

8447

No. \_\_\_\_\_

# Supreme Court of Illinois

John D.P.Hungate

---

vs.

Robert W.Rankin et al

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71641  7

Plas had before the Honorable Justice  
Harbau judge of the fourth judicial circuit  
in the State of Illinois, including the county  
of Clay at the May and October terms,  
of said court, held at the court house  
in the town of Louisville in the county  
of Clay and State of Illinois, in the year  
of our Lord one thousand eight hundred  
and fifty eight.

" State of Illinois Clay County  
Clay Circuit Court  
May Term A. D. 1858

Precipe

Robert M. Rankin &  
William L. Furkhouer

vs  
John D. P. Hungeate

Apumpsit  
in Damages \$10.00  
The Clerk of the said  
Circuit Court, will please issue sum-  
mons in the above entitled suit, return-  
able according to law &c.

And oblige

To

Constable p[ro]p[ri]ety

Jackson P. Hungeate Esq  
Clerk &c

Upon the back of which are the follow-  
ing endorsements, to wit;  
Clay Circuit Court May Term A. D. 1858

Robert M. Rankin & William L. Frank-  
houser vs John D. P. Hungate  
Assumpsit &c Damages \$1000 in  
Precipe &c.

Filed April 15th 1858

J. P. Hungate Clerk  
Constable Atty's

State of Illinois  
Clay County The People of the State  
Summons of Illinois. To the Sheriff of said County  
Greeting. We command you to summon  
John D. P. Hungate, if to be found  
in your county, to appear before the circuit  
court of Clay County, on the first  
day of the next term thereof, to be holden at  
the court-house in Louisville, on the first  
Monday in the month of May next  
to answer Robert M. Rankin & Willi-  
am L. Frankhouser of a plea of trespass on the  
case or promises, to them the said plaintiffs,  
damages of one thousand dollars as they say  
and hereof make due return to our said cou-  
rt as the law directs

Witness J. P. Hungate Clerk  
of our said court and the judicial  
seal thereof at Louisville, this 15th day  
of April A.D. 1858. J. P. Hungate Clerk

Upon the back of which summons, are the following endorsements &c

"No 138. May Term 1858. Robert M. Rankin  
Wm L<sup>y</sup> Frickhouser vs John D. P. Hingate  
ate" "Summons Deft" being 50 milage  
10 m 50 Returning 10 \$1.10"

Served this writ on the defendant John D.  
P. Hingate by reading the same to him  
on April 17<sup>th</sup> 1858. April 20<sup>th</sup> 1858.

H. Phelps Sheriff  
By B. F. Reynolds D. P.

State of Illinois, Clay County,  
Clay Circuit Court.

May Term A. D. 1858.

Robert M. Rankin and William L. Frickhouser, plaintiffs in this suit, (who sue for the use of Thomas A. Apperson) complain of John D. P. Hingate, the defendant herein, being summoned &c. of a plea of trespass on the case on promises &c. For that whereas, heretofore to wit, on the twenty eighth day of July, in the year of our Lord one thousand eight hundred and fifty seven, at the county of Clay and State of Illinois, the said plaintiffs by the name and style of R. M. Rankin and W. L. Frickhouser, at the special instance and request of the said defendant, bargained

with the said defendant, to buy of the said  
 defendant, and the said defendant then and  
 there sold to the said plaintiff, by such name  
 and style, a large number of hogs, to wit;  
 one hundred and seventy five head or more  
 of well fatted hogs, one hundred and fifty  
 of which were to weigh two hundred pou-  
 nds and upwards, and twenty five to weigh  
 one hundred and eighty pounds and up-  
 wards, at the rate or price of four dollars and  
 twenty five cents for each hundred pounds  
 said hogs might weigh in the gross, to be  
 delivered by the said defendant to the said  
 plaintiff, and by the said plaintiff, to be  
 received, on the part of the said defendant  
 between the first day and the tenth day of  
 December A. D. 1857, and to be paid for by the  
 said plaintiff, to the said defendant, on the  
 delivery thereof as aforesaid, eight hundred  
 dollars of the value of said hogs to be paid as  
 aforesaid, in gold, the balance thereof in good  
 currency, and in consideration thereof, and  
 that the said plaintiff, at the like special  
 instance and request of the said defendant,  
 had then and there undertaken, and faith-  
 fully promised the said defendant to  
 accept and receive the said hogs and to  
 pay him for the same, at the rate or price

aforesaid in manner aforesaid, he the said  
defendant undertook and then and there  
faithfully promised the said plaintiff to  
deliver to them the said hogs as aforesaid; and  
although the time for the delivery of the said  
hogs as aforesaid hath long since elapsed and  
the said plaintiff have always been ready  
and willing to accept and receive the said hogs,  
and to pay for the same at the rate or price of  
aforesaid in manner aforesaid; to wit; at the  
County aforesaid, whereof the said defendant  
hath always had notice, yet the said defend-  
ant, not regarding his said promise and un-  
dertaking in this behalf, but contriving  
and intending to deceive and defraud the  
said plaintiff, did not nor would within  
the time aforesaid, or at any time, before or after-  
wards deliver the said hogs or any part thereof  
to the said plaintiff, or for him, at the farm  
of him, the said defendant, or elsewhere,  
but wholly neglected and refused so to do, wh-  
ereby the said plaintiff hath lost and been de-  
prived of divers great gains and profits  
which might and otherwise would have aris-  
-en and accrued to him from the delivery of  
the said hogs to the said plaintiff as aforesaid  
to wit, at the county aforesaid, &c.

