No. 8557

Supreme Court of Illinois

Sexton

vs.

School Commissioners

71641

No 21

Nov. 1857

Orville Sexton

vs

School Commissioners

Gallatin County – Sec

9 T 9 S. of R 10 East

Error to Gallatin

8557

Reversed and

Remanded

County greeting we command you to Summon Orville Sexton and John A McClernand if to be found in your County, to 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 Shawneetown on the second Monday in the month of June next to answer the School Commissioner of Gallatin County Illinois for the use of the Inhabitants of Township № 9 S Range № 10 E in a plea of Debt of $83 33 1/3/100 to their damage one hundred & fifty dollars as is alledged, and here of make due Return to our Said Court as the Law directs

Seal

Witnes John E Hall Clerk of our said Court and the Judicial Seal there of at Shawneetown this 13th day of May A D 1856 J E Hall Clerk

Return of Summons

Served this Summons By Reading the same to John A McClernand Orville Sexton not found in My County May 19th 1856

C. Mathews Shff, Pr, C

Declaration

State of Illinois Gallatin County
SS In the Gallatin circuit court
To the June Term 1856

The School commissioner of Gallatin County Illinois who sues for the use of the Inhabitants

Summons

State of Illinois }
Gallatin County } Set

The people of the State of Illinois To the Sheriff of Gallatin County Greeting we command you to summon Orville Sexton and John A McClernand if to be found in your County, to 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 Shawneetown on the second Monday in the Month of June next to answer The School Commissioner of Gallatin County Illinois for the use of the Inhabitants of Township No. 9 S Range No. 10 E in a plea of Debt of $83 33 1/3 100 to their damage of one hundred & fifty dollars as is alledged; and have of Make due Return to our said court, as the Law directs

Witness John E Hall clerk of our said Court, and the Judicial seal thereof at Shawneetown this 13th day of May A D 1856 J E Hall Clerk

Seal

Return of Summons

Executed the within Summon by Reading the Same to Orville Sexton This 30th day of May 1856, John A McClernand not found James Davenport Shff Gl

Summons

State of Illinois }
Gallatin County } Set

The people of the State of Illinois to the Sheriff of Morgan

L 9587-2

2

Returnable &c May 12th 1856

Filing — Filed 13th May 1856

J E Hall clk

Copy

Copy of Note — $83 33⅓ Twelve Months after date we Orvill Sexton John Lane & John A McClernand Jointly and Severaly promise to pay to the School Commissioner of Gallatin County Ills for the use of the Inhabitants Township No 9 S Range No 10 E the Sum of Eighty three dollars & thirty three & ⅓ cents with Interest thereon at the Rate of Eight percent peranum to be paid half yearly in advance from this date until until paid we further promise that in case additional security for the payment of the aforesaid Sum of money and interest or any part thereof Shall be Required the Same Shall be Given to the Sattisfaction of the School Commission=er for the Time being

Witness our hands and Seals
This 25th day of Oct 1847

Orvill Sexton (Seal)
John Lane (Seal)
John A McClernand (Seal)

Filing — Filed 13th May 1856

J E Hall Clk

Pleas before the Hon. the Circuit-Court in and for the County of Gallatin in the State of Illinois. Hon. Edwin Beecher, sole presiding Judge, James Davenport, Sheriff, and John C. Hall, Clerk.

In an action of Debt, wherein The School Commissioner of Gallatin County, Illinois, for the use of the inhabitants of Township No. 9 South of Range No. 10 East is plaintiff, and Orvall Sexton and John A. McClernand, are defendants.

On the 13th day of May 1856, the said plaintiff came and filed his praecipe, in words and figures following – to wit

praecipe "State of Illinois — In the Circuit-Court
Gallatin County. — June Term 1856.
The School Commissioner of Gallatin County Illinois for the use of the Inhabitants of Township No. 9 S. Range No. 10 E
vs
Orville Sexton } Debt $83 33/100
John A McClernand } Damages 150 00/100

The clerk will please issue Summons directed to the Sheriff of Gallatin County in the above cause, against Orvill Sexton and also a Summons directed to the Sheriff of Morgan County against John A McClernand

[8557-1]

of Township No nine South Range No Ten
East the plantiff in this Suit complains of Orville
Sexton and John A M'Clernand defendants
who has been Summond &c of a plea of Debt
For that whereas the said defendants heretofore
to wit on the 25th day of October 1847 at the
County of Gallatin State of Illinois in connection
on with one John Lane Since deceased Executed
and delivered to the said plantiff for the use
aforesaid their certain promisory note under seal
which is now here Shown ~~to~~ to the court
dated the day and year aforesaid, whereby they
promise Jointly and Severally To pay to said
plantiff for the use aforesaid twelve Months
after the date thereof the Sum of Eighty three dollars
and thirty three & 1/3 cents with Interest thereon at
the rate of Eight percent peranum to be paid
half yearly in advance from the date thereof
until paid— Nevertheless the said plantiff for
the use aforesaid avers that although the amount
Specified in said promisory note has Long since
became due and payable, yet the said defendant
although often Requested so to do have not as
yet paid the same ~~and~~ nor any part thereof
but on the contrary wholy Refused and
Neglected so to do whereby and by Reason of
Said Sum of Money in said promisory note
being and Remaining entirely unpaid an

