

14548

No. _____

Supreme Court of Illinois

Berger

vs.

Riggs

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 253

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

Benger

L

864

Benger

L

14548

Supr Cant
Bryer Stein {

Peter Regg }

This is closed on the ~~inter~~ Dept in
and makes the total to the bill of
Captains in this case

Aug 25. 1864

A. H. Humphreys
at the Dept

253

Supreme Court

May 1. 1864

Peter Riggs

"

Stipulation v. v. v.

Seal to Bill of
Exception

Given April 28. 1864

L. L. L. L.

Be it remembered that on the 13th day of
October A.D. 1863 a praecipe was filed in the
office of the Circuit Court of Warren County
Illinois, and thereupon a summons issued
out of said Court which said praecipe and sum-
mons are in the words and figures following
to wit:

State of Illinois } October Term A.D. 1863
Warren County } of the Warren Circuit Court

George J. Burgen
& Frederick P. Sisson
partners under name of
Burgen & Sisson
vs
Peter Riggs

Clerk please issue
summons in above cause returnable as
above action to appear on the case on prom-
-ised damages two hundred dollars.

Jos. R. Raper
atty for Pet

"Filed Oct 13" 1863 W. Loferty clk"

State of Illinois }
Warren County } The People of the State of Illinois
To the Sheriff of Warren County, Greeting:

We command you to summon Peter Riggs, if to
be found in your County, personally to be and appear
before the Circuit Court of the County of Warren, on
the first day of the next term thereof to be holden

partners under name of
 Bergum & Sisson
 vs
 Peter Riggs

The Plaintiffs in this suit
 George I Bergum and Frederick P Sisson partners
 doing business under the name and style of Ber-
 gum & Sisson by J H Ripley their attorney
 complain of Peter Riggs defendant herein
 of a plea of trespass on the case on promises
 For that whereas the said plaintiffs heretofore
 to wit: on the twenty seventh day of July in
 the year of our Lord one thousand Eight hundred
 and sixty three were engaged in the occupation
 and doing the business of Government contract-
 -ors for the purchase of horses and mules for the
 use of the army of the United States, and being
 so engaged in such occupation and business,
 the said Defendant on the day and year afore-
 said at and within the County of Warren and
 State of Illinois aforesaid, in consideration that
 the said plaintiffs at the special instance and
 request of the said Defendant would buy of the
 said Defendant a certain horse at and for a
 certain price or sum of money to wit:
 the sum of Eighty dollars the therefor paid by
 the said plaintiffs, undertook and then and there
 faithfully promised the said plaintiffs that
 the said horse then was his the said Defend-
 -ant's own property. And the said plaintiffs
 aver that they confiding in the said promise

and undertaking of the said Defendant did afterwards, to wit: on the day and year aforesaid at and within the County and State aforesaid buy the said horse of the said Defendant, and then and there paid him for the same the said sum of money: Nevertheless the said Defendant & contriving and fraudulently intending to injure the said plaintiffs did not perform or regard his said promise and undertaking so by him made as aforesaid, but thereby craftily and subtly deceived and defrauded the said plaintiffs in this, to wit: that the said horse at the time of the making of the said promise and undertaking of the said defendant was not the property of the said Defendant, but on the contrary was the property of the Government of the United States, whereby the said horse was wholly lost to said plaintiffs, by the taking of the same, afterwards to wit: on the tenth day of September A.D. 1863 from the possession and control of said plaintiffs by one Charles E. Dewey, a duly authorized agent of said Government for the reclaiming of lost or stolen horses, to wit: at the County aforesaid, and thus the said plaintiffs have been put to great charges and expence of their moneys in and about feeding, keeping and taking care of said horse in the whole amounting to a large sum of money, to wit: the sum of fifteen dollars, to wit: at the County aforesaid,

5

and the said plaintiffs further aver that they have by reason of the non-performance by the said Defendant of his promise and undertaking aforesaid, been deprived of a large sum of money, to wit: the sum of fifty Dollars which would have accrued to said plaintiffs as profits upon the sale by them of said horse to said Government of the United States, which said sum of money, by reason of the default of said Defendant, was wholly lost to said plaintiffs, to wit: at the County aforesaid,

And for that whereas also the said Defendant on the twenty seventh day of July AD 1863 at and within the County of Warren and State of Illinois aforesaid; in consideration that the said plaintiffs at the like special instance and request of the said Defendant would buy of the said Defendant a certain other horse at and for a certain price or sum of money to wit: the sum of Eighty dollars to be therefor paid by the said plaintiffs, undertook and then and there faithfully promised the said plaintiffs, that the title to and right of property in said horse, which he the said Defendant should then and there transfer to said plaintiffs should be perfect, absolute and unincumbered. And the said plaintiffs aver that confiding in the said promise and undertaking of the said Defendant, they did, afterwards, to wit: on the day and year last aforesaid, ~~and~~ at and

within the County and State aforesaid buy the said
 horse of the said Defendant, and then and there paid
 him for the same the said sum of money:
 Nevertheless the said Defendant contriving and
 fraudulently intending to injure the said plain-
 tiffs did not perform his said promise and
 undertaking so by him made as aforesaid
 but thereby craftily and subtly deceived and
 defrauded the said plaintiffs in this, to wit:
 that the title to, and right of property in said
 horse so transferred at the time aforesaid by
 the said Defendant to said plaintiffs was not
 perfect, absolute and unincumbered, but on the
 contrary thereof that the said title and right
 of property so pretended to be conveyed by the
 said Defendant was wholly worthless and no right
 of property was passed from said Defendant to
 said plaintiff, but that the perfect title to and
 sole right of property in said horse was and
 is in the United States, whereby said horse was
 wholly lost to said plaintiffs, and was after-
 wards to wit: on the 10th day of September A.D.
 1863, taken from the possession of said plaintiffs
 by the authority of the United States aforesaid,
 to wit: at the County aforesaid: And thus the
 said plaintiffs have been put to great charges
 and expense of their moneys in and about the
 feeding, keeping and taking care of said horse
 in the whole amounting to a large sum of money
 to wit: the sum of fifteen dollars to wit: at

the County aforesaid

And for that whereas also the said Defendant on the first day of October in the year of Our Lord One Thousand eight hundred and Sixty three at and within the County of Warren and State of Illinois aforesaid became and was indebted to the said Plaintiffs in the sum of One hundred dollars for money by the Plaintiffs before them lent and advanced to the said Defendant at his special instance and request; and also in the further sum of Eighty dollars for so much money by the said Defendant before them had and received to and for the use of the said Plaintiffs; and also in the further sum of one hundred dollars for so much money by the said Plaintiffs before them paid laid out and expended for the said Defendant at his special instance and request; And whereas the said Defendant afterwards, to wit: on the day and year last aforesaid at and within the County aforesaid in consideration of the premises respectively, undertook and then and there faithfully promised the said Plaintiffs to pay them the said several last mentioned sums of money ~~respectfully~~ respectively on request.

Yet, the said Defendant not regarding his said promises & undertakings has not as yet paid the said several sums of money

or any or either of them or any part thereof
to the said plaintiffs, but the said Defendant
to pay them the same has hitherto altogether
neglected and refused & still does refuse.

To the damage of the said plaintiffs of
two hundred dollars & therefore they bring
their suit

John H. Ripley
Atty for Plffs

Peter Riggs to
George J. Bergen
& Frederick P. Sisson by
name of Bergen & Sisson

Oct 1/63 To money lent & advanced

" " had & recd

" " paid laid out &c

Dr.

\$100.00

80.00

100.00

"Filed Oct 16th 1863. Wm. Lafayette C/2"

Copy of plea filed in said cause -
George J. Bergen & } Warren Leitch
Frederick P. Sisson } Court
partners &c }
as }
Peter Riggs }

October Term QD. 1863

And said Defendant comes
& defends the wrong injury when &c & says that
he did not undertake or promise in manner
& form as the said plaintiff hath above there-
of in said Declaration complained against
him & of this he puts himself upon the

9

County &c

3 +

A.G. Kirkpatrick D.A.

