No. 11802

Supreme Court of Illinois

Trustees of Schools T.26

vs.

Gardner, et al

71641 7

State of Illinois

Iroquois County ss

The People of the State of Illinois to all to whom these Presents shall come Greeting: Know ye that we having caused to be inspected the Records and proceedings now remaining in the Office of the clerk of the Circuit Court of said Iroquois County do find therein certain Records and proceedings in words and figures following to wit:

" United States of America

" State of Illinois

" Iroquois County ss

" Pleas before the Honorable

" Charles R Starr Judge of the twentieth Judicial Circuit

" and Presiding Judge of the Iroquois County Circuit Court

" in the State of Illinois - at a term of said Court begun

" and held at the Court House in Middleport in said County

" and State aforesaid on the third Tuesday (the same being

" the Fifteenth day) in the month of November in the year

" of our Lord one thousand Eight hundred and fifty nine

" and of the Independence of the United States of America the

" Eighty fourth.

" Present Hon Charles R Starr Presiding Judge of the Twentieth Judicial Circuit

" Charles J. Beattie States attorney

[11802-1] " Theodore Ayres Sheriff of Iroquois County

" Thomas Vennum clerk of the Circuit Court

Be it remembered that on the 13th day in the month of October in the year last aforesaid there was filed in the office of the clerk of the Circuit Court of said County a certain Precipe which reads in words and figures following to wit:

" State of Illinois } Circuit Court of Iroquois County
" Iroquois County } ss November Term AD 1859.
" The Trustees of Schools of ~~Schools~~ Township
" Twenty six North of Range Eleven West
" of Iroquois County Illinois Plaintiffs
" vs
" Samuel S Gardner & Daniel B Gardner } Trespass on the case on promises
" Defendants.

The clerk of said
" Court will issue a Summons in the above cause directed
" to the Sheriffs of Lasalle & Iroquois Counties in a plea of
" Trespass on the case on promises returnable at the November
" Term of said Court AD 1859 to the damage of the Plaintiffs
" of One thousand Dollars.

" Joines & Blades Plaintiffs attorneys
" To Thomas Bennum Esq Clerk
" Oct 13th 1859.

And afterwards to wit on the said 13th day of October aforesaid there was issued from the office of said clerk a writ of Summons which reads in words and figures following:

State of Illinois Iroquois County ss

The People of the State of Illinois to the Sheriff of said County Greeting: We command you that you summon Daniel B. Gardner and Samuel S Gardner if to be found in your county personally to be and appear before the Circuit Court of said County, on the first day of the next term thereof to be holden at the Court House in the town of Middleport on the 15th day of November next to answer The Trustees of Schools of Township Twenty six North of Range Eleven West of Iroquois County Illinois in a plea of Trespass on the case on promises to the damage of them the said Plaintiffs as it is said in the sum of One thousand Dollars and have you then and there this writ.

Witness Thomas Vennum Clerk of our said Court and the seal thereof at Middleport this 15th day of October AD 1859.

Seal

Thomas Vennum

Clerk

And on the back of said summons is the following endorsement, "Served by reading this writ to the within named Daniel B Gardner on the 15th day of October AD 1859. S. S. Gardner not found in my county

Fees Service	,50
Milage	1,00
Return	10
	$1,60

[11802-2]

Theodore Ayres Sheriff"

And afterwards to wit on the 5th day of November in the year 1859 aforesaid there was filed in the office of the Clerk of said Court a declaration which reads in words and figures following to wit.

In the Iroquois Circuit Court

November Term AD 1859

State of Illinois }
Iroquois County }

The Trustees of Schools of Township Twenty Six North of Range Eleven West, in the County of Iroquois Plaintiffs in this suit by Joiner & Blades their Attorneys complain of Samuel S. Gardner and Daniel B Gardner defendants Whom are summoned &c in a plea of Trespass on the case on promises: For that whereas the said defendants heretofore to wit: on the 28th day of May AD 1856 at &c in the County of Iroquois made their certain promissory note bearing date the day & year aforesaid and then and there delivered the same to the Plaintiffs in and by which said note said defendants by the name style and description of S. S & D B Gardner promised to pay to the said Plaintiffs by the name style and description of the Board of Trustees of Township Twenty Six North Range Eleven West, Two thousand three hundred and Seventy Eight dollars and Eighty Six cents five years after ~~date~~ the date thereof with interest at

" the rate of ten per centum per annum payable half yearly in
" advance, And said Plaintiffs say that there has been
" paid on said note four installments of interest each payment
" amounting to one Hundred and Nineteen dollars and
" Ninety four cents, and amounting in all to Four Hundred and
" Seventy five dollars and Seventy six cents which said ~~second~~
" Several installments of interest were for the payment of the
" interest on said note up to the 28th day of May AD 1858
" And the said Plaintiffs further aver and say that there are now
" three several installments of interest at the rate aforesaid due
" and payable on said note as follows to wit: the sum of
" One Hundred and Eighteen dollars and Ninety four cents
" which became due and payable on the 28th day of May AD
" 1858: the sum of one hundred and Eighteen dollars and
" Ninety four cents which became due and payable on the 28th
" day of November AD 1858 and the sum of One Hundred
" and Eighteen dollars and Ninety four cents which became
" due and payable on the 28th day of May AD 1859, and
" the said Plaintiffs further aver that said sums of money
" as interest as aforesaid were not paid at the times and
" in the manner aforesaid according to the tenor and effect
" of the said Promissory note. By means whereof and
" by force of the Statute in such case made and provided
" the said defendants became liable to pay the Plaintiffs
" interest on the same at the rate of twelve per centum per
" annum from the time that each of the said several sums

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" of money as interest as aforesaid, became due and payable as
" also the said several sums or installments of interest ~~as~~
" aforesaid, and being being so liable in consideration thereof
" the said defendants then and there undertook and prom-
" -ised to pay the same to the Plaintiffs according to the tenor
" tone effect intent and meaning of said note and
" according to the Statute in such case made and provided
" to wit at the place aforesaid,

" And whereas also the said defendants afterwards
" to wit: on the 28th day of May AD 1857 at or near at Med-
" -deport in the County of Iroquois made their certain other
" promissory note bearing date the day and year aforesaid
" and then and there delivered the same to the said Plain-
" -tiffs in and by which said note the said defendants by
" the name and Style of Saml. S. Gardner and D. B.
" Gardner promised to pay to the said Plaintiffs by the name
" style and description of the Board of Trustees of Township
" Twenty six Range Eleven West One Hundred and twenty four
" dollars and Eighty Eight cents One year after the date
" thereof with interest thereon at the rate of ten per centum
" per Annum which period of one year had elapsed before
" the Commencement of this suit. By means whereof and by
" force of the Statute in such case made and provided, the
" said defendants became liable to pay to said Plaintiffs
" said sum of money mentioned mentioned in said note

" together with interest on the said Principal and interest after the
" same should become due and payable at the rate of twelve
" per centum per annum and being so liable in consid-
" -eration thereof the said defendants then and there undertook
" and promised to pay the same to said Plaintiffs according
" to the tenor and effect tone, intent and meaning of said
" note and according to the Statute in such case made and
" provided to wit at the place aforesaid.

