

No. 14754

Supreme Court of Illinois

Bourk

vs.

Riggs

April Term 94/1865

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.
(Reported)

No. 216

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

*Bourk
vs
Riggs*

The State of Illinois
Supreme Court

Third Grand Division
Louis Bouck

216.

vs

William Riggs

Replevin

Error To

Kankakee County

Now Pinkney H. Walker Chief
Justice said in the above entitled
case is submitted on the papers
now on file and a decision is
desired at the present term of the
Supreme Court

be A Lake Atty for
Proff in error

James W Carr atty for
Respondent in error

No 26, 94

Stipulations

Filed Apr. 13. 1865 -
Island
OK

State of Illinois
Third Grand Division
Loris Bowk
vs
William Riggs

In Supreme
Court
To April Term
A.D. 1865
Error To Kankakee
County

Indagament In Replein. at December
Term A.D. 1864

Issue a writ of Error to the Circuit
Court of Kankakee County against
William Riggs at the Suit of
Loris Bowk returnable at the next
April Term

To the Clerk of the Supreme
Court
April 4th 1865

C. Locke. Atty
for Puff in Error

It will not be necessary to issue the
writ in the above entitled case
as the deft has already formed in
Error I have sent you the papers
in this case by mail which you
will please place on file and
Enclosed you will find eleven
dollars & 4 for the judges fees and
five for the Clerks advance fees
C. Locke

216 94
Lewis Bank
to

William Riggs

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The People of the State of Illinois

To all to whom these Presents shall
come Greeting;

Know Ye That we having caused to be
inspected the Records and Proceedings now remaining
in the office of our clerk of our circuit Court in and
for Kankassee County do find certain Records and
proceedings in the words and figures following to wit;

United States of America
" State of Illinois
" Kankassee County

" Pleas before the Honorable
" Charles R Starr Judge of the Twentieth Judicial Circuit
" and presiding Judge of the Kankassee County Circuit Court
" in the State of Illinois at a term of the said Kankassee
" County circuit Court begun and held at the Court House
" in Kankassee City in said Kankassee County on the first
" Monday (the same being the fifth day) of December in the
" Year of our Lord one thousand Eight Hundred and Sixty
" Four and of the Independence of the United States of
" America the Eighty ninth
" Present

" Hon Charles R Starr Judge of the Twentieth Judicial Circuit
" W J Ames State attorney of " " "
" Byron D Sherman Sheriff of Kankassee County
" John B Welch Clerk of the Kankassee County Circuit Court

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and heretofore to wit. on the 4th day of August A.D. 1864
Louis Bourk the Plaintiff made his affidavit before
John B S Lemoine a Justice of the Peace of said County
in an action of Replevin in the words and figures
following to wit:

State of Illinois }
Kankakee County } Louis Bourk being duly sworn
deposes and says that he is the owner of and is now
lawfully entitled to the possession of the following goods
and chattels viz. one Brown cow nearly black two years
old last spring having a white spot in the face and
some white under the belly one ear split and crop off
the other - also one sucking calf Red lined back and
that said goods and chattels are of the value of Eighteen
Dollars. That William Riggs wrongfully took and
wrongfully detains the said goods and chattels from
the affiant and that said goods and chattels have
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 affiant liable to execution or attachment
Subscribed and sworn to before me
this fourth day of August 1864 } } Louis Bourk
John B S Lemoine JP }

On the same day August 4th A.D. 1864 the said Justice
issued a writ of Replevin in the words and figures
following to wit:

State of Illinois

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Kankakee County

The People of the State of Illinois to any Constable of said County Greeting

Whereas Louis Bork Plaintiff complains that William Riggs Defendant unlawfully and wrongfully detain and hold from said Plaintiff the following described goods and chattels to wit: One Brown cow nearly black two years old last spring having a white spot in the face and some white under the belly one ear split and crop off the other also one sucking calf red lined back. Therefore you are hereby commanded 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 without delay and to make return of the said goods and chattels if return thereof shall be awarded and to save and to keep you harmless in Replevying said goods and Chattels you cause the same to be repleined and delivered to the said Plaintiff without delay, and also that you summon the said Defendant to be and appear before me at my office in Kankakee City in said County on the 13th day of August AD 1864 at ten o'clock AM to answer 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 take of the Plaintiff before executing this writ.

Given under my hand and seal this 4th day of August AD 1864

John B L Lemmon *Seal*
Justice of the Peace

I have served the within writ by Replevying the within described property and delivering the same to the within named Louis Bourk and by reading the within writ to William Riggs this 4th day of August 1864.

