

No. 13607

# Supreme Court of Illinois

Funk

---

vs.

Hough et al

---

71641  7

STATE OF ILLINOIS,  
SUPREME COURT,  
Third Grand Division.

No. 212

*Funk  
vs  
Kemp & Kemp*

1862

13607

*Repealed*

# SUPREME COURT.

JAMES FUNK  
vs.  
ROSELL M. HOUGH & ORAMEL S. HOUGH. } *Appeal from the Su-  
perior Court of  
Chicago.*

## ABSTRACT OF RECORD.

This was an action of assumpsit, brought by the defendants here, as plaintiffs below, to recover against the plaintiff here, as defendant below, upon a special contract for the purchase and sale of cattle. Judgment by default was rendered against the defendant below for \$2,192.50 damages, besides costs. From this judgment the defendant below appealed  
2 to this court. The defendant below resided in McLean county, and a summons in the usual form was issued to McLean county; said summons was returned and filed, with a sheriff's return endorsed thereon in words and figures as follows :

3 Executed this writ, by reading it to the within named James Funk,  
May 8th, 1861.

JOHN S. ROUTT, Sheriff.  
By GEO. PARKE, Deputy.

Upon this return defendant below was defaulted.

The declaration contains two special counts, and the money counts.

5 The first special count alleges that the plaintiffs below, on the 15th  
of October, 1860, bargained with the defendant below for, and promised  
to buy and receive of said defendant, one hundred head of good stall fed  
beef cattle, to be delivered to said plaintiffs, in Chicago, during the  
month of January then next, and for which the said plaintiffs, on delivery  
6 of said cattle as aforesaid, were to pay said defendant at the rate of five  
cents and three-fourths of a cent per pound net, or three cents per pound  
gross, at the option of the said defendant. That the said plaintiffs after-  
wards advanced to said defendant, upon the said contract, \$1,705, and

7 that the said plaintiffs "were ready and willing to accept and receive"  
said cattle, "and to pay for the same the balance of such purchase price  
therefor, at any time during said month of January." That the said de-  
fendant did not, during the said month of January, or at any time, de-  
liver the said cattle, &c.

8 The second count alleges, that the said defendant, on the 20th of  
October, 1860, agreed to sell, and plaintiffs agreed to buy and purchase,  
9 one hundred head of fat cattle, to be delivered by defendant on or before  
the 15th day of February then next, to be paid for by said plaintiffs "at  
the delivery of said cattle," at the rate of five and three-fourths cents per  
10 pound net, or three cents per pound gross, at the option of said defen-  
dant. That plaintiffs afterwards, on the 9th day of November, 1860,  
advanced on said contract \$1,705. That said plaintiffs "then and there,  
and thenceforth, until and on said said 15th day of February then next,  
that is to say, on the 15th day of February, 1861, at said county, were  
11 ready and willing to accept and receive said cattle, and to pay for the  
same at the rate and price aforesaid, on the delivery thereof, &c.

That the defendant did not deliver the said cattle, &c.

Damages were assessed by the court, and final judgment rendered  
for the sum above stated.

The following are the errors assigned.

1. The sheriff's return to the summons upon which the default was  
entered, is not sufficient; it does not state with sufficient certainty the  
time of service of such summons.

2. The court has no jurisdiction of the person of the defendant  
below, by reason of the insufficiency of the sheriff's return to the sum-  
mons.

3. The first special count of the declaration is bad in substance,  
and states no cause of action.

4. The second special count of said declaration is bad in substance,  
and states no cause of action.

5. The judgment is against law.

FARWELL & SMITH,  
Attorneys for Plaintiffs in Error.

216-131

216-131  
James Frank  
ES  
Hough & Hough  
Abstract

Filed April 28. 1862  
L. Leland  
Clerk.