" And whereas also the said defendants afterwards
" to wit on the 28th day of May AD 1859 to wit at &c in the
" County of Iroquois became and was indebted to the Plaintiff
" in a large sum of money to wit Eight Hundred dollars
" for money before that time lent and advanced to and paid
" laid out and expended for said defendants by said
" Plaintiffs at said defendants request, and for money
" before that time had and received by said defendants
" to and for the use of said Plaintiffs. and being so indebted
" said defendants in consideration thereof then and there
" undertook and promised to pay said Plaintiffs said last
" mentioned sum of money when thereunto afterwards
" requested. Yet the said defendants not
" regarding their said promises and undertakings but contr
" -ving &c although often requested so to do have not paid
" said Plaintiffs either of said sums of money or any
" part thereof nor any part of the interest on the same, but
" so to do have hitherto wholly neglected and refused and

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" still do neglect and refuse to the damage of the said Plaintiffs
" of One thousand dollars and therefore they bring suit &c
"
Joiner & Blades
"
Attys for Pltffs

" (Coppy of Notes sued on)
" $2378 86. Five years after date for value Received we or either
" of us promise to pay to the Board of Trustees of Township
" Twenty six North Range Eleven West for the use of the
" inhabitants of said township the sum of Two ~~Hundred~~
" Thousand three Hundred & Seventy Eight 86/100 dollars
" with ten per cent interest from date half yearly in
" advance this the 28th day of May AD 1856
S. & D. B. Gardner

" $124 88/100 One year after date we or either of us promise to pay to the
" Board of Trustees of Township Twenty six Range Eleven West for
" the use of the inhabitants of said township One Hundred
" and twenty four dollars and Eighty Eight cents with
" ten per cent interest payable half yearly in advance.
" Middleport May 28th 1857
"
Saml. S. Gardner
"
D B Gardner

Daniel Samuel S Gardner and Daniel B Gardner Dr

To Trustees of Schools of Town 26 AR 11 W

To money lent and advanced, paid laid out and expended for said S. S & D. B Gardner by said Trustees $800

And for money had and received by them to and for the use of said Trustees $800

Oct 1st 1859

And afterwards to wit on the 21st day of November in the year 1859 aforesaid it being one of the regular days of the November Term of the said Circuit Court for the year 1859 the said Court being then duly organized and sitting as a Court for the transaction of business, the following proceedings were had and entered of Record by said Court in words and figures following to wit:

" Trustees of Town 26 AR 11 West

139 vs Assumpsit

" Samuel S. Gardner and Daniel B Gardner

" This day comes the said

" defendants by Fletcher and Kay their attorneys on whose motion

" it is ordered by the Court that the rule to plead in this cause

" be and the same is hereby extended till ten oclock to-

" -morrow morning.

[1803-5]

And afterwards to wit on the 22d day of November in the year 1859 there was filed by the defendants in said Court certain Pleas which read in words and figures following to wit:

" State of Illinois }
" Iroquois County } Iroquois Cir Court
" of the Novr Term 1859
" Samuel S Gardner &
" Daniel B. Gardner
" ads
" The Trustees of Schools of Township
" Twenty ~~&~~ 26 N R 11 West

" And the said Daniel
" B Gardner one of the above named defendants by
" Fletcher, Bovie & Kay his attorneys comes and defends
" the wrong and injury when &c and says that the said
" defendant did not undertake and promise in
" manner and form as the said Plaintiffs have above
" thereof complained against him and the said Samuel
" S Gardner, and of this he the said Daniel B Gardner
" puts himself upon the Country &c

" Bovie Fletcher & Kay
" Attys for D. B. Gardner

" And the Plffs doth the like
" Joiner & Blades Attys for Plffs

" And for a further plea in this behalf the said defendant
" Daniel B Gardner says actio non because he says
" that the said Plaintiffs before and at the time of the
" commencement of this suit, to wit at the County of
" Iroquois aforesaid were and still are indebted to the
" said defendants in a large sum of money, to wit the
" sum of one thousand ~~dollars~~ & ~~twenty~~ thirty four dollars and
" two cents of lawful money of the United States for diverse
" and sundry sums of money by the said defendants
" before that time paid to the said Plaintiffs as interest on
" & principal on said notes and for the said Plaintiffs and
" at the special instance and request of the said Plaintiffs
" which said several sums of money so due and owing
" from the said Plaintiffs to the said defendants exceeds
" the damages sustained by the said Plaintiffs, by reason
" of the non-performance by the said defendants of the
" said several supposed promises and undertakings in
" the said declaration mentioned, and out of which said
" several sums of money amounting to the said sum of
" one thousand & thirty four dollars & two cents so due
" and owing from the said Plaintiffs to the said defendants
" the said defendants are ready and willing and the
" said Daniel B Gardner hereby offers to set off and
" allow to the said Plaintiffs their said damages
" according to the form of the Statute in such case made
" & provided & take Judgment for the balance & this the said

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" Daniel B Gardner is ready to verify, wherefore he prays
" Judgment &c

" Bovie. Fletcher & Kay
" for D B Gardner

" The Trustees of Schools of T 26 N R 11 West &c
" To L. L & D. B. Gardner

" May 28th 1856	To money paid	$118.94
" April 13th 1858	To money paid to said Trustees as per Receipt	$118.94
" May 28th 1857	To money paid to said Trustees as per Receipt	118.94
" Nov 26 1858	To money paid to said Trustees as per Receipt	30 00 ~~118.94~~
" Feb 11th 1857	To money paid to said Trustees as per Receipt	15.00
" Jany 13th 1857	To money paid to said Trustees as per Receipt	13.50
" Jany 28 1856	To money paid to said Trustees	118.94
"	To 4 installments as mentioned in the said Plaintiffs	
"	declaration each $119.94 ~~making in all~~	497.76
"	making in all	1034.02

" And for a further plea in this behalf by leave of the Court
" to the said Daniel B Gardner says actio non because
" he says that the said several sums of money and each
" and every of them, the said defendants did had
" before the Commencement of this suit to wit, on the 13th
" day of October AD 1859 at the County of Iroquois afore-
" said fully pay and satisfy together with all and

singular the interest which had accrued thereon and this the said Daniel B Gardner is ready to verify wherefore he prays Judgment &c

Bovio Fletcher & Kay

Attys for D B Gardner

And afterwards to wit on the 30th day of November in the year 1859 it being one of the regular days of the November Term of said Court for said year 1859 the said Court being then duly organized and sitting as a Court for the transaction of business certain other proceedings were had and entered of Record in said Court in words and figures following to wit:

" Trustees of Town 26 N R 11 West

" 139 vs } Assumpsit

" Samuel S. Gardner and Daniel B Gardner

" This day come the

" Plaintiffs by Joines & Blades their Attorneys on whose motion

" it is ordered by the Court that this cause be and the same is

" hereby continued with alias summons to Lasalle county, and it

" is further ordered that the Plaintiffs have leave to amend

" the declaration in this cause.

And afterwards to wit on the 10th day of January in the year 1860 there was filed in the office of the Clerk of

[11802-7] said Circuit Court an amended declaration which reads

in the words and figures following to wit:

" In the Iroquois Circuit Court

" State of Illinois } November Term AD 1859

" Iroquois County }

" The Trustees of Schools of Township Twenty

" Six North of Range Eleven West, in the County of Iroquois

" Plaintiffs in this suit by Jones & Blades their attorneys

" Complain of Samuel S Gardner and Daniel B Gardner

" defendants whom are summoned &c in a plea of

" Trespass on the Case on promises: For that whereas the said

" defendants heretofore to wit: on the 28th day of May AD

" 1856 at &c in the County of Iroquois made their certain

" promissory note bearing date the day & year aforesaid

" and then and there delivered the same to the ~~said~~ Plaintiffs

" in and by which said note said defendants by the name

" style and description of S. S & D B Gardner promised to

" pay to the said Plaintiffs by the name style and description

" of the Board of Trustees of Township twenty six North Range

" Eleven West, Two thousand three hundred and Seventy Eight

" dollars and Eighty six cents five years after the date thereof

" with interest at the rate of ten per centum per annum

" payable half-yearly in advance, And said Plaintiffs

" say that there has been paid on said note four installments

" of interest each payment amounting to one hundred and

" Eighteen dollars and Ninety four cents, and amounting
" in all to Four Hundred and Seventy five dollars and
" Seventy six cents, which said several installments of interest
" were for the payment of the interest on said note up to the
" 28th day of May AD 1858: and the said Plaintiffs further aver and
" say that there are now three several installments of interest
" at the rate aforesaid due and payable on said note as
" follows to wit: the sum of One Hundred and Eighteen
" dollars and Ninety four cents which became due and
" payable on the 28th day of May AD 1858: the sum of
" of One Hundred and Eighteen dollars and Ninety four
" cents which became due and payable on the 28th day of
" November AD 1858 and the sum of One Hundred and Eighteen
" dollars and Ninety four cents which became due and
" payable on the 28th day of May AD 1859, and the said Plaintiffs
" further aver that said sums of money as interest as aforesaid
" were not paid at the times and in the manner aforesaid
" according to the tenor and effect of the said promissory
" note. By means whereof and by force of the Statute in
" such case made and provided the said defendants
" became liable to pay the Plaintiffs interest on the same
" at the rate of twelve per centum per Annum from the time
" that each of the said several sums of money as interest as
" aforesaid, became due and payable as also the said
" several sums or installments of interest aforesaid, and
" being being so liable in consideration thereof the said defendants

[11802-8]

" then and there undertook and promised to pay the same to
" the Plaintiffs according to the tenor, tone effect intent and
" meaning of said note and according to the Statute in such
" case made and provided to wit at the place aforesaid.