And whereas also afterwards, to wit, on the

(6)

twenty eighth day of July, in the year of our Lord one thousand eight hundred and fifty seven, at the County of Clay and State of Illinois, in consideration that the plaintiffs, at the special instance and request of the said defendant, had then and there bought of the said defendant a certain large number to wit; one hundred and seventy five head or more of well fatted hogs, one hundred and fifty of which were to weigh two hundred pounds or upwards, and twenty five to weigh one hundred and eighty pounds and upwards, at and for a certain price then and there agreed upon between them, he the defendant undertook and then and there faithfully promised the plaintiffs well and truly to deliver to them the said hogs at his farm in the said County, between the first day and the tenth day of December in the year aforesaid and the plaintiffs in part say, that although the time for the delivery of the said hogs in manner aforesaid hath long since elapsed and although they the said plaintiffs were then and there ready and willing to pay the said defendant for the same, according to the terms of the said bill and although the plaintiffs were then and there ready and willing, and offered to

receipt and receive the said last mentioned  
hogs of and from the said dependant, yet the  
dependant not regarding his last mentioned pro-  
mise and undertaking, did not, either within  
the time specified in the said contract of sale  
nor at any other time, before or since, deliver to  
the said plaintiff, at the place aforesaid  
or elsewhere the said last mentioned hogs, or  
any part thereof, but that he thereto wholly re-  
fused and still doth refuse, whereby the said  
plaintiff have lost and been deprived of di-  
vers great gains and profits, which might  
and otherwise would have arisen, and accrued  
to him from the delivery of the said last mentioned  
hogs to the said plaintiff, as aforesaid, to wit;  
at the county aforesaid, &c.

And whereas also heretofore to wit on the  
first day of March, in the year of our Lord one thou-  
sand eight hundred and fifty eight, at the  
county of Clay and state of Illinois, the said  
dependant was indebted to the said plaintiff  
in the sum of five hundred dollars for so much  
money by the said plaintiff before that time  
but did advanced to, and paid, laid out  
and expended for the said dependant and at  
his special instance and request - and also  
in the further sum of five hundred dollars  
for other money by the said dependant



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Before that time had and received to aid for  
the use of the said plaintiffs, and being so indebted,  
he the said defendant, in consideration thereof,  
afterwards, to wit, on the day and year aforesaid  
at the County aforesaid undertook, and then  
and there faithfully promised the said plain-  
tiffs to pay them the said several sums of  
money in this Court mentioned, when he  
the said defendant should be thereunto afterwar-  
ds requested. Yet the said defendant not re-  
garding his said promise and undertaking  
but continuing and intending to deceive and  
deprave the said plaintiffs in this behalf  
hath not as yet paid the said several sums  
of money in this Court mentioned nor  
any nor either of them nor any part thereof  
to the said plaintiffs (although often requested so  
to do); but the said defendant, to pay them  
the same hath hitherto wholly neglected and  
refused and still doth neglect and refuse so  
to do, &c.

To the damage of the said plaintiffs of one  
thousand dollars, and therefore they bring their  
suit, &c. Constable Attorney &c.))

And the plaintiff herewith in compliance  
with the statute in such case governing, files  
the instrument in writing on which this

Suit is brought together with a copy of the account sued on, to wit; "

Clay County Ill. July 28. 1854  
Article of W. John D. P. Hurgate have this day  
agreement sold to R. M. Rankin and S. Finkhouser  
one hundred and seventy five head or more  
of well fattened hogs, one hundred and fifty  
of said hogs to say two hundred pounds and  
upward, twenty five to say one hundred and  
eighty pounds and upward, said Rankin  
an co. to receive said hogs between the first  
and tenth of Dec on the farm of said Hurgate  
and pay four dollars and a quarter a  
hundred gross, eight hundred in gold, the  
balance in good currency. Witnesses our hands  
John D. P. Hurgate  
R. M. Rankin

John D. P. Hurgate

In account with  
Robert M. Rankin & W. S. Finkhouser

Dr.

1858 March 1st To Money loaned &c. \$500.00

" " had & rec'd &c. 500.00

C. C. \$1000.00

Constable, Atty.

On the back of which declaration are the fol-  
lowing endorsements &c.

