

## Theophilus W. Smith 1825-1842

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Once described as “one of the striking characters in the history of the legal profession in Illinois,” Theophilus Washington Smith holds the distinction of being the



subject of Illinois’ only judicial impeachment trial. Born in New York City on September 28, 1784 to Thomas and Mary Green Smith, Theophilus Smith served as a young man in the United States Navy.<sup>1</sup>

A law student in the office of American political leader Aaron Burr and fellow student of Washington Irving, Smith was admitted to the New York bar in 1805. Three years later, he married Clarissa Harlow Rathbone of Stonington, Connecticut, and they would become parents of eight children.<sup>2</sup>

Moving to Illinois in 1816, the Smiths settled in Edwardsville, and he soon became one of the state’s most powerful politicians. Losing to Samuel Lockwood for the position of Attorney General, Smith won election to the state Senate in 1822. He vigorously supported a new state constitution for the legalization of slavery and helped to edit the *Illinois Republican*, a newspaper published in Edwardsville for the pro-slavery faction in Illinois.<sup>3</sup> In 1823, he became a member of the first Board of Commissioners of

the Illinois and Michigan Canal, then cashier of the Bank of Illinois branch at Edwardsville.<sup>4</sup>

Smith was the third associate justice elected at the 1825 session of the Illinois legislature. From 1828 to 1835, he also served as judge of the Fourth Judicial Circuit in southeastern Illinois. Attorneys and Illinois politicians Thomas Ford and John Reynolds both credited justices Smith and Lockwood with revisions to more than thirty laws, including the criminal code, habeas corpus, and right of property.<sup>5</sup>

In the 1832 Black Hawk War, Justice Smith served as Quartermaster-General on the Governor's staff. Impeached that year on allegations of "oppressive conduct, corruption, and other high misdemeanors in his judicial office," the specific charges included selling a circuit clerk's office, swearing out fictitious writs returnable before himself, imprisoning a Quaker for not removing his hat in court, and suspending a lawyer for advising a client to apply for a change of venue.<sup>6</sup>

Three attorneys defended Smith: Ford, Sidney Breese, and Richard M. Young. Ford reported that during the Senate trial, Smith "procured some one to go into the Senate chamber regularly after every adjournment and gather up the scraps of paper on the desks of the senators upon which they had scribbled during the trial." That information allegedly enabled his defense counsel "to direct their evidence and arguments to better advantage."<sup>7</sup> The Senate voted a majority in favor of impeachment, 12 to 10, but the Constitution required a two-thirds vote for conviction. Afterwards, the House of Representatives passed a resolution for his removal, but that, too, failed in the Senate.<sup>8</sup>

As Illinoisans grew to favor the elimination of black servitude, so, too, did members of the Supreme Court, particularly noted in the opinions of formerly pro-slavery

Justice Smith.<sup>9</sup> In the 1836 *Boon v. Juliet* case, he delivered the Court opinion that sharply reduced the legal basis for existing slavery in Illinois. He ruled that an 1807 territorial act regarding registration of servants did not affect the rights of the children, writing that “I am clearly of opinion that the children of registered negroes and mulattoes, under the laws of the Territories of Indiana and Illinois, are unquestionably free.”<sup>10</sup> According to historian N. Dwight Harris, “The importance of this decision is at once apparent, when we remember that the larger proportion of the younger slaves were the offspring of Negroes who had been indentured under these Territorial laws. It is most difficult to determine at present [1904] just how many received their freedom through this act of the Supreme Court, but the number must have been considerable.”<sup>11</sup>

In the highly political 1839 *Field v. People ex rel. McClermand* case, the lone Democrat Smith wrote the dissenting opinion. Democratic Illinois governor Thomas Carlin attempted to replace the Whig Secretary of State Field, but Field refused to leave the position because he could remain in office as long as he desired. The Illinois Supreme Court upheld Field’s right to remain in office, but in his dissent, Smith held that since the Illinois Constitution was patterned after the U.S. Constitution—under which the President could dismiss the national Secretary of State, Democratic Governor Thomas Carlin could replace the incumbent Whig, Alexander P. Field.<sup>12</sup>

