

13676

No. _____

Supreme Court of Illinois

HOLBROOK

et al

vs.

Trustees of Schools

71641  7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 38.

Holbrook
75

Trustees of
School

1862

13676

Prepared

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

EDMUND S. HOLBROOK,
WILLIAM PAUL and
EBENEZER HIGGINS,
vs.
TRUSTEES OF SCHOOLS OF
TOWNSHIP 33, N. R. 1, E.
3d, P. M.

APPEAL FROM LA SALLE.

BRIEF FOR APPELLANTS BY LELAND & BLANCHARD.

This cause was heard at the April term of this court, A. D. 1859, (22 Ill., 539) Upon petition of appellants, a re-hearing has been granted.

We think the court erred in overruling the demurrer interposed by Paul to the declaration, for the reason that the facts stated in the declaration clearly show that there is no cause of action. It is alleged in the declaration that Holbrook was appointed Treasurer on the third day of April, 1850, and thereupon the bond declared upon was executed, and that said Holbrook continued to hold said office until the appointment of Hough, on the first of April, 1856. Now the school law of 1849, which was in force when Holbrook was so appointed treasurer, (Session laws of 1849, p. 119) provided for the election of Township Trustees on the second Saturday in January, and every two years thereafter.— It was further provided by said law that each newly elected board of Trustees should, at the first meeting, organize by appointing one of their number President, also a treasurer who should be ex-officio clerk of the board; that said treasurer so appointed, before entering upon the duties of his office, should execute a bond with two freeholders as security, to be approved by the Trustees and delivered to the commissioners, "*and every township treasurer appointed subsequent to the first, as herein provided, shall execute bond with security, as is required of the first treasurer.*" (Session laws of 1849, p. 163, section.) The law of 1849 continued in force until February 15, 1855. (Laws of 1855, p. 51.) From the first appointment of Holbrook in April, 1850, until the alleged appointment of Hough in April, 1856, two elections of Trustees intervened, namely—

January 1852 and January, 1854. And it is a presumption of law that the elections were held. Again we have shown that the law required each succeeding board of Trustees to appoint a treasurer, the law presumes that they performed their duty and made such appointments.

And if Holbrook acted as such treasurer, as is alleged in the declaration, the law presumes that he was the appointee, and that the appointing power performed their duty, and required their appointee to execute bond as required by law. 21 Geo. 217; 1 Greenleaf sec. 92.

Then it follows as a logical consequence that the averment in the declaration that Holbrook was appointed Treasurer in April, 1850, and continued to hold such office until April, 1856, is equivalent to an averment that Holbrook was re-appointed in 1852 and 1854-5, and gave bond as the law requires. The rule that a pleading must be construed most strongly against the pleader will aid us in our position. Now the re-appointment of Holbrook, and giving a new bond was equivalent to the appointment of another person, and a delivery to him of all the appurtenances of the office, as required by law, which would render the bond sued upon of ^{more} effect by its terms. Suppose, for instance, that the board of Trustees elected in 1852, had appointed Mr. Paul such treasurer, and bond had been given by Paul, as required by law, and Holbrook had delivered to him, as his successor in office, all the appurtenances thereof, of course no action could then be maintained upon the bond declared upon. How does the case at bar differ from the supposed one? The succeeding board appointed a treasurer who is the same person appointed by the preceding board. The appointee of the succeeding board executes to them his bond as required by law. Does the first bond still remain in full force and virtue. All the appurtenances of the office are now in the hands of the treasurer appointed by the succeeding board of Trustees, and they hold his bond conditioned for the faithful performance of his duties. Now are the securities on the first bond liable for the wrongful acts of the treasurer appointed by another and a different board? Again, according to the above reasoning, Holbrook succeeded himself again as treasurer in 1854. Now can the Trustees elected in 1856 elect upon which of the three bonds given by Holbrook they will rely upon. Can they, by one step backward, obliterate the intermediate space and re-^{re-}assitate the old bond? If they can, then the same person may be appointed term after term, for an indefinite number of years, and file a new bond at each successive appointment, and at the outcome prove a defaulter, when the board of Trustees can look over the file of bonds and select the first one upon which to commence legal proceedings. We would call the attention of your Honors to the fact that the evidence in this ^{case} shows that elections were held in 1852 and in 1854.

The law of 1855, which was in force at the time Hough was appointed, provides that the treasurer, before entering upon the duties of his office, should execute a bond, with two or more freeholders, to be approved, &c. Now, before Hough can claim to act as treasurer, he must show that his bond was approved. The declaration contains no averment that Hough's bond was so approved.

Rounds vs. Mansfield, 38 Maine, 586.

It is true the declaration contains the averment that Hough was duly qualified to act as treasurer but we

respectfully submit where unad-
done involves in it a question of
law whether it is done as the law
directs. the quo modo must be
pointed out. 24 Days Conn 313

But where it is a mere matter of
fact a general averment of
performance is sufficient; now
it is for the court to say, whether
the bond given by Hough was in
compliance with the law or not.
See authorities referred to in
printed points on file. In the
opinion of the court upon the
former trial of this cause the
court say, "the see no evidence
that notice was served upon
Plaintiffs to produce the bond of
which parol proof was sought to
be made. The court must have
inadvertently overlooked the
evidence upon this point. We
call the attention of the court
to the 29 - 30 & 31 pages of the record
where they will find as we think
ample proof upon that subject.
We also refer the court to the
printed points and argument of
E. S. Holbrook filed upon the former
trial

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Argument of
Appellant

Nollbrook et al }
as }
Trustees of Schools. }

Argument for appellants
by E. P. Nollbrook

1st point - question of dem-
urred by Paul.