"Clay Circuit Court May Term A.D. 1858.  
 Robert M. Rankin & William L. Furkhouser  
 vs. John D. P. Hingate.  
 Assumpsit, Declaration. Damages \$1000  
 Filed April 15th 1858.  
 J. P. Hingate Clerk  
 Constable, Attorney &c.

Of the Clay Circuit Court  
 for the year 1858.

John D. P. Hingate &  
 at Assumpsit  
 Robert M. Rankin &  
 William L. Furkhouser

Plea

And the said defendant  
 by Hewitt & Bryan his Atlys, comes and def-  
 ends the wrong & injury, when &c. and says  
 that he did not undertake and promise in  
 manner & power as the said plaintiffs have  
 or on thereof complain against him and  
 of this he puts himself upon the country &c.  
 Hewitt & Bryan Atlys.

And the plaintiffs doth the like  
 Constable Atty

The plaintiffs in the above cause will take  
 notice that in the trial of said cause the defen-  
 dant will give in evidence and rely upon a  
 beam of the contract set out in said declaration

Notice and file as the same by the said plaintiffs and will insist upon damages to the amount of five hundred dollars for the breach of said contract by the said plaintiffs &c.

Keomet & Bryan Attys

Upon the back of which are the following endorsements: " J. D. P. Hengate ats R. M. Rankin & W. L. Funkhouser.

Pleas General issue & Notice.

Filed May the 4th 1858

J. D. Hengate Clerk

At the May Term of the Clay Circuit Court in the state of Illinois, began & held at the Court house in Louisville on the first Monday of May in the year of our Lord one thousand eight hundred and fifty eight the following order was made and entered of record on Friday the fifth day of said Court, to wit;

Robert M. Rankin &

William L. Funkhouser

vs

John D. P. Hengate

Asampruit

Now on this day

It is ordered by the court that this cause be continued &c.

1st  
Order

Order

Order

At the October Term of the Circuit Court  
 held at the Court house in the town of Louis-  
 ville, County of Clay & State of Illinois  
 On the first Monday of the month of  
 October A.D. 1858. To wit on Friday the  
 fifth day of said court the following  
 proceedings were had and entered of  
 record &c

Robert M. Rankin & }  
 William L. Finkhouse }  
 vs }  
 John D. P. Hengate } Assumpsit

Now on this day  
 came the plaintiff by their attorney Constable  
 as well as the defendant by Hewet & Bryan  
 his attorneys, and this cause being submitted  
 to the court for trial without the interven-  
 tion of a jury, and after the hearing of  
 evidence, the court being advised, gives  
 a verdict for the plaintiff for the sum  
 of two hundred dollars and costs of suit  
 whereupon again comes the defendant by  
 his attorneys and moves the court for a  
 new trial, which motion is overruled.  
 It is therefore ordered by the court that the  
 plaintiff have and recover of and from  
 the defendant the said sum of two hundred

Dollars together with their costs herein about  
their suit expended and there of have execu-  
tion &c. And then again comes the depen-  
dant by his attorneys and takes exceptions  
to the overruling of the court upon the said  
motion for a new trial, and prays for an  
appeal to the supreme court of the state  
of Illinois. It is therefore ordered by the  
court that dependant file his in the sum  
of four hundred dollars, in the office of the  
clerk of the circuit court, with J. M. Moni-  
cal his security within thirty days &c

State of Illinois }  
Clay County }  
Know all men by these  
presents that we John D. P. Hengate and  
George M. Monical, are held and firmly  
bound unto Robert M. Rankin & Will-  
iam S. <sup>1st</sup> Shankhouse in the penal sum of  
four hundred dollars, for the payment  
of which well and truly to be made we  
bind ourselves, our heirs, executors, admin-  
istrators and assigns, with our hands  
and seals, this the twenty first day of  
October, in the year of our Lord one thousand  
eight hundred and fifty eight.

The condition of the above obligation  
is such that whereas the said Robert

Bond

M. Rankin & William L. Finkhouser did at the October term A.D. 1858 of the Circuit Court of Clay County, in the State of Illinois recover a judgment in an action of assumpsit against the above bounden John D. P. Hengate for the sum of two hundred dollars and costs of suit from which judgment the said John D. P. Hengate prayed an appeal to the Supreme Court of the State of Illinois. Now if the said John D. P. Hengate, shall prosecute his appeal to effect, or in case of failure thereof shall well and truly pay whatever judgment, costs interest and damages, that may be awarded against him, by said Supreme Court, in case the aforesaid judgment shall be affirmed &c.

John D. P. Hengate *Execut*  
 J. W. McConical *Execut*

Filed October the 26th A.D. 1858  
 J. P. Hengate Clerk

Fee Bill	
Clerk's costs	\$ 14.95
Sheriff "	11.05
Witness "	<u>25.00</u>
	\$ 51.00

State of Illinois }  
Clay County }

Certificate

W. Jackson P. Hunt  
Clerk of the circuit court of said county  
do hereby certify that the foregoing is a true  
and correct transcript of all the orders, pro-  
ceedings and papers, had and filed in my  
office appertaining to said cause.

