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Standing as a Credible Witness in 1819

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Chapter Three

Standing as a Credible Witness in 1819

Jeffrey N. Walker

Joseph Smith Jr.'s introduction to the legal system came at an early age. In January 1819, his father, Joseph Sr., and oldest brother, Alvin, initiated a lawsuit against Jeremiah Hurlbut arising from his sale of a pair of horses to the Smiths for $65. During the previous summer, the Smith boys had been working for Hurlbut to both pay down the $65 obligation and for other goods. Twelve witnesses were called during the trial, including Hyrum and Joseph Jr. Under New York law, being just thirteen, Joseph Jr.'s testimony about the work he had performed was admissible only after the court found him competent. His testimony proved credible, as the court record indicates that every item he testified about was included in the damages awarded to the Smiths. Although Hurlbut appealed the case, no records have survived noting the final disposition of the appeal, leading one to speculate that perhaps it was settled outside of court. The significance of this case is not limited to the fact that a New York judge found the young Joseph Jr., just a year prior to his First Vision, to be competent and credible as a witness. Additionally, the fact that the suit was brought against a prominent Palmyra family and involved two other prominent community leaders as sureties on appeal may have contributed to Joseph Jr.'s memory of his estrangement from much of the Palmyra community.

Background

The Smith family moved to Palmyra during the winter of 1817–18, after both crop and business failures in Vermont. Joseph Sr. first arrived in the area in

1816, initially working as a merchant in Palmyra. Shortly after the arrival of his family, he and Alvin decided to turn their energies to farming. To pursue their farming interests, on March 27, 1818, they executed a promissory note in the amount of $65 in favor of Jeremiah Hurlbut for the purchase of a pair of horses. The promissory note was payable the following January to be paid in "good merchant grain," evidencing the Smiths' plans to farm. By summer 1818, the Smith boys were working as farmhands on Hurlbut's and likely his mother's Palmyra farms.

The town of Palmyra, founded in 1789, was originally called "Swift's Landing" and "District of Tolland." The name was changed to Palmyra in 1796. In the year 1800 the town's population was about 1,000. By 1820 it had grown to 3,124. The Erie Canal, which runs through Palmyra, was proposed in 1807. It was under construction from 1817 through 1825, reaching Palmyra in 1822.

The Hurlbuts were a prominent founding family of Palmyra. They were part of a group of founding settlers coming from the Wyoming Valley in Pennsylvania. In the 1780s, this group of Wyoming Valley residents appointed fellow residents John Swift and John Jenkins to find them a new settlement. Swift and Jenkins would ultimately purchase property including the land that would be organized as Palmyra in 1790.[1] While the Court of General Sessions of Ontario County created Palmyra on January 16, 1789, it was not formally organized until 1796 with John Swift being elected as the town's supervisor.[2] Jeremiah Hurlbut was four years old when his family moved to Palmyra in 1795.[3] His father had operated a distillery in Palmyra and had built a home and barn in town. He was called "Captain," an apparent reference to his service in the Revolutionary War. His death in 1813 left Jeremiah, the oldest son of ten, responsible for the family and his widowed mother, Hannah Millet Hurlbut.

By January 1819, when the promissory note became due, the Smiths and the Hurlbuts disagreed on several fronts. First, although the promissory note had become due, the Smiths had found the pair of horses to be "unsound." Second, the Smith boys had been working for Hurlbut, and with the failure of the horses they sought payment for their labor. Finally, Hurlbut claimed

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1. *The First Settlement and Early History of Palmyra, Wayne County, N.Y.: Embracing Some Incidents and Anecdotes Hitherto Unpublished* (Palmyra, NY: Wayne Democratic Press, 1858), 4–5.

2. *First Settlement and Early History of Palmyra,* 8.

3. King's Daughters' Library. "Genealogy and Palmyra Standing Files." Manuscript; Microform edition: "Genealogy H–L," *Genealogy and Palmyra Standing Files.* Provo, Utah: BYU Library, 1970. FHL US/CAN Film 833182. Family History Library, Salt Lake City.

that the Smiths owed him money for using some of his farm equipment and for other goods they had received from him.

The Dispute

On January 12, 1819, Joseph Sr. and Alvin filed with the local Justice of the Peace, Abraham Spears, a summons and declaration against Hurlbut. As justice courts were not "courts of record," no record of these proceedings would have been created if the matter had not been appealed. Once the case was appealed, Justice Spears was required to prepare a record of the trial and forward it to the court of common pleas, the next highest court. It is that record and the pleadings attached thereto that provide us with the details of this trial.

Three documents delineate the competing claims between the parties: (1) the "Promissory Note"; (2) the "List of Services" detailing the work that the Smiths claimed to have provided to Hurlbut; and (3) the "List of Goods" detailing the goods Hurlbut claimed to have given the Smiths.

1. The promissory note, dated March 27, 1818, appears to be written by Joseph Sr. and includes both his and Alvin's signatures. It reads in full:

> For value Received I Promise to Pay to Jeremiah Hurlbut Or Barer the sum Of Sixty five Dollars to be Paid in good Merchant Grain at the market Price by the first January next with use for value Received March the 27th—1818
>
> Jos Smith
> Alvin Smith

The signatures of both Joseph Sr. and Alvin have remained on the promissory note, evidencing that the note was not fully satisfied. During this period, promissory notes were often treated as currency, being exchanged, transferred, and sold. Consequently, when a note was paid in full, the signatures were torn off so the note would not be subsequently used in commerce.