[8567-9]

6

action hath accrued to said plantiff for the use aforesaid to demand have of and from the said defendants the said sum of $83 33/100 yet the said defendants although often Requested so to do have not paid the same nor any part there of but so to do have hitherto wholy and entirely neglected and Refused and do still neglect and Refuse to the damage of said plantiff for the use aforesaid of $150 00/100 Therefore he sues &c

Olney
for plff

Filing Filed 30th May 1856
J E Hall clerk

Demurrer Orvill Sexton &
John A McClemand
vs
School Commrs of Gallatin County for use &c

In Gallatin circuit Court
June 5 1856

and the said defendant Sexton Comes & defends the wrong & injury when &c for plea in this behalf says actio non because he says the said declaration of said plff herein is not sufficient in law & this he is Redy to verify -- wherefore &c

Freeman

Filing Filed 11th June 1856
J E Hall clk

Order of Court

Wednesday 11th June 1856

School Commissioner of Gallatin County
ure inhabitants Tg 8R 10E

v

Orvill Sexton & John A McClernand } Debt

on this day came the plantiffs by Olney & McCabe their attys and the defendants being duly served by proces the defendant Orvill Sexton comes and files his demurer to plffs declaration herein and the defendant McClernand having failed to plead under the Rule of this court and now three times called came not but make default

Note Sued on

$83 33 1/3/100 Twelve Months after date we Orvill Sexton John Lane & John A McClernand jointly and severally promise to pay to the School Commissioner of Gallatin County Ills for the ~~of the Inhabitants~~ ure of Township No 9 S Range No 10 E the Sum of Eighty three dollars & thirty three & 1/3 cents with interest thereon at the rate of Eight percent per annum to be paid half yearly in advance from this date until paid we further promise that in case additional security for the payment of the aforesaid Sum of Money and interest

Order of Court

Wednesday 11th June 1856

School Commissioner of Gallatin County
ure inhabitants Tg 8R 10E

v

Orvill Sexton & John A McClernand } Debt

on this day came the plantiffs by Olney & McCabe their attys and the defendants being duly served by proces the defendant Orvill Sexton comes and files his demurer to plffs declaration herein and the defendant McClernand having failed to plead under the Rule of this court and now three times called came not but make default

Note Sued on

$83 33 1/3/100 Twelve months after date we Orvill Sexton John Lane & John A McClernand jointly and severally promise to pay to the School Commissioner of Gallatin County Ills for the ~~of the Inhabitants~~ ure of Township No 9 S Range No 10 E the Sum of Eighty three dollars & thirty three & 1/3 cents with interest thereon at the rate of Eight percent per annum to be paid half yearly in advance from this date until paid we further promise that in case additional security for the payment of the aforesaid Sum of Money and interest

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or any part thereof Shall be Required the Same Shall be Given to the Sattisfaction of the School Commissioner for the time being Witnes our hands and Seals this 25th day of Oct 1847

Orvill Sexton (Seal)

John Lane (seal)

John A McClernand (Seal)

W. Monday 27th October 1856

Order of Court

School Commissioner of Gallatin County use of the inhabitants of Township 9, Range 10 E. Debt

v

Orvill Sexton & John A McClernand

On this day Came the Defendant Sexton and withdraws the demurer filed herein, whereupon came the plantiffs by Olney their atty and on his Motion the defendant Sexton is three times called who comes not ~~and~~ but makes default It is therefore ordered and adjudged that the plantiffs recover of the defendants their debt and damages to be apered by the clerk whereupon the Clerk reports the debt to be $83,33⅓ and the damages being interest on the note sued on to be $143,65 and making in the aggregate $226,98 it is therefore adjudged and decreed that the plantiff Recover of the

defendants, the aforesaid Sum of Two Hundred and twenty Six dollars and ~~Ninety~~ Eight cents the debt and damages as also the costs in this Suit and that Execution Issue therefor &c

State of Illinois }
Gallatin County } ss I James Davenport Clerk of the Circuit Court in and for Said County do hereby Certify that the foregoing Nine pages Contain a true full perfect and Complete Record of the proceedings had in a certain Suit wherein the School Commissioner of Gallatin County Illinois for the use of the inhabitants of Township 9 S R 10 E is plaintiff and Orville Sexton and John A McClernand are defendants as appears from the files and Records in my office

Given under my hand and the Seal of Said Court affixed at office in Shawneetown this 13th day of April 1857

James Davenport Clerk

Clerks fee for Record $2,00
Paid by Plaintiff
James Davenport Clerk

[8557-5]

State of Illinois - In the Supreme Court -
First Grand Division - To Nov. Term 1857.

Orrill Sexton - plaintiff in Error -

vs.

The School Commissioners of Gallatin
County, for the use of the inhabitants
of Township No. 9. South of Range 10 East -

The said plaintiff in Error comes and says, there is manifest error in the record and proceedings herein, and assigns for Error

1st assignment is weak

1st. The Court erred in directing the clerk to assess the debt, instead of finding the amount of the debt, and directing the clerk simply to assess the damages.