" And whereas also the said defendants afterwards to
" wit: on the 28th day of May AD 1857 at &c to wit at Middleport
" in the County of Iroquois made their certain other promissory
" note bearing date the day and year aforesaid and then and
" there delivered the same to the said Plaintiffs in and by which
" said note the said defendants by the name and style of Saml
" S Gardner and D B Gardner promised to pay to the said
" Plaintiffs by the name style and description of the Board of
" Trustees of Township Twenty six Range Eleven West one
" hundred and twenty four dollars and Eighty Eight cents one
" year after the date thereof with interest thereon at the rate
" of ten per centum per annum which period of one year
" had elapsed before the commencement of this suit.

" By means whereof and by force of the Statute in such case
" made and provided, the said defendants became liable
" to pay to said Plaintiffs said sum of money mentioned
" mentioned in said note together with interest on the
" said Principal and interest after the same should become
" due and payable at the rate of twelve per centum per
" annum and being so liable in consideration thereof the
" said defendants then and there undertook and promised

" to pay the same to said Plaintiffs according to the tenor and
" effect tone intent and meaning of said note and
" according to the Statute in such case made and
" provided to wit at the place aforesaid.

" And whereas also the said defendants afterwards
" to wit on the 28th day of May AD 1859 to wit at oc in the
" County of Iroquois became and was indebted to the
" Plaintiff in a large sum of money to wit: Eight
" hundred dollars for money before that time lent
" and advanced to and paid, laid out and expended
" for said defendants by said Plaintiffs at said defend-
" ants request, and for money before that time had
" and received by said defendants to and for the use
" of said Plaintiffs; and being so indebted, said defend-
" -ants in consideration thereof then and there undertook
" and promised to pay said Plaintiffs said last men
" -tioned sum of money when thereunto afterwards
" requested.

" Yet the said defendants not regarding their
" said promises and undertakings but contriving etc
" although often requested so to do have not paid said
" Plaintiffs either of said sums of money or any part
" thereof, nor any part of the interest on the same, but so
" to do have hitherto wholly neglected and refused and
" still do neglect and refuse to the damage of the said
" Plaintiffs of one thousand dollars and therefore

" they bring suit &c

" Jomer & Blades

" Attys for Plffs

(Coppy of notes sued on)

" $2378 86 Five years after date for value Received we or
" either of us promise to pay to the Board of Trustees of Township
" Twenty six North Range Eleven West for the use of the inhab-
" -itants of said Township the sum of Two thousand three
" Hundred & Seventy Eight 86/100 dollars with ten per cent
" interest from date half yearly in advance, this the 28th
" day of May AD 1856

" S. S & D B Gardner "

" $124. 88 One year after date we or either of us promise
" to pay to the Board of Trustees of Township Twenty six
" Range Eleven West for the use of the inhabitants of
" said Township One Hundred and twenty four
" dollars and Eighty Eight cents with ten per cent
" interest payable half yearly in advance
" Meddleport May 28th 1857

" Saml. S. Gardner

" D. B Gardner "

" Samuel S Gardner and Daniel B Gardner Dr

" To Trustees of Schools of Town 26 N 11 W.

" To money lent and advanced paid laid out and

" expended for said S. S & D B Gardner by said Trustees $800

" And for money had and received by them to

" and for the use of said Trustees. $800

" Oct 1st 1859

And the said amended declaration is endorsed "Filed as amended January 10th 1860."

"Thos Brennan Clerk"

"pr Taylor Depty"

The amended declaration is an exact copy of the original declaration and is the original declaration with this exception, the word ~~Eig~~ "Nineteen" in the original is erased and the word "Eighteen" interlined instead in the amended, according to information received from Plaintiffs attorneys. There being other interlineations it is quite impossible to tell ~~what~~ from the declaration itself what changes were made

T. Brennan Clerk.

[11802-10]

And afterwards to wit on the 16th day of January in the year 1860 there was issued from the Clerks office of said Circuit Court a writ of alias summons which reads in words and figures following to wit:

" State of Illinois Iroquois County ss

" The People of the State of Illinois to the Sheriff
" of said County Greeting: We command you as we
" have before commanded you that you summon
" Samuel S Gardner if to be found in your county
" personally to be and appear before the Circuit Court
" of said County on the first day of the next term
" thereof to be holden at the Court House in the town
" of Middleport on the 21st day of February next to
" answer The Trustees of Schools of Township Twenty six
" North, of Range Eleven West, of Iroquois County Illinois
" in a plea of Trespass on the Case on promises to the damage
" of them the said Plaintiffs, as it is said in the sum of
" One thousand Dollars, and have you then and
" there this writ.

" Witness Thomas Vennum Clerk of our said
" Court and the Seal thereof at Middleport
" this 16 day of January AD 1860

Seal

" Thomas Vennum clerk

and on the back of the said alias summons in the following endorsement,

" Served by reading this writ to the within named
" Samuel. S. Gardner on the 16th day of January AD 1860,
" Theodore Ayres Sheriff

And afterwards to wit on the 22nd day of February in the year 1860 aforesaid it being one of the regular days of the February term of the said Circuit Court for the year last aforesaid, the said Court being then duly organized and sitting as a Court for the transaction of business certain other proceedings were had and entered of Record by said Court in the words and figures following to wit:

" Trustees of ~~Township~~ Schools of Township
" No Twenty six North, of Range No Eleven
" West of 2d P.M in Iroquois County Illinois
" 51 vs
" Samuel S. Gardner and Daniel B Gardner } Assumpsit

" This day come the
" defendants into Court by Fletcher and Kay their attorneys and
" enter their motion to continue this cause till next term,
" The Court having duly considered the matter ordered that
" the motion to continue be and the same is overruled,

[11882-11]

And afterwards to wit on the 27th day of February AD 1860 there was filed by the clerk of said Court in said Cause certain Replications in words and figures following to wit:

In the Iroquois County Circuit Court
February Term AD 1860

" Trustees of Township Twenty six R 11 W }
" vs
" S. S. Gardner D. B Gardner }
" And the Plaintiffs
" by leave &c as to the plea of the said defendants by them
" secondly above pleaded say precludi non because they say
" that the said Plaintiffs did not receive of the said defendants
" the said several supposed sums of money in the said second
" plea mentioned and of this they the Pltffs put themselves
" upon the Country &c

" Joiner & Blades
" And the said defendants Attys for Pltff
" doth the like

" Bone Fletcher & Kay Attys for Deft

"

" And the Plaintiffs by like leave &c ~~say~~ as to the plea
" of the said defendant D. B Gardner by them thirdly
" above pleaded say precludi non because they say that
" the said defendant did not pay and satisfy the said sums

" of money in the said declaration mentioned nor any part
" thereof and of this they the Pltffs put themselves upon the
" Country &c

" Joiner & Blades
" And the said defendants doth — Attys for Pltffs
" the like.
" Bone Fletcher & Kay
" Attys for Defts.

