

No. **12296**

Supreme Court of Illinois

Barnett*

vs.

Smith.

71641  7

State of Illinois } ss
County of Cook

I was before the Honorable John M. Nelson Judge of the Cook County Court of Common Pleas within and for the County of Cook and State of Illinois at or before the term of said Cook County Court of Common Pleas begun and holden at the Court House in the City of Chicago in the County and State aforesaid on the said Monday being the seventh day of April in the year of our Lord one thousand eight hundred and fifty six and of the Independence of the United States the eightieth

Fourth day of John M. Nelson Judge
James C. Beach Coroner
acting Sheriff of Cook County

Attest

Walter Kimball Clerk

Be it remembered that heretofore to wit: On the sixth day of June in the year of our Lord one thousand eight hundred and fifty five, came George Smith Marritiff, by his attorneys, Frank and Winston, and filed in the office of the Clerk of the Court County Court of Common Pleas, his precept for a summons against: George Barnett, George Armon & Thomas Hamilton Noble, Defendants in a plea of Debt and also his Declaration which said precept & Declaration in in words and figures as follows to wit:

George Smith	}	Clerk County Court
George Barnett		of Common Pleas
George Armon &		
Thomas Hamilton Noble		

The Clerk will please
issue summons in within cause in Debt \$5000
Dams \$500 - Returnable to July Term
Very truly

Frank & Winston

And therefore on the seventh day of June in the year last aforesaid there issued out of the office of the Clerk of said Court a writ of Summons where said Summons & endorsement thereon is in words and figures as follows to wit:

State of Illinois } ss. The People of the State of
County of Cook }
to the Sheriff of said County - Greeting

We command you that you summon George Barnett, George Armon and Thomas Hamilton Noble if they shall be found in your county personally to be and appear before the Cook County Court of Common Pleas of said County on the first day of the next term thereof to be holden at the Court House in the City of Chicago in said County on the first Monday of July next to answer unto George Smith in a plea that they render unto the said plaintiff their Debt of Five Thousand Dollars which they owe to and detain from him to the damage of the said plaintiff as he says in the sum of Five thousand Dollars

And have you open and true this writ with an endorsement thereon in what manner you shall have executed the same -

Witness - Walter Churchill Clerk
of my said Court and the seal thereof
at the City of Chicago in said County
this 7th day of June A.D. 1855

Walter Churchill Clerk

"Endorsed thereon"

Served this writ on the within named George Armon by reading to him this 22d day of June 1855 - George Barnett & Thomas Hamilton Noble not found in my county James Anderson Shy
By J. D. Binkley Deputy

State of Illinois } ss. Cook County Court of Common Pleas
Cook County } of the June Term A.D. 1855 -

George Smith plaintiff in this
suit by Frank & Winston his attorneys complains
of George Barnett George Armon and Thomas
Hamilton stable defendants herein who were
summoned &c of a plea that they owe to the
said plaintiff the sum of Five thousand doll-
ars lawful money of the United States which
they owe to and unjustly detain from him
And thereupon the said Smith by his said
attorneys states -

For that whereas heretofore to wit
on the nineteenth day of April in the year of
our Lord one thousand eight hundred and
fifty at Chicago to wit: at Cook County afo-
aid the said Defendants made their certain
writing obligatory in the words and figures follo-
wing that is to say -

"Know all men by these pres-
ents that we George Barnett of the County of Will
and State of Illinois and George Armon and
Thomas Hamilton stable of the County of Cook
and State of Illinois are held and firmly
bound unto Messrs George Smith Esq of the city
of Chicago County of Cook and State of Illinois
in the sum of Five thousand Dollars lawful.

money of the United States of America to be paid unto the said George Smith & Co - For which payment well and truly to be made we bind ourselves jointly and severally and each one of our heirs executors and administrators firmly by these presents - Sealed with our seals - Dated this nineteenth day of April in the year of our Lord one thousand eight Hundred and fifty -

The condition of the above obligation is such that ~~whereas~~ if the above bounden Thomas Hamilton Noble shall well and truly perform the duties assigned to and trust reposed in him as Seller of said firm and as long as he shall continue in that capacity or if the said Thomas Hamilton Noble shall well and truly perform the duties of every other office duty or employment to which he may be appointed in the office of said firm and also such other duty or duties as may from time to time be assigned to him by the said firm or by the Managing Club thereof or undertaken by him in relation to the said firm; and shall also faithfully keep the secrets of the said firm which may come to his knowledge in the service of the same; and if he shall at all times during the time aforesaid faithfully execute and promote the interest of said firm and shall make known to said firm or the Managing Club thereof

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without delay any fraud false entry error or
mistake which he shall or may know or disco-
ver to have been made or to have taken place
in any of the books of said firm or in any
matter, transaction or thing relating to the
business and affairs, thereof. then the the
above obligation to be void otherwise to remain
in full force and virtue -

Sealed and delivered
in presence of
C. B. Farnell
H. S. Morse

Geo Barnett
George Armon
Thos H Noble

seal
seal
seal

And sealed with their
seals and delivered the same so made to the
said Plaintiff, and that by said writing obli-
gatory the said defendants acknowledge
themselves to be held and firmly bound
unto the said plaintiff by the name and
style of George Smith Dec in the said sum
of five thousand Dollars in said bond
mentioned upon the condition therein set
forth -

And the said Plaintiff further states
that afterwards to wit on the day and year
aforesaid the said Thomas Hamilton Noble
entered upon the duties of Seller of said
firm in said Bond mentioned and
continued in the discharge of such duties