This question was fully
settled by the case in 2^d.
Egman 426

The court, after having
stated that where the per-
formance of a condition
precedent was ~~merely~~
a question of fact, a gener-
al allegation of perform-
ance was sufficient - said.

When the act to be done
necessarily involves a ques-
tion of law the general
allegation (of performance)
will not suffice - but the
pro modo must be join-
ed out and averred as
if the covenant be to give
an acquittance or exe-
cute a conveyance, the ac-
quittance or the deed must
be set out and brought
before the court so that its
sufficiency and legal effect

may be seen and determined. This becomes a question of law, and not of fact, to be decided by the court, and not by the jury. These distinctions run through the books on pleading and have been repeatedly recognised by the courts.

Common uses this language
"In assumpsit in consideration to acquit of a debt it is not sufficient to say he acquitted him without saying how"

"Of the consideration of an assumpsit be that he shall give a bond with sureties, it is not sufficient to say that he tendered a bond if he does not say in what sum and what sureties"

"He ought to show performance with such certainty that the court may judge that the intent of the covenant has been performed"

Chitty uses this language
"Performance ought to be

2

shown with such certainty
that the court may judge
whether the intent of the cov-
enant has been duly ful-
filled"

The language used in *H. Wend. Co.*
"When the act involved is
a question of law, viz.
whether done as the law
directs, the grounds must
be pointed out"

The language used in *H. Wend. Co.*
"Where it is necessary on
the part of plaintiff to aver
performance it must be
set forth with such cer-
tainty as to enable the
court to see that the con-
tract has been fulfilled"

In *24 Wend* the same rule
is laid down. In fact as
this court has said, "These
distinctions run through
the books" and I find no
counter authority.

See also *1 Sarnd. on Plead-
ing & Evidence*, 209.

It is alleged that Thompson was
"duly gratified" &c. The words
"duly" &c. have no effect without
a statement of the special

facts of which they are pred-
icated - for such terms are
not only indefinite, but of
firm matter of law and
not of fact and consequent-
ly are not traversable" See
Goulds R. Ch. 4. Sec 29

It may be observed also that
no profit is made.

So this matter seems placed
beyond controversy. To say
nothing of other matters the
bond given by Hough should
have been set out either in
full or in its material parts
so that the court could
determine whether the law
had been fulfilled - as
whether it were a lease
in form - with proper pen-
alty conditions securities
&c. whether properly approved.
H

After rehearsing the bond
given by Hough the
statement is. "plaintiffs
aver that David Hough
continued to hold said
office of Treasurer until
the appointment of David

Though as his successor
The construction of the plead-
ing is to be rendered most
thoroughly against the pleader
See 15 Ill. 558. and it can-
not be held that this is a
sufficient allegation that
Hobbrook still held under
that appointment on which
the bond declared on was
given.

He may have held the of-
fice but under any other
appointment In fact there
is a presumption in favor
of the fact of another appoint-
ment. Hobbrook was appointed
in 1850. Borough (as alleged) in
1836. The law requires an
appointment every two
years. Sec 23 School laws
(Scates St. pg. 438) term of office
of Justices two years and Sec
32. makes it their first du-
ty to appoint a Treasurer
who shall hold his office only
during their term. The pre-
sumption is that officers
perform their duty and ob-
serve the law and so there
is a presumption that Hol-
brook did not continue to
hold under that appointment
= which should have been
removed by abatement =

2^d Point. Under this I will
add as to permitting
the entry of 19th of March
to go to the jury that it ap-
pears from the School re-
cords that the Board
then in session was elec-
ted in Jan 1855 (Arnold
having been elected to fill
a vacancy in Spring of 1854)
and it was their duty to
elect a Treasurer at their
first meeting in 1855. The
records show that they did
this and Keelbrock was re-
elected. All the subsequent
entries show that he acted
as such and I submit that
this is sufficient proof of a
recognition of him by the
Trustees as their Treasurer &
Clerk. This is not the regular
meeting for the election of
treasurer. There appears to be a
regular incumbent of the
office. The office is filled. There
is no vacancy.

Sec 32 (pay 400 Dollars) makes
the appointment of treasurer
a part of the organization
of the Board, - may be
removed for good cause

shown with such certainty that the court may judge whether the intent of the covenant has been duly fulfilled"

The language used in 1. Bay is "When the act involved is a question of law, viz. whether done as the law directs; the pro modo must be pointed out"

The language used in 4. Wend. is "Where it is necessary on the part of plaintiff to aver performance it must be set forth with such certainty as to enable the court to see that the contract has been fulfilled"

For 24 Wend the same rule is laid down. In fact as this court has said, "these distinctions run through the books" and I find no counter authority.

See also 1 Samd. on Pleading & Evidence, 209.

It is alleged that "duly" was "duly gratified" &c. The words "duly" &c. have no effect without a statement of the special

facts of which they are pred-
icated - for such terms are
not only indefinite - but of-
firm matter of law and
not of fact and consequent-
ly are not traversable" See
Goulds Pl. Ch. 4. Sec 29

It may be observed also that
no protest is made.

So this matter seems placed
beyond controversy. To say
nothing of other matters the
bond given by Hough should
have been set out either in
full or in its material parts
so that the court could
determine whether the law
will be fulfilled - as
whether it were a lease
in form - with proper pen-
alty conditions securities
&c. whether properly approved.
22

After rehearsing the bond
given by Holtbrook the
statement is. "plaintiffs
aver that David Holtbrook
continued to hold said
office of Treasurer until
the appointment of David

Sec 65. Provides for proceedings in case of removal, resignation, or the expiration of his term of office.