# SUPREME COURT.

---

JAMES FUNK  
VS.  
ROSELL M. HOUGH } *Plaintiff's Points.*  
AND  
ORAMEL S. HOUGH. }

---

## I.

The sheriff's return to the summons is insufficient. It does not with sufficient certainty state the time of service. This is no longer an open question. In the case of *Ogle vs. Coffey*, 1 *Scam.* 239, the return was as follows: "Executed Oct. 18th, 1832," and it was held insufficient. The Court say: "Whether the date specified is intended for the date of the day of service, or is the day on which the summons is returned, is wholly uncertain." In *Bancroft vs. Speer*, 24 *Ill.* 227, there was the following return: "Served the within by reading the same to and in the hearing of S. B. Bancroft, June 21, 1858," and the Court say: "It fails to specify whether the date is designed to indicate the day it was served or returned. In this it was insufficient." In the case at bar the return is as follows: "Executed this writ by reading it to the within named James Funk, May 8th, 1861." It is needless to add that this return is obnoxious to the same objection as in the two cases cited above, and we submit that the judgment should for this reason be reversed.

## II.

The two special counts in the declaration are radically defective. They only allege that the plaintiffs below were *ready* and *willing* to pay, and fail to state an offer or tender of payment. As the cattle were to be paid for *at or upon delivery*, the plaintiff cannot recover without averring and proving an offer or tender of payment.

*Davis vs. Wiley*, 3 *Scam.* 234.

*Johnson vs. Wygant*, 11 *Wend.* 48.

*Williams vs. Healey*, 3 *Denio*, 363.

These counts being defective in substance, the judgment should be reversed. It is unnecessary to cite authorities to show that this is the rule at common law. Nor is the question affected by the 25th section of the practice act. That only applies to the case of an "*entire verdict*" of a jury upon a declaration containing defective counts, in which case the defendant has his remedy by asking the "Court to instruct the jury to disregard such faulty count." Here was no verdict of a jury, the Court having assessed the damages without a writ of inquiry or the intervention of a jury; and where parties proceed under this special statute, applicable only to the practice of Cook county, and contrary to the course and practice of the common law, the court should not extend to them by construction benefits of the 25th section of the general practice act of the State, which in terms, applies only to the case of a judgment based upon the *verdict of a jury*, and which provides a remedy for the defendant wholly inapplicable and unavailing in a proceeding like this under our special practice act. Besides, it appears affirmatively that the Court assessed the damages on these same defective special counts, and that the plaintiffs below did not go upon the money counts to recover back the money advanced upon the contract, inasmuch as the damages were assessed at \$2,192.50, whereas the money advanced was only \$1,705.

FARWELL & SMITH,  
Atty's for said JAMES FUNK.

212 131  
James Funk

10

Hough & Hough  
Points for Puff

Filed April 28<sup>th</sup> 1862

L. Leland  
clerk

1  
UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the third day of June in the year of our Lord One Thousand Eight Hundred and Sixty One and of the Independence of the United States of America the Eighty fifth.

Present, The Honorable John M. Wilson Chief Justice of the Superior Court of Chicago. }

Saml. Higgins and } Judges.

Grant Goodrich }  
Charles Harris Prosecuting Attorney.

Anthony C. Nesing Sheriff of Cook County.

Attest, Walter Kimball Clerk.

Be it remembered that heretofore to wit: on the first day of May in the year of our Lord One thousand eight hundred and sixty one, there issued out of and under the Seal of the Superior Court of Chicago a certain Peoples writ of Summons, which said Summons, together with the Sheriff's return thereon endorsed are in the words and figures following to wit:

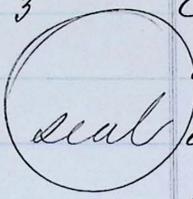
State of Illinois,  
County of Cook } ss.

The People of the  
State of Illinois, To the Sheriff of  
McLean County, Greeting.