2nd. The judgment is erroneous in the amount of damages given which is $143.65, when the interest which had accrued on the debt to the time of the rendition of the judgment, at the rate of 8 per cent per annum, compounded semi-annually, was only about $85.17.

3rd. The judgment is erroneous in being for too large an amount in damages.

Wherefore the said plaintiff in Error prays for a supersedeas and a reversal of said judgment and that the proper judgment be rendered in this Court &c

Joinder in Error
W. Thomas for Defts

[3551-6]

N. L. Freeman atty for
Plff in Error -

State of Illinois - In the Supreme Court.
First Grand Division - To the Nov. Term 1857.

Orvill Sexton, Plaintiff in Error.

vs.

The School Commissioner of Gallatin County, Illinois, for the use of the inhabitants of Township No. 9 S. Range 10 East. Defendant in Error.

Abstract.

Pages of Record.

This was an action of debt commenced by ordinary summons in the Circuit Court of Gallatin County, on the 13th day of May 1856, at the suit of The School Commissioner of said County for the use of the inhabitants of Township No. 9 South of Range No. 10 East, against Orvill Sexton, the plaintiff in Error,
3 - 4. and John A. McClernand

The action was brought upon a note under seal, executed by said Sexton, John Lane, and the said McClernand, on the 26th day of October, 1847, whereby they jointly and severally promised to pay, twelve months after the date thereof, to the school Commissioner of Gallatin County, for the use aforesaid, the sum of Eighty three dollars and thirty three 3/3 cents, with interest thereon at the rate of Eight per cent. per annum, to be

[1857-7]

paid half yearly in advance from the date
2. thereof.

Lane having died, only Sexton and Mc-
4-5. Clernand were declared against.

The declaration is in the usual form of debt, and contains no claim for 12 per cent damages, upon the failure to pay the principal or interest of the note
4, 5, 6. sued upon.

At the October Term, 1856, a judgment was rendered against the defendants below, for the debt and damages to be assessed by the clerk, whereupon the clerk reported the debt to be $63.33⅓, and the damages being interest on the note sued on, to be $143.65, and making in ~~all~~ the aggregate $226.98 - for which judg-
8. ment was given. and execution awarded.

From this judgment, Sexton prosecutes his separate writ of Error - and assigns the following errors -

1st. The court erred in directing the clerk to assess the debt, instead of finding the amount of the debt: and directing the clerk simply to assess the damages.

2nd The judgment is erroneous in ~~find-~~ ing the amount of damages given, which

is $143,65 - when the interest which had accrued on the debt to the time of the rendition of the judgment, at the rate of 8 per cent per annum, Compounded semi-annually, was only about $85,17.

3rd The judgment is erroneous in being for too large an amount in damages.

Wherefore the said plaintiff in error prays a reversal of said judgment, and that the proper judgment be rendered in this Court &c

N. L. Freeman, atty.
for plff. in Error -

Brief of Plaintiff in Error.

Under the 2nd and 3rd assignments of Error, it is very evident that the amount given in damages is too large, if the terms of the contract, as expressed in the note sued upon, were the basis of the computation of the interest. The contract calls for interest at the rate of 8 per cent per annum, to be paid half yearly in advance; and taking that as the basis of the computation, the interest, compounded semi-annually could amount only to about the sum of $85,17.

[8557-8]

whereas the damages assessed amount to $143.65.

This discrepancy can only be accounted for on the supposition that the clerk, in making the computation, assumed that the note sued upon was given for borrowed school money, and added the 12 per cent which is given by the statute as a penalty for a failure to pay the principal and interest of such loans, when they become due.

The clerk clearly had no right to assume as a fact what was not alleged in the declaration, nor stated on the face of the note - nor could the penalty of 12 per cent be assessed without being specially claimed in the declaration.

Hamilton vs. Wight - 1 Scam. 562.
Russell et al. vs. Hamilton. 2 Scam. 57.
Bradley vs. Snyder et al. 14 Ills. 268.

The above decisions were made upon contracts which were entered into under the act of 1835. the 2nd section of which is as follows -

"If any person shall make default in the "payment of interest as it becomes due and "payable, such interest shall thereafter be "considered principal, and interest at the rate "of twenty per cent per annum shall be charge-

"able and recoverable thereon; and if any
"person shall fail to pay the principal sum
"borrowed at the time the same becomes due
"and payable, such person shall be charge-
"able with interest on such principal sum
"at the rate of twenty per cent. per annum
"until paid: and the school commission-
"ers of Counties shall be authorized to recover
"the penalties aforesaid, in an action or suit
"on the note or mortgage given for the pay-
"ment thereof." (Gales Stat. page 636.)