R D Sherman

Bond taken by Constable is in the words and figures following to wit;

Know all men by these presents that we Louis Bourk Pierre Bourque and Auguste Bourque are held and firmly bound unto R D Sherman a Constable of the County of Kansas in the State of Illinois and to his executors administrators and assigns in the penal sum of Thirty Six dollars lawful money of the United States for the payment of which sum we do hereby jointly and severally bind ourselves our heirs executors and administrators

The Condition of this obligation is such that whereas on the fourth day of August in the year of our Lord one thousand eight Hundred and Sixty four the said Louis Bourk sued out before John B L Semmes a Justice of the Peace of Kansas County a writ of Replevin against William Riggs Defendant for the recovery of the following described goods and chattels property to wit; one brown cow, nearly black, two years old last spring having a white spot in the face and some white under the belly one ear split and crop off the other also one sucking calf red and lined back. Now if the said Louis Bourk plaintiff shall prosecute his suit to effect and without delay and make return of the said property

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if return thereof shall be awarded and save and keep harmless the said Constable in replenishing the said property then this obligation to be void otherwise to remain in full force and effect. Witness our hands and seals this

fourth day of August A.D. 1864

Witness John B. Semmes

V. H. Young

Louis Bourke *Real*

Auguste Bourque *Real*

Pierre Bourque *Real*

On the 14th day of September A.D. 1864. the cause was tried by a jury before said Justice and verdict rendered for the defendant. from which the Plaintiff appealed to the circuit Court appeal papers being filed. Novr 25, 1864 in the Clerk's office

and on the 25th day of November A.D. 1864 the Plaintiff filed in the Clerk's office his declaration, ^{with the appeal papers} as follows to wit:

State of Illinois }
Kankakee County } ss In Justice Court before J B S
Semmes Justice

Louis Bourke by M B Loomis his attorney complains of William Riggs the Defendant in this suit who is summoned to answer Louis Bourke the Plaintiff in this suit of a plea whereof he took the goods and chattels of the Plaintiff and unjustly detain the same until he and thereupon the said Plaintiff by M B Loomis his attorney complains for that the said Defendant on to wit the 1st day of August in the year of our Lord one thousand eight hundred and sixty four at Orono in the County of Kankakee aforesaid

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took the goods and chattels to wit one brown cow nearly
black two years old last spring having a white spot
in the face and some white under the belly one ear
split and crop off the other also one sucking calf
red lined back of the said Plaintiff of great value
to wit of the value of Eighteen Dollars and unjustly
detains the same until &c. and also for that the
said defendant on the to wit 1st day of August in the
year of our Lord one thousand eight hundred and
sixty four at Aumau in the said County of How
Kawee detained the goods and chattels to wit. one
Brown Cow nearly black two years old last spring
having a white spot in the face and some
white under the belly. one ear split and crop off
the other - also one sucking calf red lined back
of the said Plaintiff of great value to wit: of the value
of Eighteen dollars and unjustly detain the
same &c and the said plaintiff is now lawfully
entitled to the possession thereof and is the owner of
the same wherefore said Plaintiff says he is injured
and has sustained damage to the sum of Eighteen
dollars and therefore he brings suit &c

W B Loomis Plffs atty

and afterwards on the 10th day of December AD 1864
the same being one of the regular days of the December
Term AD 1864 of said court and the said court
being then duly organized and sitting for the

transaction of business the following proceedings were
had and entered of Record by said court in said cause

" Louis Bourk {
" 1919 vs { Replein Appeal
" William Riggs {
" This cause is passed until Wednesday
" morning of the second week by agreement.

And afterward on the 17th day of December ad
1864. the same being one of the regular days of the second
term of said circuit court for said Year ad 1864
and the said Court being duly organized and sitting
in open court for the transaction of judicial business
the following proceedings were had and entered of
Record in said cause to wit:

" Louis Bourk {
" vs { Appeal Replein
" William Riggs { now come the parties by their
" attorneys and it is ordered that this
" Cause do proceed to trial and that a jury do now come
" for that purpose Whereupon come the names of a jury of
" good and lawful men to wit: Jeremiah Ingraham
" John Fabrix Geo Streeter Daniel Young Henry Smarttger
" A B Nichols Antoine Lefleur Joshua Aldrich J W Dickson
" Aaron Shreffler Sidney Dubois and Antoine Marcotte
" who were duly tried elected and sworn to well and
" truly try the issues joined between the parties to this

" Suit and a true verdict given according to the evidence
 " after hearing the evidence adduced the arguments of counsel
 " the instructions of the Court retire to consider of their
 " verdict and having agreed thereon come again into
 " open Court and for verdict say we the jury find the
 " Defendant not guilty. Whereupon the Plaintiff
 " Counsel enters his motion for a new trial in
 " this cause

and afterwards to wit on the 19th day of Decem-
 ber AD 1864 the same being one of the regular days of
 the December Term of said Court for said year AD
 1864 and the said Court being then duly organized
 and sitting for the transaction of judicial business
 certain other proceedings were had and entered of
 Record in said cause To wit;