We Command you that  
you summon James Taut  
if he shall be found in your  
County, personally to be and  
appear before the Superior Court  
of Chicago, of said Cook County,  
on the first day of the term  
thereof to be holden at the Court  
House in Chicago, in said Cook  
County, on the first Monday  
of June next to answer unto  
Roselle M Nough and Oramel  
S Nough partners & in a plea  
of Trespass on the Case upon  
promises, to the damage of  
the said plaintiffs, as is said  
in the sum of Twenty five  
Hundred dollars.

And have you there this  
writ, with an endorsement  
thereon, in what manner you  
shall have executed the same  
Witness Walter Kimball

3

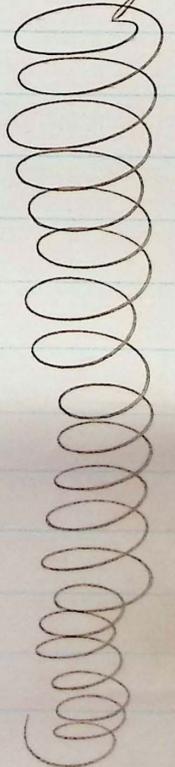
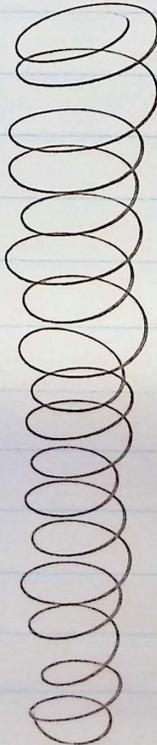
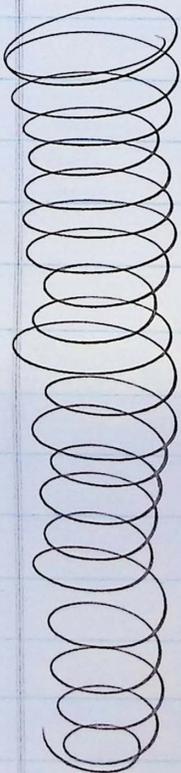


clerk of our said Court  
and the seal thereof at Chicago  
seal aforesaid, this 1<sup>st</sup> day of May  
1861

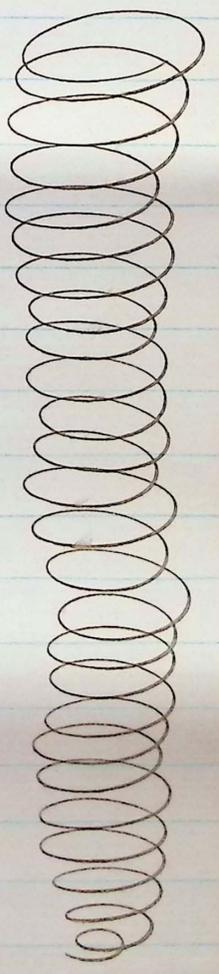
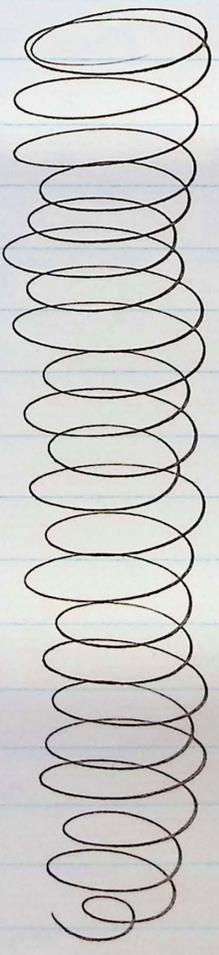
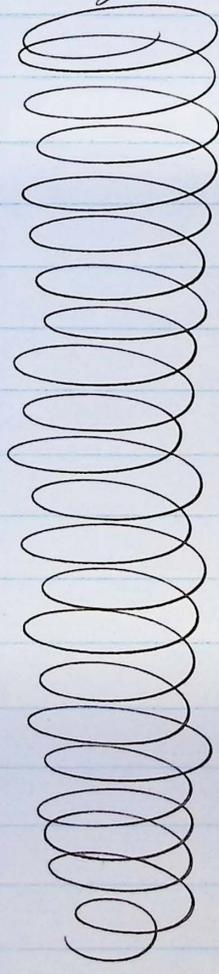
Walter Kimball Clerk

