

8736

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

# Supreme Court of Illinois

James H. Parker

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vs.

Wm. Brooks

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71641  7

Pleas at Louisville, in the County of Clay and State of Illinois on Wednesday the 28<sup>th</sup> day of September in the year of our Lord one thousand eight hundred and fifty three (the being the third day of the September Term of the Circuit Court in & for the County of Clay State of Illinois) before the honorable Justice Thayer Judge of the fourth Judicial Circuit in Illinois in the County of Clay sitting, in the Case of James H. Parker who sues for the use of Alexander S. Byers and Robert Byers vs. William Brooks, in the words & figures following to wit:

State of Illinois } ss.  
Clay County }

Of the September term of  
the Clay Circuit Court in the  
year of our Lord 1853

James H. Parker, who sues for the use of Alexander S. Byers and Robert Byers, Plaintiff in this suit, Complains of William Brooks, defendant &c. being summoned &c. of a plea of Trespass on the Case on promises. For that whereas the said defendant heretofore, to wit: on the tenth day of December in the year of our Lord one thousand eight hundred and fifty two, at and in the County of Clay and State of Illinois the said plaintiff 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 & there sold to the said Plaintiff a large lot of fat hogs, to wit: thirty head of fat hogs at the rate and price of four dollars and sixty two and a half cents for each and every hundred pounds of neat weight, which said hogs should weigh, the said neat weight to be ascertained by weighing said hogs gross and deducting one fifth from the amount of the gross weight of said hogs, to be delivered to said plaintiff at the residence of



one Alexander Maxwell, at and in the County of aforesaid  
 at any time desired by said plaintiff between the twentieth  
 and twenty eighth day of said month of December, in  
 the year of aforesaid, the said plaintiff, to give notice to said  
 defendant upon what day between the said twentieth and  
 twenty eighth of said month, on which said hogs should  
 be delivered as aforesaid, and which said hogs were to be  
 paid for by said plaintiff according to the rate aforesaid  
 on the delivering thereof by said defendant as aforesaid  
 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 agreed and faithfully pro-  
 mised the said defendant to accept and receive the said hogs  
 and to pay him for the same at the rate or price aforesaid;  
 he the said defendant then and there undertook, and faith-  
 fully promised the said plaintiff, to deliver the said  
 hogs to the said plaintiff, whenever he should give  
 notice for such delivery thereof at any time between the  
 said twentieth and twenty eighth day of the said  
 month of December as aforesaid and the said plain-  
 tiff here avers that he did give due notice to the said  
 defendant to deliver the said hogs between the said  
 twentieth and twenty eighth of the said month of  
 December, to wit on the twenty sixth day thereof  
 which period has long since elapsed, And although  
 the said time for the delivery of the said hogs as aforesaid,  
 hath long since elapsed, and the said plain-  
 tiff hath always been ready and willing to accept &  
 receive the said hogs, and to pay for the same at the  
 rate and price aforesaid, to wit; at and in the County  
 of aforesaid, whereof the said defendant hath always had  
 notice, yett the said defendant not regarding his sever-  
 al promises and undertakings, but continuing and  
 intending to deceive and defraud the said plaintiff, in  
 this behalf, did not nor would at the time aforesaid



or at any time afterwards deliver the said hogs or any part thereof for the said plaintiff, at the place aforesaid or elsewhere but wholly neglects and refuses so to do, whereby the said plaintiff hath lost and been deprived of divers great gains and profits, which might and otherwise arisen and accrued to him, the said plaintiff from the delivery of the hogs aforesaid to wit: at and in the County aforesaid.

