

No. 12834

Supreme Court of Illinois

Parker.

vs.

Palmer, et al.

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Charles Parker

vs

William Palmer et al

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12834

1059

~~William Palmer~~

~~Charles Parker~~

~~vs~~

12834

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Plas before the Honorable Circuit Court
within and for the County of Marshall, in the
State of Illinois, at a Term thereof begun and hold-
en at the Court house in Leon, in said County,
on Monday, the twenty-fifth day of January, in the
year of our Lord one thousand eight hundred
and fifty-eight. Present, the Honorable Martin
Ballou, Judge of the 23rd Judicial Circuit; George
W. Stipp, Esq., State's Attorney; James Wescott, Clerk;
and Henry L. Crane, Sheriff.

William F. Palmer and
William Maxwell,

partners under the name and style
of Palmer and Maxwell,

vs.

Charles Parker.

Assumpsit.

Be it remembered, that heretofore to wit,
on the 15th day of January, A.D. 1858, the said plain-
tiffs, by their attorney, filed in the Clerk's office of the
Court aforesaid a certain Declaration, in the words
and figures following, to wit:

Declaration.

[1538-5]

Error to Marshall Co

Charles Parker Pff in Error } In the Supreme
William J. Palmer et al } Court
April Term 1858

And the said Plaintiff in error comes and says that in the record proceeding and in the rendition of judgment in this cause manifest error hath intervened to the injury of the Plaintiff and for assignment of Error he shows the following:

1. The Court below erred in rendering judgment against the Plaintiff in error.
2. The Court below erred in rendering judgment before disposing of or deciding the demurrer to the second plea.
3. The Court should have settled & decided upon the demurrer to the second plea before rendering judgment upon the merits. He therefore says that said judgment may be reversed set aside & wholly for naught entered.

Ramsay, Thos his Atty

File And now come the said de-
pendants by their Attorney
and for plea say that no such
hath intervened as is above alleged
and this they pray may be enjoined
by the Court By their Attorney
their Attorney

State of Illinois, ss And Circuit Court thereof, to the
Marshall County, ss. Term, A.D. 1858.

William F. Palmer and William Maxwell, partners
under the name and style of Palmer & Maxwell, the
plaintiffs in this suit, complain of Charles Parker,
the defendant, in a plea of assumpsit,

For that whereas the said defendant, on the twentieth day of May, in the year of
our Lord one thousand eight hundred and fifty seven, at Lacon, in the County of Marshall,
State of Illinois, made a certain note in writing, commonly called a promissory note, bearing date the day and year last afore-
said, and then and there delivered the said note to the said plaintiffs, by which said note the said defendant promised
to pay to the order of said plffs, by their firm name of Palmer &
Maxwell, at their place of business in Lacon, Marshall County, Illinois,
the sum of three hundred and fifty dollars, in one day after the date thereof, with ten
per cent. interest.

for value received. BY REASON whereof, and by force of the statute in such case made and provided, the said defen-
dant became liable to pay to the said plaintiffs the said sum of money in the said note specified, according to
the tenor and effect of the said note, and being so liable, the said defendant in consideration thereof, afterwards, to wit, on
the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs
well and truly to pay unto the said plaintiffs the said sum of money in the said note specified, according to the
tenor and effect of the said note. AND WHEREAS also the said defendant afterwards, to wit, on the

twentieth day of May in
the year of our Lord one thousand eight hundred and fifty seven, at Lacon in the County
of Marshall and State of Illinois,

made a certain other note in writing commonly called a promissory note, bearing date the day and year last aforesaid,
and then and there delivered the said last mentioned note to the said plaintiffs, By which said last mentioned note the
said defendant promised to pay to the said plaintiffs the sum of seventeen dollars
and fourteen cents, in one day after the date thereof,

for value received. BY REASON WHEREOF, and by force of the statute in such case made and provided, the said defendant
became liable to pay to the said plaintiffs the said sum of money in the said last mentioned note specified, according to
the tenor and effect of the said last mentioned note; and being so liable, the said defendant in consideration thereof,
afterwards, to wit, on the same day and year and at the place last aforesaid, undertook, and then and there faithfully
promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in the said last men-
tioned note specified, according to the tenor and effect of the said last mentioned note. AND WHEREAS ALSO, the said

defendant afterwards, to wit, on the first day of January,
in the year one thousand eight hundred and fifty eight, at the place aforesaid, was indebted to the
said plaintiffs in the sum of five hundred dollars, lawful money of the United