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for a long time to wit: for the space of four
years and upwards and that afterwards to wit
the tenth day of October in the year of our
Lord one thousand eight hundred and
fifty from the said Noble while in the dis-
charge of the duties of said office of Clerk
fraudulently and wrongfully abstracted
and retained from the funds of said George
Smith & Co a large sum of money to wit:
the sum of nine thousand five hundred
and seventy nine dollars and ninety three
cents (\$9579.²³) which said sum was the pro-
perty of the said plaintiff - By means
whereof said defendants became and were
liable to pay said sum of nine thousand
Dollars in said Bond mentioned to said
plaintiff when they should be thereunto
afterwards requested - But the said defen-
dants (though often requested so to do)
have not as yet paid the said sum of nine
thousand Dollars, above demanded or
any part thereof to the said plaintiff, but
have hitherto wholly neglected and refused
and still neglect and refuse so to do - To
the Damage of the said Plaintiff of nine
thousand Dollars and therefore he brings
his Suit

Amos & Austin
Attys

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And thereafter to wit: on the twenty first
day of February in the year of our Lord
one thousand eight hundred and fifty
six, came the said defendants, by their att-
orneys, and filed in the office of the clerk
of said Court their Plea which said Plea
is in words and figures as follows to wit:

George Barnett & George Ammon &c ad George Smith	}	Brooks County Court of Common Pleas June Term A.D. 1856
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And the said defendants George Barn-
ett & George Ammon, by their attorneys Higgin
Beckwith & Stratton come and defend the
writ &c where and say that the said plain-
tiff ought not to have or maintain his assumpsit
action thereof against said defendants, because
they say that said Thomas Hammiten Noble
did not while in the discharge of the duties
by him to be performed in said writing obli-
gatory mentioned abstract or return ~~from~~ the
funds of the Aff the sum of money in said
declaration mentioned or any other sum
of money and of this they put themselves
upon the country for trial —
And for a further plea in this behalf

the said debtors say action because they say
 that said Thomas Hamilton Noble at the time
 of the execution and delivery of the writing
 obligatory in said declaration mentioned
 was employed by the said plaintiff for a long
 period of time to wit for the term of three
 years from the 1st day of April A.D. 1857 and
 no longer to perform the duties in the said
 writing obligatory mentioned; and that he
 the said Thomas Hamilton Noble during all
 that time, did well and truly observe per-
 form fulfil and keep all and singular the
 articles clauses payments conditions and
 agreements in the said condition of the said
 writing obligatory specified comprised and
 contained in all things therein contained
 on his part and behalf to be observed per-
 formed fulfilled and kept, according to the true
 intent and meaning of the said condition
 and that long before any default had been
 made in the condition of said writing obliga-
 tory or any liability whatever incurred by said
 debtors by reason of any default by the said Thomas
 Hamilton Noble the said time for which the
 said Thomas Hamilton Noble was employed
 as aforesaid had elapsed and expired; and that the
 said debtors are ready to verify; wherefore they pray
 Judgment if the said Plaintiff ought to have or main-
 tain his aforesaid action thereof against them &c

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And for a further plea in this behalf the said
defts say "actio non"; because they say that before
& at the time of the execution and delivery of
the writing obligatory in the said declaration
mentioned by the said defendants to wit; on
the 19th day of April A.D. 1850 the said
plff was trading and doing business as a private
banker under the name and style of George Smith
& Co and that before and at the time of the execu-
tion and delivery of said writing obligatory in
the said declaration mentioned to wit; on the
day and year last aforesaid, and for a long
time thereafter to wit for the period of two years
the said plff was and continued to be
sole and only person composing the said firm
of George Smith & Co and that the service
duty and trust reposed in the said Thomas
Hamilton Noble mentioned in the condition
of the said writing obligatory were intended
to be executed and performed by the said
Thomas Hamilton Noble to the said plaintiff
in his said business as a private Banker so
carried on by him on and for his sole account
as aforesaid; and that the said Thomas Ham-
ilton Noble during all the time he continued
in the service of the said plff alone did well
and truly observe perform fulfil and keep
all and enjoin the articles clauses and agreements

in the said condition of the said writing obligatory specified comprised and contained in all things therein contained on his part and behalf to be observed performed fulfilled and kept according to the true intent and meaning of the said condition; and more especially did not during that time abstract or retain from the funds of the plff the sum of money in the breach assigned in said declaration mentioned or any other sum of money; but that the said plff afterwards to wit on the 19th day of April A.D. 1852 and before any default had been made in the condition of the said writing obligatory by the said Thomas Hamilton Noble associated with himself in the said business as a partner one Elisha H. Willard; and that while the said Willard was associated with the said plff as a partner in the said business as aforesaid the said default of the said Thomas Hamilton Noble in the said declaration mentioned occurred, and at no other time whatever, and that after the said Willard was associated with said plaintiff as a partner as aforesaid the said Noble served the said firm and did not serve for the said plaintiff alone at the time said default occurred was in the employ of said plaintiff & said Willard, and was not in the employ of said plaintiff alone and thus the said depts are ready to verify

Wherefore they pray Judgment if the said plff
ought to have or maintain his aforesaid action
thereof against them &c

By their attys
Niggin Beckwith & Stralher

And thereafter to wit; on the twentieth day
of March in the year last aforesaid - came
the said Plaintiff by his said attorneys and
filed in the office of the Clerk of said Court
his Replication Demurrer & Similitur which
are in words and figures as follows to wit;

Serge Smith

Sir Barnett

And the said plff as to the
Plea of the Deft by them first above pleaded
and whereof they have put themselves upon
the country doth the like -

And as to the said second plea of the
Deft the plff says it is not good in law and
he is not bound to answer the same - whereof
Verdict in Demurrer

C. Beckwith Defts Atty

And in replication to the defts third plea a
plff says that on the 29th day of November 1855

He and the said Elisha W Willard made and entered into a covenant and agreement in the words and figures following to wit;

"Articles of agreement made this twenty ninth day of November in the year of our Lord one thousand eight hundred and fifty one between George Smith of the City of Chicago first party of the first part and E. W Willard of the same place party of the second part Witnesseth Whereas said party of the first part has been and now is engaged in the general business of banking and exchange in the City of Chicago under the name style and firm of Geo Smith & Co and the said party of the second part being desirous of becoming a member of said firm it is hereby stipulated and agreed between said parties as follows -

1st The said party of the first part hereby admits and receives said party of the second party as a member of the firm of Geo Smith & Co

2^d The business to be continued and carried on in the City of Chicago in the name style and firm of Geo Smith & Co and to be a general banking and exchange business of the same kind and character as has been hitherto done by said party of the first part -

3 The partnership hereby entered into is to continue from the first day of December in

the year of our Lord one thousand eight hundred and fifty one until the first day of December in the year of our Lord one thousand eight hundred and fifty three.