Given under my hand and  
official seal at Parisville this  
the 6th day of November A.D.  
1858. J. P. Hargate  
Clerk



Appled from Lewis  
John

John D. P. Hingate

Robert M. Rankin

William L. <sup>24</sup> Frenchman

Clerks Costs 14.95

Sheriffs " 11.05

Witness " 25.00

State of Illinois  
Clay County

But it is remembered that at  
the October term of the Clay County Circuit Court for the year 1848 a Cause  
came on to be heard in which Robert K  
Rankin & William S Dunkhouser (who came  
for the use of Thomas A Apperson) were plaintiffs  
and John D W Hungeate was defendant  
and the said plaintiffs to sustain their  
claim introduced the following contract  
in writing & Clay County Illinois July 28<sup>th</sup>  
1847 I John D W Hungeate have this day sold  
to R K Rankin & S Dunkhouser one hundred  
and seventy five head of hogs <sup>among which</sup> one hundred  
and fifty of said hogs to weigh ~~two~~ two hundred  
pounds and upwards and twenty five to weigh  
one hundred and eighty pounds and upwards  
said Rankin & Co to receive said hogs  
between the first and tenth of December  
on the farm of said Hungeate and to pay  
four dollars and twenty five cents per  
hundred gross eight hundred in gold  
Dollars in good currency unless otherwise  
stated

J. M. Rankin

John D W Hungeate

on the terms of said contract was the following  
receipt: ~~Receipt~~ Received on the within con-  
tract two hundred dollars

John D W Hungeate

There was also on the back of said ~~contract~~  
contract a Receipt from Rankin to Apperson  
of two hundred dollars for said contract

Called on the 24th day of August 1887  
the plaintiffs then stated their case

Whereupon the defendant produced as  
a witness George Sherrill who testified that  
he knew Rankin ~~one~~ of the plaintiffs and  
the defendant, heard Rankin say that there  
was a plot laid to break the contract with the  
defendant at Chocoma on the morning of the  
tenth day of Dec 1887, that it was resolved to  
go to the defendant's house late in the evening  
of that day and not in time for him to weigh  
the hogs that they did not intend to take the  
hogs under the contract with Hungate but  
wanted to break the contract with the defendant

~~Dr. Boyer was next called as a witness for  
the defendant and stated that he heard Rankin  
say a day or two ago that they did not intend  
to take the hogs of Hungate when they went  
to his house~~

~~Mr. John Conly was called and testified that  
he knew the hogs of Hungate that he had about  
two hundred heads of hogs on the 9th of December  
last that he bought some <sup>one hundred</sup> of the hogs  
a short time after Rankin was there, the hogs  
were well fated and about 140 weighed ~~about~~  
two hundred pounds and more that some  
twenty or thirty more of the lot weighed one  
hundred eighty or more that pork was then  
selling from three to three dollars and fifty-  
cents per hundred~~

Dr Boyer was then called for the defendant and testified that he heard Rankin say a dog or two ago that it was understood when they went to the defendant's house that they would not take his hogs but wanted to break the contract with him.

John Conly was then called and testified that he lived in the neighborhood of the defendant and that he had nineteen well fated hogs which would weigh between two and three hundred pounds that he had sold them to the defendant to apply on his contract with the plaintiffs if he needed them and they were on the ~~street~~ day of the before that time. Subject to his order had seen the defendant's hogs through them a good lot of hogs.

— Sheila was then called & testified that she lived in a mile and a quarter or half of the defendant and had forty five or fifty head of hogs which he had sold to Rankin to the defendant to apply on his contract with the plaintiffs and that the hogs were under the control of the defendant when Rankin was there on December last and subject to his order that the hogs would weigh over two hundred pounds and were well fated that Rankin came to his house when the sun was about one hour high on the 10th of December last and told him that the defendant did

not have the hogs weight - and he would  
not take them

Mrs Minick was then called by the defendant  
and testified that she was at the house of the  
defendant on the tenth day of December last  
that late in the evening Rankin and others  
came to the house of defendant and asked  
him if he had the hogs weight and defend-  
ant said he had not but that he would  
weight them if there was time but he  
thought it was ~~too~~ late in the evening  
to get through - that the hogs were ready  
and he wanted him Rankin to take them  
under the contract. Defendant seemed  
very anxious to have Rankin take  
the hogs and Rankin objected because  
they were not already weighted and  
defendant proposed to commence weighting  
the hogs but Rankin said he had not  
time to get through before night.

