to which the said plaintiffs, Butler's Coun-
sel objected & insisted on the damages
being assessed by the Court as provided
by Statute. Contending that it was
imperative upon the Court to apear
the value of the use of the property
which objection was overruled by the
Court to which the said plaintiffs Counsel
then and there excepted & thereupon the
Court called a Jury & swore them to apear
the damages for the use of the property.
The defendants then called in a witness
in the Cause Augustus Crane who
after being sworn stated that he resided
in Chicago & is somewhat acquainted
with Circus property, was engaged in
Circus business about four years he is

acquainted with the property described in
the writ; has seen it, never noticed it par-
ticularly with a view to its value. The
value of the use of the property described
in the writ from the 17th of August to the
first Oct; would be worth from 75 to 100
dollars per day after that it would not
be worth so much per day. The value is
fifty Dollars per day from 17th Aug^t to
present time. Said witness then stated on
cross examination as follows. Does
not know the entire value of the
property described in the writ.
Never examined it with the view of
ascertaining its value. Does not know
what would be called an examination
of the property. has seen it. Saw it in
Chicago. Saw it twice while in Mr Butters
possession. While it was in Merchants possession
saw it every day for a week at Chicago,
they were exhibiting there as a Circus about
half a dozen times. Thinks he could identify
the Band Wagon. Could identify some of
the horses & could not identify the others
but have seen them. Could identify the two
wagons. Does not know that the property
he saw at Chicago was the same property
described in the writ. part of the prop-
erty in the writ. Answers the description

of the same property I saw in Chicago
Never knew such property rented.
never such property to be chartered or
leased rented or hired. Bases his estimate
of the value upon having been in the business
in my experience in the business. Would say
that the use of such property would be worth
fifty-Dollars per day - the use of such prop-
erty is more valuable from the 17th of
August to present time than it would
be at some other seasons, because the
show business is better at that season
than it is at some other. It is
better at that season of the year because
more money can be made by it -
People generally attend shows more at
that season than at others, according
to my experience. Withopes opinion
as to the value of the use of the property
is based upon the fact that people
attended shows better at that season of
the year than at others. Withopes
opinion of the value of the use of the property
is based upon his experience and knowl-
edge of Circus Business. The use of such
property is more valuable from the
17th ^{day} of August to this period because
it can be used more profitably
because the business is better ^{business is better} because

people generally attend shows more
at that season. Estimates the value
of the use of such property higher at that
season than at others because people attend
exhibitions better at that season. The use
of such property would not be worth
any thing at a time when people generally
did not attend exhibitions.

There are portions
of the year when the use of such property
as Circus property would be worth
nothing. When people do not generally
attend Circuses the use of such property
would be worth less. The reason why
I put so high an estimate on the
property for the time is because at that
time the Circus is generally well attend-
ed and Circuses are more profitable
at that season of the year. Circuses
are some times unprofitable during that
season of the year. Witness has known
them to be so in one instance. There is
property enough in the world to give a
performance. The Circus might travel
by Canal Rail Road or Boat. Would
be a small Circus. don't know any
thing about Circuses that have to
travel by sail Road or Boat. The Circus
Witness spoke of as being worth fifty dollars

per day was a circus that posed the means of travelling within itself. My opinion of the use of such property being worth fifty-dollars per day is because I think I could make that amount per day with it as a circus in a good business season. Witnep has no other reasons for the opinion he has given as to the value of the use of the property than what he has stated. Witnep commenced in the circus business in April AD 1849 & quit it in September AD 1852. He commenced such business in & was engaged in it in the States of Pennsylvania, Ohio, Michigan, Virginia, Indiana, Illinois, Wisconsin, Iowa, Missouri, & Kentucky. I was in Illinois with a circus in July & part of August of the year AD 1847 also in August & September in the year AD 1852. About the middle of August was in Chicago & from thence travelled down the Canal to Peoria & from thence down the River to Beardstown from thence traveled east to Indianapolis. Was never further west than about 25 miles west of Peoria. does not know what the property described in the writ would have rented for in its then condition without the addition of other property.

Does not know what said property would have rented for in Doddavies County if it had remained here from August 1st to the present time, does not know what it would have rented for if it had been removed. Nitup is not acquainted with the value of the use of property in Doddavies County, is acquainted with the value of the use of property in New York, but is not acquainted with the value of the use of property in the State of Illinois. It is possible that money could have been made out of the property as a circus as it then was, but it would have been very expensive to have traveled about the County with it.

It was not such an adventure as a man could engage in with a view of making money with it without adding other property to it. To have made money with it would have been necessary to have added two or three thousand dollars to it. And the addition of more property still would have made it still more profitable. Does not know the value of the use of this property for any other than ^{for} Circus purposes. Does not know that he can enumerate the articles described in the writ

Cannot enumerate all the Articles Merchants
had in Chicago in his Circus. Carvass,
seats, Band Wagon Ticket Wagon Four
horses. Some harness, i.e. harness for six
horses. Some Saddles, bridles and pads
Chandeleir - Saw this property in Mer-
chants possession at Chicago either in
April or May last. he bases his estimate
of the value of the use of such property
and ^{on} his knowledge of the business. I
said a prudent man would not take
this property in its then Condition at
fifty Dollars per day from the 17th of
August to the present time. This property
would be more valuable a portion of
the time from 17th of August to this time
than it would be at other seasons. Is of
more value in August and September
than in other Months. December would
be the poorest month. November
a very poor month. One ex-
amination Witness said he based
his opinion of the value of the use of
the property on his knowledge
of the business & of the value of
the property named in the writ.
Plaintiffs Counsel then asked the
Court to exclude the testimony of Mr
Crane from the Jury & to instruct

them to disregard the same, because
by the testimony of Mr Crane himself
it appears that he is not acquainted
with the value of the use of such
property & is not acquainted
with the value of its use in Illinois
or De Davis County because he
is not well enough acquainted with
the particular property to testify
as to the value of its use, and because
- he is not an expert & because
his opinions of the value of its use
are based entirely upon the profits
which he believes a Circus Company
could make by travelling about
the County & because he states that
he is ~~not~~ acquainted with ^{the value of} the use
of the property in the City of New York
but not in Illinois. And because
he states that he does not know the
value of the use of the property for
any other than ^{the} Circus purposes,
and because he does not know
that the property described in
the writ is the same property
which Witnup saw at Chicago &
because Witnup states that he
bases his estimate of the value
thereupon upon the fact that people