And afterwards to wit on the said 27th day of February in the year 1865 it also being one of the regular days of the said February term of said Court for the year last afore-said the said Court being then duly organized and sitting as a Court for the transaction of business certain other proceedings were had and entered of Record in said Court in words and figures following to wit:

" The Trustees of Schools of Township No
" Twenty six North, of Range No Eleven West
" of 2nd P. M in Iroquois County Illinois
" 51 vs — Assumpsit
" Samuel S. Gardner & Daniel B Gardner

" This day come
" the parties to this cause into court, the Plaintiffs by
" Joiner & Blades their attorneys and the defendants in
" person and by Fletcher & Kay their attorneys and by agreement

[1803-12]

" of parties a Jury for the trial of this cause is waived and the
" cause submitted to the Court for trial,

And afterwards to wit on the 28th day of February in the year 1860 it also being one of the regular days of the February Term of said Court for the year last aforesaid the said Court being then duly organized and sitting as a court for the transaction of business certain other proceedings were had and entered of Record by said Court in words and figures following to wit;

" The Trustees of Schools of Township No Twenty
" Six North, of Range No Eleven West of 2nd P.M
" in Iroquois County Illinois
" 51 vs
" Samuel. S. Gardner & David B Gardner } Assumpsit

" And now come
" the parties to this cause by their respective attorneys, and the
" Court having duly considered the questions submitted to him
" in this cause, and after hearing the evidence adduced;
" upon computation finds due the Plaintiffs upon the notes
" sued on in this cause the sum of five Hundred and
" twenty nine dollars and Ninety four cents,
" It is therefore considered and ordered by the
" Court that the said Plaintiffs have and recover of and

" from the said defendants the said sum of five hundred
" and twenty nine dollars and sixty four cents together with
" the costs expended in the prosecution of this suit by the
" said Plaintiffs, and that they have execution therefor
" against the said defendants.

" And now come the defendants by Fletcher and
" Ray their attorneys and enter their ~~exprotons~~ exceptions
" to the decision of the Court in rendering judgment as aforesaid
" and enter their motion to the court for a new trial in this
" cause. Whereupon the Court ~~ordered~~ being advised in the
" premises ordered that the motion for a new trial by the
" defendants be and it is overruled, to the overruling of
" which said motion the defendants except, and enter
" their motion for an appeal to the Supreme Court of this
" State.

" It is thereupon ordered by the Court that the appeal
" be granted on condition that the defendants file an
" appeal bond with the clerk of this court in the sum of
" one thousand dollars conditioned according to Law, within
" twenty days after the adjournment of this Session of the
" Court, and by agreement of parties it is ordered that
" the clerk do approve of the security on said appeal bond.

" And on motion it is ordered that the defendant
" do file his bill of Exceptions with the clerk of this court
" within twenty days from the adjournment of this Court.

[11802-13]

And afterwards to wit on the 23d day of March in the year 1860 there was filed in the office of the clerk of said Court a Bill of Exceptions which reads in words and figures following to wit:

" State of Illinois
" Iroquois County ss In the Iroquois Circuit Court
" February Term AD 1860.
" The Trustees of Schools Township
" Twenty six North of Range Eleven
" West in the County of Iroquois
" vs } Bill of Exceptions
" Samuel S Gardner & Daniel B Gardner
" Afterwards to wit at
" a Circuit Court held at the Court House in the Town of Middleport
" in and for the County of Iroquois in said State, on the twenty
" Eighth day of February AD 1860, Before Charles R Starr
" Esquire one of the Circuit Judges appointed to hold the
" said term of Court according to the form of the Statute in
" such case made ~~and~~ & provided, The aforesaid issue so
" joined between the said parties as aforesaid came on
" to be tried before the said Charles R Starr Esq Judge as
" aforesaid, by consent of parties without a Jury, at which
" day came there as well the said Plaintiffs as the said
" Defendants by their respective Attorneys aforesaid

" And upon the trial of the said issue the counsel for the said
" Plaintiff, to maintain and prove the said issue on the part
" of the said Plaintiff produced and offered in evidence a
" certain promissory note in writing in the words and figures following
" to wit. '$124 88/100 One year after date we or either
" of us promise to pay to the board of ~~of~~ Trustees of Township Twenty
" six Range Eleven west for the use of the inhabitants of said
" Township, One Hundred and twenty four dollars and Eighty
" Eight cents with ten per cent interest payable half yearly in
" advance. Middleport May 28th 1857

" Saml. S. Gardner

" D B Gardner

" But to the reading of the same in evidence the said Counsel
" for the said Defendants did then and there object because
" and for the reason that the said note was not properly des-
" -cribed in the Plaintiffs declaration.

" 2d For the reason that there was a variance in the descip-
" -tion of the instrument sued ~~on~~ upon and described in the
" declaration and the one offered to be read in evidence.

" 3d That the note described in the declaration was a dif-
" ferent and another note than the one produced &
" offered to be read in evidence.

" 4th That the Court could not properly allow the said instru-
" -ment offered to be read in evidence for the reason that the
" note sued upon and described in the declaration was made
" payable one year from date with interest at the rate of ten

[11802-14]

" per centum per annum, and interest on the note offered in
" evidence was made payable by the terms thereof half-yearly
" in advance & was a fatal variance in the same.

" But the said Circuit Judge did then and there overrule
" said objections, and then and there ~~declare~~ deliver his opinion
" that the said objections so as aforesaid taken by the said Coun-
" -sel for said defendant, ought not to be allowed, but that
" the said note ought to be admitted in evidence; and did
" accordingly decide that the same should be read in evidence
" on the part of the said Plaintiff, to which said opinion
" and decision of the said Circuit Judge the said Counsel for
" the said defendants in due form then and there on behalf
" of the said defendant except. The said note so
" objected to was then and there read in evidence.

" And upon the trial of said issue before said Judge
" as aforesaid, the Counsel for the Plaintiffs to maintain and
" prove the said issue on their part produced and offered in
" evidence a certain other promisson note in writing which said
" note ~~reads~~ was in words & figures following, ~~to wit~~:

" $2878 86/100 Five years after date for value Received we
" or either of us promise to pay to the Board of Trustees of
" Township Twenty six North Range Eleven West for the use
" of the inhabitants of said Township, the sum of Two
" thousand three Hundred & Seventy Eight 86/100 dollars
" with ten per cent interest from date half yearly in advance

" this the 28th day of May AD 1856.

" S. S & D. B. Gardner

" But to the reading of which said note in evidence the said
" Counsel for the said Defendants did then and there object
" for the reason & because the said note so as aforesaid
" offered in evidence was made payable to the Board of Trustees
" of Township twenty six North of Range Eleven West, for the
" use of the inhabitants of said Township, And was sued in
" the name of the Trustees of Schools of Township Twenty six, North
" of Range Eleven West.

" 2d that it did not appear that the parties suing & named in
" the Declaration as Plaintiff were entitled to sue or that they
" were the persons described in the note. But the said Circuit
" Judge did then and there declare and deliver his opinion that
" the said objection so taken by the said Counsel for the said
" defendants as aforesaid ought not to be allowed, but that
" the said promissory note ought to be admitted in evidence
" and did accordingly decide that the same should be read in
" evidence on the part of the said Plaintiff, to which said opinion
" and decision of the said Circuit Judge, the said Counsel for
" the said defendants did then and there on behalf of said
" defendants except. Whereupon said note was read and
" received in evidence.

" Whereupon Plaintiff rest their cause.

" [1802-15]

" And the Counsel for the defendants to maintain and prove the

" said issue on their part offered in evidence a certain Receipt
" in writing which said Receipt is in the words and figures
" following to wit:

" 15 $ Received Middleport Feb 11th 1857 of S. S & D B Gardner
" Fifteen Dollars as interest on School note I hold as Treasurer
" of Town 26 Range 11 West, to be endorsed on said note.
" School Treasurer. John McDermet

" which said receipt was read in evidence on the part of
" Defendants by their counsel. And the counsel for the
" Defendants to maintain and prove the said issue on their
" part offered & read in evidence another certain receipt
" in writing which said receipt was in the words and
" figures following to wit:

" Received Middleport January 13 1857 of S. S & D. B.
" Gardner thirteen dollars & fifty cents as interest on School
" Note, due Town Twenty six 26 North of Range Eleven West
" to be endorsed on their note as interest paid.

" John McDermet Treasurer
" of Town 26 North of R 11 West

" Other receipt was then offered & allowed in evidence without
" objection. This receipt was for the full amount of the
" half years interest ending May 28th 1857. And witness
" John McDermet swore positively that it embraced also the
" amount of the two former receipts and was intended to
" cover the whole of the interest for that half ~~that half~~ year but that

" he had neglected to take up the two small receipts when
" he gave the last, which included them. Which receipts
" were objected to by the Counsel for the Plaintiffs on the ground
" that the amounts were included in the large receipt which
" was given on the payment of the ballance of the interest
" due for that half year ending May 28th.