States of America for so much money before that time lent and advanced by the said plaintiffs to the said defendant
and at the special instance and request of the said defendant. AND for other money by the said plaintiffs before that time
paid, laid out, and expended, for the said defendant and at the like request of the said defendant. AND for other money
by the said defendant before that time had and received to and for the use of the said plaintiffs. AND being so indebted,
the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place
aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs
the said sum of money in this count mentioned, when the said defendant should be thereunto afterwards requested.
AND WHEREAS also the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid,
accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing
from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the
said defendant then and there was found to be in arrear, and indebted to the said plaintiffs in the further sum
of five hundred dollars, of like lawful money as aforesaid. AND being so found in arrear
and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and
year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and
truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto
afterwards requested.

NEVERTHELESS, the said defendant, (although often afterwards requested, &c.) has not yet paid the said several
sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same
or any part thereof, to the said plaintiffs, the said defendant has hitherto altogether refused and still does refuse, to the
damage of the said plaintiffs of five hundred dollars, and therefore the
said plaintiffs bring suit, &c.

By Gibbons & Miller
their attys.

Copy of note sued on.

\$350⁰⁰

Lacon, May 20, 1837.

One day after date I promise to pay to the order of Palmer & Maxwell at their place of business in Lacon, Marshall Co. Illinois, Three Hundred and Fifty dollars value received with interest at 10 per cent. per annum from date.

Chs Parker,

Copy of other note sued on.

\$17⁵⁰

Lacon, May 20, 1837.

One day after date I promise to pay to the order of Palmer & Maxwell at their place of business in Lacon Marshall Co. Illinois Seventeen ¹⁴/₁₀₀ Dollars, value received, with without per cent. per annum from date.

Chs Parker,

Copy of account sued on.

Charles Parker,

To Palmer & Maxwell, Dr.

To goods sold and delivered,	\$ 500.00
" money lent & advanced,	500.00
" work, labor & materials,	500.00
" money paid for his use,	500.00
" " recd. by debt. for plfft's use,	500.00
" " due on account stated,	500.00

And afterwards, to wit, on the same day and year last aforesaid, the said plaintiffs, by their attorney, sued out of the Clerk's office of the Court aforesaid the following writ of Summons against the said defendants, to wit:

Summons.

The People of the State of Illinois, to the Sheriff of Marshall County, Greeting: We command you to summon Charles Parker to appear before our Circuit Court, on the first day of the next term thereof, to be held at Lacon, within and for the said County of Marshall, on the fourth Monday of January, A. D. 1858, then and there, in our said Court, to answer William F. Palmer and William Maxwell, partners under the firm name of Palmer and Maxwell, in a plea of assumpsit, in damages at the sum of five hundred dollars, as they say. Hereof fail not, and make due return of your doings hereon.

Witness, James Wescott, Clerk of our said Court, and the seal thereof, at Lacon, this fifteenth day of January, ~~in~~ the year of our Lord one thousand eight hundred and fifty-eight.

L.S.

James Wescott, Clerk.

And afterwards, to wit, on the 19th day of January, in the year last aforesaid, the said writ was returned to the Court aforesaid by the said Sheriff, indorsed as follows, to wit:

Return.
112004-3

I have served this writ by reading the same

to the within named Charles Parker, on this, the 15th day of January, A. D. 1858, as within commanded.