1919 " Louis Bough ^{appellant} { Appeal Replevin
 " vs William Riggs }
 " now again come
 " the parties by their attorneys and
 " the Court being advised upon the motion for a new
 " trial overrules the same It is Thereupon considered by
 " the Court that the Defendant have and Recover of the
 " Plaintiff his damages to the sum of one cent together with
 " his costs and charges by him about this suit in this
 " behalf expended and that he do have execution therefor
 " and it is further ordered that a writ de Replevin be
 " awarded for the return of the property to all of which

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the Plaintiff excepts and ten days are given in which
to file his Bill of exceptions

and afterwards to wit on the 26th
day of December A.D. 1864. the Plaintiff by his attorney
files his Bill of exceptions in the words and figures follow-
ing to wit:

State of Illinois	{	Circuit Court of the December
Kankakee County		
Louis Bourke	{	Term 1864 appeal from a Justice of the peace
28 William Riggs		
	{	Replevin

Be it Remembered that on the trial
of this cause at the December Term A.D. 1864 of the
Kankakee County Circuit Court the said Louis
Bourke to maintain the evidence on his part gave
in evidence to the jury a writ and return in the
following words and figures to wit. State of Illinois
Kankakee County ss The People of the State of Illinois to
any Constable of said County Greeting: Whereas Louis
Bourke plaintiff complains that William Riggs Defen-
dant unlawfully detains and holds from the plaintiff
the following described goods and chattels to wit one
Brown cow nearly black two years old last spring
having a white spot in the face and some white
under the belly one ear split and crop off the other
also one sucking calf red lined back therefore
you are hereby commanded 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 without delay and to make return of the said goods and chattels if return thereof shall be awarded and to come and keep you harmless in Replevying said goods and chattels you cause the same to be replevied and delivered to the said Plaintiff without delay and also that you summon the said Defendant to be and appear before me at my office in Kansas City in said County on the 13th day of August AD 1864 at 10 o'clock am to answer the said Plaintiff in 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 take of the Plaintiff before executing this writ;

Given under my hand and seal this 4th day of August AD 1864 John B L Lemmon Justice of the Peace
 said writ was endorsed on the back as follows

I have served the within writ by replevying the within described property and delivering the same to the within named Louis Burk and by reading the within writ to William Riggs this 4th day of August 1864
 R D Sherman Constable

Fees \$2.30

and the said Plaintiff to further maintain the issue on his part offered the testimony of one Abel Spinnard who testified as follows
 I live in the town of St Ann in Kansas

county I am acquainted with the Plaintiff Bourk
I lived about one mile from him during the year 1863
and for some time before - I know the cow or heifer
in dispute - she is a dark brown color - nearly black
with a white spot in forehead, between the horns, also
a white spot on belly her right ear has a diamond
shaped crop - don't remember whether left ear
was slit or not - her horns were black - saw the heifer
frequently at Bourk's place - saw her there last time
about one year ago last June - The next time I saw
her was in August last at the time of the trial of
this cause before the justice am sure it was the
same heifer I saw at Bourk's place - don't think
I can be mistaken". Plaintiff offered further
the testimony of Napoleon Wood who testified
as follows - I live in Bourbonnais Kansas
do know the Plaintiff - know the heifer in question
she formerly belonged to Henry Margins who
lived with me and kept the heifer in my
yard Bourk bought the heifer of Margins
in winter of 1862 or Spring of 1863. The heifer
is a dark Brown color white spot in forehead and
a white spot on belly - it had no marks on ears
when Bourk took it away - It was a nice small
built heifer & I noticed it particularly because
it was so pretty & I wanted to buy it myself - the
last time I saw the heifer was in August last
at the trial of this cause before the justice - It is
the same heifer Bourk bought of Margins -

are very sure and cannot be very well mistaken
There may have been other cattle marked the same
as this one dont remember to have seen any

The Plaintiff further offered the testimony
of one Henry Marguis who testified as follows
I live in Bourbonais. Kankakee Co Ill. and
acquainted with Plaintiff Bourk know the heifer
in dispute - I sold it to Bourk. I think in February
or March 1863 - It was a dark brown heifer with
white spot in forehead and a small white spot on the
belly - and black-horns - she had no ear marks when I
let Bourk have her. I saw her afterwards on Bourk's
place - she then had a diamond shaped crop out of
right ear - I saw her afterwards last August on
trial of this cause before the Justice - This is the
same heifer I sold to Bourk - am sure of it and
do not think I can be mistaken - she was a
fine shaped creature and when I owned her I
noticed particularly the white spot on her belly
it was so small and round being about half
an inch in diameter - I never saw but one calf
marked near like this one. I know because
I was acquainted with the mother of them & saw
both heifers when they were sucking the cow - the
heifer is now about 2 1/2 years old - The
plaintiff further offered the testimony of one
Alexander Goyette who testified as follows
I live in Town of St Ann - am acquainted