Plaintiff doth the like

Jas K Ripley

P.A.

"Filed Oct 26th 1863

Wm Lafferty Clerk

State of Illinois }
Warren County }

Pleas before the Honorable Charles

B Lawrence Judge of the Tenth Judicial Circuit
of the State of Illinois, at a Circuit Court
begun and held at the Court House in the City
of Mazonia in Warren County in the State
of Illinois, on the fourth Monday in the Month
of October in the year of Our Lord One Thousand
Eight Hundred and Sixty three, It being the 26th
day of said Month

Present the Honorable

Charles B Lawrence Judge

James A Stewart State Attorney

David C Riggs Sheriff

William Lafferty Clerk

George J Bergen &

Frederick Plisson

partners under name of

Bergen & Plisson

vs

Peter Riggs

Assumpsit

And afterwards, to wit:
on the 12th day of November AD 1863 the follow-
ing order was entered upon the records of said
Court which is as follows to wit:

George I Bergen & Frederick Plisson
 partners under the name of Bergen & Plisson
 us
 Peter Riggs } Assumpsit

This day came the parties by their attorneys and issue being joined for trial they put themselves upon the country. Thereupon came a jury, to wit: Lehaney Hatch, Wilson Sheldon, Hiram Breckinridge, Wm Porter, Benj H Gardner, David B Smith, David R. Shulton, Henry Cable, George W Johnson, James Clarke, W. J. Fathey & John Gamble who being duly elected and sworn to well and truly try the issue joined, and after ~~long~~ hearing the Evidence and arguments of counsel and receiving the instructions of the Court retired to consider of their verdict. and again returned into Court with the following verdict to wit: "We the jury find for the defendant" Thereupon came the Plaintiffs and entered their Motion for a new trial herein

And afterwards to wit on the 14th day of November A.D. 1863. the following order was entered upon the records of said Court, to wit:

George I Bergen & Frederick Plisson
 partners under name of Bergen & Plisson
 us
 Peter Riggs } Assumpsit

Now on this day this cause coming on to be heard on the Plaintiffs

Motion for a new trial herein, and after hearing the same the Court overrules the motion, and the verdict of the jury is the judgment of the Court, thereupon it is considered by the Court that the said Defendant have and receive of the said Plaintiff his costs by him in this suit made and may have Execution therefor, Thereupon came the Plaintiff and enter their motion for an appeal to the Supreme Court, which is allowed by the Court, upon the said Plaintiff entering into Bond in the penal sum of Two Hundred dollars with security which by agreement of the parties is to be approved by the Clerk of this Court, And Plaintiff have sixty days to file their Bond and Bill of Exceptions by consent and agreement of parties

Warren County Circuit Court

George S. Bergen.
 Frederick P. Bisson

vs

Peter Riggs

State of Illinois }
 Warren County } p

Be it remembered that at the October Term A.D. 1863 of the Circuit Court held in and for the County of Warren and State of Illinois at the Court House in Wommonth on the 12th day of November A.D. 1863 at the October Term of said Circuit Court before the Hon. B. Lawrence Judge.

The issue joined between the parties aforesaid came on to be tried by a jury of the County aforesaid for that purpose duly impanelled and sworn and upon the trial of said issue the Counsel for the Plaintiffs to maintain said issue on their part called De Riggs a witness on behalf of the Plaintiffs who being sworn testified as follows.

I am a brother of the Defendant Peter Riggs. I am acquainted with the Plaintiffs and William D. Look - I know the horse in question - I sold the horse as agent of Peter Riggs - was authorized by the Defendant to sell him - sold him to Wm D. Look - I suppose he was agent for Plaintiffs - the horse was sold in the summer, some time in July or August last.

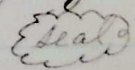
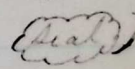
- I told Mr. Look it was my brother's horse -

Cross Examined witness testified, I told him I had a horse I wanted to sell him - drove around the town - tried him - I got on him and rode him - If he smited he said he would give Eighty dollars - and he finally paid me eighty dollars & took the horse - There was no special warranty of the horse I acted as the agent of my brother in the sale of this horse - I told him it was my brother's horse - I paid the money over to my brother in twenty minutes after I received it. Look said nothing about being agent for Plaintiffs or any one else. I knew nothing about that.

William D Look - a witness called on behalf of Plaintiffs. objected to be defendant, and sworn on his voir dire said - I was purchasing horses for Bergen and Sisson for a proportion of profits - I have settled with Bergen and Sisson for this horse - They have paid me It will make no difference with me which way the verdict goes in this case my arrangements with Bergen and Sisson was if loss, I was to stand my proportion, they furnished the money and bore expenses. I received a proportion of profits. I have acted for some time as agent of Bergen & Sisson - I still act as their agent - I have never acted as a partner but only as I have stated as agent I still act as agent & was

employed as such, the share of profits I received was only a mode of compensation for my services. I acted under their orders and had no control of the business. I have been paid by them for the same & settled the whole matter with them. They have given me a written release, which was produced & read as follows viz -

"Know all men by these presents that we George I Bergen and Frederick P Sisson partners under the name of Bergen & Sisson, that for and in consideration of the sum of one dollar to us in hand paid by William D Look we do hereby release the said William D Look from all liability on or on account of any judgment that may be rendered against us in a certain cause where we are Plaintiffs and one Peter Riggs is defendant brought to recover the purchase price of a certain horse and damages for breach of warranty thereon which was bought by us of said Peter Riggs through said Look as agent & taken as a U.S. Animal from us by C E Dewey. And we do further release the said William D Look from all liability to us for or on account of any damages we may sustain by reason of the purchase of said horse by said Look - In witness whereof we have hereunto set our hands & seals this 26th day of October AD 1863

Geo. I Bergen 
 F P Sisson 

They were in business before they employed me - only employed me as agent afterwards -

Cross Examined witness said - I purchased horses - they furnished the money - they dispose of the horses - I got one third, Bergen and Sisson two thirds, I shared one third of losses as well as profits. If we made \$15. on a horse my share was \$5. If we lost \$15. I lost \$5. I bought the horses they furnished the money and sold the horses. We have settled as to this horse in controversy, this was all the testimony as to the competency of Look, whereupon against the objections of defendant, the Court permitted said Look to be sworn in chief to which ruling of the Court the defendant then excepted.

Said Witness William Look was then sworn in chief & testified as follows - I know the parties to this suit. I purchased the horse in question for Bergen and Sisson the Plaintiffs in this suit. I purchased him the 27th of July 1863 - of David L. Riggs acting for his brother Peter Riggs - He said he was selling for his brother - I gave 80 dollars for the horse - paid the money - I discovered a brand upon the horse three or four weeks after I bought him U.S. on the left fore shoulder - It was not perceptible when I bought him. It is the brand the United States use for their animals

The brand I did not see at the time of purchase - examined pretty thoroughly - after horse began to shed I noticed it - I was not informed at the time of the purchase that there had been such brand - I notified Calvin Riggs and he went to his brother the Defendant with me & I notified him of the brand and requested him to take the horse and return the money - he refused to take the horse back -

Crop Examined Witness said - in answer to the following interrogatory - what did he say when he refused to take the horse and what reasons did he give for refusing? (objected to by Pltff as incompetent but the objection was overruled by the Court, to which ruling of the Court, the Plaintiffs then and there duly Excepted)

The first reply was that he had disposed of a part of the money, I offered to take part of the money and a due bill for the balance - Did he say the horse was his? (objected to by Plaintiffs not because leading in form but as improper in substance, objection overruled by the Court, to which ruling of the Court Plaintiffs by their Counsel duly Excepted) He claimed that the horse was his horse - I made an offer to give back the horse - It was soon after I discovered the brand, I never brought the horse down here - The Horse was taken away under assumed Authority of the United States by Charles E. Drury who claimed to act as Quartermaster

Agent for the Western Division of the United States Army - head quarters at St. Louis, He left what he called a receipt, Receipt offered which reads as follows

Galesburg Ill. Sept 10th 1863

This is to certify that I have this day taken from Bergin & Lison one bay horse about fifteen hands and one inch high about eight years old with a crooked bone at root of his tail, with three white feet - one in front branded U.S. - by my Authority as per order given from Col Myers at St Louis Sept 7th 1863

Chas E Dewey D.M.A.

objected to by defendant, which objection was sustained by the court, to which ruling of the court Plaintiffs by their Counsel then and there duly Excepted - Witness resumed I have never seen the horse since he has been taken away - the cost of taking care of the horse was 30 cents a day from July 27th to Sept 10th. The Plaintiffs then offered to prove what said horse was worth in the Market, this Evidence relative to the Expense of keeping the horse was objected to by the Defendant and on his motion Excluded by the court, to which ruling the Counsel for the Plaintiffs then and there duly Excepted.