generally attend shows more at that season of the year than at others, and because the witness never knew any such property rented hired leased or chartered & therefore could not know the value of its use in Illinois where he states expressly that he is ignorant of the value of the use of such property & because the opinion of the witness was not admissible as evidence of the value of the use of the property until there was testimony other than the description in the writ to show what property, or until the witness was shown to be acquainted with it or shown to be an expert, or one so well acquainted with the property as to be regarded as an expert. Which the Court refused to do. To which plaintiff then & there excepted. The defendants then next introduced as a witness George Barker who being sworn stated that he is acquainted with the property described in the writ. that he is acquainted with the kind of property. & have traveled with and been familiar with this kind of property. Have heard the description of the property in the writ read, it was used for Circus purposes. Witness would consider the property as a traveling concern

worth One hundred Dollars per day for the
use of it. from the 17th of August to the pres-
ent-time; Witnep then stated on cross
examination as follows. Witnep resides
in Toledo State of Ohio Came here to testify
for Mr Markling, never resided in the
State of Illinois except about a month
& eight to ten days last Spring in Chicago
have been in Peoria was never west of
Chicago until he came here as a
witness Was employed as a Circus
man by Markling & Corson took care
of the Horses. never owned a Circus
nor any part of one, never leased, sub-
hired, or chartered one in any way -
could not say that he ever knew of
one being leased, rented, hired or chartered
Don't know what such property would
lease for in the State of Illinois, Don't
know what the use of Horses or wagons
are worth per day in Illinois, Can't state
what the use of the Canvass per day, could
not state what the use of any one
article separate from the rest would
be worth per day. has been in the
Circus business about two years, was
during that time through a number of
different States, New York, Ohio & Penna
Came to Jo Daviess County two or three

days since. learned what he knows about
the value or his estimate of the value
he has put upon the use of the property
when ^{he} has been traveling in New York,
Pennsylvania & Ohio. did not learn
any thing about the value of the use
of such property in To Davis County.
I formed some little idea of the
value of the use of said property by
the number of persons attending Merklings
Circus in the City of Chicago. Witness
thinks he saw Merklings & Co Circus exhib-
ited in Chicago six or eight nights.
Taking care of the horses & training them
during the day time was witness part
of the business at Chicago. Merklings
expenses while at Chicago must have
been about forty dollars per day for
his Circus.

He had 18 to 20 men in his
^{employ} company, had 18 or 19 horses, Had also
one boy. Had a couple of Squaws & three
Indians. Dont know how much it cost
for the men per day; or for the keeping
of the horses; dont know how much
it cost per day for boarding the men.
Thinks there was an average of three hundred
persons attended Merklings Circus each
night in Chicago. One night witness

Counted them & there was 300 persons
present prices for attending Circus were
fifty cents for part & twenty-five cents
for part and about half of the persons
attended at twenty-five cents & half
at fifty cents. Don't know how many went
in free. Don't know any thing of the value
of the use Circus property in Illinois
except for Circus purposes. Has no
other means of knowing the value of
the use of said property except from
seeing the persons attending Merklings
Circus at Chicago & from the fact of
having been employed as aforesaid
in Circuses & in taking care of horses &
training them in ^{the} day time.

Merklings had some other horses in Chicago
not included in the writ of replevin
but don't know how many as I don't now
recollect the number of horses in the writ
of Replevin; The horses in the writ were
ring horses & the others were for traveling.
Had no knowledge of the amount of
the receipts of the Circus except by judg-
ing of the number of persons that I saw
attending the Circus. Which was all the
testimony given by said George Baker.
Plaintiffs Counsel then asked the Court

to exclude from the jury the testimony of
the witness as to the value of the use of
said property because by the testimony
of Mr. Baker himself it appears that he
is not acquainted with the value of
the use of such ~~property~~ I is not acquainted
with the value of its use in St. Davids
County nor in the State of Illinois
because he is not an expert & because
his opinions of the value of its use are
based entirely upon the profits which
he believes a Circus Company could
make by traveling about the Country
& upon seeing the persons attending
McHilings Circus in Chicago. And be-
cause the witness never knew any such
property rented hired leased or chartered
& never owned any. because the witness
is not so well acquainted with the value
of the use of the property as to be regarded
as an expert. Which the Court refused
to exclude from the jury to which the
plaintiffs ^{by} Counsel then & then excepted
Defendants Counsel then asked this further
Question.

Was this kind of property or the use
of it of pretty much the same value every
where. Which question was objected to by
plff & overruled by ^{the} Court to which plaintiff

then & were excepted.

In answer to which said witness, stated that this kind of property was of about the same value everywhere it was of about the same value everywhere he had been in Circuses. Witness identified all the property in the writ as knowing it; Defendants then offered in evidence the record of dismissal of the Suit of Replevin of Loren G Butter vs Henry R Muehling. The judgment de retorno habendo & the entire order of the Court also the writ of replevin & the return of the Sheriff thereon to each of which plaintiffs - Counsel objected severally as they were offered, which objections were overruled by the Court to which ruling the plaintiff then and there severally excepted.

The order of said Court referred to as aforesaid of date of Nov 29th AD 1853 is in the words and figures following to wit;

Loren G Butter }
vs } Replevin
Henry R Muehling }

On motion of the defendant by his Attorney: It is ordered by the Court that

this Cause be dismissed at the Costs of the plaintiff for want of a declaration on the part of the plaintiff. It is therefore considered by the Court that the defendant have return of the property replevied and that a writ of returna habenda issue for that purpose together with a fieri facias for the Costs herein & the defendant by his Attorney moves the Court for a jury to assess the damages sustained by him for the detention of the property replevied.