4th The capital stock to be used in said business is to be furnished by said party of the first part.

5th The said party of the second part is to devote his whole time and attention to said business and is not to use the name and style of said firm for any other purposes except such as regularly belong to the business aforesaid.

6th Said party of the second part is to have and receive from said business the sum of three thousand dollars per annum in full for his services and in lieu of all other profits or claims upon said party of the first part the said firm or the business thereof.

7th The said party of the first hereby guarantees to said party of the second part the payment of the sum mentioned in article number six.

Witness our hands and seals this day and year first above written.

Sealed & delivered in
presence of Henry Snicker

Geo. Smith seal
E. W. Willard seal

which said covenant and argument was on the first day of June 1853 by an agreement thereunder written and signed and sealed (as was the said covenant above set forth) by the plff and the said Millard with their own hands and seals extended and continued for the term of three years from the time the same would have expired by the limitation therein expressed; which agreement for the extension and continuance of the said covenant as aforesaid is in the words and figures following to wit: We within articles of copartnership and the covenants and agreements therein contained are hereby extended and continued for the term of three years from and after the time they would expire by the limitation therein expressed upon the same terms and conditions except that the compensation provided for in article six shall be from the date hereof at the rate of Five Thousand Dollars (\$5000) per annum and the said parties severally ~~covenant~~ with each other to perform and fulfill the said agreements according to the terms therein expressed and the modifications herein contained for the time herein provided for Witness our hands and seals this first day of June 1853

In presence of Robert Reid }

G. Smith } *Real*
E. W. Millard } *Real*

which said covenant and agreement to extend the same are here to the Court shown.

And the plff avers that the said covenant and agreement to extend and continue the same as above recited and set forth are the only covenants, agreements and undertakings, promises and relations ever made entered into or framed at any time by or between the plff and the said Willard; nor have they at any time interest into done, transacted or carried on any business of banking or exchange or any other business except as stipulated and provided in said covenant or agreement; nor has the said Willard at any time had any interest in the business done, transacted and carried on profits made capital put in or stock in trade, used or on hand under the stipulations and provisions in said covenant and agreement contained or otherwise; and so the said plaintiff says that the money abstracted and retained by the said Thomas Hamilton Noble as in the plff's declaration alleged, always was the sole and absolute money and property of the plff and not at any time that of the said Willard or of the said Willard and plff. And so the said plff further says that notwithstanding the said articles of agreement between T. Willard & the said plff the said sum

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of money in said declaration mentioned was so
retained and abstracted by the said Noble
while in the service and employ of the plff
alone, under and by virtue of the covenants
and undertakings in the writing sued on and
not, while he was in the service and employ-
ment of the plff and the said Willard as in the
said defts Plea alleged; and so the plff further
says that, by reason of the premises aforesaid he
and the said Willard have at no time been
partners in business as private bankers in
manner form and effect as alleged by the
deft in their said Plea, without this that
the said Thomas Hamilton Noble during all
the time he continued in the service of the plff
did well and truly observe perform fulfil
and keep all and singular the articles clauses
conditions and agreements in the said condi-
tion of the said writing obligatory sued on
specified expressed and contained in all
things therein contained on his part in his
behalf to be observed performed and fulfilled
and kept according to the true intent and
meaning of the said condition
and without this further that the said
Thomas H. Noble, did not during the time
he was in the service of the plff as above
stated abstracted and retain from the funds
of the plaintiff the sum of money in the

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breach assign in plffs declaration mentioned
or any other sum of money - and without
this further that the plff afterwards to wit;
on the 19. Apr 1852 and before any default
had been made in the condition of the
said writing obligatory by the said Thomas
H Noble associated with himself in the
said business as a partner in Elisha H.
Willard and that while the said Willard
was associated with the said plff as partner
in the said business as aforesaid the said
default of the said, Thomas H Noble in the
Declaration mentioned occurred and at no
other time whatever and that after the said
Willard was associated with the plff as a
partner as aforesaid the said Noble served
the said firm and did not serve the plff
and that at the time said default occurred
was in the employ of said plff & said Willard
and not in the employ of the plff alone -
And that he is ready to verify wherefore &c

Wmston D Briston
for Plff

And thereafter to wit on the twenty third day
of April in the year last aforesaid - came the said
deft. by their said attorneys and filed in the
office of the Clerk of said Court their Rejoinder in words
and figures as follows to wit -

George Barnett &
 George Armon imp &c
 ad
 George Smith } Cook County Court
 of Common Pleas

And the said defendants
 as to the said replication of the said plff
 to the said third plea of the said defendants
 sayth that the said plff ought not by reason
 of anything by him in said replication alle-
 ged to have or maintain his aforesaid action
 there against them the said defts because
 they say that the said plff from and after
 the entering into said articles of agreement
 in said replication mentioned and set forth
 at all times represented and held himself out to
 said defts and to world at large as a partner
 of the said Willard as in the said plea alleg-
 ed and that they the said defts had know-
 ledge or information of said articles of agree-
 ment in said replication mentioned and set
 forth, and that the said defendants are ready
 to verify. Therefore &c