The Counsel for the Plaintiffs then and there offered to show that this horse was purchased for the Chicago Market by the Plaintiff

of the Defendant which was well understood by both parties at the time and to show his value in the Chicago Market and the costs of transportation to be deducted - (which was objected to by the Defendant as not the proper measure of damages which objection was sustained by the Court and the Evidence excluded - to which ruling of the Court the Counsel for the Plaintiffs then and there duly excepted) He would have been worth now \$105 - was worth at the time of purchase \$90. - I know this brand was the United States Brand - at the inspection of horses I have seen Inspector brand horses, "U S" and all their horses are so branded

Joseph K. Ripley - a witness sworn in behalf of Plaintiffs testified. The Wm Myers whose name is subscribed to that order acts as Quarter Master of the Western Division of the Army, and has the Rank of Colonel. I have seen his handwriting upon official papers passing through the Quarter Master's Department, that is the signature, I never saw Myers, I learn this man Myers was (and has been) and is Quartermaster and know he ranks as Colonel, I have not personally corresponded with him, I know in fall or winter of 1862 he was acting Quartermaster in the Western Division of the United States Army. I was Clerk in the

Quarter Masters Department four or five months at Fort Donaldson Tennessee. He has charge of the Western Division of Quarter Masters Department. I never saw him, all I know is from papers that were frequently passing through my hands signed by him as Quarter Master. My connection with the affair closed in January AD 1863 (the signature of the order was by Wm Loomis here admitted to have been genuine). Order of ~~Myers~~ Col. Myers offered and Receipt of Dewey again offered which order and receipt were severally objected to by the defendant, but were admitted in evidence by the Court, to which decision of the Court admitting said order and receipt the defendant then Exceeded, said order reads as follows.

Assistant Quarter Master's Office St. Louis Mo
Sept 7th 1863

Chas E Dewey Q.M.A.

You will proceed to Illinois and take possession of such United States Animals as you may find and bring the same to Saint Louis

Wm Myers Col & A.Q.M.

W D Look recalled said - this description contained in the receipt offered in evidence is a correct description of the horse

Plaintiffs hear closed their case

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The defendant to maintain the issue on his part then called John Riggs who being sworn testified as follows - I am son of defendant - I know the horse - the first time I saw the horse was in Macon Co. Missouri - It was on the prairie - a soldier belonging to the State Militia came with the horse to father's and wanted to swap him until his back got well, father let him have another horse which he took and left this one the soldier was not wearing the U.S. uniform father kept the horse three or four weeks when the Militia man came after him, father would not let him go without having his own horse back, afterwards the soldiers came again took the horse, kept him three or four days and then brought him back again, soon after that father took the horse down to Head Quarters at Palmyra, I went with him, we saw there an officer who called himself Provost Marshall He and father had some talk about the horse and he told father to take the horse home again - that it was all right, father did so, father never got back the horse he let the soldier have for this horse -

De Riggs a witness sworn testified - I was not present when he tendered the horse, they came together & I stopped

Motion on the part of defendant to exclude the evidence of Look - Overruled -

W D Look, recalled by the Court testified -

I never was known as a partner with Bergen and Sisson or acted as such - I was not known nor did I act as such in the purchase of this horse - I only purchased as the Agent of Bergen & Sisson for them and in their name alone - I was not known as a party at all in the contract or negotiations, nor as a joint contractor with them -

The Evidence here closed, the foregoing being all the evidence given on the trial -

The Court at the request of the Plaintiffs thereupon gave the following Instructions:

The Court is requested to instruct the jury on behalf of the Plaintiffs as follows: viz -
 1st That if the jury believe upon the the Evidence that the Defendant by his agent sold & delivered the horse in question to the Plaintiffs & said horse in fact at the time belonged to the United States & was a part of the Equipment of the Army or Soldiers of the United States & was subsequently taken from the possession of the Plaintiffs under the authority of the United States by any Military officer of the United States or by his directions then the jury should find a verdict for the Plaintiffs for such damages as they have sustained by the loss of said horse the law being that every man who sells &

23.

delivers personal property to another person implicitly warrants the title to said property & guarantees that he is the owner thereof, although he does not warrant by express terms & in fact is wholly silent as to the ownership of the property at the time of sale -

2d

In determining who was the owner of the horse in question at the time of sale & whether or not it belonged to the United States, the fact that the horse was branded with the United States brand "U.S." if they find in the evidence such fact to exist is itself (especially, in connection with the defendant's admissions as to the ownership when notified that the horse had this brand on him) if they find such fact in the evidence is proper & legitimate evidence for the consideration of the jury on this question of ownership & is to be considered by them in deciding whether the horse belonged to the defendant or to the United States at the time of said sale by the defendant to the Plaintiff if they find such sale to have taken place -

And the Court modified said first instruction by adding the following words, to wit:
"If the jury find for the Plaintiff the measure of damages will be the price paid for the horse and six per cent interest from the sale to this time"

and the Court modified the said second instruction by striking out the following words to wit:
 "Especially in connection with the Defendants admissions as to the ownership ~~where~~ notified that this horse had this brand on him) if they find such facts in the evidence is" - And by adding the following words, to wit:

"Such evidence is to be considered by the jury in connection with the other evidence and is to have such weight as the jury may think it deserves,"

also No 9. as follows to wit:

9th A Provost Marshall has no authority by virtue of his office to sell the horses and property of the United States and in the Army of the United States, and any such sale made by him would be void. Property of this description must be duly inspected and condemned by the proper authority under the laws of the United States & sold upon such inspection & condemnation a sale would be valid.

But the Court modified said 9th instruction by striking out the following words, to wit:

"Property of this description must be duly inspected and condemned by the proper authority under the laws of the United States & sold upon such inspection & condemnation a sale would be valid"

And by adding the following words, to wit:

"unless he was authorized to make such sale by an officer commanding a Department or an army in the field"

The Counsel for the Plaintiffs then read there requested the Court to give the following instructions on the part of the Plaintiffs

- 3 If the jury are satisfied upon the evidence that the horse in question prior to his purchase by the Defendant or alleged acquisition of the title by him, actually belonged to the United States & was a part of the equipment of the army of the United States & of any soldier or soldiers thereof, no title claimed by the Defendant to have been acquired from the United States being valid unless the horse has been condemned or sold in the manner & by the proper officers, authorized by the laws of the United States to condemn & sell the same the jury before they can find that the title of said horse was legally acquired by said Defendant prior to the time of sale to the Plaintiffs if such sale was had, must be satisfied upon the evidence that a Board of Survey or Inspectors was had & the property was duly inspected & that it was by a commander of a Department or of an army in the field ordered to be held it was regularly sold in pursuance of the laws of the United States & in the particular manner provided thereby - otherwise said sale would be void unless the evidence shows that

refused

the United States Brand of the letter "C" was branded on said horse, in which case it might be evidence of the due condemnation thereof; but the absence of such brand is also evidence for the consideration of the jury to show that the horse was never legally condemned & sold; & if the jury are satisfied that the horse prior to the sale to the Plaintiffs actually belonged to the United States, & was never legally sold to the Defendant or the title legally acquired by the Defendant directly or remotely under a legal sale by the United States & further find that it was after the sale to the Plaintiffs duly taken from him by due authority of the United States, or by any of the officers of the United States, lawfully authorized to take possession of said horse, then they should find a verdict for the Plaintiffs for such legal damages as they may have sustained in consequence of the loss of said horse.