The defendant then rested his case

The plaintiffs then called Mr. True as  
a witness who testified that he went  
with Apperson & Rankin to the house  
of the defendant on the tenth of December  
last that he went as the agent of Nichols  
who was to get the hogs from Apperson  
that he and Apperson went to the house  
of Rankin in the morning of the 10th December  
and Rankin wanted them to stay at his  
house till after an early dinner

That they did stay with Rankin till  
after dinner and then they rode over  
to the house of the defendant a distance  
of some eight miles or more witness thought  
it a long distance that they got to defend-  
ants about the middle of the afternoon that  
day and Rankin demanded the hogs of  
defendant or asked him if they were  
weighed and defendant said no. But  
that he could weight the hogs and that  
the hogs were ready but said there was  
not time to weigh them that evening but  
that he would commence and get through  
as soon as he could, that Rankin then  
proposed to guess at the weight of the  
hogs but that defendant said they  
could not do and did not appear will-  
ing to guess off the hogs that under  
Apperson's contract with Nichols he  
would have made money on the  
hogs for he had sold at five dollars per  
hundred to Nichols

Cross examined by defendant  
Saw Rankin and Apperson together  
through the day of the tenth of September  
December and thinks they were counseling  
or had an opportunity to counsel. Thinks  
that the understanding was not to take the  
hogs if they could see help it - that  
Rankin did not want to take the hogs  
if he could break the contract with

Hungate - Defendant appeared very anxious  
 that Hunkin would take the hogs and  
 wanted to commence weeping them that  
 evening

Whereupon the plaintiff and defendant  
 closed the case on both sides the above  
 being all the evidence in the cause  
 which was submitted to the court  
 by agreement for trial and the court  
 then proceeded to render judgment  
 for the plaintiff for two hundred dollars  
 And the defendant by his attorney entered  
 a motion ~~in court of judgment~~  
 for a new trial and assigned as ~~grounds~~  
~~of error the written contract in court of~~  
~~judgment that the contract offered in~~  
~~evidence by the plaintiff was not the~~  
~~the obligation in the document and~~  
 for error on motions for new trial  
 that the finding of the court was  
 contrary to the evidence and the  
 law in the case - the court overruled  
 the motions ~~in court~~ and for new trial  
 and entered judgment against the defend-  
 ant for two hundred dollars whereupon  
 the defendant prayed an appeal to the  
 Supreme court and it is granted and  
 thirty days given to file appeal <sup>with George W. Deffenbacher</sup> bonds  
 and he tenders this his bill of exceptions  
 And the court hereby certifies that the foregoing bill of exceptions  
 contains a true history of the proceedings in the case

52  
John G. P. Shreve

Robert M. Rankin  
William L. Rankin

Bill of Exceptions

Appeal from Clay -

Filed Nov. 10. 1858.

N. Johnston clk

Paid - \$5.00

And appellant avers  
for error in this case  
1<sup>st</sup> the finding of the  
Court was contrary to the  
evidence  
2<sup>d</sup> the judgment of the  
Court below was contrary to  
the Law and the facts and  
3<sup>d</sup> the judgment below  
was against Law and the  
evidence. *By* John G. P. Shreve  
for Rankin



# ABSTRACT.

JOHN D. P. HUNGATE, Appellant,  
vs.  
ROBERT W. RANKIN and WILLIAM  
L. FULKHOUSE, Suing for the use of  
Thomas A. Apperson, Appellee.

APPEAL FROM  
CLAY COUNTY.

- 1 Trespass on the case on promises.
- 2 Appearance of Defendant.
- 3 Trial by the Court without the intervention of jury, by consent of parties.  
Testimony of Plaintiff:

Written Contract between Plaintiff and Defendant:

Clay County, Illinois, July 25th, 1857.

I, John D. P. Hungate, have this day sold to R. M. Rankin and L. Fulkhouser one hundred and seventy-five head or more of well-fatted hogs--one hundred and fifty of said hogs to weigh two hundred pounds and upwards, twenty-five to weigh one hundred and eighty pounds; said Rankin and Co. to receive said hogs between the 1st and 10th of December, on the farm of said Hungate, and pay \$4 25 cents per hundred gross, \$800 in gold balance in currency.

JOHN D. P. HUNGATE.  
R. M. RANKIN.

Receipt on the back.

Received on the within contract, \$200.

JOHN D. P. HUNGATE.

Also assigned, Aug. 26th, 1857:

Received of T. A. Apperson \$200, for the within contract and above receipts.  
R. M. RANKIN.