And the plff says that the said rejoinder
 of the defts is not good and sufficient
 in law. Wherefore

And the said defts further say that the
 said plff ought not to be admitted or per-
 mitted to reply the said replication to the said
 defts third plea as to so much thereof wherein

He alledges, that the money abstracted and retained
 by the said Thomas Hamilton Noble in said dis-
 position mentioned was the sole and absolute
 money and property of the said plff and not
 at any time that of the said Willard and the
 said plff and that he the said Willard and
 the said plff have not any time been partners
 in business as private bankers as alledged by
 the defts in their said plea, because they
 say that on the 9th day of July A D 1855 the
 said plaintiff and the said Elish W. Willard
 sued out of the Cook County Court of Common
 Pleas, their writ of attachment of that date
 against the said Thomas Hamilton Noble to recover
 the same identical money and some other, men-
 tioned in the breach of the said plffs declaration;
 and that such proceedings were thereupon had
 that the said plff and the said Elish W. Willard
 as partners by the consideration and judgment
 of the said Cook County Court of Common Pleas
 on the 13th day of September A D 1855, ^{recovered} ~~secured~~ a
 judgment against the said Thomas Hamilton
 Noble for the sum of Nine Thousand eight hundred
 and seventy one dollars and seventy three
 cents, for their damages and the further sum
 of fourteen dollars and fifty cents costs of suit,
 as by the record of said judgment ^{now} ~~was~~ remain-
 ing in said Court will more fully appear in

And the said defts aver that the said sum of nine thousand eight hundred and seventy one dollars and seventy three cents so received by the said plff and the said Willard in the said judgment against the said Noble were for the same identical moneys abstracted and retained by the said Noble mentioned in the back of the said plff declaration - and the said plff further avers that said last mentioned judgment remains in full force and not in any manner reversed or set aside - and thus they the said defts are ready to verify wherefore they pray judgment if the said plff ought to be admitted or received against the said record to reply the replication by him last above replied to the third plea in this suit that the money abstracted and retained by the said Noble in said declaration mentioned was the sole and absolute money and property of the said plff and not at any time that of the said Willard and the said plff and that he the said Willard and the said plff have not any time been partners in business as private bankers as alleged by the defts in their said plea &c

And the plff says that the said record of the defts is not good and sufficient in law wherefore

Wmston & Burton

and the said defts by leave of court further say that the said plff ought not to be admitted or received to reply the said replication to the defts third plea as to so much thereof wherein he alleges and sets forth certain articles of agreement between him the said plff and the said Willard, because they say that the said plff from and after entering said articles of agreement in said replication mentioned and set forth at all times represented and held himself out to the said defts and to the world at large as a partner of the said Willard upon the said plea alleged; and that they the said defts had no knowledge or information of said articles of agreement between said plff and said Willard in said replication mentioned and set forth; and that the said defts are ready to verify; Wherefore they pray judgment of the said plff ought to be admitted or received against the said representations and holding himself out of himself as a partner with the said Willard to reply the replication by him above replied to the said defts third plea in this suit setting forth said agreements between him the said plff and the said Willard —

By their Attorney
 Beckwith

And the said plff says that the said Replication of the defts is not good and sufficient in law — Wherefore
 Assistant Attorney
 for plff

And thereafter to wit; on the twenty third day of April in the year A.D. 1856, said day being one of the days of the April Vacation Term of said Court, the following proceedings were had in said cause and entered of Record to wit:

George Smith

vs

George Barnett George Armon
and Thomas Hamilton Noble

Debt

And now comes the said plaintiff by Frank Austin his attorney and the defendants George Barnett and George Armon impleaded with said Thomas Hamilton Noble by Higgin's Beckwith & Strathairn their attorneys also come and said defendants with draw their demurrer to plaintiff's third replication and leave is given said defendants to rejoin by several replications which are thereupon filed and thereupon said plaintiff demurs to defendants rejoinder which demurrer is sustained by the court and said plain demurs to defendants second plea which demurrer is also sustained by the court and said defendants stand by their said rejoinder and second plea —

And issue being joined by agreement of parties this cause is submitted to the court for trial without the intervention of a jury and the court after hearing the allegations and proofs submitted argument of counsel

and being now fully advised in the premises
finds the issue for the plaintiff and that said
defendants owe and are indebted to the said
plaintiff in the sum of Five Thousand Dollars
as alleged in their said declaration and
the court assesses said plaintiffs damages
by reason of the premises to the sum of Five
Thousand dollars -

Therefore it is considered that
the said plaintiff do have and recover of the
said defendants in pleading as aforesaid
his debt of Five Thousand dollars, and
also his damages of Five Thousand Dollars
in form aforesaid by the court here assessed
and also his costs and charges by him
about his suit in this behalf expended
and have execution therefor - and that
said debt be discharged upon payment
of said damages and costs -

And said defendant moves the court
for a new trial herein which is overruled
by the court to which said defendant excepts.

And whereupon said defendants
pray an appeal herein to the supreme
court which is allowed by the court -
and said plaintiff here waives
the filing of appeal bond by said defendants.

And there after to wit: on the same day and year last aforesaid, there is filed in the office of the Clerk of said Court, a Bill of Exceptions which said Bill of Exceptions is in words and figures as follows to wit:

George Smith	} In Cooke County Court of Common Pleas Term A.D. 1856
"	
George Arnsont	
George Barnett imp ^r	

Be it remembered that on the 23^d day of April A.D. 1856 being one of the days of the April Term of that year of said Court this cause came on to be heard before the Hon John W. Wilson Judge of said Court, and a jury being waived by consent the same was tried by the Court.