4th No mere statement of the Defendant, is legal or competent evidence of a sale by the United States to the Defendant, provided the jury upon the evidence, that the horse belonged to the United States & was a part of the equipment of any soldier or soldiers of the Army of the United States, but such sale must be proved by the production of the proper papers, instructions &c required by law before a sale can be legally be had & must show

the proper steps to authorize such sale, to have been actually taken by competent proof thereof -

5th If the jury find for the Plaintiffs & find that the Defendant is liable under the Evidence upon his implied warranty of title to the horse, the proper measure & general rule of damages which the jury have a right to allow, is the price paid for the horse with six per cent interest thereon to the time of trial & also such special damages as the Plaintiffs may have sustained in keeping & taking care of said horse after the sale to him until he was taken away from plaintiffs possession

6 If the jury find for the plaintiffs, they are authorized to find as damages the actual value of the horse at the time of sale to the Plaintiffs

7 The jury if they find for the plaintiffs are authorized to allow as damages, the actual value of the horse in the Market, & for the purpose for which he was purchased, deducting the necessary expenses of removal to the place of destination - provided they find upon the Evidence that he was purchased by the Plaintiffs & held by the Defendant for a particular purpose & a particular market

8 The mere fact that W^d Look purchased the horse in question of the Defendant's agent unless Look represented himself as a member of the firm

refused

of Bergen & Sisson or claimed to purchase as a partner, or was so understood by Defts Agent at the time of the sale, does not constitute the sale as a sale by Bergen Sisson & Look jointly, nor prove or tend to prove that the action is improperly brought in the name of Bergen & Sisson alone - without joining Look -

refused

10 The jury are instructed that the initials "U.S." placed upon public property by mark or brand is the general and legally recognized method of designating the same as property of the Government of the United States, and that such mark or brand when found upon property is prima facie evidence that the same is Government property

refused

11 If the jury find for the plaintiffs then the measure of damages will be the value of the property at the time he was taken from the Plaintiffs, if the jury believe he was so taken - or the price said horse would have commanded in the market for which said Plaintiffs were buying at the time of the purchase of said horse from the Defendant.

refused

12 The jury are instructed that the brand "U.S." when found upon ~~the~~ an animal, in the absence of any other mark or brand, and unexplained by other circumstances raises the presumption that such

animal is the property of the Government of the United States

13 The jury are instructed that if they believe from the Evidence that the Defendant sold to the plaintiffs a horse with the brand "U S" upon him, and that such brand was not perceptible at the time of said sale, and that said Defendant did not disclose the existence of such brand, then such failure to disclose the existence of said brand is in itself a concealment of the same, and is a circumstance from which the jury may infer fraud on the part of said Defendant & which entitles the plaintiffs at his Election to disaffirm said Contract of sale & recover back the price paid for said horse & for which plaintiff in that case would be entitled to a verdict

refused

Which the Court severally refused to give - to which ruling of the Court in refusing to give each separate instructions so refused by the Court, the Counsel for the Plaintiff then and there duly separately and severally Excepted.

The Court against the Plaintiffs Objection also modified the following Instructions asked by the Plaintiffs as follows.

1st That if the jury believe upon the Evidence that the Defendant by his agent sold & delivered the horse in question to the Plaintiff & said horse in fact

at the time belonged to the United States & was a part of the Equipment of the Army or Soldiers of the ~~Army~~ United States & was subsequently taken from the possession of the plaintiffs under the authority of the United States by any Military officer of the United States or by his direction then the jury should find a verdict for the plaintiffs for such such damages as they have sustained by the loss of said horse, the law being that every man who sells & delivers personal property to another person impliedly warrants the title to said property & guarantees that he is the owner thereof, although he does not warrant by Express terms, & in fact is wholly silent as to the ownership of the property at the time of the sale. If the jury finds for the plaintiffs the measure of damages will be the price paid for the horse and Six per cent interest from the sale to this time.

2^d In determining who was the owner of the horse in question, at the time of sale & whether or not it belonged to the United States, the fact that the horse was branded with the ~~brand~~ United States Brand "U S" if they find in the evidence such fact to exist, is itself proper & legitimate evidence for the consideration of the jury on this question of ownership & is to be considered by them in deciding whether the horse belonged to the Defendant or to the United

31
given

status at the time of said sale by the defendant to the plaintiffs if they find such sale to have taken place. Such evidence is to be considered by the jury in connection with the other evidence and is to have such weight as the jury may think it deserves.

given

9th A Provost Marshall has no authority by virtue of his office to sell the horses and property of the United States and in the army of the United States, and any such sale made by him would be void unless he was authorized to make such sale by an officer commanding a department or an army in the field,

To each and every of which modifications of the Court of the several instructions as read by the Plaintiffs and given as modified by the Court the Counsel for the Plaintiffs then and there duly and severally & separately objected and Excepted.

The Court at the request of the Defendant thereupon gave the following instructions
2^d The jury are instructed that it is not necessary in order to make Cook a partner with the plaintiffs that he should furnish any of the money for the purchase of the horses but if Cook furnished his skill & labor in buying the horses and had a joint interest in the profit and losses sustained or to be

given

sustained in the purchase & sale of such horses
 then he was as much a partner as if he had
 furnished a part or the whole of the money;
 and if he was an open partner with Bergin &
 Sisson in the purchase of horses & known as
 such then the jury will find for the defendant
 but if the jury believe from the evidence that
 Look was only a dormant partner then it
 was not necessary that he should be a co-
 plaintiff. And if the jury find from the
 Evidence that he was only a dormant part-
 ner, then the jury in deciding the case
 will disregard all that has been said about
 the partnership and decide the case without
 reference to that question.

3 The jury are instructed that possession is
prima facie evidence of the ownership of
 personal property, and if they believe from
 the Evidence that defendant had possession
 of the horse for about one year prior to the
 sale then in order to overthrow such prima
facie case it was incumbent on plain-
 tiffs to prove that the title to the horse
 was not in the defendant but in the United
 States.

4 The jury are instructed that it is incum-
 -bent on the plaintiff in this case to prove
 the same as alleged & if they have failed

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give

either in proving that the horse was the property of the United States when Defendant sold him, or have failed to prove that the plaintiffs bought the horse of Defendant in manner & form as alleged they should find for Defendant

give

5th The evidence in regard to Dewey taking the horse off was not admitted for the purpose of showing that the title of the property was in the government, but was admitted for the purpose of showing that the plaintiffs lost the horse

give

6 The jury are instructed that it is incumbent on plaintiffs in this case to prove their case and although it may appear that the horse was branded U.S. yet unless the proof shows that the letter "e" did not appear on the horse, then no presumption whatever can be had from the fact that U.S. was branded on said horse

12th The jury are instructed that if they believe from the Evidence that the horse in question never belonged to the United States service but belonged when Riggs got the same, & a member of the Missouri State Militia and was by him in good faith traded to said Riggs for another horse, they will find for Defendant, although they may also believe

from the evidence that said horse was taken from the possession of said Plaintiffs by a duly authorized Quarter Master's Assistant acting under an order from Col Myers Assistant Dr. Master General for the Western Division of the U.S. Army -

2nd the giving of each of the several instructions by the Court on the part of the Defendant the Counsel for the plaintiffs then and there duly separately and severally objected and Excepted -

The jury found a verdict for the Defendant - as follows -

"We the jury find for the Defendant" And thereupon the Plaintiffs came and made their motion for a new trial as follows -

State of Illinois } Actoten Term AD 1863 of the
Warren County } Warren Circuit Court

George J. Bergin & {
Frederick P. Lison {
name & style of {
Bergin & Lison {

vs
Peter Riggs }

And now come the said plaintiffs

35-

and move the Court for a new trial herein
for the following reasons, to wit;

- 1st The verdict is against the Law
- 2nd The verdict is against the Evidence in
the case
- 3rd The Court improperly refused each of the
several instructions asked by the plaintiffs
numbered 3, 4, 5, 6, 7, 8, 10, 11, 12, & 13.
- 4th The Court improperly modified instructions
asked by the plaintiffs numbered 1, 2, & 9.
- 5th The Court improperly allowed instructions
asked by the Defendant numbered 2, 3, 4,
5, 6, & 12.
- 6th The Court admitted improper Evidence on
the part of the Defendant & objected to by the
plaintiffs
- 7th The Court refused to allow proper Evidence
offered by the plaintiffs & excluded by the Court
- 8th The Court Erred in refusing each & several
instructions asked for by the plaintiffs & refu-
sed by the Court.
- 9th The Court Erred in giving each & several instruction
asked for by the Defendant & given by the Court

Frank & Ripley
Attys for Plff

"Filed Nov 13th 1863 Wm. Laferty Clerk"

Which motion for a new trial was overruled by
the Court, to which ruling of the Court in
denying said motion the Counsel for the

Plaintiffs then and there duly excepted.

