

No. 14266

# Supreme Court of Illinois

Smith

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vs.

Fo  
~~D~~erney

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STATE OF ILLINOIS,  
SUPREME COURT,  
Third Grand Division.

No. 72

14266

Smith

vs

Jennery

1862

Ch 71. Rosey Smith Appellant  
vs  
Lepa y Horney Appellee

Ch 72. Rosey Smith  
and others Appellants  
vs  
Horney Appellees

Motion for 5 Per  
cent damages on amount of judgment below  
in case No 71. and for 5 per cent damages on amt  
of decree in 72.

Henry Howe being sworn on  
oath states that the records in the above ~~cases~~  
numbered cases were filed by Rosey Smith executor  
on the 18<sup>th</sup> April 1861. An affidavit of Dennis was  
filed on same date showing that ~~the intestate~~ Patrick  
Smith had departed this life after the rendition of  
the judgment in 71 & the decree in 72 against him  
on this date of facts this court at last term concluded

both ~~parts~~ suits He further states that  
no abstract, Brief or argument has ever been  
filed by the representatives of Smith and at  
this time the appeal in the each cause has  
been dismissed.

Deponent further states that he is  
informed and believes that the appeal was  
taken simply for delay and not because of any  
error or ~~objection~~ in the proceedings. He further  
states that the record was filed by the legal representatives  
of Smith as he is informed & believes solely for  
the purpose of evading and avoiding the penalty  
allowed and provided by statute in cases where  
the appellant fails to file the record. He states  
that the judgment was rendered at West Term 1860  
and the record not long after. He further states  
that during the interim the appellee has been  
without fault and only allowed 6 percent  
on his draft & claim. He therefore moves  
for an order allowing damages to each case to  
the Part of Roy Smith & Co. & Co. & Co.

Administration  
Subscribed & sworn to before  
me April 24, 1862.

L. Deland  
Clerk.

ms.

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From

71 + 72

ms. 71 + 72

1  
Pleas before the circuit court, within  
and for the county of Peoria and state  
of Illinois, on the sixth day of September  
in the year of our Lord, one thousand  
eight hundred and sixty

Be it Remembered that afterwards to wit:  
on the 9<sup>th</sup> day of August A.D. 1860, there  
was filed in the office of the clerk of  
said court a declaration in words and  
figures following to wit:—

State of Illinois } In the circuit court of Peoria County  
Peoria County } 20 To August special term A.D. 1860

Jesse Forney }  
" }  
Patrick Smyth }

Assumpsit = Damages 6000<sup>00</sup>/<sub>100</sub>

Patrick Smyth }

Jesse J. Forney plain<sup>tiff</sup> in this suit com-  
plains of Patrick Smyth dependant in this suit  
in a plea of trespass on the case on promises.  
For that whereas the said dependant heretofore  
to wit: on the 23<sup>d</sup> day of March A.D. 1859 at  
Peoria in the county of Peoria and state  
of Illinois, made his certain promissory  
note in writing, and then and there deliv-  
ered the same to said plain<sup>tiff</sup> and thereby  
then and there said dependant in and by the  
name, style and description of Patrick Smyth  
promised to pay to plain<sup>tiff</sup> or bearer sixteen

Declaration

hundred and fifteen dollars and nine cents on the 11<sup>th</sup> day of May AD 1859 with interest, for value received which period has now elapsed; Also, for that whereas the said dependant on said 23<sup>d</sup> day of March AD 1859 at Peoria in the county of Peoria and state of Illinois aforesaid made his certain other promissory note in writing, in words and figures following to wit: \$1615.09. On the 11<sup>th</sup> day of May eighteen hundred and fifty nine I promised to pay Jerry J. Forney or bearer sixteen hundred and fifteen dollars and nine cents for value received with interest.

Patrick Smyth

March the 23<sup>d</sup> 1859.

and then and there delivered the same to the said plaintiff and thereby then and there said dependant in and by the name style and description of Patrick Smyth promised to pay to the said plaintiff or bearer the sum of sixteen hundred & fifteen dollars & nine cents, on the 11<sup>th</sup> day of May AD 1859 with interest for value received which period has now elapsed. Also for that whereas the said dependant heretofore to wit, on the 23<sup>d</sup> day of March AD 1849 at Peoria in the county of Peoria and state of Illinois made his certain other promissory note in writing, and then and there delivered

the same to the said plaintiff and thereby then and there said defendant in and by the name, style and description of Patrick Smyth promised to pay to the plaintiff by the name & style of Jesse J. Forney or bearer sixteen hundred and five dollars on the 11<sup>th</sup> day of May AD 1859 with interest from date for value received which period has now elapsed.