Sheriff's fees:
 Service, \$ 50
 Eight miles travel, 40
 Return of this writ, 10
 \$ 100

H. L. Crane, Sheriff
 of Marshall Co., Ills.
 By J. C. Gore, Deft.

And afterwards, to wit, on the 26th day of January, in the year last aforesaid, being one of the days of the said January Term of the Court aforesaid, the following Rule was made and entered in said cause, to wit:

Rule to
 plead.

William T. Palmer &
 William Maxwell,
 vs.
 Charles Parker.

} Assumpsit.
 This day, on motion of the
 plaintiffs, by Gibbons and
 Miller, their attorneys, a rule
 is entered by the Court that
 the defendant plead herein by Saturday morning.

And afterwards, to wit, on the 29th day of January, in the year last aforesaid, the said defendant filed in the Clerk's office aforesaid the following Pleas, to wit:

Pleas.

Palmer & Maxwell,
 vs.
 Charles Parker.

} State of Illinois, Marshall County,
 and the Circuit Court thereof,
 of January Term, A. D. 1858.

And now comes the said defendant, by Silas Ramsey, his attorney, and defends vs., and says, that he did not promise and undertake in manner

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and from as the said plaintiffs hath above declared against him, and of this he puts himself upon the country, &c.

Plffs doth like.

Gibbons & Miller, his attys.

Silas Ramsey,

atty. for deft.

And for further plea in this behalf, the said defendant says *actio non*, because, he says, that the promissory notes in the plffs' declaration mentioned was given in and for the consideration of the sale of goods, wares and merchandise from the said plaintiffs to the said defendant before that time made, to wit, on the 20th day of May, A.D. 1857, at the County of Marshall aforesaid, it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the said defendant and the said plaintiffs that the said plaintiffs should forbear and give time for the payment of said sum of money, and that in consideration thereof the said sum of seventeen dollars and fourteen cents, the amount of one of said notes, was usury, and the amount of the said ten per cent. upon the said note was and is usurious; and the said defendant avers that the said defendant executed and delivered to the plaintiffs the aforesaid notes, and that the said plaintiffs did forbear as aforesaid, and that said sum of money exceeds the rate of ten per cent. upon each

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hundred dollars for one year, contrary to the form of
the statute in such case made and provided, all
of which said sum of money became and was
and is wholly forfeited and void; and thus the
said deft. is ready to verify, whereby he prays
judgment &c.

Silas Ramsey, atty. for deft.

And afterwards, to wit, on the same day and
year last aforesaid, to wit, the 29th day of January,
A.D. 1858, the said plaintiffs, by their attorney, filed
in the Clerk's office aforesaid the following Demurrer
to the plea of the said defendant secondly above pleaded,
to wit.

Demurrer to
2nd Plea.

And now come the said plffs., and demur to
the 2nd plea of deft. herein, and say that the
same is informal and insufficient; and this
they are ready to verify, wherefore they pray
judgment, &c.

By Gibbons & Miller,
their attys.

And afterwards, to wit, on the 12th day of
February, A.D. 1858, being one of the days of the said
January Term of the Court aforesaid, the said plain-
tiffs produced in Court certain Notes in the words
and figures following, to wit:

Notes.

\$350

Lacon, May 20-1857.

One day after date, I Promise to pay to the order of Palmer & Maxwell, at their place of business in Lacon, Marshall Co, Illinois, Three Hundred & Fifty Dollars Value received, with interest at 10 per cent. per annum from date.

No. Due Ch^s Parker.

\$17¹⁴

Lacon, May 20 - 1857.

One day after date, I Promise to pay to the order of Palmer & Maxwell, at their place of business in Lacon, Marshall Co, Illinois, Seventeen ¹⁴/₁₀₀ Dollars Value received, with without per cent. per annum from date.

No. Due Ch^s Parker.

And afterwards, to wit, on the aforesaid 12th day of February, A.D. 1858, being one of the days of the said January Term as aforesaid, the said Court rendered judgment against the said defendant in said cause, as follows, to wit:

Judgment.