- 5 Testimony of Defendant:  
George Monical being called, testified that he knew Rankin, one of the plaintiffs, and the defendant; that he heard Rankin say that there was a plot laid to break the contract with the defendant, on the morning of the 10th of December, 1857; that it was arranged to go to Defendant's house late in the evening of that day, but not in time to weigh the hogs; thought that they did not intend to take the hogs, but wanted to break the contract with Defendant; that he knew the hogs of Hungate—he had 200 head on the 9th of December last; that he bought 180 head of hogs off Hungate a short time after; Rankin was there; the hogs were well fatted; 140 weighed 200 pounds and upwards; some 20 or 30 weighed 180. That pork was selling from \$3 to \$3 50 per hundred.
- 6 Dr. Bougher testified, that he heard Rankin say, a day or two ago, that it was understood when they went to defendant's house that they would not take his hogs but wanted to break the contract.
- 7 John Connelly testified that he lived in the neighborhood of Defendant; that he had 19 well-fatted hogs, which weighed between 200 and 300 pounds; that he had sold them to Defendant to apply on his contract with Plaintiff; that on the 9th and 10th days of December they were subject to the order of Defendant. He had seen the hogs of Hungate, they were a good lot of well fatted hogs.
- 8 David Shields, was then called, and testified he lived within a mile of Defendant's; had 45 head of well-fatted hogs, which he had sold to Hungate to apply on his contract with Rankin; that the hogs were subject to the order of Hungate, when Rankin was there; that the hogs would weigh over 200 pounds; that Rankin came to his house when the sun was about one hour high on the 10th of December, and told him that Hungate did not have the hogs weighed, and he would not take them.
- 9 Margaret Monical testified, that she was at the house of Hungate on the 10th day of December last; that late in the evening Rankins and others came to the house of Defendant and asked him if he had the hogs weighed, and defendant

said he had not, but that he would weigh them, if there was time, but he thought it was too late in the evening to get through; that the hogs were handy, and he wanted him (Rankin) to take them under the contract. Rankin refused to take the hogs because they were not weighed. Hungate proposed to commence weighing them, but Rankin said he had not time to get through before night.

70 The Plaintiff (Rankin) called Mr. True, who testified that he went with Apperson and Rankin to the house of Hungate on the 10th day of December last; that he went on the request of Nichols, who was to get the hogs from Apperson; that he and Apperson went to the house of Rankin on the morning of the 10th of December, and they and Rankin rode over to the house of Hungate in the afternoon; that they got to the house of Defendant about the middle of the afternoon on the 10th of December, and Rankin demanded the hogs of defendant, and asked him if they were weighed, and Hungate said not, but that he could weigh them, and that the hogs were ready, but thought there was not time to weigh them that evening; but said he would commence and get through as soon as he could.

Cross-examined by Defendant:

Saw Rankin and Apperson together through the day of the 10th; thinks they were conversing about the contract with Hungate; that the understanding was not to take the hogs, if they could break the contract made with Hungate, who appeared anxious that they should take the hogs, and wanted to commence weighing them that evening.

71 Whereupon the Court proceeded to render judgment for the plaintiff for two hundred dollars. And the defendant, by his Attorney, entered a motion for a new trial, and assigned as cause of error on motion for new trial, that the judgment of the Court was contrary to the evidence and the law in the cause.

72 The Court overruled the motion for new trial, and rendered judgment against the Defendant for two hundred dollars—Defendant at the time excepted.

SILAS L. BRYAN, }  
E. L. HOWET, } Attorneys for Appellant

Printed at the "Democrat" Job-Printing Office, Louisville, Clay Co., Ill.

# ABSTRACT.

JOHN D. P. HUNGATE, Appellant,

vs.

ROBERT W. RANKIN and WILLIAM  
L. FULKHOUSER, Suing for the use  
of Thos. A. Apperson, Appellee.

APPEAL FROM CLAY COUNTY.  
SUPREME COURT, DEC., 1858.

E. L. HOWETT,  
&  
SILAS L. BRYAN, } Attorneys  
for  
Appellant.

Democrat print, Louisville, Clay Co., Ill.

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E. L. HOWETT  
&  
SILAS L. BRYAN.

Attorneys for Appellant

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The Court considered the motion for new trial, and rendered judgment against the Court and against the evidence for the appellant and the law in the case.

11

It is shown the Court proceeded to render judgment for the appellant for two years past starting.

11

of which the first year of the first year was set aside to commence working to give the justice of the law to the appellant and the law to the case.

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Hungate  
vs  
Rankin et al

Defendants Brief.

By the assignment of the Contract Apperson became the real party in interest, and Rankin but a nominal party, and the rights of Apperson cannot be affected or impaired by the acts or declarations of Rankin, ~~since~~ after the assignment.

The declaration contains a count for money had & received, and entitles the plffs <sup>below</sup> to recover the money (\$200) paid on the contract.

The contract required Hungate to furnish 150 bags of 200 lbs ~~or~~ over, and 25, of 180 lbs or over, but the proof shows he had only 140 of 200 lbs, and 20 or 30 of 180 lbs. There did not fill the contract.

The Hogs were to be paid for by weight,  
and until weighed The Defendants could  
neither receive them or pay for them,  
and the failure of Hungate to have  
them weighed by the 10<sup>th</sup> of December  
excused the other party from the  
contract and entitled them to recover  
back the money paid.

The absence of the purchasers from the  
1st to the 10<sup>th</sup> of December, did not excuse  
Hungate from failing to weigh the Hogs  
& to have them ready before the 10<sup>th</sup> of said  
month, so as to be ready to deliver them on  
demand.