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with plaintiff - have worked for him frequently - worked
for him in Spring of 1863 - Know the cow in dispute
fed her with Bourks other cattle all the time I
worked for him - she is of a dark brown color nearly
black, with a white spot in forehead and white spot
in flank. she has a diamond shaped crop out of
right ear and the left one is split - all of Bourks
cattle were marked in the same way - it is his mark
for cattle - The heifer had black horns - she last time I
saw her was about the last of June last year before she
strayed away from Bourk - saw her again sometime
about August last. at the time of the trial of this cause
before the justice, am very sure it is the same cow I
fed on Bourks place - dont think I can be mistaken

Plaintiff further offered the testimony of one Alphon
so Bourk who testified substantially as follows: - am
a brother of plaintiff - Have lived with him a good
deal - stay there some times 3 or 4 weeks and some
times longer lived with him in Spring of 1863

Know the cow or heifer in dispute saw her on my
brothers place frequently in Spring of 1863 - her color
is dark brown. she has a white spot in the forehead and
on the belly - Diamond shaped crop out of right ear
and a split in left ear - This is my brothers cattle
mark saw the cow about 2 weeks ago - am sure
it is the same one that was on my brothers place
in Spring of 1863 - I noticed her because she was so
fine and pretty and then the said Plff rested his
case

The Defendant to maintain the

issue on his part offered the testimony of one Thomas Snitzer who testified as follows - Lived at Sugar Island in Kansas county. Know the heifer in question she was taken up in fall of 1863 or winter of 1864 by Mr Steller a neighbor of mine with two or three other cattle - saw the heifer at the time of the trial of this cause before the Justice to the best of my judgment it is the same heifer taken up by Steller -

Defendant further offered the testimony of one Jane Steller who testified as follows - am acquainted with Defendant Riggs - Know the heifer in dispute - she was taken up by us in the fall of 1863 with two other cattle - Streeter and Riggs came in the spring and took her away Streeter claimed her & paid ^{us} for keeping her - saw the heifer at the time of the trial of this cause before the Justice It is the same heifer taken up by us and taken away by Streeter - The defendant further offered the testimony of one J. J. Streeter who testified as follows "Lived in Michigan - In 1863 I lived on the Maffit place in the town of Burna I am acquainted with the heifer in dispute - I sold her to the Deft Riggs. She with several others strayed away in the fall of 1863 in Feby 1864 - I found her at Stellers and in March I took her away and paid the keeping - She had a square cross of the right ear and slit in the left ear I brought her with several others from Chicago when she was a

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sucking calf - some of the other cattle that I brought from Chicago were marked in the same way as this heifer is - I know this heifer she is a brown heifer - I sheared some hair out of this heifers tail my cattle were also branded. I did not look to see whether the brand was on this heifer or not and then the defendant rested his case and there was ^{other} no evidence given to the jury in said cause -

The Plaintiff by his counsel moved the Court to instruct the jury as follows

Plffs instructions No 1 In Replevin no demand is necessary to be proved by the plaintiff in cases of illegal taking which instruction the Court gave to the jury

Plffs instruction No 2. The Court instructs the jury that if they believe from the evidence that the heifer in controversy was the property of the plaintiff and that the Defendant obtained possession of her without authority from Plaintiff Bond then no demand by the Plaintiff is necessary - which instruction the Court refused to give the jury -

Plffs instruction No 3 If the heifer in question is the property of the Plff and the taking by the Defendant was illegal then no demand is necessary and the taking would be illegal unless the authority to take said heifer came from the Plaintiff Bond which instruction the Court refused to give and the Plaintiff then and there except

and the court then gave the following instructions on the part of the deft - No 1

It is the duty of the jury in passing upon the evidence in this case to take into consideration the reasonableness or unreasonableness of the testimony as given by the Piffs witnesses which instruction the court gave

No 2 . Defts instruction

If the jury believe from the evidence that the deft was rightfully in the possession of the property - that the Piff made no demand upon the deft. for this property before this suit was brought then the law is for the deft which instruction the court gave

Defts Instruction No 3

If the jury believe from the evidence that the property belongs to the plaintiff and that it strayed off and was kept through the winter by other parties and that Wheeler in the Spring claimed the heifer and took her away from there where had kept her and sold her to deft then in order to maintain Replevin against the deft for the heifer : Piff must first have made a demand for it which instruction the court gave & the Piff then and there excepted -