Sec 110. provides for removal by Trustees "at any time they may deem such removal expedient."

[The law under which Holbrook was appointed in 1857 provided only for removal "for good cause"; were if Holbrook having received his appointment under this law can be affected by the change of the law after he takes the office?]

There is no vacancy in an office while there is an incumbent. If it is to be argued that the election of Hough is sufficient to affect the removal of Holbrook by the same act. I answer that it is too great a construction stretch of construction to say so. At the very time of the action of the Board there must be a vacancy, else there is no occasion for the vote of the Board, nothing to found its action upon. The act of removal must

just be a positive act. An incumbent may desire to be heard; it is right he should be. Though was not elected on a vacancy, not as a successor, but as a new and additional clerk; an office not provided by law.

The operation of such a construction can be seen in its application to any other officer, where there is a power of removal, as judge, sheriff, clerk, justice, constable, administrators, guardians &c.

Authorities on this point.
23 Miss. 556. Suit on guardian's bond given on an appointment after another appointment without a removal ^{or revocation} &c. Held bonds _{not liable} on the ground that the appointment was void. The court say "Had the probate any power to make another appointment? we think not. The act appointing &c. expressed the whole power of the probate court in the premises until removal &c. — the act of appointing was void."

1 Now 479 is here referred to as authority. but I do not find it. it was a like decision as to the appointment of Ad. de bonis non during lifetime of executor.

8 branch 9. is quoted. ~~the case and like~~ see Vol 3 Cond Rep. pag 93. syllabus in these words. If Administration is granted on estate of a deceased person whose executor is present and in the constant performance of his executorial duties, such appointment is absolutely void.

The case in 6 Serg. 463. Blessor vs Britt case where one guardian had been appointed, and another appointed without order of removal. Court say.

In conferring the appointment upon her (the first appointee) the court exercised its power, and could not confer any right to act as guardian upon the plaintiff (second appointee) until the removal of the former guardian. then and

not ~~tell them~~ before the right
to act upon this subject
should be resumed" I am
distrusting in another case
same book pg. 169

The case in 18 Wend. 575 - is
The people neglected (at a town
meeting to elect a certain
officer, the justice appointed
one; subsequently the people
at a special election ~~election~~
elected one, question which
one was entitled to the office.
held the former was and
court say an office cannot
be said to be vacant while
any person is authorized to
act in it and does so act"

3d Point.

Sec. 55 School laws (pg
457 Stats St) says security
shall be approved by ~~the~~
~~Board~~ a majority of the
Board

The order of the appoint-
ment of Borough requires his
bond to be approved by the
Board. The Board is a cor-
poration and I suggest
that the only evidence

of approval should be found in the records, and then was no such given. Certainly there should be proof of joint action. It cannot be said that simple proof of their hand writing makes out such proof.

The general rule is that when the law requires ~~and~~ the performance of a duty of several persons in office, all must meet and at least a majority must act together. See 22 Barb. (S.C.) Rep 137 Perry vs. Jagers - and on this point there can be no controversy.

2nd Point

I hold that inasmuch as plaintiffs had at one time the bond given by Halbrook on his re-appointment and failed to produce it on notice, defendants were entitled to prove its contents. It makes no difference that the law required the bond to be kept in another place. So far the burden is thrown upon plaintiffs to discharge

themselves of the presumption that they still have the bond. I refuse to produce it. Hitchcock, on being called upon, did not dis-charge himself.

There is sufficient evidence that it was never on file in the School Com^y office. Jones made a thorough search and could not find it. This was some two years after he should have had the bond and it is preposterous to say (certainly after the statement of Hitchcock) that the present incumbent must be called (who had received the office as Jones left it) to prove that it had not arrived there since.

But that was done which was equivalent to calling ~~now~~ the present School Com^y. On request of the party in interest he searched and reported that he could not find it which was done under oath of office. If all this evidence did not ~~show~~ ^{prove} that the bond was either lost or out of the

power of the defendant. Then
such proof can seldom be
made.

In 3 Gil - a paper was
found to have been in
the possession of the op-
posite party and seconda-
ry evidence was admit-
ted. quoting 7 Bend 31

In 2 Gil An enquiry was
made of a person concern-
ing a deed of his, and
his answer was deemed
sufficient without calling
him as a witness. Under
these circumstances, he bei-
ing entitled to its custody,
it is the
turned - it was lost or destroyed

Case in 15 Ms. of the Shurston.

The further objection under
this head to the ruling of
the court goes upon the
supposition that the action
of the Justices upon the bond
(its legality, sufficiency &c) is
final, and so their action
in reference to the bond giv-
en by Hollowok or his ap-
pointment, in the manner
proposed & he proved by
defendants effected a discharge

of Hollbrook's bondsman on his
first appointment. It seems
to me this is the proper rule
any other might work a
very great wrong upon bonds-
men. They might find them-
selves liable for years after
they and the obligees even
supposed them to be discharged.
I have not been furnished
with ~~the~~ Appelles points and
authorities. E. Hollbrook.

No 187-188
112
Holbrook et al
vs

Trustees of Schools

Argument for
Appellants -
by Holbrook

Filed May 18. 1859
L. Leland
Clerk.

