

8638

No. _____

Supreme Court of Illinois

Wm.E.Smith

vs.

DeWitt C.Barber

71641  7

At a Circuit Court begun
and held at the Court house
in the Town of Pinckneyville in
and for the County of Perry
and State of Illinois on
Monday the fourteenth day of
September in the year of our
Lord one thousand eight hund-
red and fifty seven. Present
the Honorable William H
Parrish Judge of the Third judicial
Circuit Court of the State of
Illinois Evan B. Rushing clerk
of said Court and David
M. Hays high Sheriff of said
County.

On the 11th day of August A.D. 1857 Summons
was issued in words & figures as follows to wit

State of Illinois Perry County - s.s
The People of the State of Illinois To the Sheriff of
said County Greeting:
We command you
to Summon William E. Smith, if to
be found in your County to be and app-
ear before the Circuit Court of said County
On the first day of the next Term thereof

to be holden at the Court House in the
Town of Rockneyville on the Second Monday
in the month of September next to answer Dewitt
C Barber in an action of Trespass on the case
on promises to his damage Five hundred
Dollars as he says and hereof make due return
to our said Court as the Law directs

Witness, Evan B Rushing clerk of ^{our} said
Court and the Judicial Seal thereof,
at Pinckneyville, this 11th day of August
(A. D. 1857) in the year of our
Lord one thousand eight hundred
and fifty seven

E B Rushing clerk
And upon the back of said Summons
is the following endorsement to wit

"Executed by reading the within Summons to the
within named Wm E Smith Augt 15th 1857
D. M. Keay Shff."

And again to wit upon the 14th day of
August A D 1857 Declaration was filed
which is in words & figures as follows to wit
State of Illinois of the Supt. Term of the
Perry County Perry Circuit Court
A D 1857

Dewitt C Barber the plaintiff in this
Suit complains of William E Smith the
defendant in this suit being Summoneed & C

1st
Of a plea of Creepas on the case on promises
For that whereas one G. W. Murry
& Elizabeth heretofore to wit on the 26th day of
May A. D. 1836. to wit at Samara in the County
and State aforesaid according to the usage and
Custom of Merchants from time immemorial
~~issued~~ and approved within this State made
their certain bill of Exchange in Writing
bearing date the day and year aforesaid &
then & there directed the said bill of exchange
to the said defendant to pay to the said
Plaintiff $\$130 \frac{49}{100}$ & then & there delivered
the said Bill of exchange to the said
Plaintiff, which said Bill of exchange
the said defendant afterwards to wit
on the day & year aforesaid to wit, at
the County aforesaid upon sight
thereof accepted according to the usage
& custom of Merchants by means whereof
& according to the said usage & custom
of Merchants the said defendant then & there
became liable to pay to the said Plaintiff
the said Sum of Money in the said bill of
Exchange specified according to the tenor
& effect of the same & of his said acceptance
thereof & being so liable he the said defend-
ant in consideration thereof afterwards to wit
on the day & year aforesaid undertook & then

& there faithfully promise the said plaintiff to pay him the said sum of money in the said bill of exchange specified according tenor & effect of the said bill of exchange and of his acceptance thereof

2nd

And whereas afterwards to wit on the day & year aforesaid one Elizabeth Murry wife of George Murry was an heir at Law an distributee of one Josiah Little deceased and the said defendant who was acting as an administrator of the estate of the said Josiah Little deceased having at the time aforesaid the estate & moneys of the said Elizabeth Murry wife of the said George Murry descending to her from her deceased father in his hands and control the Elizabeth & George Murry being indebted to the Plaintiff, drew a certain order or bill of exchange upon & directed to the said defendant requesting him to pay over to the Plaintiff their distributive share of said estate whenever the same was ascertained by a settlement with the Probate Court of Perry County Ill the amount of which order or bill was left blank with direction & authority to fill the same when a settlement was had & made by the said defendant before said