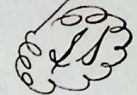
The court then sent the jury in charge of an officer to consider the case & make up their verdict shortly after which said jury

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came into court and handed to the Court their written verdict as follows "We find for the Defendant" whereupon the Court put the verdict in the following form. "We find the Defendant not guilty and entered the same of Record - after entering the verdict the Court asked the jury if that was their verdict to which they responded that it was - The Court then stated to the jury that for his own information and for the information of counsel in the case he would like to know whether they had founded their verdict upon the finding that the property belonged to the Defendant or because there was no demand - they responded because there was no demand - then the Court said and you did not consider the other question; they replied that they did not make up a verdict - or that some were for Jeff & some for Jeff -

Whereupon the Plaintiff moved the Court to send the jury out to decide the question as to who owned the heifer which the Court refused to do and thereupon discharged the jury from the further consideration of the case. Jeff then moved for a new trial which motion the Court overruled and gave judgment on said verdict so put in form and awarded a writ of Return Habends. Whereupon the counsel for the said Louis Bernk then and there made their exceptions to the said opinion of the Court in that behalf and inasmuch as the matter aforesaid do not appear upon the Record of the said Court prayed that the Judge

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would sign and seal this their Bill of
exceptions and make it a part of the Record
of said case which is accordingly done

Chas R Starr 
Judge of the 20th Judicial Circuit

State of Illinois
Kankakee County

I, John B Welch Clerk of the
Circuit Court in and for said County in
the State aforesaid do hereby certify that the forego-
ing is a correct transcript of the Record of the
proceedings of the Kankakee County Circuit Court
in a certain cause lately pending therein in
which Louis Bourn was Plaintiff and William
Riggs was defendant as appears from the Records
and files of said Court now in my said office
Witness my hand and seal of said
Court at Kankakee City Illinois in
said County this 22^d day of March
AD 1865



John B Welch Clerk

Louis Bourk }
vs
William Riggs }
Replevin

Record

#6⁰⁰ PD by Jeff
Bourk

The State of Illinois
Third Grand Division
Louis Bank Proff
in Error

In Supreme Court
April Term
1865-

Assignment of
Errors

vs

William Riggs
Left in Error

And now comes the Said Louis
Bank Proff in Error and says
there is manifest Error in the
record and proceedings aforesaid in
this to wit

1 The Circuit Court Erred in
refusing to give Proff instruction
No 2 which is as follows to wit
The Court instructs the Jury that
if they believe from the Evidence
that the higer in controversy was the
property of the plaintiff and that
defendant obtained possession of her
without authority from plaintiff
Bank then no demand by the Proff
is necessary

2 In refusing to give plaintiffs
instruction No 3 which is as
follows to wit If the higer in
question is the property of the

3^d

plaintiff and the taking by the
 defendant was illegal then no
 demand is necessary and the
 taking would be illegal unless
 the authority to take said heifer
 came from the plaintiff. Now
 in giving 5th instruction No 3 which
 is as follows to wit If the Jury
 believe from the Evidence that the
 cow was rightfully in the possession
 of the property that the plaintiff
 made no demand upon the
 defendant for this property before
 this suit was brought then the
 law is for the defendant

4th

In giving 5th instruction No 3
 which is as follows If the Jury
 believe from the evidence that the
 property belongs to the plaintiff
 and that it strayed off and
 was kept through the winter by
 other parties and that Strater in
 the Spring claimed the heifer and
 took her away from there where
 he had kept her and sold her
 to Axt then in order to

maintain Replevin against the
act for the hifter plaintiff must
first have made a demand for
it.

5th In changing the Recard of the Jury

6th In refusing to grant a new trial

7th In giving Judgment in favor of
Def

8th In not giving Judgment in favor of
Def

9th In refusing to send the Jury out to
decide who owned the hifer

10th In awarding a Writ Returns
habeas for the property
By reason whereof the said plaintiff
says that Judgment may be
reversed

C. A. Loke Loke
Att'y for Def in
Error

State of Illinois } ss. In Supreme Court
Third Judicial Division }
In April Term 1865-

Louis Burke Plff }
vs }
In Error }
William Riggs def }
In Error }

And the said William Riggs defendant in error; now comes and says that there is no error either in the record and proceedings aforesaid, or in giving judgment aforesaid in manner and form as above assigned and therefore he prays that the said judgment may be affirmed and that his costs may be adjudged to him &c

By James M. Little for def in error

Louis Bouch
vs
William Riggs

212 94
Bouch
vs
Riggs

Filed April 5. 1825
L. Leland
Clerk

SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

April Term, A. D. 1865.