On trial the plff called James Alexander who being duly sworn testified as follows that Thomas Hamilton Stable one of the lessees obligors in the bond sued on was teller of the firm of George Smith & Co, and that while in said office and in the employment of said plaintiffs he abstracted and retained the sum of nine thousand eight hundred and seventy one dollars and seventy three cents the property of the said Plaintiff which he the said Stable still owes to said Plaintiff. The default of Stable in abstracting and retaining said money was not discovered until after he ^{was} ~~went~~ away in July

on August 4th 1854. It was admitted by the counsel of both parties that money mentioned by the witness was the same money sent for in the suits of Smith & Willard, the records of which are hereinafter set forth in

The defendants then offered ^{evidence} ~~in~~ the record of a judgment in the Court Common Pleas in the words and figures following to wit:

George Smith &
Elisha W. Willard

vs
Thomas Hamilton Noble

} Attachment

And now again come the the said plaintiffs by their said attorney and the default of said defendant having been heretofore at this term entered herein the court now after hearing the testimony adduced by said plaintiffs being fully advised in the premises assess said plaintiffs damages to the sum of nine thousand eight hundred and seventy one dollar and seventy three cents

Therefore it is considered that the said plaintiffs do have and recover of the said defendant their damages of nine thousand eight hundred and seventy one dollar and seventy three cents in form aforesaid by the Court here assayed and also their costs and charges by them about their suit in this behalf expended and they have

execution against the property attached in
 the writ issued in this cause to satisfy the
 same - so which the plff affected and the
 objection was overruled & the evidence admitted
 The defendants then offered in evidence the
 record of a decree in the last bounty court of
 common Pleas in the words & figures following
 to wit:

George Smith & Elisha W. Willard	} In Chancery
Thomas Hamilton Noble & Anna	
Noble sued as Rebecca S. Noble	
& Elisha C. Munday	
	} Bill

This day came the defendants Thomas W. Noble
 and his wife Anna W. Noble sued as Rebecca
 S. Noble by H. F. Waite Esq their solicitors
 and filed a demurrer to the complainant's
 Bill to which the complainant filed a
 rejoinder and the Court being advised of the
 law arising on said demurrer it is ordered that
 the same be overruled and leave being given
 said Defendants to plead and answer to said
 bill and they being ruled so to do, failed
 and refused to make further defence - This
 therefore Ordered that the allegations of said
 Bill as to the said defendants be and
 they are taken for confessed -

And thereupon the complainant's

X

introduced and proved by James Alexander a witness that on the 13th day of September Eighteen Hundred and fifty from the defendant Thomas Hamilton Noble was indebted to George Smith Esq in the sum of Nine Thousand eight Hundred and seventy one Dollars and seventy three cents for and on account of moneys received and retained by the said Thomas Hamilton Noble while acting as the servant of the said George Smith Esq and which money belonged to and was the money of the said George Smith Esq and for which the said Thomas H. Noble has failed to account -

Wherefore it is decreed and Ordered by the Court that so much of the right title equity and interest of the said Thomas H. Noble and Eliza H. Hubbard E. Mindeley in and to the real Estate in the Bill mentioned as may be necessary to pay the complainants the sum of Nine Thousand Eight Hundred and seventy one dollar and seventy three cents to wit; One undivided half of five acres of land in the South East corner of the East half of the South East Quarter of Section Seventeen in Township forty North of Range fourteen East of the third principal meridian to be bounded on the West by the centre of the Lake Shore plank Road and on the North by a line running at right angles

with said road running the right of way over
 thirty three feet on the South and East sides
 if E. C. Hundley shall choose to exercise it he
 sold at public auction to the highest bidder
 for cash in hand at the South door of the
 Court House in the City of Chicago A. H. Wood-
 bury is appointed a commissioner to make
 said sale and he is directed to advertise
 the time place and terms also stating the amo-
 unt due or to become due on the contract
 of purchase by said Stable so far as can be
 ascertained of the same by advertisement
 in the Chicago Democrat a daily Sun paper
 published in the City of Chicago for at least
 fifteen days immediately preceding the day
 of sale - He will give to the purchaser a certi-
 ficate of his purchase stipulating for a convey-
 ance of the title upon the confirmation of said
 sale by the court - This decree is in no manner to affect
 the right of the defendants Hundley to the unpaid
 balance of the purchase price due or to become
 due from the defendant Thomas H. Stable but the
 Court reserves the right to make and will in the
 coming in of the said Commissioner's report of sale
 which he is hereby directed to make such orders
 and decrees as may be equitable in the premises
 and the result of this case is confirmed -
 To which the plaintiff objected and the objection
 was overruled the evidence admitted - which

was all the evidence in case - The Court found the issue for the plaintiff and the defendant then and there moved for a new trial, which motion was overruled by the Court - To the overruling of which motion the Defendant then and there excepted and prays that at this his Bill of Exceptions may be signed and sealed in open Court which is done this 23^d day of April A.D. 1856

John W. Nelson Seal

State of Illinois
County of Cook } S.S.

I Walter Kimball Clerk of the Cook County Court of Common Pleas in & for said County & State, do hereby certify that the foregoing is a full true and correct Transcript of the papers and proceedings had in said Court in the Case of George Smith Plaintiff and George Barnett et al. Defendants

In Testimony Whereof I have hereunto set my hand & affixed the Seal of said Court at Chicago in said County this 13th day of June A.D. 1856

Walter Kimball Clerk

George Barnett Atal

"

George Smith

Supreme Court

June 2nd 1886

And now the said George Barnett and
George Smith come before our said justices and say
that in the record and proceedings aforesaid there is manifest
error in this

1st In formulating the debt motion for a writ of

2nd In sustaining the debtors to the debt record
plea

3rd In sustaining the debtors to the debt several
writs

4th In rendering judgment for greater sum
in damages than the advertisement in the
declaration

Wherefore for the errors and for other errors appearing
upon the face of said record & proceedings the
said debtors pray said justices, to reverse
and for nothing held and that they may
be restored to all things which they lawfully
enjoy the same

By their Attys

Alfred McKnight & William

The appellee says there is no error in this record.