On the back of the promissory note, additional information pertained to the status of the obligation. First, the notation on the back, "recd on the within Note—fifty three Dollars by the Corps on the ground—~~which the~~ Augt ~~2~~10th 1818—," appears to be in accord with the agreement between the parties that the Smiths would be paying the note by "good Merchant Grain," although the amount credited for the grain was less than the face amount of the note. Second, calculations show the balance due on the note. These calculations appear to be in the handwriting and signature of Justice Spears, and are included as follows:

Note	65.00
Int.	1.50
	66,50
Deduct	53.00
	13,50
	39
Balance	13.89

Judgment entered on the within note Feb^{y} 6th 1819
A.Spear JP

The words "with use" in the text of the promissory note justified the inclusion of interest in this calculation, and thus interest of $1.50 is included. Also, $0.39 was likely charged for court costs, as both parties were required to pay their own costs during this era.

2. The list of services appears to be in the handwriting of Joseph Sr., and it details the work the Smiths had performed for Hurlbut. The two most likely explanations for the list of services are either: (1) the document was prepared concurrent to the work being performed by the Smiths; or (2) in anticipation of trial in the justice court. It is unlikely that it was prepared as part of the appeal process because on appeal, the court record noted that an interlocutory judgment accompanied by a writ of inquiry was entered. An interlocutory judgment and a writ of inquiry indicate that a judgment was awarded in an amount to be determined in a later proceeding.[4] Thus, if this list was prepared for the hearing in the court of common pleas, there would have been no reason for the writ of inquiry to be ordered.

The following is a transcription of the list of services. The date at the top likely indicates the date the Smiths started working for Hurlbut. This is further supported by the date noted on the list of goods (see further below), which notes at its top: "10 May-Aug 1818." The next line references "hanah," which is likely a reference to Hannah Millet Hurlbut, Jeremiah Hurlbut's widowed mother, who also had a farm in Palmyra. Such a reference likely indicates the Smiths may have worked at both Jeremiah and Hannah Hurlbut's farms during summer 1818. The X's on this document appear to have been placed by either Judge Spears or members of the jury, as the judgment rendered in the Smith's favor included these items as damages.

The following is a transcription of this document (bold type indicates different and heavier handwriting):

4. J. Bouvier, *A Law Dictionary* (Philadelphia, PA: T. & J. W. Johnson, 1839), s.c. "interlocutory judgment," "writ of inquiry," 550–51.

May the 8th 1818

hanah jer Hulbert Dr
X to work moveing fence next |.| oct white $0.75 **X**
X to plowing garden **X** 0,50 **X**
X to work with teem & boys **X** 1.50 **X**
to Dressing veal ~~0.25 X~~
X to hyrum half Day fenceing **X** 0.50
X to my Self & Hyrum & teem one Day **X** 3.00
X to making fence one Day **X** 1.00
half Day
X to Hyrum & horses Drawing Rales **X** 1.50
up to the 22nd May
X July the 10th Dr to half Day mowing **X** 0.50
X to one Day mowing &c. **X**$1.00
X to part of two Days my self & Boys <hayers> **X** 0.75
X to Joseph half Day Drawing hay **X** 0.25
X to Hyrum & teem part of a Day Drawing hay **X** 1.00
to horses & waggon one & half Days Drawing
X hay & Rye in the South field – **X**$2.25
to horses & waggon two & half Days
X Drawing hay & grain in the north field **X** 3.75
X to horses & waggon to pitsfields **X** 0.75 **X**
to horse to Onterio **X** 1.00
8 to takeing horse without Leave
to go to the Ridge **X** 4 00
X to horses & waggon one Day Drawing wood **X** 1.50
to horses & waggon three Days Drawing
X Stocks ponkins Buckwheet Rales & wood **X** 4.50 [p. 1]
to one Day of the horses & waggon
X Drawing Corn & wheet **X**$1.50
X to horse to go to quaker meeting **X** 0.50
to takeing horse without leave **X** 1 00 **X**
to go after peaches
Dr |..| after feed admitted $5.00 **X**
to two Bushels of Seed wheet (1.25) 2.50 **X**
X 2 bus Rye **X**|.| 75
Damages sustained by means of warranty &
fraud or ducet in the Sale of Horses &c 80.00
To not performing contra|.|y 25 00 [p. 2]

A review of these entries allows for several conclusions. First, references to "self" appear to be referring to Joseph Sr. as the itemization also refers to "myself & Boys." The "boys" would include Alvin, Hyrum, and Joseph Jr. Consequently, references to "Joseph" would be for Joseph Smith Jr. With this understanding, one can then determine which items each Smith testified about. These entries for work performed by the Smiths totaled $41.25.

The final two entries on the list appear to be connected with the filing of the lawsuit as additional damages that Joseph Sr. and Alvin asserted based on the failure of the horses and the obligation under the promissory note. The first seeks damages due to the failure of the horses for $80, while the second for $25 is based on a breach of contract with the only written contract between the parties being the promissory note.

While this exhibit may have been helpful in identifying what services the Smiths claimed were performed, rules of evidence require a party to produce actual testimony from a witness to establish what services had been provided. Such testimony would be used at the trial, including that of Hyrum and Joseph Jr.

3. The list of goods appears to list the goods and services allegedly provided by Hurlbut to Joseph Sr. for which Hurlbut sought payment or offset. This interpretation is supported internally with notations of "Joseph Smith to Jeremiah Hurlburt Dr"[5] and one item notes, "to be paid by Smith." On the following pages are a transcription and image of this document (fig. 1). Bold type indicates different and heavier handwriting. Additional markings on this document appear to have been made either by the judge or by a member of the jury. The markings include "X," "proved," "admitted," and so forth. These notations appear to track the testimony and evidence presented at the trial. In addition, they could assist in determining how the justice court calculated and rendered their final judgment.