And because none of the said Exceptions so offered and made to the opinion and decision of the said Circuit Judge, do appear upon the records of the said trial - thereupon on the prayer of the said Plaintiffs by their Counsel the said Circuit Judge hath to this Bill of Exceptions put his seal according to the Statutes in such case made and provided this 20th day of December AD 1863

C. B. Lawrence
Circ. Judge

"Filed Jan'y 9th 1864 Wm. Laferty Clerk"

Circuit Court, Warren County
George I. Bergen & } Oct Term AD 1863
Frederick P. Sisson }
vs
Peter Riggs }

This case having been tried & verdict for defendant, 60 days have been allowed to file a Bill of Exceptions & appeal Bond: It being doubtful whether an appeal lies & the remedy is not exclusively by writ of Error; it is stipulated that if the Plaintiffs take an appeal, instead of writ of Error, no exception shall be taken to that mode of removing the cause to the Supreme Court & the said appeal shall not be dismissed on that account.

A. G. Kirkpatrick

37

Nov 14th 1863

7

Atty for Deft
Repley & Frost

Atty's for Plffs

"Filed Jan'y 9th 1864 Wm Safford Clerk"

Know all men by these presents that we George I Bergen, Frederick P Sisson, W P Sisson & E. H. Weaver are held and firmly bound unto Peter Riggs in the full and true sum of Two hundred dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs and administrators, jointly severally and firmly by these presents

Witness our hands and seals this 9th day of January AD 1864
The condition of the above obligation is such that whereas the said Peter Riggs did at the October Term AD 1863, to wit: on the 14th day of November AD 1863, of the Circuit Court of Warren County Illinois, recover a judgment against said George I Bergen and Frederick P Sisson for the sum of Fifty One & 5/100 dollars costs of suit from which judgment the said George I Bergen and Frederick P Sisson have taken an appeal to the Supreme Court of the State of Illinois.

Now if the said Bergen and Sisson shall pay the said judgment, costs, interest and damages in case the judgment shall be affirmed, and shall prosecute their said appeal, then this obligation to be null and void, otherwise to remain in full force and virtue.

George I Bergen (Seal)

Frederick P. Sisson *Seal*

W. P. Sisson *Seal*

E. H. Weaver *Seal*

We do hereby authorize and empower Wm. Laferty
Circuit Clerk of Warren County or J. B. Frost
to fill in the amount of the judgment - and
amount of the penalty and all other blanks in
the above appeal bond, the same to have the
same effect & force as if filled in before signing
by us

George J. Bergen *Seal*

W. P. Sisson *Seal*

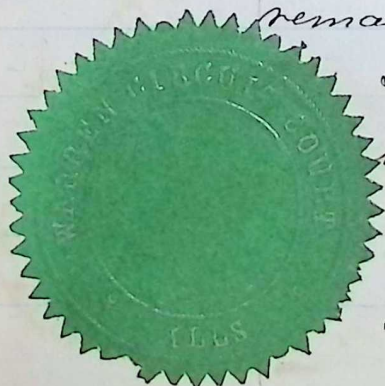
Frederick P. Sisson *Seal*

E. H. Weaver *Seal*

"Filed & approved by me this 4th
day of January AD 1864 Wm. Laferty Clerk"

State of Illinois }
Warren County }

I Wm. Laferty Clerk of the Circuit
Court in and for said County do hereby certify
that the above and foregoing ~~are~~ ^{are} true copies from
the records and files in the foregoing case as the
same appear from said record and files now
remaining in my office



In Testimony whereof I have hereunto set my
hand and affixed the Seal of our said Circuit
Court at my office in Moundville this 29 day of
January AD 1864

Wm. Laferty Clerk

Fees \$8.50 Paid by Plaintiff.

Supreme Court of the State of Illinois -
April Term A.D. 1864.

George J. Bergen ^{And}
Frederick P. Wilson
partners ~~to~~
Plaintiffs in error

vs

Peter Riggs
defendant in error

(in error)

Afterwards to wit on the 3^d Tuesday
of April in this same term. before the Justices of the Supreme Court
of the People of the State of Illinois at the Court Room in the City of
Ottawa comes the said George J. Bergen ^{And} Frederick P. Wilson
by Thomas B. Frost their Attorney and say that in the record ^{And}
say that proceedings aforesaid and also in giving the
judgment aforesaid there is manifest error in this to wit -
1st The Court erred in admitting the evidence offered by the
defendant and objected to by the Plaintiffs -
2^d The Court erred in excluding the evidence offered by the
Plaintiffs and objected to by defendant -
3^d The Court erred in overruling the Plaintiffs motion
for a new trial -
4th The Court erred in refusing each of the several
instructions asked by the Plaintiffs numbered 3. 4. 5. 6. 7. 8.
10. 11. 12 + 13.
5th The Court erred in modifying instructions asked by
the Plaintiffs numbered 1. 2. + 9.
6th The Court erred in allowing instructions asked by the

defendant numbered 3, 3, 4, 5, 6, + 12.

7th The Court erred in refusing each and several instructions asked by the Plaintiffs and refused by the Court.

8th The Court erred in giving each several instruction asked by the defendant and given by the Court.

9th The Verdict is against the law

10th The Verdict is against the evidence in the case

11th The Verdict is against the instructions of the Court.

And the said George J. Bergen and Frederick P.

Dixon pray that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings aforesaid may be reversed annulled and altogether held for nothing and that they may be restored to all things which they have lost by occasion of the said judgment &c

J. B. Frost

Attornies for Plaintiffs in error

And said deft in Error Peter Rigg comes & says that there are no such errors in said record as above set forth. He therefore prays for an affirmation of said judgment.

Al. H. H. H. H. H.
for deft in Error

253

George S. Bergen
as

Peter Riggs

Recd & Ins

Filed April 21, 1864
L. Leland
Clerk

Supreme Court of Illinois
April Term at St. Louis

George I. Bergen

et al.

v

Ernest W. Warren

Peter Riggs

The plaintiffs in error
move for leave to amend
or to permit the judge to amend
the Bill of exceptions filed herein
by attaching a seal to his
signature to the same.

J. G. Frost
Attorney for plaintiffs in error

²⁵³
George I. Bergant
Et al 3
Peter Riggs

Motion

BILL OF EXCEPTIONS.

WARREN COUNTY CIRCUIT COURT.

13 GEORGE I. BERGEN,
 FREDERICK P. SISSON,
 vs.
 PETER RIGGS.

STATE OF ILLINOIS, }
 WARREN COUNTY. } ss.