And whereas also afterwards, to wit on the day and year first aforesaid at and in the County aforesaid, the said plaintiff at the like 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 a large lot of fat hogs to wit thirty head of fat hogs at the rate and price of four dollars and sixty two and half Cents for each and every hundred pounds of neat weight, which said hogs should weigh the said neat weight to be ascertained by weighing said hogs gross, and deducting one fifth from the amount of the gross weight of said hogs to be delivered to the said plaintiff, at the residence of one Alexander Maxwell at and in the County aforesaid at anytime between the twentieth and twenty eighth day of said month of December in the year aforesaid, and to be paid for by said plaintiff according to the rate aforesaid on the delivery thereof by the said defendant as aforesaid 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 promised the said defendant to accept and receive the said hogs and to pay him for the same at the rate & price aforesaid, he the said defendant then and there undertook and promised the said plaintiff to deliver the said hogs



to the said plaintiff as aforesaid; and although often requested so to do, and although the time for the delivery of the said hogs as aforesaid hath long since elapsed; and the said plaintiff hath always been ready and willing to accept and receive the said hogs and to pay for the same at the rate and price aforesaid, to wit: at and in the County aforesaid, whereof the said defendant hath always had notice; yet the said defendant not regarding his said promises and undertaking but intending to deceive and defraud the said plaintiff in this behalf did not nor would within the time aforesaid or at any time afterwards deliver the said hogs or any part thereof for the said plaintiff at the place aforesaid or elsewhere but wholly neglected and refused so to do, whereby the said plaintiff hath lost and been deprived of divers great gains and profits, which might and otherwise would have arisen and accrued to him from the delivery of the said goods to the said plaintiff, as aforesaid, to wit: at and in the County aforesaid.

And whereas also afterwards, to wit: on the first day of January in the year of our Lord one thousand eight hundred and fifty three at and in the County of Clay and State of Illinois the said defendant was indebted to the said ~~defendant~~ plaintiff in the sum of three hundred dollars for so much money ~~loaned~~ loaned and advanced to the said defendant and at the special instance and request of said defendant and also in the further sum of four hundred dollars for so much by the said defendant before then received to and for the use of said plaintiff, and being so indebted by the said defendant afterwards to wit: on the day and year last aforesaid at and in the County aforesaid in consideration thereof undertook and faithfully promised the said plaintiff to pay him the said several sums of money last above mentioned, whenever he should be thereunto afterwards requested.



5

Yet the said defendant although often requested so to do hath not as yet paid said several sums of money above mentioned or either of them or any part thereof but to pay the same he hath hitherto wholly neglected and refused and still doth neglect and refuse so to do.

nor hath he paid the damages or any part thereof that hath accrued to the said plaintiff by reason of the promises in the two first Counts above mentioned but to pay the same although often requested so to do he hath hitherto wholly neglected and refused and still doth so neglect and refuse. Wherefore and by reason of the promises the said plaintiff hath sustained damage to the amount of five hundred dollars therefore he sues for the use aforesaid &c.

A. Kitchell

Atty for Plff

Upon the outside of which declaration it is marked filed in the words & figures following to wit

Filed September 5<sup>th</sup> 1853  
J. P. Gungate CLK

### Summons

State of Illinois  
Clay County

The people of the State of Illinois to the Sheriff of said County Greeting: We command you that you summon William Brooks if he shall be found in your County personally to be and appear before the Circuit Court of said County on the first day of the next term thereof to be holden at the Court house in Louisville on the fourth Monday in the month of September next to answer James H. Parker for the use of Alexander



L. Byers & Robert Byers of A plea of Assumpsit  
to the damage of him the said James St. Parker in the  
sum of five hundred dollars, as he saith: And have you  
there and there this writ; and make return thereon in what  
manner you execute the same.

ESB  
rec

Witness Jackson P. Hingale Clerk of  
our said Court, and seal thereof at his  
office, this fifth day of September A.D.  
1853. Jackson P. Hingale Clerk

Upon the back of which is the sheriffs indorsement  
in the following words & figures & c.

I have this day the within process by reading  
the same to the within named Wm Brooks  
this the 14 day of Sept 1853.

S. B. Walker Sheriff

General Issue & Notice & c  
State of Illinois Clay County  
Clay Circuit Court  
Sept. Term A.D. 1853

William Brooks }  
                  }     Assumpsit.  
                  }     at  
James Parker & c. }

And the said defendant by  
Constable his Attorney, comes and defends the wrong and  
injury when & c. Where & c. And says that he did not  
undertake and promise in manner and form as the said  
plaintiff hath above hereof Complained against him;  
and of this the said defendant puts himself upon the Coun-  
try & c.