Allan A. Burton &

J. H. Winston
for appellee -

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George Barnett et al

vs

George Smith
Barnett et al

Trans

Filed June 19, 1886

in Land
Office N

Miss Trans Kent \$750
Paid by Clift & Son

1259-13

Filed June 20, 1856
L. Seland
Clerk

IN SUPREME COURT, JUNE TERM, 1856.

Page 1.

GEORGE BARNETT et al., Appellants, }
vs. } Appeal from Cook County
GEORGE SMITH, Appellee. } Court of Common Pleas.

ABSTRACT OF RECORD.

4. This was an action of debt. The declaration is as follows :

For that whereas on the 19th day of April, A. D. 1850, the defendants made their certain bond or writing obligatory in the sum of Five
5. Thousand Dollars lawful money, to be paid to George Smith & Co. The condition of said Bond being such, that if the said Thomas Hamilton Noble (~~one of the appellants herein~~) should well and truly perform the duties assigned to and trust reposed in him as Teller of said firm, and as long as he should continue in that capacity ; or if the said Thomas Hamilton Noble should well and truly perform the duties of every other office, duty, or employment to which he might be appointed in the office of said firm, and also such other duty or duties as might from time to time be assigned to him by said firm, or by the managing clerk thereof, or undertaken by him in relation to the said firm, then said obligation should be void ; otherwise to remain in full force and virtue. That
6. afterwards the said Thomas Hamilton Noble entered upon the duties of Teller of said firm of George Smith & Co., and continued in the discharge of such duties for the space of four years and upwards ; and that
7. on the 10th day of October, A. D. 1854, the said Noble, while in the discharge of the duties of the office of Teller, abstracted and retained from the funds of said George Smith & Co., the sum of \$9579.93, which sum it is alleged was the property of said plaintiffs ; by means whereof said defendants became liable, &c., to pay said sum of \$5000 ; yet that said defendants have not paid said sum of \$5000, although, &c., but have hitherto neglected, &c., to the damage of the said plaintiff, of Five Hundred Dollars, and therefore he brings suit.

Noble not served

The defendants, Barnett & Armour, filed three pleas :

1. That Thomas Hamilton Noble did not, while in the discharge of the duties by him to be performed in said writing obligatory mentioned, abstract or retain from the funds of the pl'ff the sum of money in said declaration mentioned, or any other sum of money, concluding to the country.

Upon this plea issue was joined.

9. 2d plea. That said Thomas Hamilton Noble, at the time of the execution and delivery of the writing obligatory in said declaration mentioned, was employed by the said plaintiff for the term of three years from the 19th day of April, A. D. 1850, and no longer, to perform the duties in the said writing obligatory mentioned, and that said Noble did for that time well and truly perform and keep all and singular the articles, clauses, payments, conditions. and agreements in the condition of said bond mentioned, and that before any default of said Noble, or any liability of said defendants on said bond had been incurred, the time for which said Noble was employed had elapsed and expired, and this the said defendants are ready to verify, &c.

To this plea there was a general demurrer, which was sustained by the court.

10. 3d plea. That before and at the time of the execution and delivery of the writing, the said plaintiff was trading and doing business as a private banker, under the name and style of George Smith & Co., and was the sole and only person composing the said firm of George Smith & Co., and that the said service in the condition of said bond mentioned, was to be performed by said Thomas Hamilton Noble to the said plaintiff in his said business as a private banker; that said Noble during all the time he continued in the service of said plaintiff alone, did fully perform all things in the condition of said bond required of him; nor did he during that time abstract any sum of money from the funds of said plaintiff. But said defendants aver that on the 19th day of April, 1852, and before any default had occurred, the said plaintiff associated with himself in the said business, a partner, one Elisha W. Willard, and that while said Willard was associated with the said plaintiff as a partner in said business, the said default of said Noble occurred. And that after said Willard was associated with said plaintiff as a partner as aforesaid,
- 11.

In case against his sureties on this joint
bond

judgment for some two years

the said Noble served the said firm, and did not serve further the said plaintiff alone, and at the time of said default was in the employ of said plaintiff and said Willard, and not of said plaintiff alone; and this the said defendants are ready to verify.

13. To the defendant's third plea the plaintiff replied: that on the 29th day of November, 1851, he and the said Elisha W. Willard made and entered into a covenant and agreement, setting forth that on said 29th of November, 1851, said def't was and before that time had been engaged in the general business of banking and exchange, in the city of Chicago, under the name, style and firm of George Smith & Co., and that said party of the second part (the said Willard) being desirous of becoming a member of said firm, it was thereupon agreed between said parties,

1st, The said party of the first part hereby admits and receives the said party of the second part as a member of the firm of George Smith & Co.

2d, The business to be continued and carried on in the city of Chicago, in the name, style and firm of Geo. Smith & Co., and to be a general banking and exchange business of the same kind and character as has been heretofore done by said party of the first part.

14. 3d, The partnership hereby entered into is to continue from the first day of December, A. D. 1851, until the first day of December, A. D. 1853.

4th, The capital stock used in said business is to be furnished by said party of the first part.

5th, The said party of the second part is to devote his whole time and attention to said business, and is not to use the name and style of said firm for any other purposes except such as regularly belong to said business aforesaid.

6th, Said party of the second part is to have and receive from said business the sum of three thousand dollars per annum in full for his services, and in lieu of all other profits or claims upon said party of the first part, the said firm or the business thereof.

7th, The said party of the first [part] hereby guarantees to the said party of the second part, the payment of the sum mentioned in article number six.