This note was given while the act of 1845 was in force, the 31st section of which is as follows-

"If default be made in the payment of interest
"due upon money loaned by any school com-
"missioner or township treasurer, or in the pay-
"ment of the principal, interest at the rate of
"twelve per cent. per annum shall be charged
"upon the amount for which the party is or
"may be in default; which shall be included
"in the assessment of damages, in suits or
"actions brought upon the note or mortgage
"to enforce payment thereof, and interest at
"the rate aforesaid may be recovered in actions
"brought to recover interest only." &c. (Rev. Stat. 1845. page 502.)

Under the former statute (1835) the decisions before cited are clear in establishing the doctrine that the penalty of twenty per cent. must be specially claimed in the declaration, or it could not be recovered. Does the act of 1845 dispense with this rule? The language of the two statutes is somewhat different, but it is evident that in each it is only intended to point out the mode in which the penalty for non-payment may be recovered - ~~and~~ that is, to include it in the assessment of damages in the action upon the note. The word "shall" as used in the act of 1845, cannot be held to make it imperative upon the Court or clerk to assess the penalty whether claimed in the declaration or not - the same section provides that it may be recovered in a separate action brought to recover interest only.

Again, in this case, where there is no averment that the note was given for loaned money, and no claim set up for the penalty of 12 per cent, how can the Court or the clerk assume the existence of the fact that the consideration of the note was money loaned? Is there a legal presumption that every note made payable to a School Commissioner, was given for loaned money? And if the note was not for loaned money, the penalty

is not recoverable at all. Bradley vs. Case, 3 Scam. 610. As the consideration of the note is not expressed upon its face, nor averred in the declaration, it may just as well be presumed that it was given for school lands, (as in Bradley v. Case,) as that it was given for borrowed school money. This shows the necessity of a special count claiming the penalty.

The reasoning of the Court in Bradley vs. Snyder et al. 14 Ills. 268, in giving a construction to the act of 1835, applies with equal force to the act of 1845 - in that case the Court said "This penalty is given by the statute for wrongfully withholding money due the school fund, "and is not a part of the contract contained in "the bond or mortgage given to secure the money "loaned." Is the 12 per cent. given by the act of 1845 any less a penalty, than the 20 per cent given under like circumstances, by the act of 1835?

And so the Court in the case of The Trustees of Schools vs. Bibb, 14 Ills. 372, in comparing the acts of 1835 and 1849 (the latter being the same as that of 1845), say "The two statutes "are substantially alike in their provisions, and "must receive the same construction. The "only difference respects the rate of interest.

[8557-40]

"That is changed from twelve to ten per cent:
"and the penalty imposed upon the borrower
"for not paying punctually; is twelve instead
"of twenty per cent." It is true, in the case
last cited, the question before the Court was not
precisely the same as in this, but if the mark-
ed difference had existed, that under the act of
1845 the legal presumption was that Every note
made payable to a School Commissioner was
given for loaned money, and therefore the penalty
for its non-payment need not be specially
claimed in the declaration, while the opposite
rule applied to the act of 1835; the Court could
hardly have been led into the use of the strong
language cited.

The plaintiff in error submits that
the penalty given by the statute for the non-
payment of borrowed school money is not
recoverable in this action, because it is not
specially claimed in the declaration, and nei-
ther the Court below, nor the Clerk had any
right to assume as a fact, that the note sued
on was given for borrowed school money.

N. L. Freeman atty.
for Plff. in Error.

The clerk of this Supreme Court will make the writ of error in this cause a Supersedeas upon the plaintiff's Sexton entering into bond in the penalty of four hundred & fifty three dollars and ninety six cents with Wm Edwards & Andrew McCallen as sureties - conditioned according to law

Given under my hand this 20th April 1837

W. B. Scates C. J.
Illinois

[8557-11]

No 21

Orville Sexton
Pltff in error
vs
The School Commissioners
of Gallatin County
for the use of the
inhabitants of
Township No 9 S. of
Range No 10 East.

Filed 28 April 1857
J. Johnston Clk

Prepaid $5.00

Reversed

Shawneetown
14th Apl. 1857

Maj. Noah Johnston

D'Sir - I here inclose a record in the case of Sexton vs. School Comrs &c - Will you do me the favor to hand the same to Judge Scates for examination, as I desire a supersedeas - if it is granted please file the record & bond inclosed, and send me the proper documents as soon as possible as Execution is issued on the judg't. I heard Judge Scates had been from home, and fearing he might not have returned I send the matter to you. If Judge Scates is not at home will you do me the favor to forward the record on to Judge Caton at Ottawa as soon as possible, telling I want a supersedeas. - I will forward fees on demand -

Very truly yours
N. L. Freeman

Please let me hear from you soon about it -

[P557-13]

Know all men by these presents that we Orrill Sexton and William Edwards and Andrew McCallen

are held and firmly bound unto The School Commissioner of Gallatin County, Illinois, for the use of the inhabitants of Township No. 9 South of Range No. 10 East, in the penal sum of four hundred and fifty three Dollars and ninety six cents, for the payment of which, well and truly to be made, we bind ourselves, our heirs, Executors and administrators, jointly and severally, and firmly by these presents. Witness our hands and seals this 14th day of April 1857.