5. The "Dr" is a bit confusing as there is no evidence that Hurlbut was a doctor. Perhaps the "Dr" could be an abbreviation for "debtor" as Hurlbut was the debtor to the Smiths for the labor to which the lists seek as an offset.

Joseph Smith

To Jeremiah Hurlburt Dr

May 10th 1818	**X** To two bushels of oats @3/		$0.75 **X**
" 15	" **X** To 2 bushels of Rye & chess		0 75 **X**
" 20	" <**admitted ½**> To 2 ½ bushels of oats @3/		0.93
" 24	" **X** Planting corn one day @6/		0.75 **X**
"	" ½ bushel of seed corn **proved**		0.37
"	½ bushel of flax seed **proved**		0.43
" (**admits half**) 10 bushels of Potatoes – Ruff & br			3.75
June **proved** To 300 Rails the |.|/c to be paid by Smith @2|.|			3.75
" To hoing corn 1 ½ days @ @ 6/ **proved**			1.12
" **proved** To hoing corn 2 days in the west lot			1.50
July – To 3d days works hoing corn on the east lot & Renting myself **proved**			3.00
" To sowing Buckwheat	**½ day**		0.37
August To ½ Ton of hay @56/ **admitted**			3.50
" **proved** To slveing a hern			0.37
one week To use of a plow most of the summer **proved**			1.25
To paid Smith half of Tax on land			1.62 ½
To damage for not working land according to agreement		25.00	<|-|>
To 28 dollars damage sustaned in the wrong apprisal of crops			28 00
		$76.89 ½	[p. 1]

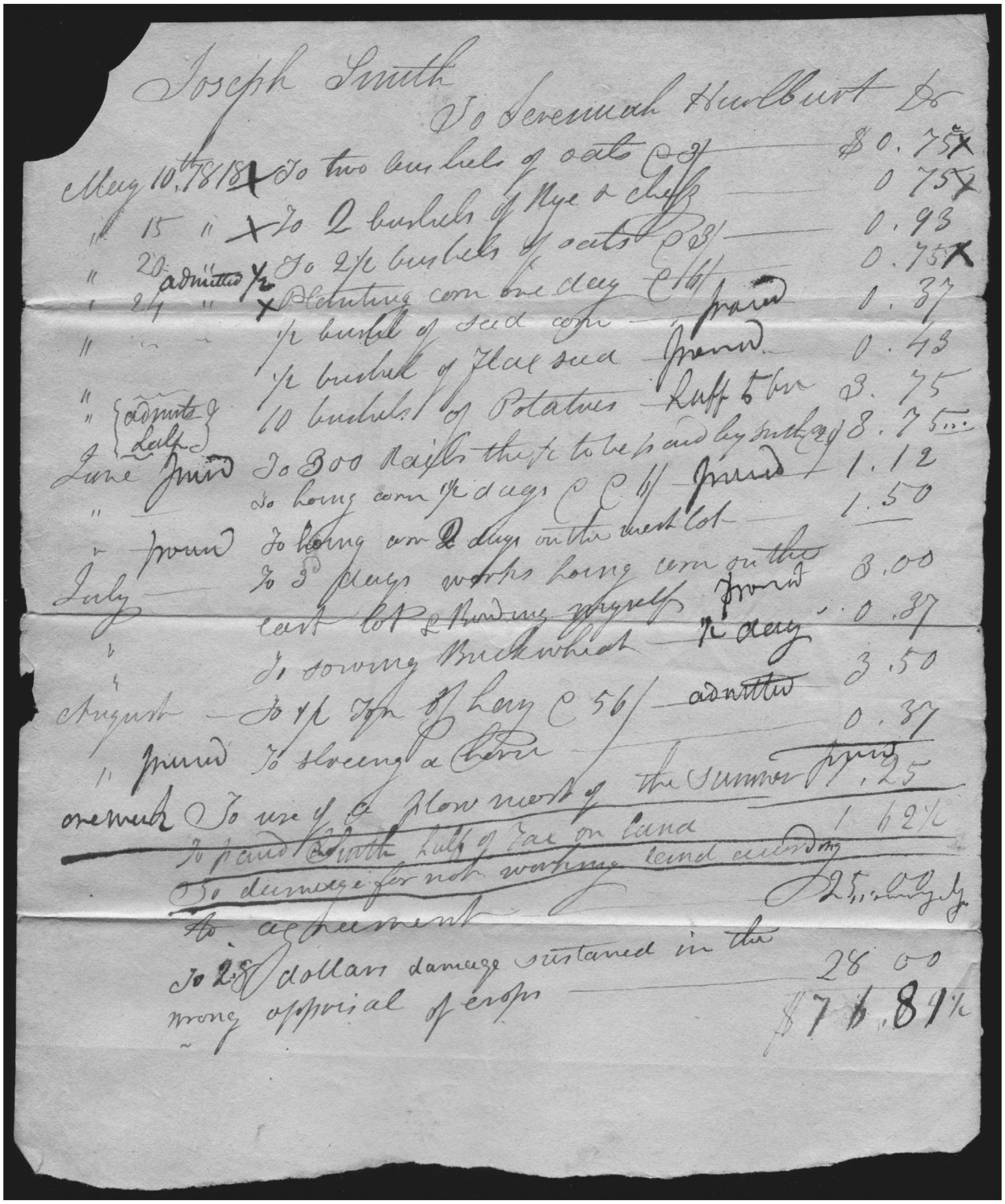
Joseph Smith
To Jeremiah Hurlbut Dr
May 10th 1818 X To two bushels of oats @ 3/ — $0.75 X
" 15 " X To 2 bushels of Rye & cheff — 0.75 X
" 20 admitted ½ To 2½ bushels of oats @ 3/ — 0.93
" 24 " X Planting corn one day @ 4/ — 0.75 X
" ½ bushel of seed corn — proved — 0.37
½ bushel of Flax seed proved — 0.43
" admitted half 10 bushels of Potatoes half to be — 3.75
June proved To 300 rails these to be paid by Smith — 8.75
" To hoeing corn ½ days @ 6/ — proved — 1.12
" proved To hoeing corn 2 days on the west lot — 1.50
July To 3 days works hoeing corn on the east lot & Rodding myself proved — 3.00
" To sowing Buckwheat ½ day — 0.37
August To ½ Ton of hay @ 56/ — admitted — 3.50
" proved To shoeing a horse — 0.37
one week To use of a plow most of the summer proved — 1.25
~~To paid Smith half of tax on land~~ — 1.62½
~~To damage for not working land according~~
~~to agreement~~ — ~~25.00~~
To 28 dollars damage sustained in the wrong approrial of crops — 28.00
$76.81½