" Whereupon the Counsel for the Defendants rested their
" defence.

" And the Counsel for the Plaintiff further to maintain
" and prove the said issue called one John McDermet and
" offered him as a witness on the part of the said Plaintiff.
" After being sworn was asked by the Counsel for the
" Plaintiff to explain said receipts (being the same receipts
" copied herein & made a part hereof).

" But to his examination as a witness in this cause
" Defendants Counsel objected because and for the reasons
" following to wit:

" 1st That the ~~was~~ said John McDermet was incompetent
" on account of his interest in the result of the suit.

" 2d That he was at the time said two mentioned receipts
" were given and the money therein mentioned paid over,
" acting as Treasurer of Township Twenty six North of Range
" 11 West, and that the said money called for in said two
" receipts was paid to him as interest upon the first mentioned
" note in the Declaration to wit the large note, as appeared by
" ~~3d That he the said~~ said receipts as such Treasurer, which

[1802-76]

" is the best evidence.

" 3d That he the said John McDermet was incompetent for
" the reason that if he had retained the amount claimed
" to have been paid as shown by said two receipts & had failed
" to account to said School fund therefor he the said witness
" would be both civillaly & criminally liable, for the reason
" that it did not appear by the books kept by said McDermet
" between himself as such Treasurer and the said Trustees that
" he the said McDermet had ever charged himself with the said
" sums of money described in said receipts or in any man-
" ner accounted therefor to said School fund and the
" evidence given by said receipts was in writing and was
" the ~~last~~ best evidence & could not be explained away by
" an interested witness.

" 4th That if he was permitted to be made a witness & testify
" in this suit he could swear the sum claimed to have been
" paid as appears by said receipts into his own pocket, for
" his own use & benefit.

" 5th That his term of Office of Treasurer had expired and
" that if he had not settled with the Trustees for the said
" money, paid him as appears by said two receipts by his
" explaining away said receipts, he could not be liable
" to said Trustees for said amount.

" 6th That he had an interest in avoiding said receipts
" and was therefore interested in the result of said suit & was

" incompetent.

" 7th That the said John McDermet had a direct, certain
" positive and legal interest in the result & final determ-
" -ination of the said suit and was therefore wholly in-
" -competent. But the said Circuit Judge did then
" and there declare and deliver his opinion that the
" said objections so taken by the said Counsel for the said
" defendants as aforesaid, ought not to be allowed but that
" the said John McDermet ought to be admitted to testify
" as a witness, and that he was competent, and did according-
" -ly decide that he the said John McDermet should be
" admitted, and sworn as a witness on behalf of said
" Plaintiff. To which said ruling & decision & opinion
" of the said Circuit Judge, the said counsel for defendants
" did then & there except. Said John McDermett then
" testified as follows to wit. I was at the date of these
" receipts Treasurer of Township 26 North of Range Eleven
" West Iroquois County, am not now Treasurer. I signed
" these two receipts, these signatures are in my ~~name~~
" hand writing. I cant tell anything about the receipts
" It may be that the amounts mentioned in the receipts was
" a part of the money for which the other larger receipts
" were given, but I cant tell anything certain about it.
" I did not charge myself with the sums mentioned in the
" receipts in the Treasures Books. I received the money men-
" -tioned in the receipts, cant explain how it happens that

[11802-17]

" the dates varies, cant tell at what time I received the
" money. Said witness on his cross examination tes-
" tified as follows, that he could not tell when he gave
" these two receipts, was quite confident that the same
" amount was included in some of the larger receipts,
" I cant tell how much money I have received on said
" notes of said defendants which was all the evidence
" offered by the parties. Whereupon the Counsel for
" the said Defendants asked the Court to receive the said
" receipts & apply the same in part payment of int on
" the large note and allow the amount therein mentioned
" as a set off so far as the said sum went in payment
" of Plaintiffs demand against these defendants and
" strike out the evidence of said John McDermett.
" The Court received the receipts in evidence but consid-
" ered that the evidence of McDermott and the fact
" that the large receipt was for the full amount of interest
" due for that half year showed conclusively that those
" small receipts were included in the large receipt, &
" Defendants excepted. The said Defendants then
" and there by their said Counsel moved the Court to
" strike out the evidence of said John McDermet for the
" reasons hereinbefore set forth, which the said circuit
" Judge declined and refused to do. To which ruling
" & decision the Defendants in due time & form then

" and there excepted,

" The said issue was then submitted to the said circuit
" Judge, and the said Court did then and there declare
" and deliver his opinion and decide that the said
" receipts must be considered and held as embraced
" in the last large receipt as testified to by witness
" Mc Dennott. And the said Court further held
" declared and then and there decided, that the Plain-
" -tiff have and recover judgment against said Defen-
" -dants for the sum and amount of five hundred
" and twenty nine dollars and 94/100 and costs of suit,
" In making up this judgment the court did not
" allow interest upon the small note of 10 percent pay-
" -able semi-annually as the note calls for but only
" 10 per cent per annum as declared for in Pltffs
" Narr. To which ruling decision and
" finding the Defendants by their attorneys in due
" time & form then and there excepted.

" Whereupon said Defendants by their Counsel then and
" there made a motion for a new trial of the issues in said
" cause, which motion was founded upon the following
" grounds & for the following causes to wit:

" 1st

" The court erred in not dismissing the suit for the want
" of amended declaration, The Plaintiff having asked leave to amend
" and had interlined and mutilated the Original Declaration

[11802-12]

" and refiled the same.

" 2d

" The Court erred in admitting the note dated May 28
" 1857 for $124 $\frac{88}{100}$ in evidence

" 3d

" The Court erred in admitting the note in evidence
" dated May 28th 1856 for $2378 $\frac{86}{100}$

" 4th

" The Court erred in allowing John McDermett to tes-
" tify in the suit and in overruling Defendants objections
" then & there made to him.

" 5th

" The Court erred in not allowing Defendants set-off to
" the amount of the sums claimed to have been paid as
" shown by receipts, and in overruling not allowing
" Defendants Counter claim.

" 6th

" The Court erred in holding deciding & adjudging
" that the Plaintiffs were entitled to recover judgment for
" the sum of $529 $\frac{94}{100}$

" 7th

" The Judgment is against law and the evidence.

" But the said Court held decided and then and
" there declared and rendered his decision on said motion
" made for a new trial as aforesaid by the said Defendants

" and then and there overruled said motion, and refused to
" grant & allow said Defendants a new trial.

" So all of which said decisions, rulings & findings the
" said Defendants by their Counsel did then and there
" in due time and form except.

" And inasmuch as the said several matters so produced
" & given in evidence on the part of the said Defendants and
" by their Counsel aforesaid objected and insisted on as
" a bar to the action aforesaid do not appear by the Record
" of the verdict aforesaid, the said Counsel for the said
" Defendants did then and there propose their aforesaid
" exceptions to the opinion of said Circuit Judge and
" requested him to put his seal to this bill of Exceptions
" containing the said several matters so produced and
" given in evidence and the objections and rulings
" thereon, on the part of the said defendant as aforesaid
" according to the form of the Statute in such case
" made and provided and thereupon the said Circuit
" Judge at the request of the said Counsel for the said
" Defendant did put his seal to this bill of Exceptions pur-
" suant to Law in such cases.

" Chas. R. Starr (Seal)

" Judge of the 20th Judicial Circuit

" of the State of Illinois.

" Kinney, Borie & Kinney

[1802-18]

" Attys for appellants.

State of Illinois
Iroquois County ss

I Thomas Vennum clerk of the Circuit Court in and for the said County in the State aforesaid do hereby certify that the within and foregoing is a true complete and perfect transcript of the Record of the proceedings of the Iroquois County Circuit Court in the said within entitled cause wherein the Trustees of Schools of Township No Twenty six North, of Range No Eleven west are Plaintiffs and Samuel S. Gardner and Daniel B Gardner are defendants, and also a true copy of the original papers and all the papers on file in said Cause (except the appeal bond) appertaining to or forming any part of the Record in said Cause.