1
" State of Illinois } Pleas before the Honorable
LaSalle County } Madison E. Hollister Judge
of the Ninth Judicial
District of the State of Illinois, and the
presiding Judge of the LaSalle County Circuit
Court at a term of said Court, commenced
and held at the Court House in Ottawa
in said County, on the second Monday
in November, the same being the tenth day
of November in the year of our Lord one
Thousand Eight Hundred and fifty six,
and of the Independence of the United States
of America the Eighty first.

Present: The Honorable Madison E. Hollister
Presiding Judge
John F. Nash Clerk,
William H. L. Wallace State's attorney
Francis Warner Sheriff "

Be it remembered that on the 27th day of
October A. D. 1856 a Precipe was filed in the
office of the Clerk of the Circuit Court, in the
words and figures following, to wit:

" Trustees of Schools of Township
(33) thirty three north of Range
40 one East of the third
Principal Meridian } Debt \$2,000-
w } Damages \$2000-

Edmund S. Holbrook.

William Paul & George Higgin

LaSalle County Circuit Court.

Clerk will issue summons as above.

Hough & Glover & Cook, atty for P'tff - "

3

Summons to November Term 1856.
Not found in my County Nov 10th 1856.
Rt 10- J. Warner Shp "

And afterwards, to wit on the 9th day of February (Monday) A.D. 1857 the same being one of the days of the February Term of said Court, for said year, an order was entered of records in said cause in the words and figures following to wit:

Trustees of Schools of Township
23, North Range one East of the 3^d p. m.
vs
Edmund S. Holbrook, William Paul
& Ebenezer Higgins

(1st Order)

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summons

Def.

On motion of the plaintiffs by D. L. Hough their attorney it is ordered by the Court that an alias Summons issue herein.

And afterwards, to wit, on the 16th day of April 1857, an "alias Summons" was issued in said cause, to the Sheriff of Cook County to execute, in the words and figures following, to wit:

"State of Illinois
LaSalle County
The People of the State
of Illinois,
To the Sheriff
of Cook County - Greeting
We command you, as has before been com-
-manded, that you summon Ebenezer Higgins,
Edmund S. Holbrook & William Paul if they
shall be found in your County, personally to
be and appear before the Circuit Court of
said LaSalle County, on the first day of the

next term thereof, to be held at the Court House
 in Ottawa, in said County, on the 8th day
 of June next, to answer unto the Trustees of
 Schools of Township 33. North Range One
 East of third principal Meridian in a plea
 that they render unto them Two thousand dollars
 debt which they owe to and unjustly detain from
 them to the damage of said plaintiffs as they
 say, in the sum of Two thousand Dollars.

And have you then and there this writ, with
 an endorsement thereon in what manner you
 execute the same.



Witness, John F. Nash, Clerk of our
 said Court and the Seal thereof, at Ottawa
 this 16th day of April. 1857
 J. F. Nash Clerk

which summons was returned by the Sheriff of
 said County with the following endorse-
 ment, thereon, to wit.

"¹⁰⁸
 Trustees of Schools 33.1. vs Ebenezer Higgins et al
 Alias summons to June term 1857

65^c Pd by PCP

Served by reading to the within named Ebenezer
 Higgins May 1st 1857 - Edm^d S. Hillbrook and
 W^m Paul not found in my County May 1st 1857

Fees	{	Service	\$ 0.50
		1 mile	5
		Return	10
			<hr/>
			\$0.65

John L. Wilson Sheriff
 By George Kemnitz Dy

5

On the 12th day of March 1857 "an alias
Summons" was issued in said cause, to
the Sheriff of LaSalle County, to execute, in
the words and figures following, to wit:

"State of Illinois }
LaSalle County }
The People of the State
of Illinois, to the Sheriff
of said County - Greeting;
We command you as we have before command-
ed you that you Summon Edmund S. Holbrook,
William Paul and Ebenezer Higgins if
they shall be found in your County person-
ally to be and appear before the Circuit Court
of said County on the first day of the next
term thereof, to be held at the Court House
in Ottawa, in said County, on the 8th day
of June, next, to answer unto the Trustees
of Schools of Township 33, North Range one
East of 3^d p.m. in a plea that they render
unto them Two thousand dollar debt which
they owe to and unjustly detain from them to
the damage of said plaintiffs as they say
in the Sum of Two Thousand Dollars.

And have you then and there this writ,
with an endorsement thereon, in what manner
you execute the Same.



Witness John F. Nash Clerk of Our
Said Court, and the Seal thereof, at
Ottawa this 12th day of March A.D. 1857
J. F. Nash Clerk

which summons was returned by the Sheriff of
LaSalle County with the following endorsement
thereon, to wit:

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Trustees of Schools 33.1 vs. Edmund S. Holbrook
William Paul & Ebenezer Higgins.

Alias summons to June Term 1857.

Served by reading to the within named Ed-
mond S. Holbrook and William Paul,
Ebenezer Higgins not found in my County.
E. L. Waterman Shff.

Fees Dr & Ct. \$ 1.10
16 Miles 80
\$ 1.90 "

On the 26th day of January 1857 the Plaintiffs
filed their declaration in this cause, in the
words and figures following to wit:

State of Illinois
La Salle County and Circuit Court thereof.

In February Special Term AD 1857

The Trustees of Schools of Township thirty
three North of Range One East of the third
Principal Meridian Plaintiffs in this Suit
Complain of Edmund S. Holbrook, William
Paul and Ebenezer Higgins, defendants
summoned &c of a plea that they render unto
the said plaintiffs the sum of Two Thousand
dollars which they owe to and unjustly detain
from said plaintiffs.