The said Writ of Replevin referred to together with the return thereon is in the words and figures following. to wit:

State of Illinois
De Grays County, 3d Dist

The People of the State of Illinois to the Sheriff of said County. Creating Whereas Loren L. Butler plaintiff complains that Henry R. Merkle, defendant, unlawfully and wrongfully, does detain from him said Butler the possession of the following described property, to wit: One Bay mare called Lady Elmore. One Bay horse called "old Dad" One Bay horse called "old dads Mate". one Gray horse called "Ellis Gray" a truck horse. One Black horse called Black Hawk. One Red & White Spotted horse called

Brown. one Black & White Spotted Horse
called Cleveland. Two horses called the Harney
team. One Band Wagon. One ticket wagon
One Circus pavillion. Curvup being the tent
or Curvup with the ropes pulleys poles
seats fastenings & fixtures belonging
to the Circus pavillion. one Centre
pole. One tin Chandelier for the ring
eight small lamps two lanterns. two
spades two Crow bars, two sledges. two
Circus pads. Six set of harness for
the Band Wagon. four sets of harness
for 4 Horse team. three sitting rigging. Seven
saddles, one lunge rein. Six fancy halters.
two Common halters, one Lady Elmore
Blanket. One Side Saddle four Common
pad Saddles Six Girths 1 pedestal Boy
for ring. One set of garters for ring. One
ladder. two Common trunks. One
Treasurers Boy, 4 tin Boxes with locks
16 Saddle cloths. ten head dreses for
horses. One ring Whip. three ring dreses
One Cairpet for ring & seats. two tin
fluid Cans. a lot of tickets & checks
One Bass Drum. One Boy to hold Chandelier
One lot tools & implements of the
value of two thousand dollars
Therefore we Command you. that if
the said plaintiff shall give you

bond, with good and sufficient security, in double the value of said goods and chattels, as required by Law, to prosecute his suit in this behalf to effect; and without delay. And to make return of the said goods and chattels, if return thereof shall be awarded, and to save and keep ^{you} harmless in replevying said goods and chattels, you cause the said goods and chattels to be replevied and delivered to the said plaintiff without delay. And also that you summon the said defendant to be and appear before the Circuit Court of De Davis County, on the first day of the next term thereof, to be holden at the Court-house, in Galena, in said County, on the 4th Monday of August Instant to answer unto the said plaintiff in the premises. And have you then and there this Writ, with an endorsement thereon, in what manner you shall have executed the same, together with the bond which you shall take from the said plaintiff as before commanded. before executing this Writ, Witness, William H Bradley, Clerk

of our said Court and the seal thereof at Galena in said County
this 17th day of August AD 1853

Attest Wm H Bradley, Clerk



Endorsed

The within named Loren G Butter first having given Bond (which is herewith returned) I then did on this 17th day of August 1853 put the said Loren G Butter in possession of the within described property (except perhaps some few articles of inconsiderable comparative value) And I also did on the 18th day of August 1853, summon the within named Henry R Merkle to appear &c by reading to him the within writ.

Wm Meighen Sheriff D.C. &c

Defendants Counsel then offered as a witness George W. Mottet who stated that he had heard the writ read describing the property in controversy that he was acquainted with & had been in the Circus & Animal business about twenty years and is partially acquainted with Circus property. Defendants Counsel then asked what would be the value of the use of the property described in the writ per day from the 17th August to the present time. Objected to & overruled by the Court to which plaintiffs Counsel then & there excepted. To which witness answered

It is a hard question to answer, what it
is worth up to the present time; in
the traveling season it ought to be
worth One hundred dollars per day if they
do any kind of business. I would consider
it worth that. Witness further states that
he had been traveling in the business about
twenty years. Have travelled with Circuses
& animals Connected together. Have
travelled with Circuses separately. Tended
door a great deal, and sold tickets
for 20 years I have been acquainted
with this kind of property its value
and use. Cross Examined. Witness
now resides in Cincinnati & has
been there more or less for the last
eight or ten years. Have never resided
in the State of Illinois more than a
week or so at a time. Was at Chicago
with the Oriental Circus of C. & Co in
AD 1849 have been in the State of
Illinois but twice before he came
here as a witness from Cincinnati
never was in any other part of
the State except Once when he
went to Michigan from Chicago
Came from Cincinnati here to
testify for Mr Merkling in this
case in regard to the damages

am not much acquainted in the State
of Illinois, never knew anything of the
value of the use of such property in
the State of Illinois, except at Chicago
on the road from thence to Michigan
never knew of any Circus property
to be rented, or leased or hired in any
Country men that get them up
generally do it to travel with & to
make money off from. never knew
of any such property being hired for
any purpose whatever. The value
of Circus property depends upon whether
it is well managed - a portion of this
property might be put to other use than
for Circus property. Horses might be
hired out for other purposes, but Witnep
does not know the value of their use.
The Canvass might be rented for a show
or to a Comedian for \$100. per day & might
not be a chance to rent it for a long time.
The other property I should consider of
no value for other purposes than for
a Circus. Witnep never saw the property
in Controversy in this suit. State
what the use of that particular property
was worth, judge of the value of
its use from having traveled with
other Companies of that description.

but judging from the description in
the writ - assuming every thing to
be complete, Ring Horses, Canvases, Ropes
& poles, Chains, drapes & everything com-
plete. Could not state the value of
this stock & property as I never saw
it, nor could I judge of its value; but
the amount of property there specified
might make a complete Circus to travel
by Rail Road, or Steam Boat. I don't know
of any Company traveling by Rail Road
or Steam boat. There was a Company
traveling by Rail Road or Steam Boat.
There was a Company traveled by Rail Road
from New York to Cincinnati. It would
be worth about five thousand dollars
to fit up a Company to travel with
by Rail Road or Steam Boat. Such as
Dan Rice, Levi Worth or Dan Worths who
travel by Canal, Ohio & Mississippi rivers.
To fit up a traveling Circus by land
it would cost some, twelve or
fifteen thousand dollars. Circuses
are not got up for hire, they are intended
to speculate with. Have never owned a
Circus. I have bought and sold
Circus property in New York &
Pittsburgh, Cincinnati & the Island of
Porto Rico. I should not set the -

value of the use of this property at \$100 per day unless I thought one could make that out of it. I base my opinion of the value of the use of the property on the fact that I have traveled with such property in the West Indies & from my experience in such matters; I made \$30,000 & brought it home to Mr Raymond in N. Y. - The reason why I think the property described in the writ worth one hundred dollars per day is because I have traveled with companies of that description & judge from the business they did. Plaintiff's Counsel then put this question "Did you fix upon that amount because you believed that profit could be made with the property by traveling with it to the amount of one hundred dollars per day?" Ans.