In attestation of which I hereunto set my name and the seal of the Circuit Court of said County this 4th day of May AD 1860

Thomas Vennum
clerk

I find no Error in this record
I D Caton

Trustees of Schools of
Township 26 R 11 West
vs
Samuel L. Gardner
& Daniel B. Gardner

Record

11802

Clerks fees 69 cts

11802-20

State of Illinois
Iroquois County SS.
Trustees of Schools
vs.
Samuel S. Gardner
Daniel B. Gardner

I Stephen G. Bonie a resident and citizen of the county of Iroquois in the State of Illinois of lawful age being first duly sworn according to law deposes and says that he is well acquainted with the circumstances of Edward French who executed the bond as surety in the above entitled cause for the purpose of taking the same to the Supreme Court of said State on writ of Error and for the purpose of obtaining a Supersedeas therein And deponent further says that said French is a Householder and land owner in said county of Iroquois and as this deponent is informed and believes is worth the sum of one thousand dollars and is the owner of property in said

[11802-01]

county to that amount ones and
alone all his debts, liabilities
incumbrances and claims
against him of whatever
kind or nature and that he
has property to that amount
over and alone all exemptions
personal or homestead and that
he is responsible for the
full amount of said bond
of property not exempt from
levy and sale on execution
after the full payment of
all his debts and liabilities

Subscribed & sworn to
before me this 20th S. G. Bowie
day of September AD 1860

Thomas Dennard
Clerk

Trustees of Schools &c
vs

S. S. & D. B. Gardner

Affidavit as to the Responsibility of Surety on Bond

[1852-22]

State of Illinois }
Iroquois County } ss:

The Trustees of Schools, Township Twenty six North of Range Eleven West in the County of Iroquois

vs

Samuel S. Gardner & Daniel B. Gardner

Abstract of Record.

This was an action of "Trespass upon the Case on promises" commenced by the Plaintiffs by the service of Summons upon Daniel B. Gardner one of the Defendants on the 15th day of October A.D. 1859 and by service of Summons upon Samuel S. Gardner the other Defendant on the 16th day of January A.D. 1860.

Declaration first filed November 5th 1859 for the November Term of the Iroquois County Circuit Court 1859. At which Term Plaintiffs declared for Money due to wit: the sum of $118.94 becoming due on the 28th day of May A.D. 1858. the sum of $118.94 which became due and payable on the 28th day of November A.D. 1858. and the sum

[11802-23]

of $108.94 which became due and payable the 28th day of May 1859. all of which was claimed as interest due upon a certain promissory note made by Defendants in the words & figures following to wit!

"$2.378 86/100. Five years after date for
" value received we or either of us promise
" to pay to the Board of Trustees of Township
" Twenty Six North Range Eleven West for
" the use of the inhabitants of said Township
" the sum of two Thousand three hundred
" Seventy Eight 86/100 dollars with ten per
" cent interest from date ~~[illegible]~~
" half yearly in advance. this the 28th
" day of May 1860."

"L. L. & D. B. Gardner"

And also further declared upon a certain other promissory note in the words & figures following to wit!

"$124 88/100" One year after date we or
" either of us promise to pay to the Board of
" Trustees of Township Twenty Six Range
" Eleven West for the use of the inhabitants
" of said Township. One hundred and twenty
" four dollars and Eighty Eight cents. with
" ten per cent interest payable half yearly
" in advance" "Saml L Gardner"

Mailed to May 28th 1857." "D B Gardner"

And claimed for the full amount of said last described note and interest thereon at the rate of twelve per cent per annum.

And also declared for money had and received under the Common law counts for the sum of one thousand dollars.

At the said November Term of the said Court held in & for said County. Hon. C. R. Starr. presiding said Plaintiffs asked that a continuance thereof be granted and that an alias summons issue to LaSalle County to be served upon Samuel S. Gardner. Defendant not served. And Plaintiffs also at the same time applied for a rule permitting them to amend their Declaration which rule was then granted by the Court.

Defendants Pleas to the Declaration having been previously to such rule filed. Writ Novr. 22^d 1839. for Defendant Daniel B. Gardner he having been served with summons -

Defendant Daniel B. Gardner ~~having been served with summons~~ Plead. First the general issue Second. Actio non & set upon indebtedness in the sum of $1034 2/100 from Plaintiffs to Deft.

[11842-34]

D. B. Gardner for money paid laid out and expended &c and asked that the same be set off as against the Plaintiffs claim and filed account under last plea -

On the 10th day of January 1860. Plaintiff again refiled the original Declaration as an Amended Declaration, which original had been in some respects Erased and in some other respects interlined -

Replication to Deft. D. B. Gardners Plea, filed Feby 27. 1860.

At the February Term of said Court Hon C. R. Starr presiding cause came on to be heard - By agreement of parties the cause was tried by the Court, a Jury having been waived - Defendant then moved the Court to dismiss the suit for want of an Amended Declaration - Which was overruled by the Court - (Deft. Excpt.)

Plaintiff then offered to read in evidence Note dated May 28th - 1857. for $124 88/100. To which - Deft - objected. For the reason that there was a variance in the description

of the instrument sued upon and the one offered in Evidence - And that the said note was not properly described in the declaration -

That the note described in the Declaration was a different and another note than the one offered in Evidence That the one sued upon and set out in the declaration was made payable One year from date with interest at the rate of ten per cent per annum. And interest on the note offered in Evidence was made payable by the terms thereof half yearly in advance which variance was fatal -

Objection overruled (Defts. Excepts)

Note read in Evidence by Plffs.

Plffs. then offered to read in Evidence the note dated May 28th 1856. for the sum of $2378 86/100 - To the reading of which Defts object - For the reason That the said note was made payable "to the Board of Trustees of Township 26 "North Range Eleven West for the use" &c And was sued in the name of "The Trus-"tees of Schools of Township 26. North of Range Eleven West" and that it did not.

[11802-25]

appear that the parties suing & made Plffs. were entitled to sue or that they were the persons described in the note Objections overruled. Defts exept. Note read in Evidence.

Plffs rested their case.

And Defts then offered and read in Evidence two receipts in the words and figures following to wit.

"#15".

"Received Middleport Feb. 11th 1857.
" of S. S. & D. B. Gardner Fifteen Dollars as
" interest on School note & hold as
" Treasurer of Town 26 Range 11. West
" to be endorsed on said note"
"School Treasurer." "John McDermet."

"Received Middleport January 13. 1857.
" of S. S. & D. B. Gardner thirteen dollars
" and fifty cents as interest on School
" note due Town twenty six 26. north of
" Range Eleven West. to be endorsed on
" their note as interest paid"
"John. McDermet"
"Treasurer of Town 26 North of R. 11. West"

And another receipt was read in Evidence without objection.

Whereupon Defendants rest their defence.

And the counsel for Plfs then called John W. Dermet as a witness on the part of the Plfs. - who after being sworn was asked by counsel for Plfs to explain said receipts (being the same receipts above copied herein) -

But this being made a witness Defendants objected on the grounds. that he was incompetent being interested in the result of the suit - That he was at the time he gave the receipts treasurer and the sums mentioned in such receipts were paid to him as interest upon the larger note as appeared by such receipts and that the receipts are the best evidence.

That he was incompetent for the reason that if he had retained the money so collected and had failed to account therefor he would be liable to the said trustees -

And for the reason that it did not appear by the books kept by him as such treasurer, that he had at any time accounted therefor or charged himself therewith. And that said receipts could not be explained away

by an interested witness - That the said John McDermet had a direct certain positive and legal interest in the result and final determination of the said suit and was therefore incompetent:

All of which objections were overruled by the Court - And Defts Excpt.