For that the said defendants heretofore
to wit, on the 3^d day of April AD 1850 executed
and delivered to said plaintiffs their writing
obligatory which writing obligatory is in sub-
stance as follows.

State of Illinois }
La Salle County } Know all men by these
presents that we Edmund

S. Holbrook, Ebenezer Higgins and William Paul are held and firmly bound, jointly and severally unto the Trustees of Schools of Township thirty three, North of Range one East, of said County in the penal sum of Two thousand dollars, for the payment of which we bind ourselves, our heirs, Executors, and administrators firmly by these presents -

In witness whereof we have hereunto set our hands & seals this 3^d day of April AD 1850.

The condition of the above obligation is such that if the above bounden Edmund S. Holbrook Township Treasurer of Township thirty-three North Range one East of the 3^d P.M. in the County aforesaid shall faithfully discharge all the duties of said office according to the laws of which now are or may hereafter be in force & shall deliver to his successor in office, all monies, books, papers, securities & property in his hands as such Township Treasurer, then this obligation to be void otherwise to remain in full force & virtue.

Edmund S. Holbrook 

W^m Paul 

E. Higgins 

Approved & accepted by us

Theron D. Brewster  Trustees of Schools.

S. W. Lindley 

And the plaintiffs aver that said Edmund S. Holbrook continues to hold said office of Township Treasurer until the appointment of David L. Hough as his successor, as hereinafter mentioned, and that as such township Treasurer said Holbrook

did receive a large sum of money, to wit; the sum of two thousand dollars which sum came to and was in the hands of said Holbrook as such Township Treasurer and that afterwards, to wit; on the first day of April A.D. 1856 David L. Hough was duly appointed Township Treasurer of said Township and accepted said appointment and gave the bond required by law and was duly qualified to act as such township treasurer and then and there became and the successor of said Edmund S. Holbrook as Township Treasurer of said Township, of all of which the said Holbrook had notice, & said Holbrook then and there had in his hands as such Township Treasurer the sum of money aforesaid, and afterwards, to wit on the same day the said David L. Hough demanded said sum of money of said Holbrook then and there refused & neglected to pay said sum of money to said Hough, nor has he ever paid the same to said Hough though often requested so to do, nor have the said defendants or either of them ever paid the said sum of money in said writing obligatory mentioned or any part thereof though often requested so to do, wherefore an action hath accrued to the said plaintiffs to have and recover of and from said defendants the said sum of two thousand dollars which they owe to and unjustly detain from said plaintiffs to their damage of two thousand dollars, and therefore they bring this suit

Hough, Glover & Cook
attys for Pelffs

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And afterwards, To wit; On Monday June 5th 1857, the same being one of the days of the June Term of Said Court for said year 1857, an order was entered of record in said cause, in the words and figures, following, to wit:

"Trustees of Schools of Township 33
North range One East of 3^d P.M.
vs.
Edmund S. Holbrook, William
Paul and Ebenezer Higgins

Debt.

This day the defendant Holbrook moves the Court to strike the Plaintiffs' declaration from the files herein. The Plaintiffs come by D. L. Hough their attorney and enter a cross motion, for leave to amend their declaration in this cause -"

On Wednesday June 17th 1857, the same being one of the days of the June Term for said year, a further order was entered of record in this cause in the words and figures following, to wit:

"Trustees of Schools of Township
33 North range one East of 3^d P.M.
vs
Edmund S. Holbrook, William
Paul & Ebenezer Higgins

Debt

This day again come the plaintiffs by D. L. Hough their attorney and on his motion it is ordered that the plaintiffs have leave to amend their declaration or file herein. "

11)

And afterwards, to wit, on Feby 5th the same being one of the days of said term of said Court for the year 1858, there was entered of record in said cause, an order in the words and figures following, to wit;

"Trustees of Schools of Township 33,
North Range one East of 3^d P.M.

vs

Edmund S. Holbrook William
Paul & Ebenezer Higgins

Debt.

The plaintiffs again come by Glover & Cook & Hough their attorneys, and the defendants by Holbrook & Chumarsen and Eldridge their attorneys, and after hearing the arguments of counsel, the plaintiffs Counsel confess the defendants demurrer to plaintiffs declaration and ask leave of the Court to amend their declaration, which motion is sustained by the Court, "

On the 3^d day of November 1858 the Defendants file a second demurrer to Plaintiffs declaration, in the words and figures following, to wit:

"In the LaSalle Circuit Court, Nov Term AD 1858
The Trustees of Schools of Township 33. R. 1
vs

Holbrook, Paul & Higgins
now come the said defendants and say that the above declaration is not good in law and that they are not bound to answer the same

W. Chumarsen &
E. S. Holbrook, for defendants,

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On Tuesday November 16th 1858, the same being one of the days of the Nov. Term of said Court for the year last aforesaid, an order was entered of record in said Cause, in the words and figures following, to wit;

Trustees of Schools of Township 33, North Range one East of 3 ^d P.M. vs Edmund S. Holbrook William Paul & Ebenezer Higgins	} Debt.
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This day the plaintiffs come by G. L. Hough & Glover & Cook their attorneys and the defendants by E. S. Holbrook their attorney and after hearing the arguments of counsel, the Court overrule the defendants demurrer to plaintiffs declaration.