Be it remembered, that at the October Term, A. D. 1863, of the Circuit Court held in and for the County of Warren, and State of Illinois, at the Court House in Monmouth, on the 12th day of November, A. D. 1863, at the October Term of said Circuit Court, before the Hon. C. B. Lawrence, Judge,

The issue joined between the parties aforesaid came on to be tried by a jury of the County aforesaid, for that purpose duly empaneled and sworn, and upon the trial of said issue the counsel for the Plaintiffs, to maintain said issue on their part, called D. C. Riggs, a witness on behalf of the Plaintiffs, who being duly sworn, testified as follows:

I am a brother of the defendant, Peter Riggs; I am acquainted with the Plaintiffs and William D. Look; I know the horse in question. I sold the horse, as agent of Peter Riggs; was authorized by the Defendant to sell him; sold him to Wm. D. Look; I suppose he was agent for Plaintiffs. The horse was sold in the summer, sometime in July or August last. I told Mr. Look it was my brother's horse.

14 Cross-examined, witness testified: I told him I had a

horse I wanted to sell him. Drove round the town, tried him ; I got on him and rode him. If he suited he said he would give eighty dollars for him, and he finally paid me eighty dollars and took the horse. There was no special warranty of the horse ; I acted as the agent of my brother in the sale of this horse. I told him it was my brother's horse ; I paid the money over to my brother in twenty minutes after I received it ; Look said nothing about being agent for Plaintiffs or any one else ; I knew nothing about that.

William D. Look, a witness called in behalf of Plaintiffs, objected to by defendant, and sworn on his *voir dire*, said : I was purchasing horses for Bergen & Sisson for a proportion of profits ; I have settled with Bergen & Sisson for this horse ; they have paid me ; it will make no difference with me which way the verdict goes in this case ; my arrangements with Bergen & Sisson was, if loss, I was to stand my proportion. They furnished the money and bore expenses ; I received a portion of profits. I have acted for some time as agent of Bergen & Sisson ; I still act as their agent ; I have never acted as a partner, but only as I have stated, as
 15 agent ; I still act as agent, and was employed as such. The share of profits I received was only a mode of compensation for my services ; I acted under their orders, and had no control of the business ; I have been paid by them for the same, and settled the whole matter with them. They have given me a written release (which was produced), and read as follows, viz : " Know all men by these presents, that we, George I. Bergen and Frederick P. Sisson, partners under the name of Bergen & Sisson, that for and in consideration of the sum of one dollar, to us in hand paid by William D. Look, we do hereby release the said William D. Look from all liability on or on account of any judgment that may be rendered against us in a certain cause where we are Plaintiffs, and one Peter Riggs is Defendant, brought to recover the purchase price of a certain horse, and damages for a breach of warranty thereon, which was bought by us of said

Peter Riggs, through said Look, as agent, and taken as a U. S. Animal from us by C. E. Dewey. And we do further release the said William D. Look from all liability to us for or on account of any damages we may sustain by reason of the purchase of said horse by said Look. In witness whereof, we have hereunto set our hands and seals this 26th day of October, A. D. 1863.

GEORGE I. BERGEN, { SEAL. }

F. P. SISSON. { SEAL. }"

16 They were in business before they employed me; only employed me as agent afterwards.

Cross examined, witness said: I purchased horses; they furnished the money; they disposed of the horses; I got one-third, Bergen & Sisson two-thirds. I shared one-third of losses as well as profits; if we made \$15 on a horse, my share was \$5; if we lost \$15, I lost \$5. I bought the horses, they furnished the money and sold the horses. We have settled as to this horse in controversey.

This was all the testimony as to the competency of Look, whereupon, against the objection of Defendant, the Court permitted said Look to be sworn in chief, to which ruling of the Court the Defendant then excepted.

Said witness, William D. Look, was then sworn in chief, and testified as follows: I know the parties to this suit; I purchased the horse in question for Bergen and Sisson, the Plaintiffs in this suit; I purchased him the 27th of July, 1863, of David C. Riggs, acting for his brother, Peter Riggs. He said he was selling for his brother; I gave eighty dollars for the horse; paid the money. I discovered a brand upon the horse three or four weeks after I bought him; "U. S." on the left fore shoulder; it was not perceptible when I
17 bought him; it is the brand the United States use for their animals. The brand I did not see at the time of purchase; examined pretty thoroughly; after horse began to shed, I noticed it. I was not informed at the time of the purchase

that there had been such brand ; I notified Calvin Riggs, and he went to his brother, the Defendant, with me, and I notified him of the brand, and requested him to take the horse and return the money ; he refused to take the horse back.

Cross-examined, witness testified, in answer to the following interrogatory : What did he say when he refused to take the horse, and what reasons did he give for refusing ? (Objected to by Plaintiffs as incompetent, but objection was overruled by the Court, to which ruling of the Court the Plaintiffs then and there duly excepted.)

The first reply was, that he had disposed of a part of the money ; I offered to take part of the money and a due bill for the balance.

Did he say the horse was his ? (Objected to by Plaintiffs, not because leading in form, but as improper in substance. Objection overruled by the Court, to which ruling of the Court Plaintiffs, by their counsel, duly excepted.)

He claimed that the horse was his horse ; I made an offer to give back the horse ; it was soon after that I discovered the brand ; I never brought the horse down here.

The horse was taken away under assumed authority of the
 18 U. S., by Charles E. Dewey, who claimed to act as Quartermaster's Agent for the Western Division United States Army, Head Quarters St. Louis. He left what he called a receipt. Receipt offered, which reads as follows :

"GALESBURG, ILLS., Sept. 10th, 1863.

This is to certify that I have this day taken from Bergen & Sisson one bay horse, about fifteen hands and one inch high, about eight years old, with a crooked bone at root of his tail, with three white feet, one in front, branded "U. S.," by my authority as per order given from Col. Myers, at St. Louis, Sept. 7th, 1863.

CHAS. E. DEWEY, Q. M. A."

Objected to by Defendant, which objection was sustained by the Court, to which ruling of the Court, Plaintiffs, by their counsel, then and there duly excepted.

Witness resumed. I have never seen the horse since he has been taken away. The cost of taking care of the horse was 30 cents a day from July 27th to Sept. 10th. Plaintiffs then offered to prove what said horse was worth in the market.

This evidence, relative to the expense of keeping the horse, was objected to by the Defendant, and on his motion, excluded by the Court, to which ruling the counsel for the Plaintiffs then and there duly excepted.

The counsel for the Plaintiffs then and there offered to show that this horse was purchased for the Chicago market, by the Plaintiffs of the Defendant, which was well understood by both parties at the time, and to show his value in the Chicago market, and the cost of transportation to be deducted, (which was objected to by the Defendant as not the proper measure of damages, which objection was sustained by the Court, and evidence excluded, to which ruling of the Court the counsel for the Plaintiffs then and there duly excepted.)

He would have been worth now \$105; was worth at the time of purchase \$90. I know this brand was the United States brand; at the inspection of horses I have seen the Inspector brand horses "U. S.," and all their horses are so branded.

Joseph K. Ripley, a witness sworn in behalf of Plaintiffs, testified: The Wm. Myers whose name is subscribed to that order, acts as Quarter Master of the Western Division of the Army, and has the rank of Colonel. I have seen his handwriting upon official papers passing through the Quarter Master's Department; that is *the signature*; I never saw Myers; I learn this man Myers was (and has been) and is Quartermaster, and know he ranks as Colonel; I have not personally corresponded with him; I know in Fall and Winter of 1862 he was acting Quartermaster in Western Division of the U. S. Army; I was clerk in the Quartermaster's Department 4 or 5 months, at Fort Donelson, Tenn.; he has

charge of the Western Division of Quartermaster's Department; I never saw him; all I know is from papers that were frequently passing through my hands, signed by him as Quartermaster; my connection with the affair closed in January, A. D. 1863. (The signature to the order was, by Defendant's counsel, admitted to have been genuine.)

Order of Col. Myers offered, and receipt of Dewey again offered, which order and receipt were severally objected to by the Defendant, but were admitted in evidence by the Court, to which decision of the Court, admitting said order and receipt, the Defendant then excepted. Said order reads as follows :

" ASSISTANT QUARTERMASTER'S OFFICE, }
St. Louis, Mo., Sept. 7th, 1863. }

CHAS E. DEWEY, Q. M. A.