Constable  
Attorney for Defend

And the Plff doth the like  
Shaw & Kitchell for Plff

Mr James Parker

Sir Please to take notice that under the above plea said defendant will object and give in evidence that any contract he made with you was in writing signed by him and in the following words and figures.

December 10<sup>th</sup> 1852

Received of James H. Parker ten dollars on my lot of pork hogs 30 or 45 head to be delivered at Alexander Maxwells between the 20<sup>th</sup> and 28<sup>th</sup> of this month and weighed gross and one fifth deducted off the gross weight is @ \$4.62 1/2 cts per cwt all round W. Brooks

That in accordance with said Contract I did drive and attempt to deliver said lot of hogs at the place named to wit at &c on the 20<sup>th</sup> day of December aforesaid and was there and there ready and willing to deliver said lot of hogs but found no one there ready or authorized to receive my hogs, that I made efforts to hunt you up but failed, that after keeping my hogs at said Maxwells 24 hours and upwards I was compelled to drive them to an other market to wit, Vincennes by which I lost and was damaged \$100.00 - And that I shall ask judgment against you for said damages;

Yours &c

W. Brooks

By Constable his Attorney

Order of Court &c  
James H. Parker who mes,  
for the use of A. D. R. Pycers,

vs

Assumpsit

William Brooks

Now at this day comes the parties by their Attornies & issue being joined therefore let a Jury come, whereupon comes a Jury, to wit, James Bond, Joseph H. Maxwell, Adam McCullum, Jesse Montgomery



James A. Pearson, S. B. Moore, Edwin Compton, Wesley Wood, George Howard, Wm. Willis, Jonathan Myrman & J. A. W. Walker twelve good and lawful men, who being duly elected tried & sworn the truth to speak upon the same joined upon their oaths do say we the jury find for the defendant, whereupon it is considered and adjudged by the Court that the said defendant recover of & from the said plaintiff his Costs & Charges about his defence in this behalf expended and thereof have execution &c.

Bill of exceptions by Plaintiff  
James H. Parker who sues }  
for the use of A. S. & R. Byers }  
vs }  
William Brooks }

Be it remembered that on trial of the above cause, the Plaintiff introduced one George W. Monical as a witness by whom he proposed to prove the Contract set forth in the declaration, whereupon the defendant objected to such proof by said Witness on preliminary examination, that the following article in writing was made and delivered by defendant to plaintiff at the time of said Contract, viz

" December 10<sup>th</sup> 1852  
" Received of James H. Parker ten dollars on receipt of  
" pork hogs 30 or 45 head to be delivered at Alexandria  
" Marrocks between the 20<sup>th</sup> and 28<sup>th</sup> of this month  
" and weighed gross and one fifth deducted off the  
" gross weight at \$4.62 1/2 cts per cwt all round, which  
" which objection the Court sustained and refused to allow  
" said witness to testify in regard to said Contract, to which  
" ruling and decision of the Court the plaintiff, by his counsel  
" excepts, which exception is allowed and made a part of the  
" record, whereupon the said plaintiff, by his counsel  
" then produced and offered to give in evidence in said cause







J. H. Parker for use of  
A. L. & R. Byers

or  
W. Brooks } Error to Clay -

And the said P[er] by  
Fitchell his atty comes and says that in the  
foregoing Record and proceedings there is manifest  
error in the following particulars viz -

- 1 The Circuit Court on the trial of the above  
cause erred in refusing to allow the witness  
Merrill testify in regard to the contract set forth  
in P[er]'s declaration -
- 2 The Court erred in refusing to allow the P[er]  
to read the receipt in the Bill of exceptions pro-  
vided in evidence on the trial of said cause
- 3 The Court erred in entering the judgment  
which was rendered -

H. Fitchell for P[er]

finds no error  
Constatable for defendant in error -

Chas. for  
2. 15  
C. H. for  
2. 15  
Wm. L. Clay

Witness  
H. H. Schuster  
By J. L. Schuster  
Refered

No 43  
Transcript of  
the Proceedings of  
the Clay Circuit  
Court the within  
S. H. Parker for use  
in the case of J. H.  
By A. L. & R. Byers  
W. Brooks





L. H. Parker for use of Rogers  
vs }  
Mr Brooks } error to Clay.

This was an action in assumpsit  
1st Count upon a contract for sale & delivery of Hops  
2<sup>d</sup> for same,  
3<sup>d</sup> for money had and received.