On Monday November 22^d 1858, the same being one of the days of the said term of said Court for said Year & further order was entered of records in said Cause in the words and figures following, to wit;

Trustees of Schools of Township 33 North Range one East of 3 ^d P.M. vs Edmund S. Holbrook, William Paul & Ebenezer Higgins	} Debt.
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This day the defendant Paul by his counsel comes and says he will abide by the decision of the Court in overruling the defendants demurrer to plaintiffs declaration. It is therefore considered by the Court that judgment be entered herein against said William Paul on said demurrer for two thousand dollars debt the amount

set forth in Plaintiffs declaration. The other defendants Holbrook & Higgins move the Court for leave to plead to Plaintiffs action which motion is sustained by the Court. "

On the day following, to wit, Nov 23^d 1858 the Defendants, ^{Holbrook & Higgins} filed their Pleas herein, in the words and figures following, to wit:

"In the Circuit Court of LaSalle County, Nov Term A. D., 1858.

The Trustees of Schools
of Township 33. R 1

vs

Edmund S. Holbrook ^{and} Ebenezer Higgins,
impleaded with William Paul,

The said defendants Holbrook and Higgins come and defend themselves and injury when &c and says actio non because they say that the said David L. Hough in Plaintiffs declaration mentioned, did not become the successor of said Edmund S. Holbrook (said defendant) as Township Treasurer of said Town in manner and form as Plaintiffs have above in their said declaration alleged and of this they put themselves upon the Country &c

2 And for a further plea in this behalf said defendants Holbrook and Higgins say actio non, because they say that the said Holbrook Treasurer and obligor in said writing obligatory did not neglect and refuse to pay over the sum of money mentioned in Plaintiffs de-

laration or any part thereof to his Successor in office in manner and form as plaintiffs in their said declaration have alleged, and of this they put themselves upon the Country

3

And for a further plea in this behalf, said defendants Holbrook & Higgins say, a che now, because they say that the said Holbrook was appointed to the said office of Township Treasurer by Sheron D. Brewster, Giles A. Lindley and John L. McCormick which is the same appointment, mentioned in said declaration who were then the Trustees of said Township, that it was to said Board of Trustees, represented by said Brewster, Lindley and McCormick that said bond in said declaration mentioned was given, that afterwards A.D. 1855, to wit: On the day appointed by law for the election of School Trustees, Alexander Hitchcock, William C. Smith, and Samuel W. Mase were duly Elected Trustees of Schools of said Township, and entered upon said office, and became the Successors of said Brewster, Lindley & McCormick, whose term of office then expired and afterwards, to wit on the 15th day of January A.D. 1855 the said Hitchcock, Smith & Mase, as the Board of Trustees re-appointed said Holbrook as Treasurer of said Board that said Holbrook thereupon gave to said Board, the Bond required by law, that is to say a penal bond signed by said Holbrook and two freeholders who were not members of said Board so appointing him, conditioned that said Holbrook should faithfully

perform all the duties of Treasurer of said Township according to law, which was duly received and approved by a majority of said Trustees last aforesaid, whereby the said Holbrook thus duly re-appointed and qualified became as the Treasurer of said Board represented by said Hitchcock, Smith & Maze, the Successor of himself as the Treasurer of the said Board of Trustees represented by Brewster, Lindley & M^c Cormick and said defendants aver that said Holbrook while acting as treasurer as first aforesaid under the Trustees first aforesaid, did not before said re-appointment and the execution of said bond last aforesaid receive any of the moneys in said declaration mentioned, all which said defendants are ready to verify, wherefore they pray Judgment &c

4 And for a further plea in this behalf said defendants Holbrook & Higgins say actio non because they say that after the execution and delivery of said writing obligatory in said declaration mentioned, to wit on the 15th day of January A. D. 1855 the term of office of the ~~former~~ ^{former} Trustees of Schools, Thermo D. Brewster, Giles A. Lindley and John L. M^c Cormick who appointed said Holbrook Treasurer, which is the same mentioned in said declaration and who received said bond mentioned in said declaration, having expired and their Successors Alexander Hitchcock, William C. Smith & Samuel A. Maze, having been duly elected and

undertaken said office of School Trustees the said Holbrook was duly elected the Treasurer of said Board represented by said Hitchcock, Smith & Mage and then gave the bond required by law, that is to say a bond signed by said Holbrook and two freeholders, to wit George W. Gilson, and Isaac C. Day, who were not members of said last named board in the penal sum of One thousand dollars conditioned that said Holbrook should faithfully perform all the duties of Treasurer of said Township according to law. which said bond was received and approved by a majority of said last named board, and said approval was endorsed thereon, to wit on the 20th day of January A.D. 1855, whereby the term of office of said Holbrook as Township Treasurer under said appointment mentioned in said declaration expired, and said defendants aver that thereupon said Holbrook under said second appointment as successor of himself under said first appointment received all of the moneys which said Holbrook had in his hands at the said expiration of his said term of office as Township Treasurer under said first appointment, which said defendants are ready to verify wherefore they pray judgment &c

E. S. Holbrook
Chumason & Eldridge
for said defendants "

And afterwards, to wit, on November 30th 1858
Plaintiffs file their demurrer to defendants
pleas, in the words and figures following,
to wit: "

Trustees of Schools	} LaSalle Co
vs	} Circuit Court
Edmund S. Holbrook	} November Term
William Paul & Ebenezer Higgins	AD 1858.

And now comes the said plaintiff and as
to the 1st & 2^d pleas of defendant in which
they have put themselves upon the Country
Itself doth the like.

And as to the 3^d & 4th
pleas of defendants and each of them Severally
plaintiffs say procludi non &c because they
say that said pleas & each of them are not
sufficient in Law to bar plaintiffs' actions
& this they are ready to verify, wherefore
they pray Judgt &c.