"If I believed a man could not have made enough on it to have paid the expenses I would not have set it at that." Plaintiff's Counsel then asked the following questions - ^{was} that it because you believed that profits to the amount of one hundred dollars per day could have been made with that property by traveling with it; that you fixed the value as you did; If there were

any other reasons than because you
thought a man could make money
with it - at that rule - state what they were.
his. It was because I thought a man
could make money with it - at that
I know of no other reasons. It was
my best judgment and opinion that
the property was worth one hundred
dollars per day. Plaintiffs Counsel then
asked the Court to exclude the testimony
of Mr. Matter from the jury & to instruct
them to disregard the same as to the
value of the use of the property. because
by the testimony of Mr. Matter himself it
appears that he is not acquainted
with the value of the use of the property,
is not acquainted with the value of its
use in Illinois nor in DuPage County
because he is not well enough acquainted
with the particular property to testify as to
the value of its use and because he
is not an expert & because his opin-
ions of the value of its use are based
entirely upon the profits which he
believes a Circus^{Company} could make by
traveling about the Country & because
he stated that he does not know the
value of the use of the property
for any other than for Circus

purposes. And because the witness never knew any such property-rented, hired or leased, & because the opinion of the witness was not admissible as evidence of the value of the use of the property, until their testimony other than the description in the writ to show what property or until the witness was shown to be acquainted with the property, which the court refused to do, to which plaintiff then and there excepted.

While the witness Crane was on the stand & during his cross examination the plaintiff's counsel asked the witness "What would be the value of the use of the property described in the writ during other parts of the year than from the 1st of August to the present time?" which Defendant's counsel objected & the objection was sustained by the court & the court refused to allow the same to be put to the witness, and during said cross examination plaintiff's counsel asked the following question of the witness Bacon: "Did you know of the defendant Merkle, in carrying on the Circus Business in Chicago with the same property to fail or

Break up & to be obliged to sell out his concern which question was objected to the objection was sustained by the Court & the Court refused to allow the same to be put to the witness, to which ruling of the Court the plaintiffs Counsel then & there excepted.

The foregoing was all of the testimony introduced by the defendant he then rested his case.

The plaintiff then introduced the affidavit of Henry R Merkle to show the value of the property replevied in this case. which was read to the jury. The Court overruling the objection of Defts Counsel to its being read, to which Defts Counsel excepted.

Said affidavit is in the words and figures following. to wit:

State of Illinois,

So Davieps County, I Henry R Merkle
of lawful age, ^{after} being duly sworn according
to law & statutes, that he is about to com-
mence an action of replevin in the Cir-
cuit Court of So Davieps County again-
st Loren G Butler to recover the posses-
sion of the following property, To wit,
One Bay Mare called "Lady Elmore"
One B. horse called "Old Dad"

One Bay horse Called "Old Dad's Mule"
One Gray Horse Called "Ellis Gray" a trick horse
One Black horse Called "Black Hawk"
One Red & White Spotted horse Called "Brilliant"
One Black & White Spotted horse Called "Cleveland"
Two Horses Called the Harney team.
One "Band Wagon"; One "Ticket Wagon"
One Circus pavillion or Canvas being
the tent or Canvas with the ropes, pulleys,
poles, seats, fastenings, & fixtures.
Connected with and belonging to
said Circus pavillion. One Large Centre
pole. One tin Chandelier for the Ring. Eight
small lamps. Two Lamps. Two Spades
Two Crow Bars. Two Sledges. Two Circus
Pads. Six Set of harness for "Band" Wagon.
Four Sets of Harness for four Horse team.
Three Bitting Reigins. Seven Bridles for
Ring and One large Reim. Six fan-
cy Halters. Two Common Halters. One
(Lady Elmore) Blanket. One side Saddle. Five
Common pad Saddles. Six Girths. One
Pedestal Box for Ring. One set of Cart
for Ring. One Saddle. Two Common Trunks
One Leather Treasurers Box. Four Tin
Boxes with Locks. Sixteen Saddle Cloths
Ten Head Dresses for Horses. One Ring
Whip. Three Ring dresses. One Carpet for
Ring and Seats. Two tin Fluid Cans.

a lot of Tickets & Checks. One Base
Drum. One Box to hold Chandeliers One
lot of Tools and implements all of said
property Goods & Chattels being part of the
Circus, and now in the possession of
said Butler aforesaid. This Affiant
states he is the owner of and lawfully
entitled to the possession of all and
singular the above described property
goods and Chattels. And that said
Loren & Butler unlawfully and without
right on his part took and detains
and withholds the possession thereof from
this affiant who is now lawfully entitled
to the possession thereof and that the same
has not been taken for any tax approp-
riation or fine levied by virtue of any
law of this State, nor seized under
any execution or attachment against
the goods and Chattels of this plaintiff
liable to execution or attachment. and
that said property Goods and Chattels
above mentioned is of the value of
Fifteen Hundred Dollars

Your Affiant therefore
prays that a writ of Replevin may
issue against the said Loren &
Butler according to Law;

And further saith not &c
Subscribed and sworn } H. R. Merkle
to before me this 11th }
11th day of Aug^r 1853 }
Wm H. Bradley Clerk

To The Clerk of the Circuit Court
of St Davie Co Ills

On filing the above affi-
-davit you will issue a writ of
Replevin for the above described property
against the defendants - returnable
to next term - value of the property
\$1500.00 Damages \$300.00

Stevens & Johnson
Plff Atty

Henry R Merkle Plff
vs } Replevin
Loren G Butler deft

Endorsed Filed August 11th 1853
Wm H Bradley Clerk

Plaintiff then called Wm Meighen who
stated that he was the acting Sheriff
of St Davie County on the 11th day
of August AD 1853 & still is; that
he replevied the property for Merkle

^{Question}
not allowed to a put nor answered,
to which plaintiffs Counsel then and
then accepted.