William T. Palmer & } Assumpsit.

William Maxwell,

vs.

Charles Parker.

This day came the plaintiffs, by Gibbons & Miller, their attorneys, and the defendant, by Ramsey his attorney, and the parties

waived a jury, and agreed to submit this cause to the Court for trial upon the issues joined between the parties; and the Court having heard the evidence,

9.

and being now fully advised in the premises, doth find that the defendant did assume and promise in manner and form as the said plaintiffs have complained against him, and that the plaintiffs have sustained damages by reason thereof to the sum of three hundred and ninety-two dollars and forty cents: Therefore it is considered, that the said William F. Palmer & William Maxwell recover of the said Charles Parker the said sum of three hundred and ninety-two dollars and forty cents, their damages assessed as aforesaid, together with their costs in this behalf expended, and it is ordered that execution issue therefor.

State of Illinois, } ss. I, James Mescott, Clerk of the Circuit
Marshall County, } Court in and for said County, do
hereby certify, that the foregoing
Record, from page 1 to page 9 inclusive, is correctly
copied from the proceedings and papers in the above-
entitled cause.

In witness whereof, I hereunto set
my hand and the Seal of said Court,
at Lacon, in said County, this 19th
day of March, A. D. 1858.

Clerk's fees:

James Mescott clerk

Record, \$2.75
Cert. & seal, $\frac{35}{3.10}$

Charles Parker

^{v2}
Wm H Palmeral } In the Supreme Court
3 April Term A.D. 1859

Argument for Defendants by
H M Mead

1. The cases referred to in the brief, show that the plaintiff in Error cannot take advantage of his own neglect in failing to add the similitur. There was no issue upon the demurrer, owing to his neglect. If this is correct, it disposes of the case

2. It is alleged there was error in not disposing of the demurrer to the Plea & cases are cited to sustain this position. Let us examine it. In deciding ~~for~~ for the plaintiff, the Court necessarily overruled the demurrer. But the record does not show the demurrer was overruled. The defect there is in the record not in the decision.

But the Court must look at the whole record to ascertain whether any error has been committed.

Parker vs. ~~227~~
Palmer et al

~~228~~ 228

Record & acct
of moneys

Filed April 22 1858
J. Leland
clerk

\$392.40

What does the record show? It shows a bad plea, manifestly & palpably bad. How then has the plaintiff in error been injured? In no way -

But this Court has decided a demurrer must be disposed of - but they have never told why. If a good plea is pleaded, to which a demurrer is interposed & ~~the case~~ and not disposed of, & the case submitted to a jury, how is any one injured? Or suppose a bad plea is pleaded and a demurrer interposed and the jury find for the plaintiff - how is the defendant injured, whether the demurrer is disposed of or not? Is he injured because he pleaded a bad plea, - a plea which this Court can see is bad? Most certainly not.

But if a party pleads a good plea which is demurred to, and the demurrer is not disposed of, and a judgment is had for the plaintiff, then the defendant is injured, not because the demurrer is not disposed of, but because he plead a good plea which has been treated as a bad one. These views are fully sustained in Philips vs Dana 1 Seamon 498.

But suppose a defendant does plead a good plea which is demurred to, and judgment goes against him, whether he is injured or not depends upon the evidence. If he was permitted to prove his entire defense under the general issue, how can it be said he has been injured because the demurer was not disposed of? Courts are expected to decide for ^{the} right. Why then encourage litigation upon a technical point destitute of reason? The great purpose in view is justice and when a man has had a fair trial and all his proofs have been heard, it would seem to be idle, to reverse the judgment merely for a matter of form, which ~~it~~

It is for the Court to decide all matters of law, and for the jury to decide matters of fact. If a case is submitted to a jury in which there is a demurer undisposed of, it may or may not be error. It is certain the jury cannot pass upon the question of law, but then if the plea demurred to is bad, where is the error?