Figure 1. Hurlbut's list of goods. Ontario County, New York, May 10–August 1818, 1 p., MS, Ontario County Records Center, Canandaigua, New York.

The Justice Court Trial

The record of this jury trial in the justice court is found in the pleading captioned as the "Judgment Roll,"[6] which was prepared by Justice Spears when Hurlbut appealed the judgment to the court of common pleas. The Ontario Court of Common Pleas adopted the "Rules to Regulate the Practice in Cases of Appeals," which notes:

> A plaintiff of the term next after the appeal was lodged with the Justice, shall file a memorandum shortly stating that the cause had been commenced tried & determined before the Justice and the bringing the appeal according to the Statute the appearance of the parties in this court and the joining of issue, or the default of either party in appearing as the case may be, the return of the Justice verbatim, the demand of a trial by Jury if there is such a demand, the award of a venire returnable immediately, the trial either by a Jury or the Court, the continuances if any and the other proceedings and judgment according to the nature of the case said usages of law.[7]

Consequently, the judgment roll (see transcription on following page) provides a detailed description of the justice court's jury trial.

On January 12, 1819, Joseph Sr. and Alvin filed *pro se* a summons and declaration against Hurlbut in the local justice court. A justice court was the lowest level of the court system in early nineteenth-century New York. It was similar to today's small claims court. The justice court had limited jurisdiction with civil cases limited to $50 at issue.[8] After filing in the local justice court, the local constable served the summons and declaration on Hurlbut the following day. A declaration was the equivalent of a complaint today. This case was brought before the enactment of the Field Code of 1848, which first

6. Ontario County, N.Y., February 9, 1819, 1 p., MS, Ontario County Records Center, Canandaigua, N.Y. Endorsed: " On Appeal / Jeremiah Hurlburt / vs / Joseph Smith / Return"; "Filed Feby. 17th 1819."

7. Ontario County Court of Common Pleas, Court Minutes, vol. 8 (August 1819–August 1820), 19, MS, Ontario County Records Center, Canandaigua, New York.

8. As explained in a New York 1829 Justice Manual, "Suits may be brought before a Justice when the debt or balance due, or the damages claimed, shall not exceed fifty dollars." Thomas G. Waterman, *Justice's Manual: Summary of the Powers and Duties of Justices of the Peace, in the State of New York: containing a Variety of Practical Forms, adapted to Cases Civil and Criminal,* 2d ed. (Albany, N.Y.: Websters and Skinners, 1829), 2.

Justices Court

Joseph Smith
vs
Jeremiah Hurlbutt

The jury Drawn and sworn were:

James White
Lemuel Spear
Zebulon Reeves
Th P Baldwin
Thomas Rogers
Alva Uandee
John Russel
Timothy C Strong
Stephen Spear
Levi Jackson
Dorastus Cole
Denison Rogers

The names of the witnesses sworn & examined were as follows, plaintiffs witnesses:

Hyrum Smith
Joseph Smith Junr
Silas Shirtliff
George Proper
Ara Canfield

Defendants wit:

Fanny Lee
Lemuel Lee
Ephraim Huntly
Jared D Ainsworth
Henry Stodard
Solomon Tice
James Cole

Summons issued January 12th 1819

Returnable the 22d inst at 2 oclock PM at my office in Palmyra, personally servd January 13th 1819 by D Uandee Constable January 22d parties were called and present plaintiffs Declaration was for several articles of account and one item was for Damages which Plaintiff sustained in the purchase of a span of horses of Defendant which horses was said to be unsound. Defendant Denies the Charge and Pleads a set off of a balance Due on a note and several articles of account Court adjourned till the 30th inst to Ara Lilly at the request of the parties. January 30th parties presant plaintiff requests that the cause should be tried by a jury venira issued January 30th and for want of a constable to serve it the Court adjourned till the 6th of Febuary 1819 at 1 oclock P.M at the request of the Plaintiff and by consent of the Defendant February 6th parties presant, Jury summond by Daniel Uandee Constable and Drawn and after hearing the proof and alagations of Both parties they found for the plaintiff $40.78