Stough & Cook

P. J. "

On the 30th day of Nov^r 1858. the same being
one of the days of the Nov^r Term of said
Court for said year, a further order was
entered of record in said cause in the words
and figures, following, to wit:

" Trustees of Schools of Township 33 ^d	}	Delt
North Range 1 East of 3 ^d P. M.		
vs	}	This day
Edmund S. Holbrook, William		
Paul & Ebenezer Higgins		

the plaintiffs again come by D. L. Hough
& Glover & Cook their attorneys and the
defendants by E. S. Holbrook their attorney
and after hearing the arguments of counsel
the Court sustain the plaintiffs demurrer to
the defendants third and fourth pleas.

And now the defendants move the Court
for leave to amend their third and fourth
pleas, which motion is sustained by the
Court.

And afterwards, to wit on December 2^d 1858
Plaintiffs filed their replication ^{vs} defendants
Third ^{& 4th} Pleas in the words and figures follow-
ing. To wit:

Trustees of Schools } And now come
vs } the said plain-
Holbrook et al } tiffs and say
as to the 3^d plea
of defendants, Higgins & Holbrook precludi
now, because they say said Holbrook was
not reappointed Treasurer and qualified to
act as such Treasurer in manner &
form as in plea is alleged & of this they
put themselves upon the Country.

Defendants Holbrook & Higgins do the
like by Eldridge.

And for another
replication to said 3^d plea plaintiffs say
precludi now &c because they say that said
Holbrook never did give any such 2^d
bonds as Treasurer as in said plea is
alleged, & of this they put themselves upon
the Country. Defendants Holbrook &
Higgins do the like by Eldridge.

And for another replication to said plea, plaintiffs say, precludi non &c because they say that the monies in said plaintiffs declaration mentioned were received by said Holbrook before the re-appointment of said Holbrook and the filing of said second bond, & of this they put themselves upon the country,

Defendants Higgins & Holbrook do the like by Eldridge

And for replication to the 4th plea of ^{defendants} Holbrook & Higgins, above pleaded, plaintiffs say precludi non, because they say that said Holbrook was not reappointed Treasurer & file a bond under such reappointment as in said plea is alleged,

Defendants Higgins & Holbrook do the like.

And for a further replication to the 4th plea of defts Higgins & Holbrook above pleaded, plaintiffs say precludi non because they say that said Holbrook never did file such a bond under a reappointment as Treasurer as in said plea is alleged, and of this they put himself upon the country. Defendants Higgins & Holbrook do the like by Eldridge,

And for a further replication to the said 4th plea of defts, Higgins & Holbrook, plaintiffs say precludi non &c because they say that said Holbrook did not have

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in his hands at the date of his reappointment & of the filing of his 2^d bond the monies mentioned in plaintiffs declaration but that the same have been received by said Holbrook prior to that time & of this he puts himself upon the Country.

Glover & Cook p q
Defendants Higgins & Holbrook
do the like, by Eldridge "

And afterward ^{on the day last of aforesaid} to wit, on Thursday Dec 2^d 1858, the same being one of the days of the November Term of said Court for said Year, an additional order was entered of record in said cause in the words & figures following, to wit;

Trustees of Schools of Township
33 North Range one East of 3^d P. M.
vs
Edmund S. Holbrook
William Paul and Ebenezer Higgins

Debt

This day the plaintiffs again come by their attorneys and by leave of the Court file several replications to defendants pleas, the defendants ^{also} come by their attorneys, and the following jurors of a Jury to wit, S. P. Miner, William R. Eister, John Thompson, John Batcheller, George W. Fuchs, Ephraim Wemple, James Prescott, James Kelly, C. S. Day, Thomas M. Mason, S. L. Cody and James Winer who are duly elected tried and sworn to well and truly try the issues assess the

2)

plaintiffs damages as to defendant Paul and to well and truly try the issues herein as to defendants Holbrook and Higgins and a true verdict render according to the evidence. And after hearing the testimony and arguments of Counsel the jury retire to consider of their verdict; and after due deliberations thereon had returns into Court the following verdict to wit:

"We the jury find the issues for the plaintiffs, that the defendants Holbrook and Higgins owe to and unjustly detain from the plaintiffs two thousand dollars debt, and we assess the plaintiffs damages against all the defendants at One thousand Six hundred and ninety three dollars and thirty nine cents".

The defendants Holbrook and Higgins move the Court for a new trial - "

On the same, 2^d day of December 1858, the Pliffs filed their instructions herein, in the words and figures following, to wit: "1st If the jury find for the Plaintiff they will find the debt to be the penalty of the bond which is \$2000, and the damages at such sum as they believe is proven -

(Pliffs Instructions)
Review

2

The Jury will also find the amount of damages without finding the debt so far as debt Paul is concerned Judgment having been rendered against him on demurrer & he having filed no pleas. "

Review

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And afterwards, to wit, on Saturday December 4th 1858, the same being one of the days of the Nov^r Term of Said Court, for Said year, another order was entered of record in Said Cause in the words and figures following to-wit:

(order)

"Trustees of Schools of Township 33
North range one East of 3^d P. M.

vs

Edmund S. Holbrook
William Paul and Ebenezer Higgins

Debt.