The condition of the above obligation is such that whereas, on the 27th day of October — — 1856, a judgment was rendered in an action of debt in the Circuit Court in and for the County of Gallatin, in the State of Illinois, in favor of the said School Commissioner of Gallatin County, Illinois, for the use of the inhabitants of Township No. 9, South of Range No. 10 East; and against the above bounden Orrill Sexton and John A. McClernand, for the sum of Eighty three dollars and thirty three 3/3 cents debt, and one hundred and forty three dollars and sixty five cents damages, making in

[1857-13]

the aggregate the sum of Two hundred and twenty six dollars and ninety Eight cents - and costs of suit -
from which said judgment the said Orrill Sexton is about to prosecute his writ of Error to the Supreme Court of the State of Illinois. Now if the said Sexton shall well & truly pay the said judgment, and all costs, interest and damages which may accrue in case the said judgment be affirmed, and shall duly prosecute his said writ of error, then the above obligation to be void, otherwise to remain in full force and virtue -

Orrill Sexton Seal.
Wm Edward Seal.
A. McCall Seal

Approved & filed 20th
April A. D. 1857
N. Johnston Clk

No 21

Orville Sexton
Pltff in error
vs
The School Commissioners of
Gallatin County for the
use of the inhabitants of
Township No 9. S. of Range
No 10. East.

Supreme Court

Filed 30. April 1857.
N. Johnston Clk

[41-557]

STATE OF ILLINOIS—IN THE SUPREME COURT—FIRST GRAND DIVISION—TO THE NOVEMBER TERM, 1857.

ORVILL SEXTON, Plaintiff in Error.

vs.

The School Commissioner of Gallatin County, Illinois, for the use of the inhabitants of Township No. 9 S., Range 10 East,

Defendant in Error.

Page of Record.

This was an action of debt, commenced by ordinary summons in the Circuit Court of Gallatin County, on the 13th day of May, 1856, at the suit of the School Commissioner of said County, for the use of the inhabitants of Township No. 9, South of Range No. 10 East, against Orvill Sexton, the

3.—4. plaintiff in error, and John A. McClernand.

The action was brought upon a note under seal, executed by said Sexton, John Lane, and the said McClernand, on the 25th day of October, 1847, whereby they jointly and severally promised to pay, twelve months after the date thereof, to the School Commissioner of Gallatin County, for the use aforesaid, the sum of Eighty-three dollars and thirty-three and third cents, with interest thereon, at the rate of eight per cent per annum, to be paid

2. half yearly in advance from the date thereof.

4.—5. Lane having died, only Sexton and McClernand were declared against.

The declaration is in the usual form of debt, and contains no claim for 12 per cent damages upon the failure to pay the principal or interest of the

4.–5.–6. note sued upon.

At the October Term, 1856, a judgment was rendered against the defendants below, for the debt and damages, to be assessed by the clerk, whereupon the clerk reported the debt to be $83 33 1-3, and the damages being interest on the note sued on, to be $143 65, and making in the

8. aggregate $226 98, for which judgment was given and execution awarded.

From this judgment Sexton prosecutes his separate writ of error, and assigns the following errors:

1st. The court erred in directing the clerk to assess the DEBT, instead of finding the amount of the debt and directing the clerk simply to assess the damages.

2nd. The judgment is erroneous in the amount of damages given, which is $143 65, when the interest, which had accrued on the debt to the time of the rendition of the judgment, at the rate of 8 per cent per annum, compounded semi-annually, was only about $85 17.

3d. The judgment is erroneous in being for too large an amount in damages.

Wherefore the said plaintiff in error prays a reversal of said judgment, and that the proper judgment be rendered in this court, &c.

N. L. FREEMAN, Attorney
for plaintiff in error.

BRIEF OF PLAINTIFF IN ERROR.

Under the 2nd and 3d assignments of error, it is very evident that the amount given in damages is too large, if the terms of the contract, as expressed in the note sued upon, were the basis of the computation of the interest. The contract calls for interest, at the rate of 8 per cent per annum, to be paid half yearly in advance; and, taking that as the basis of the computation, the interest, compounded semi-annually, could amount only to about the sum of $85 17, whereas the damages assessed amount to $143 65.

[8557-15]

This discrepancy can only be accounted for on the supposition that the clerk, in making the computation, assumed that the note sued upon was given for borrowed school money, and added the 12 per cent which is given by the statute as a penalty for a failure to pay the principal and interest of such loans when they become due.

The clerk clearly had no right to assume as a fact what was not alledged in the declaration, nor stated on the face of the note—nor could the penalty of 12 per cent be assessed without being specially claimed in the declaration.

HAMILTON vs. WRIGHT—1 Scam. 582. RUSSELL et al vs. HAMILTON—2 Scam. 57. BRADLEY vs. SNYDER et al—14 Ill's. 268.