Court which order while blank was forwarded to the said defendant to wit on the day & year aforesaid & by him accepted. to wit at the County aforesaid and the sd plff avers that afterwards to wit at the January term 1857 of County Court of Perry County Illinois holden for Probate purposes there was a settlement of said estate & it was then and there found by such settlement that the defendant had on his possession \$130.49 moneys which was due owing to the said Elizabeth Murray as ^{one of} the ~~are~~ heirs of Josiah Little dec'd whereupon the blank in the aforesaid order or bill was then filled

3 x And Whereas the said defendant heretofore to wit on the 26th day of May 1856 at the County aforesaid being indebted to the Plaintiff in the sum of \$130.49 for so much money before that ~~time~~ had and receiv'd by the said defendant to the Plaintiff use in consideration thereof then and there promises the plaintiff to pay him that sum when he should be thereunto afterwards requested yet the said defendant though often requested hath never paid the said sum of money but refuses so to do, with said sum of \$130.49 which plff owes was done with & by the consent of the said defendant

as well as that of the said Elizabeth & G. W. Murry by reason of which said promises the said defendant became liable to pay the said plaintiff the sum of \$130,49 and in consideration ^{thereof} then & there promised the said plaintiff to pay him the said sum of money to wit the sum of \$130,49 when thereunto after wards requested &c,

4
X'm

And whereas one G. W. Murry & Elizabeth Murry at Sannaroca Perry County Illinois on the 26th day of May 1856 drew their order in writing under their hands of that date directed to the said defendant therein & then by requesting him to pay to the said plaintiff the sum of \$130,49 and the plaintiff afterwards to wit on the same day presented the said order to the said def^t for his acceptance who then and there duly accepted the same wherefore the balance to be and in consideration thereof promised the plaintiff to pay him that sum when he should be thereunto afterwards requested so to do,

5- And whereas afterwards to wit on the day & year aforesaid to wit at the County aforesaid one G. W. Murry & Elizabeth Murry made their certain bill of exchange in writing

in writing of that date directed to the said
defendant & thereby requested the said
defendant to pay to the said plaintiff
the sum of dollars and — cents and then
and there delivered the said Bill of
exchange to the said plaintiff, which
said Bill of exchange the said defendant
there afterwards to wit on the day & year
aforesaid & at the County aforesaid upon
sight thereof accepted and the said plff avers
that the said blanks in the said bill as to
the dollars & cents were afterwards & by
the consent & authority of the said G W F
Elizabeth Murry and the defendant
filled with the sum and amount of
\$130.⁴⁹/₁₀₀ by means whereof the said defend-
-ant then & there became liable and in
consideration thereof then & there prom-
-ised the plaintiff to pay him the
sum of \$130.⁴⁹/₁₀₀ according to the tenor
& effect the said bill and the said accep-
-tance thereof yet the said defendant although
often requested so to do hath not as yet paid
the said several sums of money although
often requested so to do but he to do this
hath hitherto wholly neglected & refused & still
doth refuse to the damage of the plff five hundred
dollars & therefore he said

A Duff
for plff

And upon the Back of said
declaration is the following endorse-
ment to wit:

"Filed August 14th 1857

Ed. T. Rushing Clk.

And to wit on the 9th day of April, ¹⁸⁵⁸ the
plaintiffs filed and amended
declaration in words & figures
as follows to wit

6th

And for that whereas afterwards to wit before the making of the promise and undertaking hereafter mentioned by him the said Defendant he the said Defendant was administrator of the estate of one Josiah Little late of Perry County deceased and had as such administrator funds in his hands belonging to Elizabeth Murry wife of George W Murry and that said George W Murray in right of his said wife as heirs of the said Josiah Little which was due and payable to them the said Murry & wife whenever a Settlement was made of said Estate in the County Court of Perry County sitting as a court of Probate and to be paid to them by him the said Defendant as such administrator whenever the amount of there Shares of said Estate was allowed on Settlement in said Court as aforesaid.