Even if the <sup>Defendants</sup> ~~purchasers~~ ~~plaintiffs~~ should  
be deemed in default in demanding the  
Hogs before the 10<sup>th</sup>, as well as Hungate  
in not having them ready for delivery, yet  
both parties being in default, The Defen-  
dants had a right to recover the advanced  
money -

Chitty on Law. 629,

" " " 310,

In Contracts like this, time is of the essence,  
and in order to allow the plaintiff to  
keep the money paid on it, he must show  
that he had performed all that he was to do  
under it within the time specified.

Chitty on Con 443-

The contract is for a certain  $\#$  of bags of a  
certain quality, & the Defendants were not bound  
to accept a less  $\#$  or quality-

Chitty, Contracts - 446. vs (1) & (2) -

Even if the declarations of Rankin were  
competent, their credibility was subject to  
consideration on account of his want of interest  
after the assignment, & having been heard  
by the Court it will be presumed due regard  
was given to them.

An Assignee is allowed to ~~use~~ use the  
name of his assignor in the suit, and will  
be protected in his rights against any  
acts or declarations of the nominal plaintiff.

5 Gil 71.

~~12 Ills 398~~

~~2 Scan 463~~

The evidence of Minnie shows that  
Hungate sold the Hogs a few days  
after the 10<sup>th</sup> December and it is no  
where shown that he did not receive  
as good a price as the ~~pl~~ contract with  
Defts, and if so he would have no  
right to keep the advanced money of  
Defendants.

The \$200 was not a penalty, and  
as Hungate sold the Hogs to <sup>an</sup> other  
party the Defendants had a right  
to recover back their money -

clitly contract 622 - Note 3 -

" " 942 - 3

2 Granby vs 259.

Hungate

to  
Rankin 1708

Defendants vs  
Bridg

A. Mitchell

Hungate  
vs  
Rankin &  
Furness } Appeal

Authorities for citations in  
the Appeal  
(12) Johnson's Reports page (210)  
(13) Wendell's Reports Do (285)  
Lilas I Bayan Atty  
for Appellant



Notes of  
Appellants

# ABSTRACT.

JOHN D. P. HUNGATE, Appellant,

vs.

ROBERT W. RANKIN and WILLIAM  
L. FULKHOUSER, Suing for the use of  
Thomas A. Apperson, Appellee.

APPEAL FROM

CLAY COUNTY.

- 1 Trespass on the case on promises.
- 2 Appearance of Defendant.
- 3 Trial by the Court without the intervention of jury, by consent of parties.  
Testimony of Plaintiff:

Written Contract between Plaintiff and Defendant:

Clay County, Illinois, July 28th, 1857.

I, John D. P. Hungate, have this day sold to R. M. Rankin and L. Fulkhouser one hundred and seventy-five head or more of well-fatted hogs—one hundred and fifty of said hogs to weigh two hundred pounds and upwards, twenty-five to weigh one hundred and eighty pounds; said Rankin and Co. to receive said hogs between the 1st and 10th of December, on the farm of said Hungate, and pay \$4 25 cents per hundred gross, \$800 in gold balance in currency.

JOHN D. P. HUNGATE.

R. M. RANKIN.

Receipt on the back.

Received on the within contract, \$200.

JOHN D. P. HUNGATE.

Also assigned, Aug. 26th, 1857:

Received of T. A. Apperson \$200, for the within contract and above receipt.

R. M. RANKIN.

- 5 Testimony of Defendant:

George Monical being called, testified that he knew Rankin, one of the plaintiffs, and the defendant; that he heard Rankin say that there was a plot laid to break the contract with the defendant, on the morning of the 10th of December, 1857; that it was arranged to go to Defendant's house late in the evening of that day, but not in time to weigh the hogs; thought that they did not intend to take the hogs, but wanted to break the contract with Defendant; that he knew the hogs of Hungate—he had 200 head on the 9th of December last; that he bought 180 head of hogs off Hungate a short time after; Rankin was there; the hogs were well fatted; 140 weighed 200 pounds and upwards; some 20 or 30 weighed 180. That pork was selling from \$3 to \$3 50 per hundred.

- 6 Dr. Bougher testified, that he heard Rankin say, a day or two ago, that it was understood when they went to defendant's house that they would not take his hogs but wanted to break the contract.

- 7 John Connelly testified that he lived in the neighborhood of Defendant; that he had 19 well-fatted hogs, which weighed between 200 and 300 pounds; that he had sold them to Defendant to apply on his contract with Plaintiff; that on the 9th and 10th days of December they were subject to the order of Defendant. He had seen the hogs of Hungate, they were a good lot of well fatted hogs.

- 8 David Shields was then called, and testified he lived within a mile of Defendant's; had 45 head of well-fatted hogs, which he had sold to Hungate to apply on his contract with Rankin; that the hogs were subject to the order of Hungate, when Rankin was there; that the hogs would weigh over 200 pounds; that Rankin came to his house when the sun was about one hour high on the 10th of December, and told him that Hungate did not have the hogs weighed, and he would not take them.