The above decisions were made upon contracts which were entered into under the act of 1835, the 2nd section of which is as follows:

"If any person shall make default in the payment of interest as it "becomes due and payable, such interest shall thereafter be considered "principal, and interest at the rate of twenty per cent per annum shall be "chargeable and recoverable thereon; and if any person shall fail to pay "the principal sum borrowed at the time the same becomes due and payable, "such person shall be chargeable with interest on such principal sum at the "rate of twenty per cent per annum until paid; AND THE SCHOOL COMMISSIONERS "OF COUNTIES SHALL BE AUTHORIZED TO RECOVER THE PENALTIES AFORESAID, IN AN "ACTION OR SUIT ON THE NOTE OR MORTGAGE GIVEN FOR THE PAYMENT THEREOF."—(Gale's Stat., page 638).

This note was given while the act of 1845 was in force, the 31st section of which is as follows:

"If default be made in the payment of interest due upon MONEY LOANED "by any school commissioner or township treasurer, or in the payment of the "principal, interest at the rate of twelve per cent per annum shall be charged "upon the amount for which the party is or may be in default; which shall "be included in the assessment of damages in suits or actions brought upon "the note or mortgage to enforce payment thereof, and interest at the "rate aforesaid may be recovered in actions brought to recover interest "only," &c.—(Rev. Stat., 1845, page 502).

Under the former statute (1835) the decisions before cited are clear in establishing the doctrine that the penalty of twenty per cent MUST BE SPECIALLY CLAIMED IN THE DECLARATION, or it could not be recovered. Does the act of 1845 dispense with this rule? The language of the two statutes is somewhat different, but it is evident that in each it is only intended to point out the MODE in which the PENALTY for non-payment MAY be recovered—that is, to include it in the assessment of damages in the action on the note.—The word "SHALL," as used in the act of 1845, cannot be held to make it imperative upon the court or clerk to assess the penalty whether claimed in the declaration or not. The same section provides that it may be recovered in a separate action brought to recover interest only.

Again, in this case, where there is no averment that the note was given for loaned money, (it was in fact given for school land), and no claim set up for the penalty of 12 per cent, how can the court or the clerk assume the existence of the fact that the consideration of the note was money loaned? Is there a legal presumption that every note made payable to a school commissioner was given for loaned money? and if the note was not for loaned money, the penalty is not recoverable at all.—BRADLEY v CASE, 3 Scam, 610. As the consideration of the note is not expressed upon its face, nor averred in the declaration, it may just as well be presumed that it was

given for school lands (and such was the fact in this case as well as in Bradley v Case), as that it was given for borrowed school money. This shows the necessity of a special count claiming the penalty.

The reasoning of the court in BRADLEY VS. SNYDER ET AL, 14 Ill's, 268, in giving a construction to the act of 1835, applies with equal force to the act of 1845. In that case the court said: "This penalty is given by the "statute for wrongfully withholding money due the school fund, and is not a "part of the contract contained in the bond or mortgage given to secure the "money loaned." Is the 12 per cent, given by the act of 1845, any less a penalty than the 20 per cent, given under like circumstances by the act of 1835? The court continues: "It cannot be recovered upon an ordinary "declaration counting upon the contract, but a special count is required, "claiming the penalty as given by the statute."

And so the court, in the case of the TRUSTEES OF SCHOOLS, &c., VS. BIBB, 14 Ill's, 372, in comparing the acts of 1835 and 1849, (the latter being the same as that of 1845), says: "The two statutes are substantially alike in "their provisions, and must receive the same construction. The only differ- "ence respects the rate of interest. That is changed from twelve to ten per "cent, and the penalty imposed upon the borrower for not paying punctually, "is twelve instead of twenty per cent." It is true, in the case last cited, the question before the court was not precisely the same as in this, but if the marked difference had existed, that under the act of 1845 the legal presumption was that every note made payable to a school commissioner was given for loaned money, and therefore the penalty for its non-payment need not be specially claimed in the declaration, while the opposite rule applied to the act of 1835, the court could hardly have been led into the use of the strong language cited.

The plaintiff in error submits that the penalty given by the statute, for the non-payment of borrowed school money, is not recoverable in this action, because it is not specially claimed in the declaration, and neither the court below, nor the clerk, had any right to assume as a fact that the note sued on was given for borrowed school money.

N. L. FREEMAN, Attorney
for plaintiff in error.

ILLINOISAN PRINT, SHAWNEETOWN.

Orvill Sexton
vs } Abstract &
} Brief
School Comm. Gallatin
Co. &c.

Filed 9. May 1857
N. Johnston Clk

In Supreme Court of Illinois,
1 Grand Division
November Term 1857.

Amicus Section

against Error from Gallatin.

The School Commissioners
of Gallatin County for the
use &c
William Thomas being sworn states
that he is well acquainted with
John A. McClernand one of the
defendants to the Judgment of
the Gallatin circuit court
from which, this Writ of Error
is prosecuted, — he saw the
said McClernand in Springfield
Illinois about two Weeks since,
and believes, that said McClernand
is still living.

Subscribed and W. W. Thomas
Sworn to, before me
This 27th of November 1857.

Subscribed and Sworn to before
me 27th November A. D. 1857.
Stuart Johnston Clk

L 1857-18

21

Scott Co.
vs } Error from
} Gallatin.
School Com:
Gallatin Co. &c

Affidavit

Filed 27th Nov. 1857.

N. Johnston Clk

WRIT OF ERROR.