15. That afterwards, and on the 1st day of June, 1853, by an agreement thereunder written, said articles of copartnership were by said parties "extended for three years from and after they would expire by limitation, upon the same terms, except that the compensation provided for in article six, be from the date hereof, \$5000 per annum."

And it is averred in said replication that said plaintiff and said Willard transacted business together only as provided in said agreement; and so the said plaintiff says, that the money so abstracted was his money solely, and that notwithstanding said articles of agreement, was abstracted by said Noble while in the service and employ of said plaintiff alone; and so the plaintiff says, that by reason of the premises, he and the said Willard have at no time been partners as is alleged in said plea. Without this, &c., with verification.

To the replication of the plaintiffs to the defendant's third plea, the defendant rejoined three several rejoinders.

1. That the said plaintiff, from and after the entering into said articles of agreement, in said replication mentioned and set forth, at all times represented and held himself out to said defendants and to the world at large, as a partner of the said Willard, as in the said plea alleged, and they, the said defendants, had no knowledge or information of the said articles of agreement, in said replication mentioned and set forth, with verification.

19. 2. That the said plaintiff ought not to be admitted to reply the said replication to said third plea, as to so much thereof as alleges that the said money abstracted as aforesaid, was the property of said plaintiff, and not at any time that of said Willard and said plaintiff; and that the said plaintiff and the said Willard have not at any time been partners as private bankers as alleged in said third plea, because said defendants say that on the 9th day of July, A. D. 1855, the said plaintiff and the
- 20.

said Elisha W. Willard, as partners, sued the said Thomas Hamilton Noble, in the Cook County Court of Common Pleas, for the same identical money mentioned in said declaration, and afterwards, as such partners, by the consideration of said Court, recovered judgment of the said Thomas Hamilton Noble for the same, together with costs.

22. 3. That the said plaintiff ought not to be admitted or received to reply said replication to the defendants' third plea, as so much as sets forth said articles of agreement, because said plaintiff, at all times after entering into the same, represented and held himself out to the said defendants and to the world at large, as partner of said Willard; and that said defendants have no knowledge or information of said articles of agreement, in said replication mentioned and set forth.

19, 20, 21, 22. The plaintiff demurred generally to each of the rejoinders, and the demurrer was sustained by the court.

- *23. Trial of the issue on the first plea was by the court, without a jury.

28. On the trial the plaintiff called James Alexander, who testified that Thomas Hamilton Noble, one of the co-obligors in the bond sued on, was teller of the firm of George Smith & Co., and that while in said office and in the employment of said plaintiff, he abstracted and retained the sum of \$9871.73, the property of the plaintiff, which he, said Noble, still owed to plaintiff. The default of Noble, in abstracting and retaining said money, was not discovered until after he went away, which was in July or August, 1854.

26. The defendants then introduced in evidence the record of a judgment in an attachment rendered on the day of A. D. 1855, by the Cook County Court of Common Pleas, in favor of the plaintiff, and Elisha W. Willard against Thomas Hamilton Noble for \$9,873.71 damages. The defendants also introduced in evidence the record of a decree in a suit in chancery, rendered by the said court on the day of 1856, wherein the plaintiff and said Elisha W. Willard were complainants against Thomas Hamilton Noble et als. for the sum of \$9873.71, and directing certain property to be sold for the payment thereof. It was admitted that the money mentioned in the testimony of Alexander was the same money in the above suits in favor of Smith & Willard.

30. This was all the evidence in the case. The court found the issue for the plaintiff. The defendant moved for a new trial, which was overruled by the court, and exception taken thereto. Judgment was rendered for the plaintiff for \$5000 debt and \$5000 damages, the debt to be discharged on payment of the damages and costs.

The errors assigned are—

1. In overruling the defendants' motion for a new trial.
2. In sustaining the demurrer to the defendants' second plea.
3. In sustaining the demurrer to the defendants' rejoinders.
4. In rendering judgment for a greater sum in damages than the *ad damnum* in the declaration.

Barnett & al

✓
Smith

Burton for Sept

{ 82 Eng C L 85-8 }
{ Same as 3 Eng Low + Sgt }

3 Pick 335

11 Mhr Under in Smith

1 Mason & Mills 389

14 Law Lib 37-50-197

12 East 400

2 Amer Lead case 402

19 Law Lib.

3 Hill 220

1 Boson & Pull 419

Book with concluding

1 Parsons on Contracts 507. (a synopsis of the case in East.)

Beckwith

3 Min Samuels 411 The recital limited
the larger words of
the obligation in the
Condition

2 Bingham 322
9 Eng C L 1469 } Subsequently the law fixing
the term of years was held to
rest on the condition
though not in recital

2 Barn + Al^d 431

3 Exchequer R 380

3 Eng Law & Eq. 326

Clark of Sup Co. Plea

showed limited appoint-

ment good

Where the employment is
for a limited term that will
in like manner rest on
the Condition.

Smith & Milward were partners as
to the world & the debt. They recovered
v Noble as partners. Now Smith
alone can't get a judgment for some
money in his own name. If they he
can't recover against Noble

Smith & Co. Barnett & Ammon.