Said McDermet was then examined as a witness: and testified as follows "I was at the date of these receipts Treasurer "of Township 26 North of Range Eleven West "Iroquois County. Am not now Treasurer. "I signed these two receipts. these signatures "are in my hand writing - I cant tell anything about the receipts - It may be that the amounts mentioned in the receipts was a part of the money for which the other larger receipts were given but I cant tell anything certain about it - I did not charge myself with the sums mentioned in the receipts in the Treasurer's books - I received the money mentioned in the receipts - Cant explain how it happens that the dates vary. Cant tell at what time I received the money -

On his Cross Examination said witness

testified - that he could not tell when he gave these two receipts. Was quite confident that the same amount was included in some of the larger receipts - I cant tell how much money I have received on said notes of said Defendants - Which was all the Evidence offered by the parties -

Defendants then asked the Court to receive the said receipts and apply the same in part payment of interest on the larger note and allow the amount of said receipts mentioned as a setoff &c.

Defts also asked the Court to strike out the Evidence of said John McDaniel which was by the Court overruled, and Defts excepted.

Whereupon the said issues were submitted to the said Court, who then & there held decided & adjudged, that the Plaintiffs have and recover of the Defendants the sum of five hundred and twenty nine dollars and ninety four cents and costs of suit and have Judgment therefor. To all of which Defts excepted.

[4802-27]

Defendants then moved for a new trial which motion the Court overruled and the Defendants excepted. Judgment was thereupon rendered against the said Defendants for the sum of $529.$\frac{94}{100}$ and costs.

Errors assigned by the Defendants.

I.

The Court erred in not dismissing the suit for the want of Amended Declaration - the Pltffs having asked leave to amend and had interlined and mutilated the original Declaration and replied the same.

II.

The Court erred in admitting the note in Evidence dated May 28th 1857 for 124\frac{88}{100}$.

III.

The Court erred in admitting the note in Evidence dated May 28th 1856. for 2.378\frac{86}{100}$.

IV

The Court erred in allowing John McDermet to testify in the suit and in overruling Defts. objections then & there made thereto.

V.

The Court erred in not allowing Defendants set off to the amount of the sums claimed to have been paid as shown by receipts and in overruling and not allowing Defendants Counterclaim.

VI.

The Court erred in ~~[illegible]~~ holding, deciding and adjudging that the Plaintiffs were entitled to recover Judgment for the sum of $529 94/100.

VII.

The Judgment is against law and the Evidence.

VIII.

The Court erred in overruling Defendants motion for a new trial.

IX.

The Court erred in admitting improper Evidence

X.

The Court erred in overruling the Defendants motion to strike out the Evidence of John McDermet.

Kinney & Boone
Attys for Plffs in Error.

[11802-28]

Trustees of Schools
vs
S. S. & D. B. Gardner
"
Abstract &c
"
Assgt. of Errors

Appln for supersedeas

State of Illinois }
Iroquois County } ss:

The Trustees of Schools, Township Twenty Six, North of Range Eleven West in the County of Iroquois -

Defendants in Error.

vs

Samuel S. Gardner & Daniel R. Gardner.

" Plffs in Error.

Points and Brief for Plffs. in Error.

I.

The Court erred in not dismissing the suit for want of an amended Declaration. The Plaintiffs having asked leave to file an amended Declaration which leave was granted by the Court, and the cause went over the Term, for that purpose Plaintiffs were bound to comply & file in due time, such Amended Declaration. The Records should show an original as well as an Amended Declaration - There is Either no original or no amended Declaration - One cannot be denominated both - The original having been previously filed and was on file at the time leave was granted to Amend had become a part

[11802-29]

and portion of the Record & should have remained on file - But instead thereof it will be seen by the Circuit Clerk's Certificate, relative thereto, that he could not determine what changes alterations or interlineations or erasures had been made -
(See Clerk's Certificate in transcript which is made a part of the same)
See 21. Illinois Reports P. 238 -
In this case (although a Chancery matter) the Court at Page 266. say relative to answers in Chancery that "We do not "understand that the original answer is "to be changed by erasures, interlineations "or in any other manner" &c "They must "remain as they were originally, as an "unmutilated and unaltered file of the "Court" &c &c -

Although this case differs from the one cited, we apprehend the same reasoning will apply to Cases where leave is asked to amend a Declaration, and the Rule allowing a party to file an Amended Declaration does not specifically point out how it shall be amended or allow the Amendment by Erasure, interlineation &c - That the Rule must be complied with

and a full Amended Declaration filed which is to take the place of the Original.

This Court in deciding the Case ~~[illegible]~~ (21. Ill. R. 366.) Say. "We know the practice "has obtained in the Circuits to amend "bills and answers and Declarations & "pleadings in this manner and there is "not so much objection to it when "such papers are not sworn to"

The Defendants had a right to examine the amended Declaration and discover if they could wherein and in what particular the same differed from the original -

The Clerk certifies that the amended Declaration refiled, was the original and he could not tell what changes had been made therein -

(See Clerks Certificate in Transcript of Record).

Defendants could not know the changes made therein by comparison or otherwise -

We apprehend that the positions here taken are well sustained by the authorities

3 Scammon R. P. 176.

The Court say in that case that "it is a loose practice to interline the original draft" &c &c

[11802-32]

II.

The Court erred in admitting the note in Evidence dated May 28th 1857. for $124.88/100 — There is a variance in the note declared upon and the one then and there offered in Evidence.

The note declared upon in the second Count of the declaration is set out in the words and figures following in said declaration to wit.

"And whereas also the said Defendants "afterwards to wit: on the 28th day of May "A.D. 1857. at &c to wit: at Middleport "in the County of Iroquois made their "certain other promissory note bearing "date the day & year aforesaid, and then "and there delivered the same to the said "Plaintiffs in and by which said note the "said Defendants by the name & style of "Saml S. Gardner & D. B. Gardner promised "to pay to the said Plaintiffs by the name "style & description of the Board of Trustees "of Township Twenty six Range Eleven "West, One Hundred and twenty four "dollars and Eighty eight cents - One "year after the date thereof with interest "thereon at the rate of ten per centum "per annum."

The note offered and read in Evidence is in the words and figures following to wit:

"$124 88/100

"One year after date we or "Either of us promise to pay to the Board "of Trustees of Township Twenty Six Range "Eleven West for the use of the inhabitants "of said Township. One hundred and "twenty four dollars and Eighty Eight "cents with ten per cent interest, payable "half yearly in advance."

"Middleport May 28th 1857."

"Saml S. Gardner"
"D. B. Gardner"

The variance consisting in this. That Plaintiffs had declared upon a note drawing interest at ten per cent per annum.

And the note offered in Evidence drew interest by its terms at ten per cent per annum payable half yearly in advance.

Which variance is fatal and made the One offered in Evidence and the instrument declared upon different in meaning, tenor and effect.

[11802-31]

The declaration does not state the legal effect of the instrument sued upon.
See 21. Ill. R. Page 599. in which this Court say that "It is laid down on "this subject, that a contract or written "instrument should be stated according "to its legal effect" &c &c

There is a vast difference in the legal meaning, tenor and effect of a note made payable with ten per cent per annum interest and a note made payable with ten per cent interest per annum half yearly in advance. One draws interest legally in advance the other at the end of the year.
See 21. Ill. R Page 85 &c.
In the last cited case (21 Ill. 85) the Court holds among other things "that no allegation "descriptive of the identity of that which is "legally essential to the claim can ever be "rejected and of this character are, names, "sums, magnitudes, dates, durations and "terms which being essential to the identity "of the writing set forth must in general "be precisely proved".

We think in addition to the authorities above cited from decisions of this Court, our position is fully sustained by the following

authorities on the same or very similar points made in Courts of other States as to variance

7 Cowens R. N.Y. Page 265.
3 Wendell's R N.Y. " 374
2 East R " 2
3 T. R. " 531
21 Wend. R. 90
2 Hill R. 616.
5 Wendell R. 276.
4 Gilman Ill R 47.
16 Ill R. 501.

III.

The Court erred in admitting the note in Evidence dated May 28th 1886. for $2378 86/100.

"This suit is commenced in the name of the Trustees of Schools of Township Twenty Six North of Range Eleven West in the County of Iroquois"

The note objected to when offered in Evidence, is made payable to the "Board of Trustees of Township twenty six North of Range Eleven West for the use" &c

Nothing appearing to show that the Plaintiffs are the same parties mentioned in the note or that they were Entitled to

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bring suit.

See Bill of Exceptions.

IV.

The fourth point that we make is that the Court erred in allowing John McDermot to testify in the suit and in overruling Defendants objections then & there made to him.