LOUIS BOURK,
vs.
WILLIAM RIGGS } *Error to Kankakee County.*

ABSTRACT OF RECORD.

2 Louis Bourk filed his affidavit for writ of error before John
3 B. L. Lemoin. L. B. for writ of replevin and writ issued be-
4 ing dated August 4th, 1865. Writ returned served and
5 bond taken Narr filed for taking and delivering one heifer and
one calf. Trial had before the justice with a jury and in-
judgment for the defendant, and the plaintiff appealed to the
Circuit Court.

7 Jury empaneled and case tried, and verdict in favor of the
defendant.

9 Bill of exceptions.

STATE OF ILLINOIS, } Circuit Court of the December Term,
Kankakee County, ss. } 1864, appeal from a J. P. Replevin.

LOUIS BOURK, }
vs.
WM. RIGGS. }

Be it remembered that on the trial of this cause at the
December term A. D. 1864, of the Kankakee County Circuit

Court, the said Lewis Bourk to maintains the issue on his part gave in evidence to the jury, a writ and return in the following words and figures to-wit, State of Illinois Kankakee county, ss. The people of the State of Illinois; to any constable of said county greeting, Whereas, Lewis Bourk plaintiff complains that William Riggs defendant, unlawfully detains and holds from the plaintiff, the following described goods and chattles to-wit: One brown cow nearly black, two years old last spring, having a white spot in the face and some white under the belly one ear split and crop off the other; also, one sucking calf, red lined back, therefore you are hereby commanded that if the said plaintiff shall give you bond with good, and sufficient security in double the value of said goods and chattles as required by law to prosecute his suit without delay and to make return of said goods and chattels of return thereof, shall be rewarded, and to save and keep you harmless in replevying said goods and chattels, you cause the same to be replevied and delivered to the said plaintiff without delay, and also that you summon the said defendant to be and appear before me at my office, in Kankakee City, in said County, on the 13th day of August, A. D. 1864, at 10 o'clock A. M. to answer 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 take of the plaintiff before executing this writ given under my hand and seal, this 4th day of August, A. D. 1864. John B. L. Lemoine, Justice of the Peace. Said writ was indorsed on the back as follows

I have served the within writ, by replevying the within described property, and delivering the same to the within named Louis Bourk, and by reading the within writ to William Riggs, this the 4th day of August, 1864. R. D. Sherman, Constable: fees, \$2.50. And the said plaintiff to further maintain the issue on his part, offered the testimony of one Noel Spinard, who testified as follows: I live in the town of St. Ann, in Kankakee County. I am acquainted with the plaintiff Bourk, I lived about one mile from him during the year 1863, and for some time before; I know the cow or heifer in dispute; she is a dark brown color, nearly black, with a white spot in forehead, between the horns, also a white spot on the belly, her right ear has a diamond shaped crop; dont remember whether left ear, was slit or not, her horns were black; saw the heifer

frequently at Bourks place, saw her there last time about a year ago last June; the next time I saw her was in Aug. last, at the time of the trial; can swear it was the same heifer I saw at Bourk's place; don't think I can be mistaken; plaintiff further offered the testimony of Napoleon Wood, who testified as follows: "I live in Bourbonnais, Kankakee County, Illinois; know the plaintiff; know the heifer in question; she formerly belonged to Henry Marquis, who lived with me and kept the heifer in my yard; Bourk bought the heifer of Marquis in the winter of 1862, or spring of 1863; the heifer is a dark brown color, white spot in forehead, a white spot on belly; it had no marks on ears when Bourk took it away; it was a nice, smooth-built heifer, and I noticed it particularly because it was so pretty, and I wanted to buy it myself; the last time I saw the heifer was in August last, at the trial of this cause before the justice; it is the same heifer Bourk bought of Marquis; I am very sure and cannot be mistaken; there may have been other cattle marked the same as this, don't remember to have seen any." The plaintiff further offered the testimony of one Henry Marquis, who testified as follows: "Live in Bourbonnais, Kankakee County, Illinois; am acquainted with plaintiff Bourk; know the heifer in dispute; I sold it to Bourk, I think in February or March, 1863; it was a dark brown heifer, with white spot in forehead and a small white spot on the belly, and black horns; she had no ear marks when I let Bourk have her: I saw her afterwards on Bourk's place; she then had a diamond shaped crop out of her right ear: I saw her afterwards, last August, on trial of this cause before the justice; this is the same heifer I sold to Bourk; am sure of it and do not think I can be mistaken; she was a fine shaped creature, and when I owned her I noticed particularly the white spot on her belly; it was so small and round being about half an inch in diameter, I never saw but one calf marked near like this one; I know because I was acquainted with the mother of them, and saw both heifers when they were sucking the cow; the heifer is now about three years and a half old." The plaintiff further offered the testimony of one Alexander Fayette, who testified as follows; "I live in the town of St. Anne; am acquainted with plaintiff, have worked for him in the spring of 1863, know the cow in dispute, fed her with Bourk's other cattle at the time, all the time I worked for him; she is of a dark brown