STATE OF ILLINOIS } SS.
SUPREME COURT, } THE PEOPLE OF THE STATE OF ILLINOIS;

To the Clerk of the Circuit Court for the county of Gallatin GREETING,

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Gallatin county, before the Judge thereof, between The School Commissioners of Gallatin County for the use of the inhabitants of Township No 9 S. of Range No 10 East was plaintiff, and Orville Easton and John A McClernand defendants it is said manifest error hath intervened, to the injury of the aforesaid Orville Easton as we are informed by his complaint, and we being willing that error, should be corrected if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay, send to our Justices of the Supreme Court, the record and proceedings of the plaint, aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Mount Vernon, in the county of Jefferson, on the first Sunday after the second Monday in November next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law:

Witness, the Hon. WALTER B. SCATES Chief Justice of our said court, and the seal thereof, at Mount Vernon this 26th day of April in the year of Our Lord One Thousand Eight Hundred and Fifty-seven.

Josh. Johnston
Clerk Supreme Court.

[85719]

No 21

Orville Stratton
Pltff in error
vs
School Commissioners of
Gallatin County Illinois for
use of the inhabitants of
Township No 9 S. R. 10. East

Writ of Error

Issued and filed this
25th April A. D. 1857
N. Johnston Clk

Writ of Error to Gallatin Circuit Court
Orville Stratton Pltff in error
School Commissioners &c
Defendants in Error

STATE OF ILLINOIS, } ss.
SUPREME COURT. }

THE PEOPLE OF THE STATE OF ILLINOIS,

To the Sheriff of Gallatin **County,**

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in the Circuit Court of Gallatin County, before the judge thereof, between The School Commissioners of Gallatin County Illinois for the use of the inhabitants of Township No 9 S. of Range No 10 East ~~xxx~~ plaintiffs, and Orville Statton and John A McClemans defendants, it is said that manifest error hath intervened to the injury of said Orville Statton as we are informed by his complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mt. Vernon, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said School Commissioners

that he be and appear before the Justices of our said Supreme Court, on the first day of the next term of said Court, to be holden at Mount Vernon, in said State, on the Second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said School Commissioners notice, together with this writ.

Witness Walter B Scates

Witness, the Hon. ~~Samuel H. Treat~~, Chief Justice of our said Court, and the seal thereof, at Mount Vernon, this 20th day of April in the year of our Lord, one thousand eight hundred and fifty-seven.

Noah J Johnston
Clerk of Supreme Court.

{P557-20}

By reading & service the within writ on the within named School commissioner on the 27th day of May 1857 J. H. McMurtry Sff G.C.

21

Orville Sexton
Pltff in error
vs
School Commissioners &c.
Deft in error

Sci fa

~~May 27~~

Serving this writ	50
12 miles travel	60
Returning	10
Postage	5
	$1.25

J H McMurtry
Sff G.C

The Writ of error issued and filed in this Cause, is made a Supersedeas, bond is to be approved by the Circuit Clerk.
N. Johnston Clk

STATE OF ILLINOIS—IN THE SUPREME COURT—FIRST GRAND DIVISION—TO THE NOVEMBER TERM, 1857.

ORVILL SEXTON, Plaintiff in Error.

vs.

The School Commissioner of Gallatin County, Illinois, for the use of the inhabitants of Township No. 9 S., Range 10 East,

Defendant in Error.

Page of Record.

This was an action of debt, commenced by ordinary summons in the Circuit Court of Gallatin County, on the 13th day of May, 1856, at the suit of the School Commissioner of said County, for the use of the inhabitants of Township No. 9, South of Range No. 10 East, against Orvill Sexton, the
3.—4. plaintiff in error, and John A. McClernand.

The action was brought upon a note under seal, executed by said Sexton, John Lane, and the said McClernand, on the 25th day of October, 1847, whereby they jointly and severally promised to pay, twelve months after the date thereof, to the School Commissioner of Gallatin County, for the use aforesaid, the sum of Eighty-three dollars and thirty-three and third cents, with interest thereon, at the rate of eight per cent per annum, to be paid
2. half yearly in advance from the date thereof.

4.—5. Lane having died, only Sexton and McClernand were declared against.

The declaration is in the usual form of debt, and contains no claim for 12 per cent damages upon the failure to pay the principal or interest of the
4.–5.–6. note sued upon.

At the October Term, 1856, a judgment was rendered against the defendants below, for the debt and damages, to be assessed by the clerk, whereupon the clerk reported the debt to be $83 33 1-3, and the damages being interest on the note sued on, to be $143 65, and making in the
8. aggregate $226 98, for which judgment was given and execution awarded.

From this judgment Sexton prosecutes his separate writ of error, and assigns the following errors:

1st. The court erred in directing the clerk to assess the DEBT, instead of finding the amount of the debt and directing the clerk simply to assess the damages.

2nd. The judgment is erroneous in the amount of damages given, which is $143 65, when the interest, which had accrued on the debt to the time of the rendition of the judgment, at the rate of 8 per cent per annum, compounded semi-annually, was only about $85 17.