Judgment against Defendant for $40.78

Cost of suit 4 76
$45 54

N:B the summons issued in the above suit was for trespass on the Case for fifty Dollars or under, This May certify that the above is a correct return which has been before me and that the Defendant in the above e[n]titled suit appeals to the court of Common pleas for the County of Ontario

Given under my hand at palmyra this 9th day of February 1819 Abraham Spear JP

introduced the modern system of civil procedure in America.[9] Accordingly, this 1819 action was based on a "Writ of Trespass on the Case," as originated under British common law and procedure.[10]

This form of action, commonly referred to simply as the "case," was a catchall procedure when no other specific writ corresponded with the circumstances of a plaintiff's injury. These claims typically involved an indirect injury to the plaintiff's character, health, quiet, or safety; to personal rights; or to personal property.[11] In contrast, a claim brought under "writ of trespass" normally dealt with real property. While breach of contract was not grounds for an action of trespass on the case, the action could be based on injuries indirectly (consequential damages) resulting from performance or non-performance of a contract, and therefore was commonly used for mixed contract and tort actions.[12]

In the Smiths' situation, it appears that this was the correct writ to commence the present action by the Smiths. Their claims centered on recovery for personal services, as well as being excused for performance on the promissory note based on Hurlbut's misrepresentations of the horses' nature or condition. Consequently, the Smtihs' claims included contract claims (which could have been brought as a writ of assumption) and tort claims for misrepresentation or fraud. The writ of trespass on the case allowed both claims to be brought under this single writ.

As shown on the judgment roll, a week after the summons and declarations were served on January 13, both parties appeared *pro se* on January 22 before Justice Spears. Neither party had retained counsel. It appears that the parties discussed their respective claims at this hearing. The Smiths explained that they were seeking payment for the labor they had performed for Hurlbut (itemized on the list of services), for the damages they sustained as a result of the "unsound" nature of the span of horses[13] they had purchased from him

9. Lawrence M. Friedman, *A History of American Law* (N.Y.: Touchstone, 2001), 293–301.

10. John H. Baker, *An Introduction to English Legal History* (London: Butterworth, 2002), 61.

11. Thorne v. Deas, 4 Johns. 84 (N.Y. Sup. Ct. 1809).

12. Bouvier, *Law Dictionary,* s.v. "Breach of contract," 449–50.

13. A span of horses consists of "two of nearly the same color, and otherwise nearly alike, which are usually harnessed side by side. The word signifies properly the same as *yoke,* when applied to horned cattle, from buckling or fastening together. But in America, *span* always implies resemblance in color at least; it being an object of ambition with gentlemen and with teamsters to unite two horses abreast that are alike." Noah Webster, *American Heritage Dictionary of the English Language,* 1st ed. (1828), s.v. "Span."

and for payments of grain they had made on the promissory note. Hurlbut countered that the Smiths still owed on the promissory note for the horses, as well as for goods that he had sold them (itemized on the list of goods). Judge Spears continued the case for a week, at which time the parties appeared and the Smiths requested a jury. Apparently, Judge Spears had not anticipated the jury request because he had not arranged for a constable to secure one. Therefore, the judge continued the case for another week, until February 6, 1819.

The law provided that a twelve-man jury was available even in a justice court. The record notes that the Smiths requested a *jury venire*, the process whereby a sheriff is commanded by writ to "come from the body of the county; before the court from which it issued, on some day certain and therein specified, a certain number of qualified citizens who are to act as jurors in the said court."[14] Under applicable New York law "qualified citizens" at that time were limited to male inhabitants of the county where the trial was being held between the ages of twenty-one and sixty and who at the time had personal property in the amount of not less than $250 or real property in the county with a value of not less than $250.[15] In the rural community of Palmyra, this effectively meant those qualified to be on the jury would be the more affluent and prominent men of the area. Ironically, none of the Smiths would have qualified to be a juror.

The trial was finally held on February 6, 1819. Twelve jurors were impaneled, all men and property owners. A total of twelve witnesses were called at trial, with the Smiths calling five and Hurlbut calling seven. Both Joseph Jr. and Hyrum were called to testify. This was Joseph Jr.'s first direct interaction with the judicial process. He had turned thirteen years old a month and a half prior to the trial. New York law and local practice permitted the use of child testimony, subject to the court's discretion to determine the witness's competency. The test for competency required a determination that the witness was of "sound mind and memory." A New York 1803 summary of the law for justices of the peace notes that "all persons of sound mind and memory, and who have arrived at years of discretion, except such as are legally interested, or have been rendered infamous, may be improved as witness."[16] This determination as to competency rested within the discretion of the judge. The general criteria were articulated in Bouvier's *Law Dictionary*:

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14. Bouvier, *Law Dictionary*, s.v. "jury venire," 466.

15. Charles Edwards, *The Juryman's Guide throughout the State of New York* (New York: O. Halsted, 1831), 54.

16. *A Conductor Generalis: being A Summary of the Law Relative to the Duty and Office of Justice of the Peace* … (Albany, N.Y.: E. F. Backus, 1819), 129.