This point covers the 9th & 10th errors assigned.

The witness John McDermet had been acting prior to this time as treasurer of such Township, and the Defendants had paid him money from time to time and had taken his receipts therefor as will appear by his Evidence and as further appears by his Evidence had not charged himself therewith and could not tell how much money he had from time to time received. His term of office had expired. It did not appear that he had settled with the Trustees. When asked to explain the receipts executed by him for money paid to him, that he could not tell anything about or explain them. The objection was taken

by Defts. that his interest was such that he was incompetent.

(See objections to McDermet in Bill of Exceptions, where they are set out in full.)

The objections being overruled and McDermet was so examined as a witness - But his Evidence was such that it should have convinced the Court that he could not be relied upon. And also that his Evidence showed that he was manifestly interested in disproving these receipts by testifying that it was his opinion that they were included in some other receipt.

See the Evidence of McDermet and the objections in full in Bill of Exceptions.

We think the authorities and rules of Evidence fully sustain the position taken at the trial & fully set out in the Bill of Exceptions.

The Rule is well settled that receipts are usually prima facie Evidence as far as their contents go. and are subject to be explained under proper circumstances.

But we apprehend the rule does not

extend so far as to allow receipts in writing to be explained away and entirely defeated by witness or witnesses interested in defeating the effect of such receipt. And in this case had not the witness' ~~testimony~~ testified to sufficient to destroy these receipts he would most certainly have been liable to the Trustees for the amount of such receipts: hence his interest.

On this point we cite the following authorities:

1 Gill & Ill. R. P. 388 + 485.
25 Wendell R. 431.
4 Mass. R. 653.
4 Scam Ill R. 167.
6 Barb. N. Y. S. C. R. 458.
1 Greenleaf's Evid^ce Sec 386.-389.-390.-391.

The case of bail being made witness is analagous to this case, in which case it is the universal rule that bail & sureties are not competent.
1 Greenleaf's Evid. Sec. 392 &c
And see 1 Greenleaf's Evid Section 393. &c in point. also. 1 Greenleaf's Evid Section 395. which is in point.

See note 1 Page 499. Greenleaf's Evid.
1 Greenleaf's Evid Sec. 396-397.

We could multiply authorities upon this point but deem the citation made will fully sustain the position that we have taken, that the witness McDermet had a certain positive legal interest beneficial to himself in the result of said suit and was incompetent –

V.

The fifth point made is that the Court erred in not allowing the Defendants set off and counterclaim to the amount of said receipts.

If the position taken in the fourth Error assigned is correct then Defts. were entitled to such set off –

The fifth Error assigned must stand or fall with the fourth – Unless the position taken that the receipts were the best Evidence, is correct. Which we apprehend is correct as against the uncertain evidence given by the witness

See Evidence, in Bill of Exceptions of John McDermet –

VI.

The Court erred in rendering Judgment against the Defendants –

VII.

The Judgment is against Law and Evidence.

VIII.

The Court erred in not granting a new trial to Defendants.

IX.

The Court admitted improper and illegal Evidence.

X.

The Court should have stricken out the Evidence of McDermet.

The Judgment should be reversed and in the meantime a Supersedeas should be allowed, as in case Plaintiffs proceed to collect the Judgment, and the same is hereafter reversed, Defendants could collect nothing back of the Town and would consequently lose in amount of Judgment and costs unjustly.

Kinney & Bovie
Attys for Plffs in Error.

Trustees of Schools &c

vs

S. S. & D. B. Gardner

Point & Brief of Plff.
in Error for Supersedeas

State of Illinois }
Iroquois County } s.s.

Trustees of Schools of
Township 26 N. R. 11 W.
vs
Samuel S. Gardner &
Daniel B. Gardner } Assignment of Errors.

And now comes the Appellants Samuel S. Gardner and Daniel B. Gardner, by Kinney and Bovie their Attorneys and assign the following, among other causes why the judgment in this cause heretofore rendered is erroneous. (As fully appears of Record.)

1st

The court erred in not dismissing the suit for the want of amended declaration. The plaintiff having asked leave to amend, and had interlined and mutilated the original Declaration and refiled the same.

2d The court erred in admitting the note dated May 28th 1857, for $124 88/100 in evidence.

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3rd The court erred in admitting the note in evidence dated 28th 1856 for $2378 56/100.

4th The court erred in allowing John McDermott to testify in the suit, and in overruling Defendants objections then and there made to him

5th The court erred in not allowing Defendants setoff to the amount of the sums claimed to have been paid as shown by receipts, and in overruling & not allowing Defendants counter-claim.

6th The court erred in holding deciding & adjudging that the plaintiffs were entitled to recover judgment for the sum of $829. 94/100

7th The judgment is against law and evidence,

8th The court erred in overruling Defendants motion for a new trial, and in rendering judgment thereon,

Kinney & Boie
Attys.

State of Illinois } S.S.
Iroquois County }

Trustees of Schools of &c
vs
Samuel S. Gardner
& Daniel B. Gardner

And now comes Samuel S. Gardner and Daniel B. Gardner, plaintiffs in Error, by Kinney & Borie, their attorneys, and say that manifest ~~error~~ injustice has been done, as will appear by the record of the proceedings hereto annexed and pray that a writ of error may be allowed by this Honorable court, which shall operate as a Supersedeas, on the filing of the requisite bond - as by law in such case made and provided and your petitioners will ever pray

Kinney & Borie
Attys for S. S. & D. B. Gardner.

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State of Illinois
Iroquois County } ss.

I Thomas Vernum clerk of the circuit court in and for said county do hereby certify that I have taken a bond in this case in the same amount with this one with the same Security on an appeal in the same case, and that I regard Edward French as good and responsible Security for that amount

In attestation of which I have hereunto set my hand and affixed the seal of said circuit court at my office in Middlepoint in said county this 11th day of May A.D. 1860

Thomas Vernum clerk
By W. N. Taylor Dep.

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State of Illinois }
Iroquois County } S.S.

I Know all men by these presents, That we Samuel S. Gardner and Daniel B. Gardner and Edward French are held and firmly bound unto the Trustees of Schools of Township Twenty Six North of Range Eleven West in the County of Iroquois in the penal Sum of one thousand dollars lawful Money of the United States, for the payment of which well and truly to be made We bind ourselves our heirs administrators and assigns firmly by these presents. Witness our hands and seals this 14th day of May A.D. 1860. —

The Condition of this obligation is such that Whereas, The said Trustees of Schools of Town Twenty Six North of Range Eleven West in the County of Iroquois did on the 28th day of February A.D. 1860, at the February Term of the Iroquois Circuit Court then being holden recover a judgment against the above bounden Samuel S. Gardner & Daniel B. Gardner for the Sum of five hundred and twenty nine dollars and ninety four cents, and costs of suit, which in the same court were

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adjudged to the above named Trustees of Schools for their damages which they had sustained, as well on occasion of the detention of said debt as for costs and charges by them about their suit in that behalf expended; Whereof the above bounden Samuel S. Gardner & Daniel B. Gardner hath been convicted, as appears of record in the said Court. And whereas the above bounden Samuel S. Gardner and Daniel B. Gardner hath brought a Writ of Error upon the judgment aforesaid Returnable before the judges of the Supreme Court of the State of Illinois.—

Now therefore if the above bounden Samuel S. Gardner and Daniel B. Gardner the parties prosecuting said Writ of Error, shall fail to prosecute the same; or if the said Writ shall be quashed or discontinued or if the said judgment for the reversal of which said Writ of Error has been brought or any part of said judgment shall be affirmed, and if then the above bounden Samuel S. Gardner & Daniel B. Gardner shall prosecute the said Writ of Error with effect and due diligence and shall pay whatever judgment

costs and interest, and damages in case the said judgment shall be affirmed, shall hereafter be rendered against them, by the said Supreme Court, - Then and in that case this obligation shall become void otherwise to remain in full force and effect

Samuel S Gardner Seal
Daniel B. Gardner Seal
Edward Finch Seal

Trustees of Schools of
Township 26. R. 11. W.

vs

S. S. & L. B. Gardner

Bond