- color, nearly black, with a white spot in forehead, and white spot in flank; she has a diamond shaped crop out of right ear and the left ear is split; all of Bourk's cattle were marked in the same way; it is his mark for cattle; the heifer had black horns; the last time I saw her was about the last of June last year, before she strayed away from Bourk; saw her again sometime about August last, at the time of the trial of the cause before the justice; am very sure it was the
- 13 same cow I fed on Bourk's place; don't think I can be mistaken." Plaintiff, to further maintain the issue, on his part, offered to the jury the testimony of one Alphonzo Bourk, who testified substantially as follows: I am a brother of the plaintiff, have lived with him a good deal; stay there sometimes 3 or 4 weeks, and sometimes longer: lived with him in the spring of 1863, know the cow or heifer in dispute; saw her on my brother's place frequently in the spring of 1863; her color is dark brown; she has a white spot in the forehead and on the belly, diamond shaped crop out of right ear, and a split in the left ear; this is my brother's cattle mark; saw the cow about two months ago: am sure it is the same one that was on my brother's place in the spring of 1863; I noticed her because she was so fine and pretty; and then the said plaintiff rested his cause. The defendant, to maintain the issue on his
- 14 part, offered the testimony of one Thomas Switzer, who testified as follows: "Live at Sugar Island, in Kankakee County, know the heifer, in question; she was taken up in the fall of 1863, or winter of 1864, by Mr. Streeter, a neighbor of mine, with two or three other cattle; saw the heifer at the time of the trial of this cause, before the justice; to the best of my judgment it is the same heifer taken up by Streeter; defendant further offered the testimony of one Jane Stretter, who testified as follows: am acquainted with defendant Briggs, know the heifer in question; she was taken up by us in the fall of 1863 with two other cattle; Streeter and Briggs came in the spring and took her away; Streeter claimed her and paid us for keeping her; saw the heifer at the time of the trial of the cause before the justice; it is the same heifer taken up by Streeter.

Defendant further offered the testimony of one S. S. Streeter, who testified as follows: Live in Michigan; in 1863 I lived on the Massit farm, in the town of Aroma; I am acquainted with the heifer in dispute; I sold her to the defendant Briggs

she, with several others strayed away in the fall of 1863; in February, 1864, I found her at Streeter's, and in March I took her away and paid the keeping; she had a square crop off right ear, and slit in the left ear; I brought her, with several others from Chicago, when she was a sucking calf; some of
15 the other cattle that I brought from Chicago were marked in the same way as this heifer is; I know this heifer; she is a brown heifer; I sheared some hair out of this heifer's tail; my cattle were also branded: I did not look to see whether the brand was on this heifer or not, and then the defendant rested his case and there was no other evidence given to jury in said case. The plaintiff by his counsel, moved the court to instruct the Jury as follows: Plaintiffs instructions No. 1. In replevin no demand is necessary to be proved by the plaintiff in cases of illegal taking, which instruction the court gave to the jury.

Plaintiff's instructions No. 2. The court instructs the jury, that if they believe from the evidence that the heifer in controversy was the property of the plaintiff, and that the defendant obtained possession of her without authority, from plaintiff Bourk, then no demand by the plaintiff is necessary—which instruction the court refused to give the jury.

Plaintiff's instructions No. 3. If the heifer in question is the property of plaintiff, and the taking by the defendant was illegal, then no demand is necessary, and the taking would be illegal, unless the authority came from the plaintiff Bourk, which instructions the court refused to give, and the plaintiff then and there excepted.

16 And the court then gave the following instructions on the part of the defendant, No. 1. It is the duty of the jury in passing upon the evidence in this case, to take into consideration the reasonableness or unreasonableness of the testimony as given by the plaintiff's witnesses which instruction the court gave.

No. 2, Defendant's instructions. If the jury believe from the evidence that the defendant was rightfully in the possession of the property, that the plaintiff made no demand upon the defendant for this property before this suit was brought then, the law is for the defendant which instruction the court gave.

Defendants instruction No. 3. If the jury believe from the evidence that the property belongs to the plaintiff, and that it strayed off and was kept throughout the winter by other parties, and that Streeter in the spring claimed the heifer, and took her away from there--where had kept her and sold her to defendant then in order to maintain replevin against the defendant for the heifer. Plaintiff must first have made a demand for it which instructions the court gave, and the plaintiff then and there excepted.