Executed this writ by Reading  
it to the within named James  
Funk. May 1<sup>st</sup> 1861

John L. Routh Sheriff  
By Geo Parke Deputy



And afterwards to wit, on the  
twenty fourth day of May in  
the year aforesaid there was  
filed in the office of the Clerk  
aforesaid a certain declaration  
in the words and figures fol-  
lowing, to wit:



5- State of Illinois  
Cook County } ss

In the Superior Court of  
Chicago Case No. 10784  
Russell M. Hough and Oramel  
S. Hough who are partners in business  
under the name and style of R. M.  
& O. S. Hough plaintiffs in this suit  
by Arrington & Deut their attorneys,  
Complain of James Frank, the  
defendant in this suit, who has  
been summoned & he in a plea of  
Trespass on the case upon promises.

For that whereas heretofore to wit,  
on the 15<sup>th</sup> day of October A.D. 1860  
at said County, in consideration  
that said plaintiffs as partners as  
aforesaid then and there bargained  
with said defendant for and  
promised to buy and receive of the  
said defendant, one hundred  
head of good, stall fed fat beef  
cattle to be delivered to said plaintiffs  
in Chicago in said County during  
the month of January then next,  
and for which the said plaintiffs  
on the delivery of said cattle  
as aforesaid were to pay said

6 defendant at the rate of five cents and three fourths of a cent per ~~hundred~~ <sup>pound</sup> net, or three cents per pound gross, at the option of said defendant, he the said defendant then and there undertook and faithfully promised the said plaintiffs to sell and deliver to them the said plaintiff, in Chicago aforesaid during the Month of January then next, said one hundred head of good stall fed, fat beef cattle, which were so to be paid for by said plaintiff on the delivery of said cattle as aforesaid. And the said plaintiffs further say that Confiding in said promise and undertaking of said defendant they the said plaintiffs, did thereafter, to wit; on the 10<sup>th</sup> day of November AD 1860, at said County advance and pay, lay out and expend for the said defendant, for and on account of the purchase price of said fat beef cattle which the said defendant had so promised to sell

7 and deliver to the said plaintiffs as aforesaid, a large sum of money, to wit: Seventeen Hundred and five dollars. And the said plaintiffs further say that they were ready and willing to accept and receive said one hundred head of good stall fed fat beef Cattle at Chicago aforesaid, and to pay for the same the balance of such purchase price therefor, at any time during said month of January, to wit: at Chicago aforesaid, whereof the said defendant then and there had notice. Yet the said defendant, disregarding his said promise and undertaking, did not nor would during said month of January or at any time before or since then, deliver to the said plaintiffs the said one hundred head of good, stall fed fat beef Cattle, or any thereof, nor repay said sum of Seventeen Hundred and five dollars by said plaintiffs paid on account of the purchase price

8 of said beef Cattle, but so to do hath hitherto neglected and refused and still doth neglect and refuse, whereby said plaintiffs have been forced and obliged to lay out of said Money, and have also lost divers large gains and profits which they might and would have made if said defendant had delivered said Cattle to them at Chicago aforesaid according to the aforesaid promise and undertaking of the said defendant.