II. The demurrer to the second plea was properly sustained on two grounds.

1. The declaration sets forth the condition of the bond in words, and alleges specific breaches. The plea of Covenants performed generally ~~is~~ not a sufficient answer to the breaches alleged - The facts relied on as a performance should have been set out to enable the Court to determine their sufficiency from the record. *The People v. McAlton 2 Gilman 731. This however*

2. The Condition is general - so long as Noble should act in any capacity in the bank of Smith & Co. - It contradicts and repels the idea that he was employed for any definite time - necessarily excludes it - The depts were therefore estopped to say that he was employed for three years or any other definite time; and the cause of estoppel appearing from the declaration, it was properly insisted on by demurrer. *Smith v. Whitaker 11. Illinois Rep. 417. Sh*

III. The demurrers to depts rejoinders were properly sustained.

1. The fact that Smith & Willard had, after the default of Noble in compliance of in this case, recovered a judgment against him alone for the same demand sued for in this case, works no estoppel -

The declaration in their joint names was filed after the default of Noble, drawn by an attorney and the Affidavit made by him can have no such effect - The use of both their names, was evidently a mistake of the attorney -

(a) seems immaterial as
the same issue is in substance
presented on the third
plea -

Until that Judgment ~~was~~ ^{shall} be satisfied, it can form no obstruction to a recovery in this case. The debts are neither parties or privies to that Judgment - They have not been misled or injured by it - They have not acted on it and it is not pretended, that Smith acted fraudulently or for any unfair purpose in procuring the suit jointly with Willard after it had been brought -

2. The true and only question of any importance as I conceive, arises out of the ~~plea~~ ^{demurrer} to the rejoinder to the replication to the third plea; and that question as presented is, were the sureties of Noble as a matter of law discharged from liability on the bond by the mere fact of Smith's holding Willard out to the world as a partner, when in fact as between themselves he was not a partner, and which holding out by Smith was ^{made} with any fraudulent intent or ^{attended with} injurious effect, and did not change the duties of Noble or increase the risk or liability of his sureties, - the sureties not acting upon or believing such representation true ~~nor~~ influenced thereby.

Before the sureties could be released from their obligation, it is incumbent on them to show that Smith by holding Willard out as a partner, acted fraudulently and that they ~~believed~~ ^{acted} in good faith acted upon the fact; ~~and were thereby injured~~, and that the duties of Noble for whom fidelity they became bound, were changed and their liability increased.

or they in some way injured on that account - Nothing of this sort is alleged or pretended by the depts -

The matter set up in the rejoinder, being a matter in pais, some one of these facts shown have been alleged or no estoppel arises, and the law will not in the absence of ~~proof~~ ~~some~~ allegation and proof of some one of them work a release of the sureties - 2 Smiths. Leading Cases, (Gow Library edition 1842) top page 532; Daryl v. Adell, 3 Hill (N.Y.) 219. 1 American Leading Cases, 82, 1842, ^{Rep. 35} 1842.

A Surety for the payment of money, are released by the creditor making with his debtor a valid agreement to give him time, for the reason that the surety but for the agreement might pay ~~the~~ the debt and pursue his remedy against ~~the~~ his principal - That rule does not apply to a guaranty for fidelity - The very nature of the ~~undertaking~~ service to be performed by Noble, precluded any remedy by the sureties against him until the expiration of his service - ^{Pitman on Disputed Surety, top page 109} The People v. McHattow 2 Gilman 639.

At the time the bond sued on was made, Smith was doing business in Chicago as a private banker under the style of Geo. Smith & Co. - The word ~~and~~ ~~officer~~ Co. necessarily implied that the parties contemplated a change in the firm by the incoming of some other person or persons as members - If this had not been so, why the necessity of supplanting Co. to the name of Smith? This view is fortified by the terms of the condition of the bond - The Condition provides that the

Servants rendered by Noble, should be rendered to
said firm and in their said office; thereby implying
clearly, that the Company or firm was understood by the
parties to a fluctuating body, changing its members
from time to time; and the bond seems to have been
drawn with an especial eye to this result and
to bind Noble and his sureties so long as the
business should be carried on under that style and
in that office. The whole law of this case will be found
summed up in Pitman on Principal and Surety
(Law Lib. edition) 49. See also Barclay v
Lucas 1 Term Rep. 29, note 1. Mitcoll v Bruin 12
East 400, 2 Campbell 422 -

An Affirmance is asked

Allan A. Burton &

J. H. Munster

for Smith

III. As to the last error assigned that the damages given
are greater than the ad damnum laid in the declaration.
The action is debt for the penalty of the bond - The damages
in this state of the pleading are merely formal and
immaterial, and especially inasmuch as it is shown
that the actual damage sustained is greater than the
penalty of the bond which renders the bond absolute.
The Court acted on the proof here given judgment for
the full penalty, as it is sustained and, the Con-
ditions being entirely forfeited - Being in pleading

in ^{the} action of ass on a penal bond, the damages laid are in addition to the debt - that is, the jess asks to recover his debt and the damages laid in addition to the debt.

In this case the declaration in terms alleges that the defendants are liable to pay the penalty of the bond (\$5000) and \$500 - damages in addition thereto.

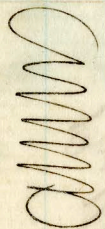
By the terms of the bond Noble was submitted to the supervision and control of the Managing Clerk R. The fact that Noble had to serve other persons (Millard for instance) that were not in the firm when the bond was made, is no release of the sureties, because this event is provided for in the condition of the bond. The sureties banded to any person and Smith might have been proper to put over Noble - that the reason that releases sureties, when a new partner is taken in does not apply in this case. Millard was nothing more than a managing clerk.

As to the restriction attempted to be placed upon the recitals of the bond, I answer; that the absence of any restriction necessarily presupposes that was none and that fact existing upon the proper interpretation of the bond an argument to the contrary will not be received - The party ~~being~~ is stopped to deny the legal effect of his deed. I call especial attention to the case in 3 Pickering 335.

As to the judgment already recovered against Noble, the rejoinder does not allege that it had been ~~in anywise~~ satisfied in anywise and is therefore no bar - But one satisfaction of the same debt can be had but the jess in error cannot complain until the judgment against Noble is satisfied -

As to Notice See 1 Story's Rep. 30 - Savas & Meisen -

Smith

ad 

Brief

Barnett & Co

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George Barnett
vs

George Smith

1856

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12296

1856

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