You will proceed to Illinois and take possession of such United States animals as you may find, and bring the same to St. Louis.

WM. MYERS, Col. & A. Q. M."

W. D. Look recalled, said : This description, contained in the receipt offered in evidence, is a correct description of the horse.

21 Plaintiffs here closed their case.

The Defendant, to maintain the issues on his part, then called John Riggs, who being sworn, testified as follows : I am son of the Defendant; I know the horse; the first time I saw the horse was in Macon county, Missouri; it was on the prairie; a soldier, belonging to the State Militia, came with the horse to father's, and wanted to swap him until his back got well. Father let him have another horse, which he took, and left this one; the soldier was not wearing the U. S. uniform. Father kept the horse three or four weeks, when the militia man came after him; father would not let him go without having his own horse back; afterwards the soldier came again, took the horse, kept him three or four days, and then brought him back again. Soon after that,

father took the horse down to Head Quarters at Palmyra; I went with him; we saw there an officer who called himself Provost Marshal; he and father had some talk about the horse, and he told father to take the horse home again, that it was all right. Father did so; father never got back the horse he let the soldier have for this horse.

D. C. Riggs, a witness sworn, testified: I was not present when he tendered the horse; they came together, and I stopped.

Motion on part of Defendant to exclude the evidence of Look; overruled.

- 22 W. D. Look re-called by the Court, testified: I never was known as a partner with Bergen & Sisson, or acted as such; I was not known nor did I act as such in the purchase of this horse; I only purchased as the Agent of Bergen & Sisson, for them, in their name alone; I was not known as a party at all in this contract, or regulations, nor as a joint contractor with them.

The evidence here closed, the foregoing being all the evidence given on the trial.

- 22 The Court, at the request of the Plaintiffs, thereupon gave the following Instructions:

The Court is requested to instruct the jury on behalf of the Plaintiffs, as follows, viz:

- 1st. That if the jury believe upon the evidence that the Defendant, by his agent, sold and delivered the horse in question to the Plaintiffs, and said horse in fact at the time belonged to the United States, and was a part of the equipment of the army or soldiers of the United States, and was subsequently taken from the possession of the Plaintiffs under the authority of the United States, by any military officer of the United States, or by his directions, then the jury should find a verdict for the Plaintiffs, for such damages as they have sustained by the loss of said horse, the law being that every man who sells and delivers personal property to
23 another person, impliedly warrants the title to said property,

and guarantees that he is the owner thereof, although he does not warrant by express terms, and in fact is wholly silent as to the ownership of the property at the time of sale.

2nd. In determining who was the owner of the horse in question at the time of sale, and whether or not it belonged to the United States, the fact that the horse was branded with the United States brand, "U. S." if they find in the evidence such fact to exist, is itself (especially in connection with the Defendant's admission as to the ownership, when notified that the horse had this brand on him) if they find such fact in the evidence, is proper and legitimate evidence for the consideration of the jury, on the question of ownership, and is to be considered by them in deciding whether the horse belonged to the Defendant or to the United States at the time of said sale, by the Defendant to the Plaintiffs, if they find such sale to have taken place.

And the Court modified said first instruction by adding the following words, to-wit: "If the jury find for the Plaintiffs, the measure of damages will be the price paid for the horse, and six per cent. interest from the sale to this time."

24 And the Court modified the said second instruction by striking out the following words, to-wit: "Especially in connection with the Defendant's admission as to the ownership, when notified that this horse had this brand on him, if they find such facts in the evidence is," and by adding the following words, to-wit: "Such evidence is to be considered by the jury in connection with the other evidence, and is to have such weight as the jury may think it deserves."

Also No. 9, as follows, to-wit:

9th. A Provost Marshal has no authority by virtue of his office, to sell the horses and property of the United States, and in the army of the United States, and any such sale made by him would be void. Property of this description must be duly inspected and condemned by the proper authority, under the laws of the United States, and sold upon such inspection and condemnation, a sale would be valid.

But the Court modified said 9th instruction, by striking out the following words, to wit: "Property of this description must be duly inspected and condemned, by the proper authority, under the laws of the United States, and sold upon such inspection and condemnation, a sale would be valid."

25 And by adding the following words, to wit: "Unless he was authorized to make such sale by an officer commanding a department or an army in the field."

The counsel for the Plaintiffs then and there requested the Court to give the following instructions on the part of the Plaintiffs:

Refused. 26 { 3. If the jury are satisfied upon the evidence that the horse in question, prior to his purchase by the Defendant, or alleged acquisition of the title by him, actually belonged to the United States, and was a part of the equipment of the Army of the United States, and of any soldier or soldiers thereof, no title claimed by the Defendant to have been acquired from the United States, being valid, unless the horse has been condemned or sold in the manner and by the proper officers authorized by the laws of the United States, to condemn and sell the same, the jury, before they can find that the title of said horse was legally acquired by said Defendant, prior to the time of sale to the Plaintiffs, if such sale was had, must be satisfied upon the evidence that a Board of Survey or Inspectors was had, and the property was duly inspected, and that it was by a commander of a department, or of an army in the field, ordered to be held, it was regularly sold in pursuance of the laws of the United States, and in the particular manner provided thereby, otherwise said sale would be void, unless the evidence shows that the United States Brand of the letter "C" was branded on said horse, in which case it might be evidence of the due condemnation thereof, but the absence of such brand is also evidence for the consideration of the jury, to show that the horse was never legally condemned and sold, and if the jury are satisfied that the horse, prior to the sale to the Plaintiffs, actually belonged to the United

States, and was never legally sold to the Defendant, or the title legally acquired by the Defendant, directly or remotely, under a legal sale by the United States, and further find it was after the sale to the Plaintiffs duly taken from him by due authority of the United States, or by any of the officers of the United States, by law authorized to take possession of said horse, then they should find a verdict for the Plaintiffs, for such legal damages as they may have sustained in consequence of the loss of said horse.

4th. No mere statement of the Defendant is legal or competent evidence of a sale by the United States to the Defendant, provided the jury, upon the evidence, believe that the horse belonged to the United States, and was a part of the equipment of any soldier or soldiers of the army of the United States, but such sale must be proved by the production of the proper papers, instructions, &c., required by law before a sale can legally be had, and must show the proper steps to authorize such sale, to have been actually taken, by
27 competent proof thereof.

Refused. { 5. If the jury find for the Plaintiffs, and find that the Defendant is liable, under the evidence, upon his implied warranty of title to the horse, the proper measure and general rule of damages which the jury have a right to allow, is the price paid for the horse, with six per cent. interest thereon, to the time of trial, and also such special damages as the Plaintiffs may have sustained in keeping and taking care of said horse, after the sale to him, until he was taken away from Plaintiffs possession.

Refused. { 6. If the jury find for the Plaintiffs, they are authorized to find as damages the actual value of the horse at the time of sale to the Plaintiffs.

Refused. { 7. The jury, if they find for the Plaintiffs, are authorized to allow as damages the actual value of the horse in the market, and for the purpose for which he was purchased, deducting the necessary expenses of removal to the place of destination, provided they find upon the evidence that he was purchased by the Plaintiffs and held by the Defendant for a particular purpose and a particular market.

28 Refused. { 8. The mere fact that Wm. D. Look purchased the horse in question of the Defendant's Agent, unless Look represented himself as a member of the firm of Bergen & Sisson, or claimed to purchase as a partner, or was so understood by Defendant's agent at the time of the sale, does not constitute the sale as a sale by Bergen & Sisson and Look, jointly, nor prove or tend to prove that the action is improperly brought in the name of Bergen & Sisson alone, without joining Look.

Refused. { 10. The jury are instructed that the initials "U. S., placed upon public property, by mark or brand, is the general and legally recognized method of designating the same as property of the Government of the United States, and that such mark or brand when found upon property is *prima facie* evidence that the same is Government Property.