2<sup>d</sup> Count, Also for that whereas the said defendant heretofore to wit; on the twentieth day of October A.D. 1860 at said County in Consideration that said plaintiffs, being partners as aforesaid, then and there agreed to buy and receive of said defendant one hundred head of good, stall fed fat beef cattle and to pay for the same at the rate of five and three fourths Cents per pound net or three Cents per pound

gross at the option of said  
9 defendant at the delivery of  
said Cattle to said plaintiffs  
in Chicago aforesaid on or  
before the fifteenth day of  
February then next, he the said  
defendant then and there under-  
took and promised the said  
plaintiffs to sell and deliver to  
said plaintiffs in Chicago aforesaid  
on or before said 15<sup>th</sup> day of  
February then next, said one  
hundred head of good, stall  
fed, fat beef cattle, which were  
so to be paid for by said plaintiffs  
on the delivery of the same as  
aforesaid, And the said plain-  
-tiffs further in fact say that  
afterwards, to wit, on the next  
day of November A D 1860 at said  
County, they the said plaintiffs  
relying on the aforesaid promise  
and undertaking of said defendant  
in this Court above mentioned,  
advanced and paid out at the  
request of said defendant, for  
and on account of the purchase  
price of said Cattle, a large

10 Sum of Money to wit Fifteen  
Hundred <sup>or five</sup> Dollars, and the said  
plaintiffs further aver that they  
then and there and thenceforth  
until and on said fifteenth  
day of February then next, that  
is to say on the 15<sup>th</sup> day of  
February AD 1861 at said County,  
were ready and willing to  
accept and receive said Cattle,  
and to pay for the same at  
the rate and price aforesaid  
on the delivery thereof pursuant  
to the said promise and undertaking  
of the said defendant, whereof  
the said defendant then and  
there to wit, from the date of  
said Contract since hitherto hath  
had notice - To wit at the County  
aforesaid, Yet the said defendant  
hath broken his promise, and  
hath not delivered said beef  
Cattle nor any thereof, nor  
returned nor repaid said money  
so paid on account of the  
purchase price thereof, but so to  
do hath hitherto <sup>wholly</sup> neglected and  
refused whereby the plaintiffs

11  
Have been obliged to lay out  
of the use of said sum of  
Sixteen Hundred five Dollars  
and have lost divers large  
gains, profits and rewards  
which they might and would  
have made if the said defendant  
had kept his said promise  
and undertaking

Also for that whereas the said  
Defendant heretofore to wit: on  
the first day of April A.D. 1861,  
at the County aforesaid, was  
indebted to the said plaintiffs  
as partners as aforesaid in a  
large sum of money to wit  
Twenty five Hundred Dollars,  
for so much money before  
then paid laid out and ex-  
pended by the said plaintiffs  
for the said defendant and  
at his request, and in the  
further sum of Twenty five  
Hundred Dollars for so much  
other money before then had  
and received by the said  
defendant for the use of the

12 said plaintiffs, and in the  
further sum of Twenty five  
Hundred Dollars for so much  
other Money due from the said  
defendant to the said plaintiff  
on an account then and there  
stated between them, and being  
so indebted the said defendant  
afterwards to wit: on the day  
and year last aforesaid. at  
said County, in Consideration  
of the premises undertook  
and then and there faithfully  
promised the said plaintiffs  
so being partners as aforesaid  
to pay them the said several  
sums of money when he the  
said defendant should be  
thereunto afterwards requested.  
Yet the said defendant hath  
not kept his said promises,  
but hath broken the same, and  
hath not paid said several  
sums of money nor either of  
them, nor any part thereof,  
but so to do hath since  
hitherto neglected and refused  
and still doth neglect and

13

refuse,

all which is to the damage  
of said plaintiffs Twenty five  
Hundred Dollars, hence this  
suit &c

Arrington & Dent.  
Ryf attys.

### Account.

James Frank  
 To R. M. & O. S. Hough Dr  
 To Money advanced to you \$2500.  
 " " Rec<sup>d</sup> by you for our use 2500.  
 " " due on account stated 2500.  
 " Interest on Money advanced 300.  
 " Damages for Non Delivery of beef cattle 2500.