- Also for that whereas the said defendant on the 23<sup>rd</sup> day ~~day~~ of March AD 1859 at Peoria in the county of Peoria and state of Illinois aforesaid made his certain other promissory note in writing in words and figures following to-wit:-

\$1605.00 On the 11<sup>th</sup> day of May eighteen hundred and sixty I promised to pay Jesse J. Forney or bearer sixteen hundred and five dollars for value received with interest March the 23<sup>rd</sup> 1859. Patrick Smyth

and then and there delivered the same to the said plaintiff and thereby then and there said defendant in & by the name, style and description of Patrick Smyth promised to pay to the said plaintiff by the name, style & description of Jesse J. Forney or bearer the sum of sixteen hundred and five dollars on the 11<sup>th</sup> day of May AD 1859 with interest from date for value received which period

has now elapsed. And whereas also, the said defendant, after ward, to wit, on the 1<sup>st</sup> day of August AD 1860 at Peoria in the county of Peoria and state aforesaid was and still is indebted to the said plaintiff in the sum of six thousand dollars, for the price and value of goods, wares and merchandise, there before that time bargained and sold by the said plaintiff to the said defendant at his special instance and request. And in the sum of Six thousand dollars for the price and value of goods, wares and merchandise there before that time sold and delivered by the said plaintiff to the said defendant at his <sup>special instance and</sup> request.

And in the sum of Six thousand dollars for money there before that time paid, laid out and expended by the said plaintiff in and about the business of the said defendant at his special instance and request.

And in the sum of Six thousand dollars for money there before that time lent and advanced to the defendant by the said plaintiff and for the use and benefit of the said defendant, at his special ~~instance~~ instance and request.

And in the sum of of Six thousand dol

5  
lars for money there before that time had  
and received by the said dependant to aid for  
the use of the said plaintiff.

And in the sum of Six thousand dollars  
for the price and value of work, labor and  
services there before that time done, performed  
and bestowed, and materials for the same pro-  
vided by the said plaintiff for the said depend-  
ant at his special instance and request.

And in the sum of Six thousand dollars  
for money found to be due from the said  
dependant to the said plaintiff on an ac-  
count there before that time stated between  
them.

And in the sum of Six thousand dollars  
for so much money before that time,  
and then due and payable from the said  
dependant to the said plaintiff for interest  
upon and for the forbearance of divers large  
sums of money before then due and owing  
from the said dependant to the said plaintiff  
borne to the said dependant, for divers  
long spaces of time before then elapsed,  
at the like special instance and request of the  
said dependant.

And whereas the dependant after-  
wards on the first day of August 1860  
in consideration of the premises, then

and there promised to pay the several sums of money in this declaration mentioned to the plaintiff on request; yet said defendant has disregarded his promises and has not (though often requested) paid the said several sums of money, nor either of them, nor any part thereof, to the damage of the said plaintiff six thousand dollars, and thereupon he brings suit, etc. By N. Grove, Atty for Plff.

State of Illinois } In the circuit court of Peoria County.  
 County } do To August special Term, 1860.

Jessey J. Torney }  
 " } In Assumpsit Damages \$6000  
 Patrick Smyth }

Issue a summons in the above cause to the sheriff of Peoria county returnable according to law.

To E. T. Moran, Clerk of said court.  
 N. Grove, Atty for Plff.

A copy of the note sued on is correctly set out in the second & fourth counts of the foregoing declaration

Copy of account sued upon.

To goods, wares and merchandise bargained and sold	\$6000
To goods, wares and merchandise sold and delivered	\$6000
To money paid, laid out and expended	\$6000
To money lent and advanced	\$6000
To money had and received	\$6000

7  
 To work, labor and services performed and bestowed, and materials  
 provided \$6000  
 To money due on an account stated \$6000  
 To money due for interest on divers large sums  
 of money \$6000

Copy of notes sued on.

\$1615 09. On the 11<sup>th</sup> day of May eighteen hundred and fifty nine I promised to pay Jessy J. Forney or bearer sixteen hundred and fifteen dollars and nine cents for value received with interest

March the 23<sup>rd</sup> 1859. Patrick Smyth

\$1605.00 on the 11<sup>th</sup> day of May eighteen hundred and sixty I promised to pay Jessy J. Forney or bearer, sixteen hundred and five dollars for value received with interest.

March the 23<sup>rd</sup> 1859. Patrick Smyth

And afterwards to wit: on the day and date of the filing of the foregoing declaration there was issued from said clerks office a summons in words and figures following to-wit:-

Summons

The People of the state of Illinois, To the Sheriff of Peoria county Greeting: We command you to summon Patrick Smyth if he may be found in your county, to appear before our circuit court on the first

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day of the special term thereof to be held at Peoria, within and for the said county of Peoria, on the third Monday of August AD 1860 then and there, in our said court, to answer unto Jesse J. Forney of a plea of assumpsit to his damage six hundred dollars as he says, and make return of this writ, with an indorsement of the time and manner of serving the same, on or before the first day of the term of the said court to be held as aforesaid.