> The age at which children are said to have discretion is not very accurately ascertained. Under seven years, it seems that no circumstances of mischievous discretion can be admitted to overthrow the strong presumption of innocence, which is raised by an age so tender. Between the ages of seven and fourteen, the infant is, prima facie, destitute of criminal design, but this presumption diminishes as the age increases, and even during this interval of youth, may be repelled by positive evidence of vicious intention; for tenderness of years will not excuse a maturity in crime, the maxim in these cases being, *malitia supplet aetatem*. At fourteen, children are said to have acquired legal discretion.[17]

The application of these principles is articulated in a New York 1829 justice's manual, noting that "there is no particular age at which children are to be admitted to testify—but it is to be determined by their apparent sense and understanding. The court may examine a child, or other person of weak intellect, to ascertain his capacity, and the extent of his religious and other knowledge. After such examination the matter must rest, in a great measure, in the discretion of the court."[18]

The New Jersey Supreme Court similarly ruled in *Van Pelt v. Van Pelt*, 3 N.J.L. (N.J. 1810) 236, at 236:

> If it has appeared to the justice at the time of the trial, that the witness was fourteen years of age, and that he was possessed of ordinary understanding; that is, was not uncommonly deficient in mental qualifications, the justice ought to have taken his testimony, and left it to the jury to judge of the credit due to it. But as it did not appear to the justice that the boy was fourteen years of age at the trial, we incline to think that his capacity as a witness was a proper subject of discretion in the justice; and therefore, that the judgment must be affirmed.

From the record, it appears that Judge Spears found Joseph Jr. competent and that he did indeed testify during the trial. This is evident by reviewing the list of services that was part of the court file. Joseph Jr.'s testimony would have been required to admit those services that he personally performed. Further, it is interesting to note that all the services Joseph Jr. testified about were included in the damages awarded to the Smiths.

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17. Bouvier, *Law Dictionary*, s.v. "competency," 329.

18. Waterman, *Justice's Manual,* 73.

Based on the judgment roll, the jury found in favor of the Smiths in the amount of $40.78 in damages and $4.76 in court costs. Unfortunately, the record does not articulate how the court derived this damage award. Examining the respective claims is helpful but not determinative. There are several scenarios that may have resulted in this judgment in favor of the Smiths. The following is a likely explanation based on these documents and pleadings:

Rationale for Ruling	**Source**	**Amount**
Re: Sale of Horses:		
• The Smiths are liable for amount of the Promissory Note for the horses, plus interest of $1.50.	Promissory Note [front]	<$66.50>
• The Smiths had paid in grain a portion of the obligation owed on the Promissory Note.	Promissory Note [back]	$53.00
• The horses were not as sound as promised and so Hurlbut was guilty of breach of contract as alleged by Smiths	List of Services [p. 2]	$25.00
Re: List of Services:		
• Hurlbut was obligated to pay the Smiths for the work performed on his and his mother's farms as delineated by the Smiths and awarded by the jury.	List of Services [p. 1]	41.25
Re: List of Goods:		
• The Smiths owed Hurlbut for goods. Hurlbut claimed that there was $76.89 owed. However, his adding was off and based on the List of Goods, $77.21 was owed. The judge or jury noted on this exhibit the items that were owed by an X or noted "admitted" or "proved."	List of Goods [p. 2]	<$13.50>
Re: Reconcile the judgment:		
• This could be for interest.	Judgment Roll	$1.53
Total Judgment to Smith		$40.78

Although the court did not award the Smiths the entire claim they had brought before the court, the Smiths had, for all practical purposes, won their case.

The Appeal

On February 7, 1819, the day following the trial, Hurlbut retained legal counsel to initiate both a new case, as well as an appeal in the court of common pleas. Hurlbut's attorney, Frederick Smith, was a familiar figure in the Palmyra legal community. He was not only an attorney but also a sitting justice of the peace for Ontario County. Frederick Smith was first elected as a justice in 1814 and continued to serve in that capacity until 1827.[19]

That same day, Hurlbut's counsel had a writ of *capias ad respondendum*[20] issued against Joseph Sr. and Alvin. This was an alternative process for initiating a lawsuit in the Ontario Court of Common Pleas. This action was brought in the court of common pleas because it sought damages of $140 and therefore exceeded the $50 jurisdictional limit of the justice court. While the writ of *capias* does not delineate the basis of the damages, it does note that it was brought under the same writ as was used in the prior justice court trial—"plea of trespass on the case." The $140 damage claim is likely the $65 owed under the promissory note and the $76 that Hurlbut claims the Smiths owed him for goods. The following is the text of this writ:[21]

> Ontario County. SS, — The people of the state of New-York, by the Grace of God, Free and Independent- to our Sheriff of our county of Ontario, Greeting:[22]
>
> We command you to take Joseph Smith & Alvin Smith if they may be found in your bailiwick, and them safely keep, so that you have their bodies before our Judge ~~and Assistant Justices~~, at our next Court of Common Pleas, to be holden at the Court-House in the town of Canandaigua, in and for our county of Ontario, on the third Tuesday of May next, to answer unto Jeremiah Hurlbut

19. Edgar A. Werner, *Civil List and Constitutional History of the Colony and State of New York* (Albany, N.Y.: Weed, Parson & Co., 1884); Registers of Government Appointments, vol. A, Records Series A0006-78, Box 32 of 33, "List of Appointed State Officers, 1823–29" (New York Archives).

20. A "writ of capias" is commonly used to command the sheriff to "take the body of the defendant, and to keep the same to answer, *ad respondendum*, the plaintiff in a plea." Bouvier, *Law Dictionary*, s.v. "writ of capis,"329.

21. Ontario County, N.Y., February 7, 1819, 2 pp., hybrid, Ontario County Records Center, Canandaigua, New York. Endorsed: "Ont Com Pleas / Jeremiah Hurlburt / v / Joseph Smith & / Alvin Smith / Dr $140 – / F Smith Atty"; "Filed 25th May 1819."