And the said Plaintiff further sayth that the said Elizabeth and George before the making of the premises and undertaking by him the said Defendant hereafter mentioned for a valuable consideration moving from the said Plaintiff to the said George and Elizabeth did transfer their interest in said Josiah Little estate to him the said Plaintiff & did thereupon that

is to say on the 26th day of May 1856. at the
County aforesaid make an order in Writing
on him the said defendant requesting him
the defendant requesting to pay him the said
Plaintiff the amount that might be allow-
ed them as heirs of said Josiah Little by the
Court on Settlement of said Estate which
amount was to be interested when said
allowance was made and then and there
delivered said order to him the said plain-
tiff, and the said order being so made he
the said defendant then and there by
written indorsement thereon as such
administrator accepted the same by
means ~~whereof~~ thereof the Plaintiff avers that
the defendant then and there became and
was liable as such administrator to pay
him the said plaintiff the amount to be
allowed them the said George and Elizabeth
according to the tenor and effect of the said
order and being so liable he the said defen-
dant as such administrator afterwards
to wit: on the day and year last aforesaid
at the County aforesaid in consideration
thereof undertake and then and there
faithfully promise him the said Plaintiff
to pay him the amount which should
be allowed to them the said George and

Elizabeth on Settlement of said Little's estate
when the same should be allowed by
said Court & inserted in said order
whenever afterwards requested by him
the said plaintiff, so to do and the plain-
-tiff says that afterwards to wit at a
County Court held for Probate purposes
in & for the County of Perry aforesaid on the
6th day of January 1857 at Pinckneyville
there was allowed to them the said George
and Elizabeth as heirs of the said Josiah
Little a certain large amount of money
to wit the sum of \$130 ~~49~~ as their distribu-
-tive share of said Estate which said allow-
-ance was inserted on the face of said order
of which he the said defendant afterwards
to wit on the day and year aforesaid at
the County aforesaid had notice yet
the plaintiff in fact says that he the
said defendant wholly disregards his
said promise and undertaking so by
him made as aforesaid to pay the said
sum of \$130.49 to him the said plaintiff or
any part thereof all though often requested
so to do has hitherto wholly failed and refuse
and still does fail and refuse to wit at the
County aforesaid &c.

Copy of the instrument sued upon

Hamarow May 26th 1856
W. E. Smith Sir,

please pay the bearer
D. C. Barber One hundred & thirty
dollars and forty nine cents the amt.
that may be allowed us as heirs
of Josiah Little Dec^d by the Court
upon Settlement of sd estate the amt.
to be inserted when allowance is made
and this shall be your receipt in
full.

And upon the Back of said order is as follows ^{Elizabeth Murry}
Excepted by me May 26th 1856 W. E. Smith Adm^r of the estate of Josiah Little dec^d

And afterwards to wit on Wednesday
the 28th day of July A. D. 1858: the following
order of court was made to wit:

Dewitt C Barber
as ^{Pres} of the case on promise
William E. Smith

Came again this day the parties
by their ^{attorneys} ~~parties~~ and issue being joined herein
therefore let a jury come, and thereupon
came a jury of good and lawful men to wit:
James Lemonous, N. B. Eaton, Charles Peters, James Wilson,
Mathew M^r Millan George Eaton, F. M. Milligan, John
Brown, Abraham Adams Daniel Bell, J. C. King &
John Campbell, who being elected tried and

sworn, to well and truly try the issue
joined upon their oaths do say: "The
jury find the issues for the plaintiff and
assess his damages at one hundred
and forty three dollars and five cents (\$143.05)
And thereupon the defendant entered his
motion for a new trial and in arrest
of judgment. And on motion of the
said plaintiff by his attorney a remit-
titer of twelve dollars and fifty six
cents is entered.