*(Circular stamp)*  
 Peoria  
 Ill.

Witness, Enock J. Sloan, Clerk of our said court, and the seal thereof at Peoria, this ninth day of August in the year of our Lord one thousand eight hundred and sixty

Enock J. Sloan, clerk  
 by J. Newton, Dpty.

Which said summons was afterwards returned into said clerk's office indorsed as follows to-wit:—

State of Illinois }  
 Peoria County }

I have duly served this writ on the within named Patrick Smyth by reading the same to him, August 10, 1860  
 John Pryor, Shff. By Easley, dept.

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notes

And afterwards to-wit on the 22<sup>d</sup> day of August A.D. 1860, there was filed in the clerks office aforesaid two notes of hand in words & figures following to-wit

\$16.15.09 On the 11<sup>th</sup> day of May eighteen hundred and fifty nine I promised to pay Jesse J. Forney or bearer sixteen hundred and fifteen dollars and nine cents for value received with interest. Patrick Smyth

March the 23<sup>rd</sup> 1859

\$16.05.00 On the 11<sup>th</sup> day of May eighteen hundred and sixty I promised to pay Jesse J. Forney or bearer sixteen hundred and five dollars for value received with interest.

March the 23<sup>rd</sup> 1859

Patrick Smyth

And afterwards to-wit on the 5<sup>th</sup> day of September A.D. 1860 there was filed in the clerks office aforesaid defendants pleas in words and figures following to-wit:-

Pleas

State of Illinois }  
 County of Peoria } In the circuit court.

August Special term 1860

Jesse J. Forney }  
 " } Assumpsit  
 Patrick Smyth } Damages \$6000

And the said Defendant by William W. O'Brien his attorney comes and defends

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the wrong and injury, when &c and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him and of this he puts himself upon the country &c.

And says doth the like

William W. O'Brien

attorney for deft

of Grove his aty

And for further plea in this behalf the said defendant says actio non because he says that the said notes in the said declaration mentioned and in every count thereof are but two and not other or more and that said notes and each of them were made and executed by said defendant and delivered to said plaintiff for the price and purchase money of a certain quarter section of land situated in Kickapoo in said Peoria county that at the time of the execution of said notes said plaintiff represented to said defendant that said quarter section of land was free and clear from all incumbrances and that he the said plaintiff had good title thereto. defendant further avers that since the execution of said notes he has discovered that the title to said quarter section of land is not nor was at

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the time of the execution of said notes free or clear from incumbrance, and that said plaintiff did not have good title thereto but on the contrary said land was at the time of the execution of said notes and still is encumbered by and subject to a certain deed of mortgage for the payment of the sum of two thousand dollars and this the said defendant is ready to verify &c. William W. O'Brien  
attorney for plaintiff

and afterwards to-wit. on the day and date last aforesaid, there was filed in the office of the clerk of said court, a motion in words and figures following:-

Motion  
 Forney        3  
 "                3  
 Smith         3  
 Peff enters a motion to strike the second plea of debt from the files in this cause because it was filed after the plea of the general issue & after the rule of filing pleas had expired & without permission of the court.

2. & Because said second plea does not profess to answer the declaration nor any ~~the~~ count thereof.

For which reasons the peff moves to strike said 2<sup>d</sup> plea from the files  
 Grove for peff

12 And afterwards to wit on the 6<sup>th</sup> day of September AD 1860, there was filed in the clerks office aforesaid, a demurrer to 2<sup>d</sup> plea in words and figures following to-wit:-

Demurrer

Jesse J. Forney      In the circuit court of  
"                              Rema county  
Patrick Smyth      Aug<sup>t</sup> special term 1860.

And the said plaintiff comes and says that the said second plea of the defendant and the matters therein stated are not sufficient in law to bar the said plaintiff from having and maintaining his action aforesaid against the defendant wherefore the defendant does demur to said plea and prays Judgt. & for cause of demurrer shows the following

1. Said plea is uncertain, evasive uncertain double & insufficient
    - A. Dont tell what land
    - B Dont tell when
    - C. Dont tell who executed the mortgage nor when, nor to whom
- Grove for plff

Proceedings at a special term of the circuit court, began and held at the court house in and for the county of Peoria, and state of Illinois, on the third Monday in the month of August, in the year of our Lord, one thousand eight hundred and sixty, it being the twentieth day of said month in pursuance of an order of said court made and entered of record at the last May term thereof, which said order is in words following to-wit: "Ordered by the court that a special term of the circuit court of Peoria county, state of Illinois, for the trial of civil cases, be held at the court house, in the city and county of Peoria, on the third Monday in August next." Present the Honorable Elisha N. Powell, judge of the 16<sup>th</sup> Judicial circuit in said state, John Bryner, sheriff and Enoch P. Sloan, clerk, to wit:—  
 Wednesday, September 5<sup>th</sup> A.D. 1860.