22. Small caps represent printed text.

> IN A PLEA OF TRESPASS ON THE CASE TO HIS DAMAGE OF ONE HUNDRED AND FORTY DOLLARS
>
> AND HAVE YOU THEN THERE THIS WRIT —WITNESS, ~~JOHN NICHOLAS~~, <NASH> ESQUIRE, FIRST JUDGE OF OUR SAID COURT, AT CANANDAIGUA, THE 7TH DAY OF FEBRUARY 1819.
>
> PER CURIAM. H. NW NAIR, CLERK.
>
> F. SMITH ATTORNEY. [p. 1].

On the back of this writ, Sheriff Phineas P. Bates noted "Cepi Corpus to Joseph Smith. None as to A. Smith." *Cepi corpus* confirms that the sheriff made the arrest pursuant to the *capias.*[23] It appears the sheriff found Joseph Sr. but not Alvin, and indeed this is confirmed in the statement of issues filed by Hurlbut on June 19, 1819, a few months later as part of his appeal.

On the following day, February 8, 1819, Hurlbut's attorney filed an appeal, including the requisite "appeal bond" of the justice court judgment. The appeal bond in this case[24] deserves special attention for a couple of reasons. First, the amount of the appeal bond was $81.56, twice the amount of the justice court judgment ($40.78). At first blush, this amount appears in accord with applicable New York law. However, a closer examination reveals a fatal problem. The New York Supreme Court ruled, on both the 1818 and 1824 acts pertaining to appeal bonds, that the amount of the bond was to be double the judgment *and* the court costs, not just the judgment.[25] In *Latham v. Edgerton,* the court found that because the appellant had failed to submit a bond that was double the amount of the judgment *and* the court costs, as awarded by the justice court, the court of common pleas lacked jurisdiction and reversed the judgment.

Based on the judgment roll, the justice court judgment included damages of $40.78 and court costs of $4.76. The bond proffered by Hurlbut only covered the damages and did not include the court costs. This failure, under the *Latham* court's ruling, would have voided the court of common pleas' jurisdiction over the appeal altogether. Unfortunately, there is no evidence that the Smiths ever raised this issue, which is likely due to the fact that while Hurlbut retained counsel for the appeal, the Smiths did not. Consequently, they were probably never even aware of this potentially fatal mistake.

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23. Bouvier, *Law Dictionary*, s.v. "capias," 161.

24. Ontario County, N.Y., February 8, 1819, 2 pp., MS, Ontario County Records Center, Canandaigua, New York. Endorsed: "Jeremiah Hurlbut / & / To / Joseph Smith / Bond."

25. Latham v. Edgerton, 9 Cow. (1828), 227, at 229, citing Ex parte Harrison, 4 Cow. (1825) 61, at 63–64.

Second, pursuant to statute, Hurlbut was required to secure the bond with two sureties. Hurlbut had Solomon Tise and William Jackway sign as sureties on the bond. Solomon Tice was Hurlbut's brother-in-law, having married Hurlbut's sister, Anna, in 1808 in Palmyra.

William Jackway's family was among Palmyra's earliest settlers, having arrived in 1787. Jackway was a veteran of the Revolutionary War and owned a five-hundred-acre farm in Palmyra. Hurlbut's appeal may have been the first skirmish of what would be years of conflict between the Smiths and the Jackways. In 1831, Joseph Jr. would mention a son of William Jackway in a letter to his brother, Hyrum, noting: "David Jackways [*sic*] has threatened to take father with a supreme writ in the spring."[26] It appears that the Smiths' lawsuit against Hurlbut may have aligned some of the founding families of Palmyra in opposition to the Smiths. These actions predate Joseph Jr.'s heavenly experiences and the seeming fall-out within the Palmyra community.

Once the court certified the appeal bond, the justice court prepared the judgment roll, a document delineating the proceedings of the case, including the claims brought, the members of the jury, the witnesses and the judgment, and the Ontario Court of Common Pleas adopted "Rules to Regulate the Practice in Cases of Appeals" noting that "the party noticing a cause for trial shall previous to the term serve a notice of issues on the Clerk."[27] Accordingly, Hurlbut's attorney prepared and filed a Statement of Issues[28] with the court of common pleas as part of the appeal. In this statement, Hurlbut claimed, in part:

> They the said Defendants[29] would pay to the said Jeremiah Hurlbert or bearer the sum of Sixty five Dollars to be paid in good merchantable grain in one year from the date thereof with use for value received-
>
> BY means of which said promise and undertaking, the said defendants [The Smiths] became liable to pay and deliver, and ought to have paid and delivered to the said Plaintiff on the day last

26. Joseph Smith to Hyrum Smith, March 3, 1831, 3pp. MS, Joseph Smith Collection, Church Archives, Salt Lake City.

27. Ontario County Court of Common Pleas, Court Minutes, volume 8 (August 1819–August 1820), 19, MS, Ontario County Records Center, Canandaigua, New York.

28. Ontario County, New York, March 27, 1818, 1 p., hybrid, Ontario County Records Center, Canandaigua, New York. Endorsed: "Ontario Com. pleas. / Jeremiah Hurlbert / vs / Joseph Smith im- / pleaded with / Alvin Smith / F Smith Atty / Narr-"; "De |-| cpa"; "To file"; "Filed 26th June 1819."

29. As Hurlbut filed the appeal, as well as initiated a new action in the Court of Common Pleas, he became noted as the plaintiff in these pleadings with the Smiths as the defendants.