Witness further stated
that Circuses don't travel later than
November, through October & November
a large Company may average
25 dollars per day for a large travelling
Company. Property would be worth
nothing after November said property
might be worth ten to fifteen dollars
per day until the last of August.
after that would not think it worth
any thing. The best months for a Circus
are April May July & August. June
is not a good month.

Plaintiff then introduced Henry Buckley
who certified that he is acquainted with
Circus property & has been engaged
for the last sixteen years in that
business, all over the United States
& for the last six years through the
Western States & Illinois. & for
the last year through Illinois most
of the time. The property was
used in Butters Circus with which
Witness traveled the past season.
Witness was well acquainted with
the property. The property was worth

at the time it was replevied fifteen hundred Dollars. The property which was replevied you could not make much use of without attaching other property to it. The value of the use of this ^{property} described in the writ as Circus property could not have been more than ten or fifteen Dollars per day until the middle of October might have paid expenses until the 5th day of November & then the season closes & it would have been an expense. Was with the property all the time since we started in the spring until we broke up in the fall. The property. The above estimated value of the use of the property described in writ. You would have to put other property with it; as near as witnesses can remember this Circus closed about the 10th day of November 1866 then Butler performed the last exhibition was given at Chicago. After leaving Galena went on through the southern part of Illinois from thence to Indiana & from thence to Chicago. Came to Galena about the 14th of Nov by mistake of telegraphic despatch. Circus season closed before that.

Plaintiff then called

Orvin C. Webster who testified, that he had seen the property described in the writ - & had been with Mr Butler the past season he became acquainted with the property described in the writ early last spring & has been acquainted with same property ever since until very recently -

The value of the use of the property from the 17th day of August to the present time I would fix up to the first of October at ten to twelve dollars per day, that being the close of the traveling season for a circus. I would be willing to rent it at that since the property was laid up about 4 weeks since the use of the property was worth nothing - worth I think from the 1st of October till it was laid up up to the fore part of November. ten dollars per day. I have resided in Illinois sixteen years I have most of the time been engaged in Livery business & in staging. part of the time have been in Galena & Elizabeth So Davis County Illinois & part of the time in St Charles, Kane Co. & part of the times in Chicago Ill. profess to be a good judge of Horses, Wagons & that kind of property Crop Examination. His acquaintance with the value of the use of circus property

is limited ^{had} no acquaintance with
till the last summer.

Defts Counsel then asked "What is the
ordinary price of Horses per day in
the Livery Business?" to which question
Plaintiffs Counsel objected, but the Court
allowed the same to be put. to which
ruling of the Court Plaintiffs Counsel then
were excepted. Witness then answered
that prices vary but the usual price
of hiring out horses per day is one
dollar for a saddle horse. Defts Counsel
then asked the following questions, "Would
you consider Ring horses of more value
than Livery horses?" to which replied
"that in the Circus he would". Defts Counsel
then asked the following question "Is the
value of Ring horses in a Circus greater
than a saddle horse?" Objected to, overruled
& exception to which Witness replied, "He
would not consider them of any more
value than saddle horses". The horses
in the writ were three of them pad horses
& 2 Horse Wagons Witness hires out for twenty-
five cents a day ordinary horses can't
be used in a Circus they have to be
trained and broke. The facts & reasons
why I think that the property is worth
no more is because I have been

in the livery business I would think it a compensation at that price.

Witnep is a judge of pad horses, and ring horses. Cuts say that he is a judge of the value of the rise of pad horses.

Could not rise ordinary horses in the ring. Witnep judges from what he would be willing to purchase the property and rent it out for. If Witnep could let three or four horses he would let them at twenty-five cents a day from the 17th of August ~~to the~~ ^{the} present time, the hire to keep them & take good care of them. Would think twenty-five cents a day a fair price.

Plaintiffs Counsel then offered in evidence a written bill of sale from Merkle to Butler of said property of which the following is a true copy to wit-

Loren G Butler bought of Henry R Merkle sixteen horses two wagons and all the Carriages and Ropes, girths, ~~pullies~~ poles, seats, Saddles, Bridles, pads, harness, outfit-equipment, and furniture of or appertaining to the Circus and Circus party conducted and trained between Michigan Avenue and State Street

in the City of Chicago in Illinois,
and showing this day of the evening,
for \$900. Receipt for the same
in full for the sum of \$900. aforesaid,

Chicago May 14th 1853

Witness presents-

(signed) H. R. Merckling

(signed) A. C. Webster

^{to which} The introduction of which the defendants Counsel
^{objection} the Court sustained the objection & refused
to permit the same to be read as evidence
to which ruling of the Court the plaintiffs
Counsel then & there excepted The foregoing
was all of the evidence given or offered
on the trial of this Cause upon which the
same was submitted to the jury, upon the
following instructions: The Defendants
Counsel asked the Court to instruct
the Jury as follows, to wit:-

- (1) The opinion of any Witness based entirely
upon the supposed profits of a Circus
is not proper evidence of the value
of the use of the property in this case
and such testimony should be disreg-
arded by the jury
- (2) Speculative profits or expected profits
from Circus business or any other

business is not a ^{proper} criterion of the value
of the use of Circus property or any other
property. The true ^{measure} ~~measure~~ of damage
is what would be a reasonable Compensation
for the use of the property. What
would be a reasonable rent for the use
of that property for that time

(3) The Jury have no right to enquire as
to whether there was a particular injury
to Merkle. it is a matter of indifference
whether Merkle hoped to make some money
out of the property - or not. The only Enquiry
for the Jury is What would be a reason-
able value for the use of the property -

(4) If the Jury believe from the testimony
of Mr Crane that he fixes his estimate
of the damage at the rate he did solely
because he believes that people generally
attend exhibitions better at that season
of the year than at others. Such
estimate of Mr Crane is not proper
evidence of the value of the use of the
property during that season & ought
to be disregarded by the Jury

(5) If the Jury believe from the ~~existence~~ testimony of Mr Crane, that his opinion, that the use of such property was worth fifty-dollars per day was based solely on the fact that he thought he could make that amount per day with it as a circus in a good business season, and has no other reason for the opinions that he has stated as to the value of the use of the property in this case. Then the Jury ought to disregard his opinion of the value of the use of the property as it is not proper evidence