Jesse J. Forney

Assumpit

Patrick Smyth

This day came the plaintiff by Grove his attorney, and on his motion the special pleas filed herein are stricken from the files in this case

Thursday, September 6<sup>th</sup> 1860.

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Jesse J. Forney

Assumpsit

Patrick Smyth

This day this cause came on to be heard on plaintiffs demurrer to defendants 2<sup>d</sup> plea; and the court being satisfied in the premises do sustain said demurrer to which ruling of the court the defendant by O'Brien his attorney excepts and abides by his plea. The parties being ready for trial, waive a jury and agree that all matters of law and fact arising in this cause shall be tried by the court, and the court having heard the evidence in the case, do find for the plaintiff and assess his damages at the sum of three thousand four hundred and ninety nine dollars and fifteen cents (\$3,499.15) Therefore it is considered by the court that the said Jesse J. Forney have and recover of the said Patrick Smyth the said sum of three thousand four hundred and ninety nine dollars and fifteen cents his damages aforesaid and also his costs and charges by him about his suit in this behalf expended and that he have execution therefor.

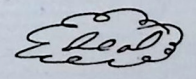
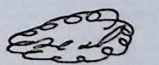
Defendant by his attorney prayed an appeal to the supreme court of this state which is allowed on his filing a bond with the clerk of this court payable to said plaintiff, conditioned as the law directs, for the sum of Six thousand dollars, with Patrick Harmon as security, said bond to be filed in 30 days.

And afterwards to-wit- on the 18<sup>th</sup> day of September AD 1860 there was filed in the clerks office aforesaid, an appeal bond, in words and figures following to-wit-:

Bond

Know all men by these presents, that we Patrick Smith as principal and Patrick Harmon as surety of the county of Peoria and state of Illinois are held and firmly bound, unto Jesse J. Forney of said county in the personal sum of Six thousand dollars lawful money, for the payment whereof well and truly to be made we bind ourselves our heirs, executors and administrators jointly and severally firmly by these presents. Witness our hands and seals at Peoria this 17<sup>th</sup> day of September AD 1860. The consideration of the foregoing obligation is such that whereas the above named

Jessy J. Forney did at the August special term of the Peoria county circuit court recover a judgment against the above bounden Patrick Smith for the sum of three thousand four hundred and ninety-nine <sup>15</sup>/<sub>100</sub> dollars with costs of suit from which judgment said Patrick Smith has taken an appeal to the Supreme court of said state of Illinois. Now if the said Patrick Smith shall prosecute his said appeal with effect and without delay, and shall pay said judgment so appealed from if the same shall be affirmed by the said Supreme court together with all costs, interest and damages then this obligation shall be void otherwise to remain in full force and virtue

Patrick Smyth   
 Patrick Harman 

17.  
State of Illinois,  
Peoria County } ss

O. Enoch Sloan, Clerk  
of the circuit court in and for  
said county and state do cer-  
tify that the foregoing is a  
full, true and complete trans-  
cript of the papers and proceedings  
of said court in the cause where-  
in Jesse J. Forney is plaintiff and  
Patrick Smyth is defendant, as the  
same appears of record and on  
file in my office.

Given under my hand  
and the seal of said court  
at Peoria this 16<sup>th</sup> day  
of April A.D. 1861.

O. Enoch Sloan, Clerk

267-77

Patrick Smith  
vs  
Jesse Fowrey  
Record

~~267-77~~ 267-77  
Rosy Smith ex  
vs  
Jesse Y Fowrey  
Record

Filed April 18, 1861  
L. Ireland  
Clk.

\$10/w.

Patrick Smith  
vs  
Jesse Y. Jorney } In Supreme Court  
April term 1861  
M. Williamson being

Oath sworn deposes and says  
that this case was appealed by  
the said plaintiff Patrick Smith  
to the Supreme Court ~~in the~~ and  
bond filed in said court on the  
18<sup>th</sup> day of September 1860  
and affiant further states that  
on the 20<sup>th</sup> day of January 1861  
and after said appeal was  
perfected and before the commen-  
cement of the term of the Supreme  
Court to which said appeal  
was taken the said Patrick  
Smith departed this life at said  
County of Peoria Illinois  
Affiant further says that on  
the 7<sup>th</sup> day of February 1861 Rosey  
Smith widow of the said  
Patrick Smith was by the probate  
Court appointed and qualified  
executrix of the last will and  
testament of said Patrick Smith  
deceased and that said Rosey  
Smith has not been served in  
any manner with process in this

Filed Apr 18. 1861  
L. A. Smith  
Clerk