> aforesaid, the said sum of money in said note mentioned according to the tenor and effect of the said note- Yet the said Defendants although requested by the said Plaintiff [Jeremiah Hurlbut] on the day last aforesaid, and often since that day, to wit, at Palmyra aforesaid have not paid said note or any part thereof to the said Plaintiff not have otherwise paid and satisfied to the said Plaintiff the said sum of money or any part thereof, but they to do the same have hitherto wholly refused, and still do refuse, to the damage of the Plaintiff of one hundred and Forty Dollars and therefore he brings his suit & c.

Hurlbut's position is very similar to the one he took during the justice court trial. Interestingly, he makes no reference to the $53 the Smiths had paid in "crops on the ground" as identified on the promissory note. Rather, he treats the promissory note as being owed in full. One can only surmise that this approach was one of strategy and not of oversight.

The caption to the statement of issues further confirms that Alvin Smith had most likely not been served with the *capias* (equivalent to a summons). It notes:

Ontario Com. Pleas
Jeremiah Hurlbut
Vs
Joseph Smith
impleaded with
Alvin Smith

The term "impleaded" indicates that a person who was not named as a party in the action as originally instituted has been brought into the action. The purpose of an impleader is to promote judicial economy, in that it permits two cases to be decided at once. While Alvin had not been served in the new suit commenced by Hurlbut in the Ontario Court of Common Pleas, he was already a co-plaintiff in the justice court suit from which Hurlbut had appealed the resulting judgment. Alvin was therefore impleaded into the new case. Some have speculated that during this time Alvin had taken work on the Erie Canal,which could explain why he was not around to be served with the *capias*.

The final reference to this case comes in a docket entry[30] in the Ontario Court of Common Pleas dated August 1819. It simply states:

30. Ontario County Court of Common Pleas, Court Minutes, vol. 8 (August 1819–August 1820), 19, MS, Ontario County Records Center, Canandaigua, New York.

Jeremiah Hurlbut vs Joseph Smith impleaded with Alvin Smith	The like as 2[d] above.

Unfortunately, if the "2d above" refers to two entries above this entry, the notation there simply also reads "the like." The entry immediately above this entry contains the following ruling:

> "The like having been duly ordered on motion of F. Smith Plaintiffs Atty interlocutory judgment & that a writ of inquiry issue."

This may be what the court intended to reference, as both matters were being handled on appeal by Frederick Smith. If this is the case, then to make sense of this, one needs to understand the relationship between an "interlocutory judgment" and a "writ of inquiry."

An interlocutory judgment is

> one given in the course of a cause, before final judgment. When the action sounds in damages, and the issue is an issue in law, or when any issue in fact not tried by a jury is decided in favor of the plaintiff, then the judgment is that the plaintiff ought to recover his damages without specifying their amount; for, as there has been no trial by jury in the case, the amount of damages is not yet ascertained. The judgment is then said to be interlocutory. To ascertain such damages it is the practice to issue a writ of inquiry.[31]

And a writ of inquiry is "a writ directed to the sheriff of the county where the facts are alleged by the pleadings to have occurred, commanding him to inquire into the amount of damages sustained 'by the oath or affirmation of twelve good or lawful men of his county;' and to return such inquisition, when made, to the court."[32]

It would appear that the "plaintiff" would be Hurlbut, as indicated by the caption on the Docket Entry and in the *capias*. There is no evidence that the Smiths ever appeared during the appeal. This would have resulted in a default being entered in favor of Hurlbut. If that is the case, then it appears that the court of common pleas reversed the jury's finding for the Smiths in the justice court. However, unlike modern default judgments in which damage awards are based on the complaint, the successful party in this case

31. Bouvier, *Law Dictionary*, s.v. "interlocutory judgment," 550.

32. Bouvier, *Law Dictionary*, s.v. "writ of inquiry," 502.

would have been required to establish the amount of damage by admissible evidence. Hence, after receiving a reversal, the court of common pleas effectively remanded the case back to the local level to have the amount of damages determined. There is no record of any subsequent events related to this matter.

Conclusion

This case could be viewed as nothing more than an example of the frontier legal system in the early nineteenth century. The facts are not terribly compelling or important—the sale of some horses, a demand of payment for labor by some farmhands, and some offsetting claims for grain and seeds. These events were undoubtedly commonplace in early agricultural America. As such, this case might have remained in obscurity because of its commonness. But this is no ordinary case; its importance rests not only on its facts, but also on who its participants were.

Ironically, this case does not reveal as much about the Smith family as it does about how sympathetically, credibly, and reasonably Joseph Jr. and the Smith family may have been viewed in the eyes of their Palmyra neighbors in 1819. The case provides a window into a period of time that is rarely viewed, namely those early years when the Smiths lived in upstate New York, just a year or so before the profoundly complicating religious events that would result in estrangement of the Smiths and disbelief in the minds of many locals.

One might ask whether this case would have been treated differently if it had arisen even a year later, after the First Vision, or after any of Moroni's visits. Would Abraham Spears have hesitated before finding this young boy competent? Would the jurors, representing the Palymra community, have found his testimony less than credible?

This case stands as an undisputed account of how Joseph Jr., and his family, were regarded in Palmyra in 1819. The jurors, composed of the more affluent members of the community, found in favor of the Smiths' claims against a much more prominent family. Even more important, this same jury, in conjunction with the local justice of the peace, found the young boy Joseph Smith to be both a credible and competent witness—something that some dispute today. Yet, there it is. Found recently and nearly two centuries after it was decided, this case provides a judicial estimate of Joseph Jr.'s character, and that finding alone makes the case significant.

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