3d. The judgment is erroneous in being for too large an amount in damages.

Wherefore the said plaintiff in error prays a reversal of said judgment, and that the proper judgment be rendered in this court, &c.

N. L. FREEMAN, Attorney
for plaintiff in error.

BRIEF OF PLAINTIFF IN ERROR.

Under the 2nd and 3d assignments of error, it is very evident that the amount given in damages is too large, if the terms of the contract, as expressed in the note sued upon, were the basis of the computation of the interest. The contract calls for interest, at the rate of 8 per cent per annum, to be paid half yearly in advance; and, taking that as the basis of the computation, the interest, compounded semi-annually, could amount only to about the sum of $85 17, whereas the damages assessed amount to $143 65.

This discrepancy can only be accounted for on the supposition that the clerk, in making the computation, assumed that the note sued upon was given for borrowed school money, and added the 12 per cent which is given by the statute as a penalty for a failure to pay the principal and interest of such loans when they become due.

The clerk clearly had no right to assume as a fact what was not alledged in the declaration, nor stated on the face of the note—nor could the penalty of 12 per cent be assessed without being specially claimed in the declaration.

HAMILTON vs. WRIGHT—1 Scam. 582. RUSSELL et al vs. HAMILTON—2 Scam. 57. BRADLEY vs. SNYDER et al—14 Ill's. 268.

The above decisions were made upon contracts which were entered into under the act of 1835, the 2nd section of which is as follows:

"If any person shall make default in the payment of interest as it "becomes due and payable, such interest shall thereafter be considered "principal, and interest at the rate of twenty per cent per annum shall be "chargeable and recoverable thereon; and if any person shall fail to pay "the principal sum borrowed at the time the same becomes due and payable, "such person shall be chargeable with interest on such principal sum at the "rate of twenty per cent per annum until paid; AND THE SCHOOL COMMISSIONERS "OF COUNTIES SHALL BE AUTHORIZED TO RECOVER THE PENALTIES AFORESAID, IN AN "ACTION OR SUIT ON THE NOTE OR MORTGAGE GIVEN FOR THE PAYMENT THEREOF."—(Gale's Stat., page 638).

This note was given while the act of 1845 was in force, the 31st section of which is as follows:

"If default be made in the payment of interest due upon MONEY LOANED "by any school commissioner or township treasurer, or in the payment of the "principal, interest at the rate of twelve per cent per annum shall be charged "upon the amount for which the party is or may be in default; which shall "be included in the assessment of damages in suits or actions brought upon "the note or mortgage to enforce payment thereof, and interest at the "rate aforesaid may be recovered in actions brought to recover interest "only," &c.—(Rev. Stat., 1845, page 502).

Under the former statute (1835) the decisions before cited are clear in establishing the doctrine that the penalty of twenty per cent MUST BE SPECIALLY CLAIMED IN THE DECLARATION, or it could not be recovered. Does the act of 1845 dispense with this rule? The language of the two statutes is somewhat different, but it is evident that in each it is only intended to point out the MODE in which the PENALTY for non-payment MAY be recovered—that is, to include it in the assessment of damages in the action on the note.—The word "SHALL," as used in the act of 1845, cannot be held to make it imperative upon the court or clerk to assess the penalty whether claimed in the declaration or not. The same section provides that it may be recovered in a separate action brought to recover interest only.

Again, in this case, where there is no averment that the note was given for loaned money, (it was in fact given for school land), and no claim set up for the penalty of 12 per cent, how can the court or the clerk assume the existence of the fact that the consideration of the note was money loaned? Is there a legal presumption that every note made payable to a school commissioner was given for loaned money? and if the note was not for loaned money, the penalty is not recoverable at all.—BRADLEY v CASE, 3 Scam, 610. As the consideration of the note is not expressed upon its face, nor averred in the declaration, it may just as well be presumed that it was

given for school lands (and such was the fact in this case as well as in Bradley v Case), as that it was given for borrowed school money. This shows the necessity of a special count claiming the penalty.

The reasoning of the court in BRADLEY vs. SNYDER ET AL, 14 Ill's, 268, in giving a construction to the act of 1835, applies with equal force to the act of 1845. In that case the court said: "This penalty is given by the "statute for wrongfully withholding money due the school fund, and is not a "part of the contract contained in the bond or mortgage given to secure the "money loaned." Is the 12 per cent, given by the act of 1845, any less a penalty than the 20 per cent, given under like circumstances by the act of 1835? The court continues: "It cannot be recovered upon an ordinary "declaration counting upon the contract, but a special count is required, "claiming the penalty as given by the statute."

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The plaintiff in error submits that the penalty given by the statute, for the non-payment of borrowed school money, is not recoverable in this action, because it is not specially claimed in the declaration, and neither the court below, nor the clerk, had any right to assume as a fact that the note sued on was given for borrowed school money.

N. L. FREEMAN, Attorney
for plaintiff in error.

ILLINOISAN PRINT, SHAWNEETOWN.

Oneill Sexton
vs } Abstract &
} Brief
School Comrs Gallatin
Co. &c.

Filed 8 May 1857.
N. Johnston Clk