But in this case all the matters of issue, or all the issues both of

law and fact were submitted to the Court. The Court found for the plaintiff thereby deciding the plea demurred to, to be bad. But the record does not show an entry expressly overruling the demurrer.

Suppose it does not — The Clerk may have failed to do his duty — but then the demurrer has been decided nevertheless — decided fully fairly and rightfully. And what is more the record shows that it was decided —

What then can the plaintiff in error complain of? I submit that the judgment ought to be affirmed.

It is Wced
for Reversal Error

48-66
Charles Parker

vs
William F. Palmer and

Argument by
Hunt Wend
for Defendant

Filed April 29, 1839

L. Leland
Clerk

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

To the Clerk of the Circuit Court for the County of Marshall Greeting:

Because, In the records and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Marshall County, before the Judge thereof, between William F. Palmer and William Maxwell partners under the name and style of Palmer & Maxwell — plaintiffs and Charles Parker —

defendant, it is said manifest error hath intervened, to the injury of the aforesaid defendant

as we are informed by his complaint — and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the records and proceedings of the plea aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 31st day of July — in the Year of Our Lord one thousand eight hundred and fifty-eight.

Leland

Clerk of the Supreme Court.

J. B. Rice Deputy

Charles Parker
vs
William F. Palmer et al

Writ of Error

This writ of Error is
made a supersedeas
and as such is to be
obeyed by all concerned
L. Leland Clerk
by J. B. Rice Deputy

Filed July 31st 1858
L. Leland
Clerk

Known all men by these presents that we
Charles Parker and Silas Ramsay are held
and firmly bound unto William F Palmer
and William Maxwell in the penal sum
of five hundred dollars Current Money
of the United States for the payment of
which well and truly to be made
we and each of us bind ourselves our
heirs Executors and administrators jointly
by these presents Signed Sealed and
Attest at Leon this 20th day of July
A.D. 1858

The condition of the above
bond is such that whereas at
the January term A.D. 1858 of the Circuit
Court of Marshall County Illinois
William F Palmer & William Maxwell
recovered a judgment against
the above bound Charles Parker for
the sum of three hundred and ninety
two dollars and forty cents damages and the
costs of suit. And the said Charles
Parker having taken said Record to the
Supreme Court for error in the same
and having applied to said Court
for a supersedeas to stay proceedings
on said Judgment, and the said
Supreme Court having made an order
granting said Supersedeas when if the
above bound Charles Parker shall
well and truly and without delay
procure his said writ of error within

delay and shall pay the said Judgment
Costs and Damages in Case the said
Judgment shall be affirmed then this
bond to be null and vain otherwise
to be and remain in full force and
effect

Signed & sealed in
the presence of
Abraham Allen

Chas Parker
Jas Ramsey

Seal
Seal

James Mendenhall

his

Chas Parker

Abraham Allen

Super Bond

Filed July 21st 1814
at New York

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

CHARLES PARKER vs. WILLIAM F. PALMER, *et al.*

DEFENDANT'S BRIEF, BY H. M. WEAD.

1. The defendant below neglected to join issue upon the demurrer. There was no issue then for the Court to try, except the general issue.

Furness vs. Williams, adm'r., 11 Ill., 237. 1 Scam 498
Waters vs. Simpson, 2 Gil., 570.

2. The plea of usury was clearly bad. It did not show the amount forborne, the time of forbearance, or what was forborne. It is vague, uncertain, and indefinite and insufficient.

Hancock, et. al., vs. Hodgson, 3 Scam., 333.

2d Sanders' Pl. and Evidence, 1182, side paging.

1 Scammon, 212.

3. The issues joined between the parties were submitted to the Court for trial. The Court did try them, and found for plaintiff. There is no error.

H. M. WEAD,
Att'y for Def'ts in Error.

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Charles Parker tal

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William F Palmerrd

Deft Brief

Filed April 28, 1859

Kelant
Clink