Refused. { 11. If the Jury find for the Plaintiffs, then the measure of damages will be the value of the property at the time he was taken from the plaintiffs, if the jury believe he was so taken, or the price said horse would have commanded in the market for which said Plaintiffs were buying at the time of the purchase of said horse from the defendant.

29 Refused. { 12. The Jury are instructed that the brand "U. S." when found upon an animal, in the absence of any other mark or brand, and unexplained by other circumstances, raise the presumption that such animal is the property of the Government of the United States.

{ 13. The Jury are instructed, that if they believe from the evidence, that the Defendant sold to the Plaintiffs a horse with the brand "U. S." upon him, and that such brand was not perceptible at the time of said sale, and that said defendant did not disclose the existence of such brand, then such failure to disclose the existence of said brand, is of itself a concealment of the same, and is a circumstance from which the Jury may infer fraud, on the part of said defendant, and which entitles the plaintiff, at his election to disaffirm said contract of sale, and recover back the price paid for said

horse, and for which plaintiffs in that case would be entitled to a verdict.

Which the Court severally refused to give, to which ruling of the Court in refusing to give each separate instruction so refused by the Court, the counsel for the Plaintiffs then and there duly, separately and severally excepted.

The Court, against the Plaintiffs objection, also modified the following instructions, asked by the Plaintiffs, as follows:

30 { 1. That if the jury believe upon the evidence that the Defendant, by his agent, sold and delivered the horse in question to the Plaintiffs, and said horse in fact at the time belonged to the United States, and was a part of the equipment of the army or soldiers of the United States, and was subsequently taken from the possession of the Plaintiffs under the authority of the United States, by any military officer of the United States, or by his direction, then the jury should find a verdict for the Plaintiffs, for such damages as they have sustained by the loss of said horse, the law being, that every man who sells and delivers personal property to another person, impliedly warrants the title to said property, and guarantees that he is the owner thereof, although he does not warrant by express terms, and in fact is wholly silent as to the ownership of the property at the time of the sale. If the jury find for the Plaintiffs, the measure of damages will be the price paid for the horse, and six per cent. interest from the sale to this time.

31 { 2. In determining who was the owner of the horse in question, at the time of sale, and whether or not it belonged to the United States, the fact that the horse was branded with the United States brand, "U. S.," if they find on the evidence such fact to exist, is itself proper and legitimate evidence for the consideration of the jury on this question of ownership, and is to be considered by them in deciding whether the horse belonged to the Defendant or to the United States, at the time of said sale by the Defendant to the Plaintiffs, if they find such sale to have taken place, such evidence is to

be considered by the jury in connection with the other evidence, and is to have such weight as the jury may think it deserves.

Given. { 9. A Provost Marshal has no authority, by virtue of his office, to sell the horses and property of the United States, and in the army of the United States, and any such sale made by him would be void, unless he was authorized to make such sale by an officer commanding a Department, or an army in the field.

To each and every of which modifications of the Court, of the several instructions asked for by the Plaintiffs, and given as modified by the Court, the counsel for the Plaintiffs then and there duly and severally and separately objected and excepted.

The Court, at the request of the Defendant, thereupon gave the following instructions:

32 Given. { 2. The Jury are instructed, that it is not necessary, in order to make Look a partner with the plaintiffs, that he should furnish any of the money for the purchase of the horses, but if Look furnished his skill and labor in buying the horses, and had a joint interest in the profit and losses sustained or to be sustained in the purchase and sale of such horses, then he was as much a partner as if he had furnished a part or the whole of the money; and if he was an open partner with Bergen & Sisson in the purchase of horses, and known as such, then the jury will find for the Defendant; but if the jury believe from the evidence that Look was only a dormant partner, then it was not necessary that he should be a co-Plaintiff; and if the jury find from the evidence that he was only a dormant partner, then the jury, in deciding the case, will disregard all that has been said about the partnership, and decide the case without reference to that question.

"We, the jury, find for the Defendant."

Plaintiffs came and made their motion for a new trial, as follows :

34	STATE OF ILLINOIS, } WARREN COUNTY, }	ss.	<i>October Term, A. D. 1863, of the Warren Circuit Court.</i>
	GEORGE I. BERGEN, }		
	AND }		
	FREDERICK P. SISSON, }		
	name and style of }		
	BERGEN & SISSON, }		
	vs. }		
	PETER RIGGS. }		

And now comes the said Plaintiffs, and moves the Court for a new trial herein, for the following reasons, to-wit :

- 35 1st, The verdict is against the Law.
 2nd, The verdict is against the evidence in the case.
 3d, The Court improperly refused each of the several instructions asked by the Plaintiffs, numbered 3, 4, 5, 6, 7, 8, 10, 11, 12 and 13.
 4th, The Court improperly modified instructions asked by the Plaintiffs, numbered 1, 2 and 9.
 5th, The Court improperly allowed instructions asked by the Defendant, numbered 2, 3, 4, 5; 6 and 12.
 6th, The Court admitted improper evidence on the part of the Defendant, and objected to by the Plaintiffs.
 7th, The Court refused to allow proper evidence offered by the Plaintiffs, and excluded by the Court.
 8th, The Court erred in refusing each and several instructions asked for by the Plaintiffs, and refused by the Court.
 9th, The Court erred in giving each several instruction asked for by the Defendant, and given by the Court.

FROST & RIPLEY,

Attys for Plaintiffs.

Which motion was overruled by the Court.

To which ruling, Plaintiffs, by their counsel, then and there
35 duly, severally and separately excepted.

36 And because none of the said exceptions so offered, and
made to the opinion and decision of the said Circuit Judge,
do appear upon the record of the said trial, thereupon, on the
prayer of the said Plaintiffs, by their counsel, the said Circuit
Judge, hath, to this Bill of Exceptions, put his seal, accord-
ing to the Statutes in such case made and provided, this 20th
day of December, A. D. 1863.

C. B. LAWRENCE,
Circuit Judge.

36 The Parties entered into the following stipulations :

Circuit Court, Warren County, October Term, A. D. 1863.

GEORGE I BERGEN,
FREDERICK P. SISSON,

vs.

PETER RIGGS.

This case having been tried, and verdict for Defendant, 60
days have been allowed to file a Bill of Exceptions and Ap-
peal Bond, it being doubtful whether an appeal lies, and the
remedy is not exclusively by Writ of Errors, it is stipulated
that if the Plaintiffs take an appeal, instead of Writ of Error,
no exception shall be taken to that mode of removing the
cause to the Supreme Court, and the said appeal shall not be
dismissed on that account.

A. G. KIRKPATRICK,
Atty for Defendant.
FROST & RIPLEY,
Attys for Plaintiffs.

37 Appeal Bond.
38 Clerk's Certificate.

Assignment of Errors.

1st. The Court erred in admitting the evidence offered by the Defendant and objected to by the Plaintiffs.

2d. The Court erred in excluding the evidence offered by the Plaintiffs and objected to by Defendant.

3d. The Court erred in overruling the Plaintiffs motion for a new trial.

4th. The Court erred in refusing each of the several instructions asked by the Plaintiffs numbered, 3, 4, 5, 6, 7, 8, 10, 11, 12 and 13.

5th. The Court erred in modifying instructions asked by the Plaintiffs numbered 1, 2 and 9.

6th. The Court erred in allowing instructions asked by the Defendant numbered 2, 3, 4, 5, 6 and 12.

7th. The Court erred in refusing each and several instructions asked for by the Plaintiffs and refused by the Court.

8th. The Court erred in giving each several instruction asked for by the Defendant and given by the Court.

9th. The Verdict is given against the Law.

10th. The Verdict is against the evidence in the case.

11th. The Verdict is against the Instructions of the Court.

T. G. FROST,

Attorney for Plaintiffs in error.

250 97
George J. Bergen
Peter Riggs

Abstract

Filed April 21, 1864
L. Leland
Clerk

Abstract of the Proceedings in error

W. C. 21021

The Verdict is against the defendants in the case.

The Verdict is given in favor of the law.

The Court are in favor of the law.

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