The court then sent the jury in charge of an officer to consider the case and make up their verdict, shortly after which said jury came into court and handed to the court their written verdict, as follows: "We find for the defendant whereupon the court put the verdict in the following form: "We find the defendant not guilty, and entered the same of record after entering the verdict, the court asked the jury if that was their verdict, to which they responded that it was. The court then stated to the jury that for his own information, and for the information of counsel in the case, he would like to know whether they had founded their verdict upon the finding that the property belonged to the defendant, or because there was no demand--they responded because there was no demand--then the court said, and you did not consider the other question; they replied that they did not make up a verdict, or that some were for plaintiff, and some for defendant, whereupon the plaintiff moved the court to send the jury out to decide the question as to who owned the heifer which the court refused to do, and thereupon discharged the jury from the further consideration of the case. Plaintiff then moved for a new trial, which motion the court overruled and gave judgment on said verdict, so put in form and awarded a writ returno habendo. Thereupon the counsel for the said Louis Bourk then and there made their exceptions to the said opinion of the court, in that behalf, and in as much as the matters aforesaid, do not appear upon the records of the said court, prayed that the said judge would sign this his bill of exceptions, and make it a part of the records of said case which is accordingly done.

THE STATE OF ILLINOIS,	} <i>In Supreme Court, April Term, A. D. 1865—Assignment of Errors.</i>
Third Grand Division, Louis	
Bourk, Plaintiff in Error,	
<i>vs.</i>	
William Biggs, Defendant in	
Error,	

And now comes the said Louis Bourk, Plaintiff in error, and says there is manifest error in the record and proceedings aforesaid, in this, to wit;

- 1 The Circuit Court erred in refusing to give plaintiff instruction number two, which is as follows, to wit: The court instructs the jury, that if they believe, from the evidence, that the heifer in controversy was the property of the plaintiff, and that defendant obtained possession of her without authority from plaintiff Bourk, then no demand by the plaintiff is necessary.
- 2 In refusing to give plaintiff's instruction number three, which is as follows, to wit: If the heifer in question is the property of the plaintiff and the taking, by the defendant, was illegal, then no demand is necessary, and the taking would be illegal unless the authority to take said heifer comes from the plaintiff Bourke.

3d.—In giving defendant's instruction number two, which is as follows, to wit: If the jury believed, from the evidence, that the defendant was rightfully in possession of the property that the plaintiff made the demand upon the defendant for this property, before this suit was brought, then the law is for the defendant.

4th.—In giving defendant's instruction number three, which was as follows: If the jury believe, from the evidence, that the property belongs to the plaintiff, and that it strayed off and was kept through the winter by other parties, and that Streeter in the spring claimed the heifer and took her away from there where they had kept her and sold her to defendant, then, in order to maintain replevin against the defendant for the heifer, plaintiff must first have made a demand for it.

6th. In refusing to grant a new trial.

5th. In changing the verdict of the jury.

7th. In giving judgment in favor of Defendant.

8th. In not giving judgment in favor of Plaintiff.

9th. In refusing to send the jury out to decide who owned the heifer.

10th. In awarding a writ retorno habendo for the property, by reason whereof the said plaintiff pays that said judgment may be reversed.

C. A. LAKE,
Attorney for Plaintiff in Error.

BRIEF AND POINTS RELIED ON BY PLAINTIFF IN ERROR.

When the jury informed the court that they had not decided who owned the heifer in question, it was his duty to have sent them out and have them decide the whole case, as the question of ownership was in issue. James H. Johnson vs. James H. How, vol. 2, Gillman ; reports page 342 and 343 and 345.

The court had no right to award a writ retorno habendo. It is enacted as follows : Sect. 6, page 434, revised statutes of 1845. If any plaintiff in the action of replevin, shall fail to prosecute his suit with effect and without delay, or shall suffer a non suit or discontinuance, or if the right of property shall be adjudged against him, the court shall give judgment for a return of the property retaken." It is apparent therefore that unless the title for the present at least is in the defendant, that the court cannot give judgment for a return of the property. Plaintiff's instructions No. 1 and No 2, is the law and ought to have been given by the court. Defendants instructions No. 3, and four is not the law, and ought not to have been given by the court. One person may justify his possession of an others property, under the estray laws, but to do so he must show he has complied with their terms, the mere statement or pretense, that he has the property as an estray will not answer, nor will it require the plaintiff to make a demand before replevying.

C. A. LAKE,
Attorney for Plaintiff in Error.

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Louis Bouché

as
Mrs Riggs

Abstract

Given Apr 24 1861
G. L. Bouché