14 And afterwards to wit: On the  
Eleventh day of June in the year  
aforesaid. said day being one of  
the days of the June term thereof  
the following among other proceedings  
were had and entered of record  
in said Court. to wit:

Russell M. Nough &  
Oramel S. Nough

James <sup>7</sup> Foubt assumpsit

This day comes  
the said plaintiffs by Arrington  
and Deat their attorneys and due  
personal service of process of summons  
issued in said Cause having been  
had on the said defendant and  
being three times solemnly called  
in open Court comes not nor  
does any person for him but  
herein he makes default which  
is on motion ordered to be taken  
and is hereby entered of record.  
Wherefore the said plaintiffs ought  
to have and recover of and from  
the said defendant their damages

13- sustained herein by reason of the premises.

And thereupon reference is had to assess damages herein hereafter,

and afterwards to wit: on the fourteenth day of June in the year aforesaid, said day being still one of the days of said June term the following among other proceedings was had and entered of record to wit:

Rosell M. Hought  
Oramel S. Hough

James <sup>or</sup> Faulk Assumpsit

This day again comes the said plaintiffs by Arrington and Dent their attorneys and default of the said defendant having been heretofore taken and entered of record herein against him, the Court now here after hearing the allegations and proofs submitted by the said plaintiffs

and being fully advised in the premises assesses their damages herein to the sum of Four thousand one hundred and Ninety two dollars and fifty Cents.

Therefore it is Considered that the said Plaintiffs do have and recover of and from the said defendant their damages of Four thousand one hundred and Ninety two dollars and fifty Cents in form aforesaid assessed by the Court and also their Costs and Charges in this behalf expended and thereof have execution.

And thereupon the said defendant appears by Farwell & Smith his attorneys and prays an appeal herein to the Supreme Court of this State from the judgment of this Court, which is allowed to him upon filing his appeal bond in the penalty of Twenty seven hundred Dollars with Security to be approved by a judge of this Court, and to be filed with his bill of Exceptions within ten days from this date.

17 And afterwards, on the twenty  
fourth day of the month and  
year aforesaid, said day being  
still one of the days of the same  
term the following among other  
proceedings were had and  
entered of Record in said Court  
to wit:

Roall McKnight  
Oramel S. Kough

James "Fink" <sup>assumpsit</sup>

This day comes  
the said defendant by Furwell  
& Smith his attorneys and on  
their motion it is ordered that  
the time in which defendant  
was required to file his appeal bond  
herein be and is hereby extended  
to Monday next being the first  
day of July instant

18 and afterwards to wit; on the first day of July in the year aforesaid. there was filed in the office of the Clerk aforesaid a certain appeal bond in the words and figures following, to wit;

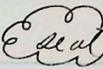
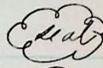
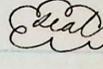
Know all men by these presents that we James Funk and Jesse Funk and D M Funk of the County of McLean and State of Illinois are held and firmly bound unto Rosell M Hough and Oramel S Hough in the sum of Twenty seven Hundred Dollars lawful money of the United States to be paid to the said Roselle M Hough and Oramel S Hough their executors, administrators or assigns, for which payment well and truly to be made we bind ourselves our and each of our heirs executors and administrators jointly and severally firmly by these presents. Sealed with our

19 seals, Dated this Twentieth day  
of June one thousand eight  
hundred and sixty one,

Whereas the said Roselle M  
Hough and Oramel S Hough  
obliges recovered a judgment  
against the said James Funt,  
Obligor in the Superior Court of  
Chicago at the June Term of the  
said Court for the year 1861  
for the sum of Twenty one hundred  
& ninety two dollars and fifty  
Cents damages besides Costs of  
suit from which judgment the  
said James Funt has prayed  
an appeal to the Supreme Court  
which has been allowed, now  
therefore the Condition of this  
obligation is such that if the  
said James Funt shall duly  
prosecute said appeal and in  
Case the said judgment so  
appealed from shall be affirmed,  
shall pay such judgment and  
all Costs interest and damages  
upon said appeal then this  
obligation to be void otherwise  
to remain in full force and

virtue.

attest  
M. A. Adams  
approved  
Grant Goodrich  
Judge.