Plff offered in evidence the following 1st by the testimony of J. M. Mical proof of the contract set out in the 1st Count. Deft objected because the following receipt was given at time of contract viz -

"Sept 10 1852

Received of James H. Parker ten dollars currency  
Est of Hopbark Hops 30 or 45, head to be delivered  
at Alexander Mowells between the 30<sup>th</sup> day  
and 28<sup>th</sup> of this month, and weighed gross and  
one fifth deducted off the gross weight at \$4.62 1/2  
cts net all round Mr Brooks"

which objection was sustained.

Plff then offers the receipt in evidence under  
1st second & 3<sup>d</sup> Counts, to which Deft objected  
& objection sustained. objections made  
& evidence incorporated in Bill of exceptions.

1st Plff insists that he had a right to prove the contract by parol. the receipt for the money was not such a written contract as to exclude parol proof.

2<sup>d</sup> Plff insists that he had a right to introduce the receipt as evidence.

3<sup>d</sup>

Under the 3<sup>d</sup> Count for money had and received.



The rept was the very best evidence of  
the amount of money expended in it.

Parker and Ogden

Brooks

Miss Bief



Parker

N  
Brooks.

Opinion by Eaton J.

The declaration in this case contains three counts. The two first are special upon a contract for the sale of hay and the third is a common count for money advanced & for money had and received. On the trial the plaintiff offered in evidence under the first & second counts the following

"December 10<sup>th</sup> 1852

Received of James H Parker ten dollars on my lot of party hays 30 or 45 head to be delivered at Alexander Maxwells between the 20<sup>th</sup> & 28<sup>th</sup> of this month and weighed gross and one fifth to be deducted off the gross weight at \$4,62 1/2 cts per cwt all round

W. Brooks!

This differed from the special agreement declared upon and was for that reason properly ruled out under the two first counts. The plaintiff then offered it under the common count when it was again objected to and ruled out by the circuit court. In this we think the court erred. It could have been offered with no other view under the common count than to recover back the money which had been paid upon the agreement and for that purpose it was competent evidence to be followed up with other proof showing an abandonment of the agreement by the defendant without the fault of the plaintiff. That count was for money had and received and this paper contained evidence direct of the receipt of the money and was the first step to be established proved to establish a cause of action under that count. It was not one of those cases for the counsel to explain the purpose for which it was offered and show that explanation in the bill of Exception. It could have but one legitimate bearing and that was manifest and palpable. It cannot be presumed that it was offered with the view



of recovering upon it entirely, for the non delivery of the  
hogs, for the third count was not upon the contract at  
all. - Nor is the objection tenable, which was urged at the bar,  
that it was not admissible in evidence for the reason that  
no copy of the instrument was filed with the declaration. -  
Admitting that an objection of this kind can first be made at  
the trial, and <sup>still</sup> the objection would not be good here for the  
reason that the statute which requires the party who sues upon  
an instrument in writing to file a copy of the instrument with  
the declaration, is not applicable here, for the reason that  
the third count was not upon the instrument at all. -  
A copy is only required to be filed where the instrument  
is specially declared on and is made the foundation  
of the action. - Where the instrument is only introduced in  
evidence in support of another part of claim, and it is  
not specially counted upon, the statute requires no  
copy to be filed. -

The judgment of the Circuit Court must be  
reversed and the cause remanded.



Rev

Mo

Opinion of  
Caton

copied



No ~~45~~ 46

James H Parker, use of  
A. L & R Byers

vs

William Brooks

Error to Clay

Opinion by

Caton. J.

Judgment reversed and  
Case remanded.

Opinion copied & sent off

No 46

November 1852

James H Parker, use of  
A L & R Byers.

vs

William Brooks

Error to Clay

Opinion by

Caton. J.

8736

Judgment Reversed

Case remanded