(6) The Jury are not to take into account any thing except the value of the use of the property. vindictive or Exemplary damages or Smart-money cannot be allowed in this case

(7) The value of the use of the property in this case is not what it would be worth in New York Pennsylvania, Ohio, Wisconsin or the West Indies, but it is the value of the use of the property in Toadav County

(8) The value of the use of the property in this Case is not what the use of it would be in another State or Country but the value of the use of it in the State of Illinois

(9) If the Jury believe from the testimony of Mr Crane that he did not know the value of the use of the property received in the State of Illinois and only stated that he was acquainted with the value of the use of it in the City of New York and that he did not know the value of it for any other purpose, than for Circus purposes, then his opinion or estimate of the value of the use of the property in this Case is not proper evidence of the value of the use of the property in this Case and ought to be disregarded by the Jury

(10) If the Jury believe from the testimony that Baker came here from Toledo in the State of Ohio to testify in this Case and that he never was in the State of Illinois except about 38 or 40 days last Spring in the City of Chicago and that he never owned nor leased, chartered or rented such property. And never

Q. Did you know any instance of such property being
leased, rented, hired or chartered at any
time? And that he did not know what
the value of the use of Horses & Wagons
is worth per day in Illinois, and could
not state what the use of the Carriage
is worth per day, and that he could
not state what the use of any one
article separate from the rest would
be worth per day? And that he
learned what he knows about
the value of the use of the property
in this case, where he had been
travelling in New York, Pennsylvania
& Ohio and that the estimate he has put
upon the value of the use of the property
was based on such knowledge alone
then the Witness is not sufficiently
well acquainted with the value of
the property in this case to testify
as to the value of such use. And his
testimony ought to be disregarded.

Q. If the Witness Baker based his estimate of
the value of the use of the property on the number
of persons he saw attending the Circus of
Mushling in Chicago, this is not a proper
estimate or opinion of the value of the
use of the property and if based on that

ground ought to be disregarded by the
Jury

Refused
(12) If the Jury believe from the testimony of
Baker that he had no other means of knowing
the value of the use of said property except
from seeing the same in Merklings Circus
at Chicago & from the fact of having been
employed in taking care of the horses
& training them in the day time - then
he is not competent to state the value
of the use of the property in this case
and his testimony ought to be disregarded
by the Jury

Refused
(13) If the Jury believe from the testimony of Statter
that he never saw the property & that he
did not know the value of the use of the
property in this case for any other purpose
than a travelling circus, and that he was
entirely unacquainted with the value
of the use of such property in the State
of Illinois except what he learned by
exhibiting a circus in Chicago for less
than a week & going therefrom to Michigan
a year ago. The witness is not competent
to testify as to the value of the use of
the property - his testimony ought
to be disregarded

14) If the Jury believe from the Testimony of
Butter that he never saw the property
and never knew of any such property
being rented, leased hired, or Chartered anywhere
for any purpose whatever And that he
never knew anything of the value of
the use of property in the State of Illinois
except what he learned by exhibiting a
Circus at Chicago for about a week
and then going to Michigan from Chicago,
The Witness is not sufficiently acquainted
with the value of the use of the property
to testify in regard to the same and can
not give his opinion of the value of
the use of the same & his testimony
should be disregarded.

15) The Jury should not presume that the
plaintiff Butter has detained the property
mentioned in the Writ or any portion
of it, but they must be satisfied of such
detention if at all by the evidence given
on the trial.

16) The Jury should not assess damages for
the detention of the property unless they
shall be satisfied from the evidence that
it has been detained from by Butter from
the defendants Mesking.

17) The Jury should not assess damages for the detention of the property if there has been any for any longer time than the time of the actual detention proved by the evidence given on the trial

18) The Jury should not assess damages for the detention of any portion of the property not proved to have been detained by Butler from Merkle

19) If the Jury should assess damages for the detention of any portion of the property named in the writ - then they should assess for the detention thereof only for the time that that portion has been proved to have been detained by Butler from Merkle

20) The Jury should not presume from the order to return the property - that that order has not been complied with; but such conclusion should only be arrived at from the evidence given on the trial

21) If the Jury should be satisfied from the evidence given on the trial that the property mentioned in the writ - or any portion of it - has been detained by Butler from Merkle and should assess damages for such detention, then and in that event the proper measure of the

Damages is the real value of the use of such property - during the precise period of such detention.

21d The judgment for a return of the property taken named in the writ - in this case has not yet taken effect.

22 The Period for which Damages for the use of the property named in the writ or of any portion of it, are to be assessed by the Jury (in case they shall make any such assessment) is to be computed from the time when the same was taken by Butler to the time of the return thereof if there has been any such return made, by Butler to Merkhing and unless the Jury are satisfied from the evidence given in the case that the property or some portion of it has been returned by Butler to Merkhing then they ought not to make any assessment.

The following instructions were given for the plaintiff as qualified, by the Judge

23 The opinion of any witness based entirely upon the supposed profits of a Circus without any knowledge of the actual profits of a Circus is not proper evidence of the value of the use of the property in this

Case And such testimony should be dis-
regarded by the Jury.

In place of Instructions 7 & 8 above asked
this is given. It is the value of the use of the
property to a person receiving it in So
Darius County & using it where he might
choose

The following instructions were given at
request of the defendant to wit

The said Merkhing asks the Court to
instruct the Jury

That the only matter
to be passed upon by the Jury is as to
the amount of damages for the use of
the property named in the writ (in
this case (it replevin under is) from the
1st day of August last up to this time,
and in determining this question the
Jury are to be governed by the testimony
in the case

The value of the property is not the only criterion
of ^{the} damages. But the value ^{& replevin under it} for the use of the property
named in the writ from the 1st August up to
this time and this question is to be determined
by the Jury from all the evidence in the
cause

To the refusing to instruct the Jury in behalf of said plaintiff as requested in each of said instructions the plaintiff by his Counsel then and there severally excepted to each of said instructions.