And afterwards to wit on
Saturday 31st July A.D. 1858 the
following order was made to wit:

Dewitt C. Barber
vs
William C. Smith

Presqap on the case on promise

Comes again this day the plaintiff
by his attorneys as well as the said defendant
by his attorneys, and the motion heretofore
entered by the defendant for a new trial
in said cause is overruled by the court.
Therefore it is considered by the court, that
the said plaintiff do recover of and
from the said defendant the sum of
One hundred and thirty dollars and
forty nine cents, and also his proper

Costs and charges by him the said
plaintiff about his said suit in this
behalf Expended and may hereof
have Execution &c

Thereupon comes the defendant
by his counsel and prays an appeal
to the Supreme Court which is allowed
upon condition that he enter into
bond in the sum of Three hundred
dollars, with John Baird as his secu-
rity within twenty days, and it is
further considered by the Court that
by agreement of the parties bill of
Exceptions may be signed in vacation.

And afterwards to wit on the
26th day of August A D 1858, a
bond was filed in words & figures
following to wit:

Know all men by these presents that we
William C Smith and John Baird of the
County of Perry and State of Illinois are
held and firmly bound unto Dewitt C
Barber, also of the same County and State
in the penal sum of ~~three~~ three hundred
dollars current money of the United
States for the payment of which well
and truly to be made we bind ourselves

our heirs executors and administrators
jointly, severally and firmly by these
presents Withp our hands and seals
this 10th day of August A. D. 1858

The condition of the above
obligation is such that Whereas the said
Dewitt C Barber did on the thirty first
day of July A. D. 1858 in the circuit
court in and for the County (and)
State aforesaid recover a judgment
against the above bounden William
E Smith for the sum of one hundred
and thirty dollars and forty nine
cents damages and seventy dollars
and ten cents costs from which said
judgment of the said Circuit Court the
said William E Smith has prayed for
and obtained an appeal to the Supreme
Court of said State, Now if the said
William E Smith shall duly prosecute his
said appeal with effect and shall moreover
pay the amount of the judgment costs
interests and damages rendered and to be
rendered against him in case the said judgment
shall be affirmed in the said Supreme Court
then the above obligation to be void otherwise to remain
in full force and virtue

W. E. Smith

John Baird

Taken and entered into before me at my office
in Pinebluffville this 10th day of August A. D. 1858
E. B. Puckney clk cir court

And upon the back of the foregoing
Bond is as follows

"Filed August 10th A.D. 1858

E. B. Rushing cl^k

State of Illinois
Perry County

I, the undersigned clerk of
the Circuit Court within and for the County
and State aforesaid, do hereby certify
that the foregoing Record contains a
true copy of the Summons, Declaration
judgment or orders of court, Bond & c as the
same appears of Record in my said
Office. & that ^{my said office} there has ~~not~~ been no bill of exceptions filed in
my testimony whereof I have
hereunto set my hand and
affixed the official seal of
said Court at office in Buck-
nerville this 4th day of Nov. A.D. 1858

Erwin B. Rushing cl^k

William E. Smith
appellant
" "

Devot C. Barber
appellee

appeal from
jury

D C Barber vs
W E Smith
in Court below
" " do
W E Smith vs
D C Barber

Summed with
Specimen Damages
on delay

Filed Nov. 12. 1858.

A. Johnston Clk

Paid - \$5.00

State of Illinois
Perry County E. Evan P. Rushing
Clerk of the Circuit Court
within & for the County & State aforesaid
do hereby certify that my fee for
making record in Case of J. C.
Basler, vs Mr. E. Smith (Removed
to your Court by appeal, from said
Perry County) is three Dollars & sixty five
cents. In Testimony Whereof I have
hereunto set my hand &
affixed the seal of said
Court, this 31st day of
Decr. A. D. 1858.

E. P. Rushing

Certificate
Showing fees
of Circuit Court
\$3.65

Wm D. Jones 5-59

66

William E. Smith

Appellant

vs

Smith Co. Bank

Appellee

8638

Appeal from Perry

Disputed Ar. 1858 - with

5 per cent Damages