- 9 Margaret Monical testified, that she was at the house of Hungate on the 10th day of December last; that late in the evening Rankin and others came to the house of Defendant and asked him if he had the hogs weighed, and defendant

said he had not, but that he would weigh them, if there was time, but he thought it was too late in the evening to get through; that the hogs were handy, and he wanted him (Rankin) to take them under the contract. Rankin refused to take the hogs because they were not weighed. Hungate proposed to commence weighing them, but Rankin said he had not time to get through before night.

10 The Plaintiff (Rankin) called Mr. True, who testified that he went with Apperson and Rankin to the house of Hungate on the 10th day of December last; that he went on the request of Nichols, who was to get the hogs from Apperson; that he and Apperson went to the house of Rankin on the morning of the 10th of December, and they and Rankin rode over to the house of Hungate in the afternoon; that they got to the house of Defendant about the middle of the afternoon on the 10th of December, and Rankin demanded the hogs of defendant, and asked him if they were weighed, and Hungate said not, but that he could weigh them, and that the hogs were ready, but thought there was not time to weigh them that evening; but said he would commence and get through as soon as he could.

Cross-examined by Defendant:

Saw Rankin and Apperson together through the day of the 10th; thinks they were conversing about the contract with Hungate; that the understanding was not to take the hogs, if they could break the contract made with Hungate, who appeared anxious that they should take the hogs, and wanted to commence weighing them that evening.

11 Whereupon the Court proceeded to render judgment for the plaintiff for two hundred dollars. And the defendant, by his Attorney, entered a motion for a new trial, and assigned as cause of error on motion for new trial, that the judgment of the Court was contrary to the evidence and the law in the cause.

12 The Court overruled the motion for new trial, and rendered judgment against the Defendant for two hundred dollars—Defendant at the time excepted.

SILAS L. BRYAN, }  
E. L. HOWET, } Attorneys for Appellant.

Printed at the "Democrat" Job Printing Office, Louisville, Clay Co., Ill.



Hungate  
vs  
Rankin et al

Defendants Brief

By the assignment of the Contract Apperson became the real party in interest, and Rankin but <sup>Junkhouse</sup> nominal parties, and the rights of Apperson could not be affected or impaired by the acts or declarations of Rankin after the assignment.

The Declaration contains a Count for money had received, and entitles the plaintiffs below to recover the money (\$200) paid on the contract.

The contract required Hungate to furnish 150 hogs of 200 lbs. a row, and 25 of 180 lbs. a row, but the proof shows he had only 140 of 200 lbs., and 20 or 30 of 180 lbs., thus did not fill the contract.

The Hogs were to be furnished & delivered on Hungates farm, and having bargained for hogs of Connolly & Shields, at neighboring farms, which were new on Hungates farm till after the 10<sup>th</sup> Decr, such Hogs could not be considered as ready for weighing & delivery.

The Hops were to be paid for by weight and until weighed the Defendants could neither receive them or pay for them, and the failure of Houghton to have them weighed by the 10<sup>th</sup> December, exonerated the other party from the contract & entitled them to recover back the money paid.

The absence of the plaintiffs from title after the 10<sup>th</sup> of December, did not excuse Houghton from failing to weigh the Hops and to have them ready before the 10<sup>th</sup> of said month so as to be ready to deliver them on demand.

Even if the Defendants should be deemed in default in demanding the hops before the 10<sup>th</sup>, as well as Houghton in not having them ready for delivery, yet both parties being in fault, the defendants had a right to recover back the advanced money  
Chitty on Contracts 629, 310-

In contracts like this, time is of the essence, and in order to allow the plaintiff to keep the money paid on it he must show that he had performed all that he was to do under the contract within the time specified, <sup>also</sup> and that he was still ready to perform it at the time of the suit, or else that he was compelled to sell them at a loss equal to the advanced money.  
Chitty on Contracts 443-

The contract was for a certain No. and quality & the Defendants were not bound to take a less number or quality.  
Chitty Con - 446 - note (1-2) -

Even if the declarations of Rankin were competent, their credibility was subject to consideration on account of his want of interest after the assignment and having been heard by the Court it will be presumed due regard was given to them.

An assignee is allowed to use the name of the assignor in suit, & will be protected in his rights against any acts or declarations of the nominal plff -  
5 Gilman 41  
~~10 Ills 398~~ ~~75 Ills 463~~

The evidence of Merrick shows that  
Huygate sold the hogs a few days after  
the 10<sup>th</sup> December, and it is nowhere shown  
that he did not receive as good a price  
as the plffs contract, + if so he would have  
no right to keep the advanced money of  
defendants. The \$300. paid down  
was not a penalty, and as Huygate sold  
the hogs to another party, the defendants  
had a right to recover back their money  
Chitty law 622, note 3.

" " 742-3-

24 principles 259

Huygate  
vs

Parker & al

Defendants vs

A. Mitchell



1858 - No 52 -

Hungate

as

Raukin et al

~~8447~~

Appeal from

Clay -

8447

Reversed and

Remanded -