The Jury afterwards returned into Court with their verdict & thereupon the plaintiff moved the Court to set aside the finding of the Jury and for a new assessment of the value of the use of the property & for a new trial with the reasons therefor which motion was in the words and figures following to wit;

Loren J. Butler } In the S. Davie's Circuit Court
vs } of November Term AD 1853

Henry R. Merkle } In Reply in the assessment
of the value of the use of the property

And the said Butler Comes by his Attorneys & moves the Court to set aside the finding of the Jury herein & for a new trial or new assessment of the value of the use of the property herein for the following among other reasons to wit. Because the Court permitted an assessment of the damages by a Jury when the law requires the damages to be assessed by the Court.
"Second, because the Court admitted improper testimony

"Third Because the Court allowed evidence of the opinions of witnesses based upon the supposed profits of Circus establishments.

"Fourth Because the Court allowed testimony of the value of the use of the property when the witnesses expressly stated that they were unacquainted with the value of the use of the property, in the State of Illinois & based their opinions entirely upon what they supposed a Circus could make as profits.

"Fifth, Because the Court refused to Exclude the testimony of Mr Crane.

"Sixth because the Court refused to exclude the testimony of Mr Baker

"Seventh Because the Court refused to exclude the testimony of Mr Miller

"Eighth Because the Court refused to admit proper testimony.

Ninth, because the Court allowed improper questions to be put to the witnesses

Tenth Because the Court refused to allow proper questions to be put to the witnesses

Eleventh Because the Court refused to give proper instructions.

Twelfth Because the Court gave improper instructions.

* Eighteenth Because the finding of the Jury was contrary to the evidence

Thirteenth Because the Court refused the instructions as asked & gave them as qualified

Fourteenth. Because the Court refused to give instructions numbered & gave in lieu thereof the one given by the Court

Fifteenth. Because the Court refused to stay the proceedings on the affidavits filed

Sixteenth Because the amount found by the Jury, was excessive & the value of the use of the property as found, was grossly excessive & outrageous

Seventeenth Because the finding of the Jury was contrary to the evidence Law

* Eighteenth, Because the finding is ^{not} ~~not~~ supported by the evidence

Nineteenth Because the finding of the Jury is against the instructions of the Court
And also for divers other good and sufficient reasons

Van H. Higgins
Hooper Campbell
Attys for L. J. Butler

Endorsed

Filed Decr 19th 1853

Wm H. Brady Clerk

I afterwards ^{is with} on the 24 day of November A.D.
1853. The said Motion for a new trial
came on to be heard. the same were
overruled by the Court to which ruling of
the Court, the plaintiff then and thereby
his Counsel excepted & prayed that his
Bill of exceptions may be signed,
dealed, & allowed which is done in
open Court at the November Term
A.D. 1853 this the 31st day of December A.D. 1853.

The Defendants Counsel objected
to the plaintiff introducing any testimony
or challenging any Jurors peremptorily which
objection was overruled by the Court & the
ruling excepted to by Defendants Counsel.
this was previous to the introduction of
any testimony by plff & the Court permitted
plaintiff to challenge peremptorily Jurors
& he did so & permitted plff to introduce
testimony all which defendants counsel
excepted to at the time

Benj R Sheldon

Endorsed

^{in open Court}
Filed Dec 31st 1853

Wm H. Brady Clerk

3^d Bill of Exceptions

Loren G Butler vs Henry R Werthing

Cir Court of D. D. Vt

Nov Term A D 1853

An Assessment of Damages

Be it remembered on this the 16th day of Decr. A D 1853 on the hearing of this Cause before a Jury on empannelling the same the said Loren G Butler by his Atty^s claimed the right to ^{challenge} preemptorily two of the Jurors. So called and about to be sworn to assess the damages in said Cause to the right to Challenge the same on the part of said plaintiff the defendant then and there objected and the Court overruled the objection and permitted the Challenge to be made and the defendant then and there excepted, and on the further hearing of said Cause after the testimony of the defendants had been heard. The plaintiff offered evidence of Nicholas Thom. Harry Buckley and O. Webster to show the value of the uses of said property described in the writ. to the admission and introduction of of said testimony or to the admission and introduction of any evidence in said Cause on the part of said plaintiff. the defendant objected and the Court overruled the

objection and permitted said evidence
to go to the Jury and the defendant
then & there excepted & prays this his
bill of exceptions may be signed
and sealed

Benj R Sheldon Esq

Endorsed

Filed in open Court Jan'y 2nd 1854
Wm H Bradley Clerk

State of Illinois
In Gauley County & William W Bradley
Clerk of the Court

Court in and for said County do hereby cer-
tify that the foregoing transcript is a true
full and correct copy from the Record of all
the proceedings which were had in said
Court in the aforesaid case of Susan
G Butler against Henry R Werhling in
Replevin with the exceptions of the affidavits filed
by the defendant & his attorneys with his motion
filed August 22^d 1853 which are entire last or
mislaide.

The testimony which I have
bracketed at my hand and affixed
the Seal of said Court at my
Office in Galena in said County
this 8th day of March A.D. 1854
Attest William W Bradley Clerk

Rece for this Record 17,498 words. \$17.49
certificates 35
Total \$17.84

Let a Supersedeas issue in this cause upon
filing this record with a bond in the usual
form in the penal sum of three thousand
dollars. executed by the said plaintiff in error
as principal & Isaac Cook as security.

Ottawa Sept 11 1854

A. Carson

Loren G. Butter
vs.
Henry R. Micheling
Record

Filed April 12th 1854
L. Leland Clk.
By P. H. Leland D. J.

Know all men by these Presents, that
we Lorin G. Butler and Isaac Cook
are held and firmly bound unto Henry R.
Merkling in the pecial sum of Three Thousand
Dollars

for the payment of which sum well and truly to be
made we hereby bind ourselves, our heirs, executors
and administrators, jointly and severally and
firmly by these presents. Witness our hands &
seals at Chicago this 10th day of April A.D. 1854.