After the legislature in 1841 required justices to ride the circuit, Justice Smith was assigned to the Seventh Judicial Circuit, comprising six northeastern counties, including Cook, Will, and DuPage. In August 1842, the Springfield *Illinois State Register* published a lengthy attack on Smith, describing accusations that included drunkenness,

nepotism, and harassment of politicians. “Under a cloud mostly of his own raising,” wrote historian Theodore C. Pease, Smith resigned from the bench in December 1842.<sup>13</sup>

Throughout his legal career, according to Ford, Smith had been “an active, bustling, ambitious, and turbulent member of the democratic party. He had for a long time aimed to be elected to the United States Senate; his devices and intrigues to this end had been innumerable. In fact he never lacked a plot to advance himself or to blow up some other person.” Smith was “a good lawyer and made an able judge,” added John M. Scott, “but he was so much a partisan politician, it depreciated his usefulness as a lawyer and as a judge.”<sup>14</sup>

Smith died in Chicago on May 6, 1845.<sup>15</sup> Most likely, he was interred in the City Cemetery. At some later point, his body was moved to Rosehill Cemetery in Chicago.

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Theophilus W. Smith Papers: In Samuel D. Lockwood Papers and Gustav Koerner Papers, Abraham Lincoln Presidential Library and Museum, Springfield, Illinois.

<sup>1</sup> James E. Babb, “The Supreme Court of Illinois,” *The Green Bag* 3 (1891): 226.

<sup>2</sup> www.worldconnect.rootsweb.ancestry.com (database for Shinn, Healey, Berger, Willons and Allied families).

<sup>3</sup> Franklin William Scott, *Newspapers and Periodicals of Illinois, 1814-1879*, Collections of the Illinois State Historical Library, VI, (Springfield: Illinois State Historical Library, 1910), 166; Newton Bateman and Paul Selby, eds., *Historical Encyclopedia of Illinois* (Chicago: Munsell, 1900), 489.

<sup>4</sup> Robert P. Howard, *Mostly Good and Competent Men; Illinois Governors, 1818-1988* (Springfield: Illinois Issues, 1988), 35.

<sup>5</sup> Thomas Ford, *A History of Illinois, From its Commencement as a State in 1818 to 1847* (1854, rpt. Ann Arbor, MI: University Microfilms, 1968), 37; John Reynolds, *In My Own Times; Embracing also the History of My Life* (1879, rpt. Ann Arbor, MI: University Microfilms, 1968), 175.

<sup>6</sup> Frederic B. Crossley, *Courts and Lawyers of Illinois* (Chicago: American Historical Society, 1916), Vol. 1, 174-75.

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<sup>7</sup> Ford, 113.

<sup>8</sup> Susan Krause and Daniel W. Stowell, *Judging Lincoln: The Bench in Lincoln's Illinois, Revised Edition* (Springfield: Illinois Historic Preservation Agency, 2008), 54; Crossley, 175; Bateman and Selby, 489.

<sup>9</sup> N. Dwight Harris, *The History of Negro Servitude in Illinois and of the Slavery Agitation in that State, 1719-1864* (1904, rpt. Ann Arbor, MI: University Microfilms, 1968), 121.

<sup>10</sup> Theodore Calvin Pease, *The Frontier State, 1818-1848* (1918, rpt. Urbana: University of Illinois Press, 1987), 378; *Boon v. Juliet*, 2 Ill. (1 Scammon) 258 (1836).

<sup>11</sup> Harris, 104-05. Boon has also been spelled Boone.

<sup>12</sup> *Field v. People ex rel. McClernand*, 3 Ill. (2 Scammon) 79 (1839).

<sup>13</sup> Pease, 282.

<sup>14</sup> Ford, 150; John M. Scott, *Supreme Court of Illinois, 1818, Its First Judges and Lawyers* (Bloomington, IL: John M. Scott, 1896), 288.

<sup>15</sup> *Illinois State Register* (Springfield), 23 May 1845, 3.