Jesse Funk   
Jesse Funk   
D. M. Funk 

State of Illinois,  
McLean County,

The above named  
Jesse Funk being first duly sworn  
on oath saith that he is worth  
above all his debts at least one  
Hundred Thousand Dollars  
above all that he owes, that his  
property consists of Eight  
thousand acres of land a large  
part of which is improved, and  
is situated in the County of Mc  
Lean, & De Witt in the State of Illinois  
& the whole of which land he  
owns in fee simple & that there  
is no incumbrances of any kind  
on any part of it, And the above  
named Duncan M. Funk being al-  
duly sworn saith that he is worth  
above all of his debts the sum

of three thousand dollars, and  
that the same consists of  
personal property in said County  
of McLean.

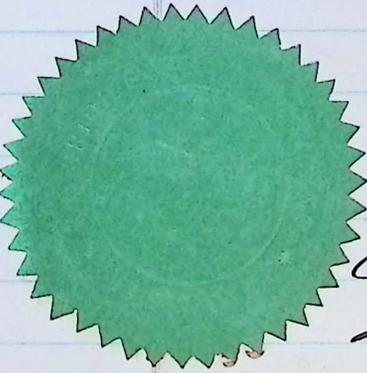
Subscribed and sworn to before me  
Ed M Funk  
Jm M Cullough Clerk  
of the McLean Circuit  
Court of Illinois  
this 22<sup>d</sup> day of June  
A D 1861.

Jm M Cullough Clerk  
By L Parr Deputy

State of Illinois

County of Cook ss

I Thomas B  
Carter clerk of the Superior Court of  
Chicago in and for said County and  
State of aforesaid do hereby Certify the  
foregoing to be a true full and  
Complete transcript of all the papers  
on file, and all orders entered  
of record including the order of  
Judgment together with the appeal  
Bond in the case wherein  
Rosell M. Hough + Oramel S.  
Hough are plaintiffs and James  
Frank Defendant.



In testimony whereof I  
hereunto set my hand  
and affix the seal of said  
Court at the City of  
Chicago in said County  
this 12<sup>th</sup> day of April A.D.  
1862. Thomas B Carter  
clerk

Supreme Court  
James Hunt

as  
Rosell M. Hough &  
Oramel S. Hough

And now comes the said James Hunt by Harwell & Smith his attorneys and says that in the record and proceedings of one said case the giving the judgment aforesaid done is manifest Error in this:—

- 1<sup>st</sup> The Sheriff's return to the summons upon which the default was entered is not sufficient, it does not state with sufficient certainty the time of service of such summons—
- 2<sup>nd</sup> The Court had no jurisdiction of the person of the defendant below by reason of the insufficiency of the Sheriff's return to the summons:—
- 3<sup>rd</sup> The first Special Count of the declaration is bad in substance & states no cause of action—
- 4<sup>th</sup> The second Special Count of the declaration is bad in substance & states no cause of action—
- 5<sup>th</sup> The judgment is against law wherefore he prays judgment & costs against Harwell & Smith attorneys for said Hunt

And the said Rosell M. Hough and Oramel J. Hough come by their attys., and say that there is no such error in the said record and proceedings, nor in the giving of said judgment, as is by the said James Funk above alleged, wherefore they pray that said judgment may be affirmed, &c.

Arrington & Dent,  
attys. for said N. M. & O. J. Hough.

N. M. Hough  
Funk  
6825

Filed Apr. 22. 1862  
A. C. C. C. C.

Transcript

Fee \$4.00  
Rec'd above fee (400)  
Apr 19 1862  
J. B. Carter  
Clerk  
F. S. J. C. C. C.