The Condition of the above obligation is such, that whereas
the said Henry R. Merkling, lately in in the 3d Juv-
ice Circuit Court, Illinois, Recovered a Judgment
against the said Lorin G. Butler in an action of
replevin for the sum of twenty two hundred dollars
and also the sum of dollars costs
in said suit, Upon which judgment the said
Lorin G. Butler, has presented a writ of error
to the Supreme Court of the State of Illinois for
the third Grand Division, and which writ of
error hath been allowed and a writ of
Superseas Theron hath been allowed by the
Honorable John Dean Catron, one of the Judges of
the said Supreme Court. Now if the said
Lorin G. Butler shall well and truly pay or
Cause to be paid the Judgment aforesaid,
so rendered in the said 3d Juvise Circuit
Court, or Cause the same to be paid together
with all costs of said Judgment, and all

Interest that may accrue upon the same
together with the interest upon said judgment,
and all damages that may be awarded
in the said Supreme Court of Florida,
in case the said Judgment of the said
Circuit Court should be affirmed,
and also, if the said Louis G. Butler
shall duly prosecute his said appeal, then
the above obligation shall be void
otherwise to remain in full force
and virtue.

Witness our hands & seals this
10th day of April A.D. 1854.

Shook

L. G. Butler

State of Illinois

County of Cook ss Isaac Cook being
first duly sworn deposes and says
that he is legally entitled and
proprietor as in his own prop-
erty of property real and personal
in the County of Cook in the State of
Illinois liable to execution extending
in value the sum of Three
Thousand Dollars, and that
he is the legal owner of a larger
amount of property than the
amount of that sum
independently and over and
above all his legal liabilities
and obligations.

Sworn and subscribed before
me at Cook County Illinois
this day of April A.D. 1854.

Subscribed & sworn
to before me this 11th
day of April 1854. B. Morris

Isaac Cook

Judge of the judicial circuit of Illinois

17
Loren G. Butler
as
Henry R. Merkleling
Bond & affd.

Filed April 12th 1854.
L. Leland Clk.
By P. R. Leland & J.

STATE OF ILLINOIS,
Supreme Court,

ss.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the county of *Jo Daviess* Greeting:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the circuit court of *Jo Daviess* — county, before the Judge thereof, between *Loren G Butler* —

plaintiff, and *Henry R. Meshling* —

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

plaintiff

as we are informed by *his* complaint, and we being willing that error, should be corrected if any there be in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint, aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the *second Monday of June* next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law;

WITNESS, the Hon. **SAMUEL H. TREAT**, Chief Justice
 of our said Court, and the Seal thereof, at Ottawa, this *12th* day of *April*
 in the Year of Our Lord One Thousand Eight Hundred and Fifty-*four*.

L. Leland Clerk of the Supreme Court.

By F. H. Leland Depy. Clk.

Loren G. Butler
vs.

Henry R. Mehrling

Writ of error -

This writ of error is to
operate as a supersedeas
and as such, is to be obeyed
by all concerned -
April 12th Leland Clerk
A.D. 1854 - By P.K. Leland, atty.

Filed April 12th 1854.
L. Leland Clk.
By P.K. Leland, atty.

Supreme Court
STATE OF ILLINOIS.

The People of the State of Illinois,

STATE OF ILLINOIS,
Supreme Court, }

ss.

The People of the State of Illinois,

To the Sheriff of the County of *Jo Daviess* — Greeting:

BECAUSE in the record and proceedings, and also in the rendition of the judgment of a plea which was in the circuit court of *Jo Daviess* — county, before the Judge thereof, between *Loren G. Butler* plaintiff —

and *Henry R. Merhling* —

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

as we are informed by *his* complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the state of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said

Henry R. Merhling —

that *he* be and appear before the Justices of our said Supreme Court, at the next term of said court, to be holden at Ottawa, in said state, on the *second* Monday in *June* next, to hear the records and proceedings aforesaid, and the errors assigned, if *he* shall see fit; and further to do and receive what said court shall order in this behalf; and have you then there the names of those by whom you shall give the said *Henry R. Merhling* — notice, together with this writ.

WITNESS, the Hon. **Samuel H. Treat**, Clerk of Justice of our said Court, and the Seal thereof, at Ottawa, this *12th* day of *April* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*four*.

L. Leland Clerk of the Supreme Court. Do
By *P. H. Leland* Depy. Clk.

I executed the within writ by sending
the same to the within named Henry R
Merkling on the 19th May 1854
per ¹⁶⁰ to

Wm Meighen Sheriff
Sabourin & Co

17
Loren G. Butler
Henry R. Merkling
Sci Ga.

Fils clay 23rd 1854.
L. Veland Clerk.

Goren G. Butler }
Henry R. McWhorter } The testimony of Butler who
had never seen the property
was not admissible as to

the value of its use - 20 Ohio 211 = 6 in. in ex 24 May -
15 N. H. 109 - 5 Conn 544 - 4 Barb S.C. 258 = 5 Hill 603 =
25 Wend. 481 - 17 Wend 161 = 3 Hill 609 =

11 The opinion of the witnesses based on supposed
profits, as to the value of the use of Circus property
was not admissible. 1 Fredell 607 = 11 Ill 616 =
17 Wend 136 = 21 Wend 342 = 3 Barb S.C. 424 - ~~10 Wend 136~~
4 Barb S.C. 258 - 13 Wis 517 = 6 1/2 = 12 Wis 513 = 3 Humph 250
17 Pick 453 - 2 Carter 547 =

111 The reasonable rent of the property would have
been the true measure of damages. 2 Carter
Indiana Rep 547 - 1 Fredell 607 - 11 Ill 616 =

112 The damages sought to be recovered were
merely speculative & contingent & the estimate
of the witnesses were based upon supposed profits
which is never admissible 13 Wis 517 - 12 Ill 513 -
17 Pick 453 - 2 Carter 547

113 The damages ought to have been assessed by the Court -
instead of a jury - Rev Stat 2434 § 6 -

114 The measure of damages would be the interest
18 Conn 555 - 12 Wis 518 - This rule obtains in other
actions & cases where wilful or approved
negligence has occurred.

Contingencies which might affect the
 profits of the circus =
 Hard times & sickness of the company.
 Sickness in the country & disease death or loss
 of the stock & property & unpopularity
 of the company & inexperience of the
 managers - prevalence of cholera.
 Bad weather & as to prevent travelling
 Religious revivals - Prejudice against the company
 Inability to purchase sufficient other property
 to fix up a circus.

Buller
 &
 Machinery -
 Brief -

The rise of price was considerable in Wisconsin
 & Erie of about 24% = 7 Blue Mt 258 - from