It is ordered by the Court that the motion for a new trial made by defendants Holbrook and Higgins be overruled, said defendants now move the Court in arrest of Judgment. "

And afterwards to wit, on Thursday Dec^r 9th 1858 the same being one of the days of the November Term of Said Court for said year, a further and final order was entered of record in said cause in the words and figures following to wit:

"Trustees of Schools of Township 33
North range one East of 3^d P. M.

vs

Edmund S. Holbrook, William
Paul & Ebenezer Higgins

Debt

It is ordered by the Court that the motion in arrest of judgment made by the defendants Holbrook & Higgins be overruled, to which opinion of the Court in overruling said motion said defendants except.

It is therefore considered by the Court that

the plaintiffs have and recover of the defendants the sum of two thousand dollars debt, and the sum of one thousand six hundred and ninety three dollars and thirty nine cents for their damages, said debt to be discharged upon the payment of the damages, also their costs and charges by them herein expended and that they have execution therefor.

All the defendants now pray an appeal herein to the Supreme Court, which is granted upon condition that they within twenty days from this date file an appeal bond payable to the plaintiffs in the penal sum of three thousand dollars with Thero D. Brewster or Frederick S. Day as their Security. "

And afterwards to wit on December 14, 1858 the Defendants filed their Bill of Exceptions in this cause in the words and figures following, to wit:

" Trustees of Schools T. 33 R. 1.
 " " " " " "
 Holbrook. Paul & Higgins.

Be it known that on the trial of this cause a book was produced by plaintiffs which was admitted by defendants Holbrook & Higgins to be the proper records of said Board of Trustees.

Plaintiffs read in evidence the following entry from said records
 " 1850

24 The newly Elected Trustees met at the office of E. S. Holbrook

Present J. D. Brewster
J. L. McCormick

On motion voted that E. S. Holbrook be appointed Treasurer of Schools of Township 33 1 - and also the following,

"Board Room April 6th 1856

Board of Trustees met

Present J. D. Brewster
G. A. Lindley

The Bonds of the Treasurer was presented and approved "

The bond described in the declaration was read in evidence without objection -

Plaintiffs then offered to read in evidence the following entry from said records

March 19. 1856

Board met at office of E. S. Holbrook at the call of the president No meeting having taken place on the 10th

Present A. B. Hitchcock
James Armour
& Sam^l N. Maze

E. S. Holbrook Treasurer,

It was moved by James Armour that we go into an Election of a New Treasurer, carried - James Armour voting aye and Samuel N. Maze voting no.

The Treasurer E. S. Holbrook protested against the proceeding

On motion voted that the vote be had *visa voce*

dollars for the payment of which well and truly to be made we bind ourselves, our heirs, ex-ecutors & administrators firmly by these presents.

In witness whereof we have hereunto set our hands & seals this 22nd day of March 1856.

The condition of the above obligation is such that if the above bounden David L. Hough Township Treasurer of Township thirty three Range one in the County aforesaid shall faithfully discharge all the duties of said office according to the laws which now are or may hereafter be in force & shall deliver to his successor in office all the moneys, books & papers, securities and property in his hands as such Township Treasurer then this obli-gation to be void otherwise to remain in full force & virtue.

David L. Hough (Seal)
James Strain (Seal)
Henry S. Pierpont (Seal)
Warren Gunn (Seal)
R. Cody (Seal)
Nicholas Runow (Seal)

~~Directors of the Board of Education~~

~~Filed March 21st 1856~~

~~D. P. Jones School Commissioner~~

Directors of the Board of Education

Approved by W. B. Hitchcock, James Armour Saml W. "Mazs". On the back, "Filed March 26th 1856 D. P. Jones School Commissioner, To the reading of which bond in evidence defendants objected on the grounds that it did not appear that said bond was properly approved by the Board of Education.

D. L. Hough was then called by the Plaintiffs who being sworn, said, that he was the School Treasurer referred to in said Bond, that he did not know that any record was made by the Board of Trustees of the approval of said bond, that he gave said bond to Hitchcock, dont know whether Armour was present or not, dont know whether said Trustees were together when they wrote their approval on the bond or not, or whether they ever acted together concerning the approval of it. Defendants admitted that said Hitchcock, Armour & Moore were School Trustees at the time of the execution of the said Bond, and that the names under words "approved by" were severally in their hand writing.

Hough also testified that C. P. Jones was School Commissioner of LaSalle County in March 1886, and that the endorsement on the back of said bond was in his hand writing.

The Court decided that said Bond might be read in Evidence, to which decision of the Court defendants then & there excepted.

Plaintiffs then proved that said Hough made a demand of said Holbrook on the 7th day of April A. D. 1886 for the moneys he had then on hand belonging to said Township and that said amount was \$1693.39 and that said Holbrook refused to pay the same & had not paid it or any part thereof since.

Plaintiffs closed their case

Defendants then called Samuel N. Haze who being sworn said that he was elected School Trustee in January 1855, and continued to act as Trustee of said Township till 1857. that said Holbrook on his re-appointment as Township Treasurer in January 1855 gave a bond to said Board of Trustees, that Hitchcock one of the Trustees took such bond to send to the School Com^r by mail. On being asked to state if such bond was approved by said Trustees, and whether the same was signed by free holders the ~~the~~ plaintiffs objected on the ground that the bond itself should be produced.

D. L. Hough was called by defendants who stated that he once called on D. P. Jones who was School Commissioner of La Salle County sometimes about the fall of 1856 and enquired for bonds given by said Holbrook as Treasurer of said Township, that said Jones looked over his papers and gave him the bond now sued on, that said Jones told him that he could find no bond of said Holbrook of a later date. He also said that a few days before the trial of this cause he asked Hitchcock who is still one of the Trustees, about the bond claimed to have been given by said Holbrook on his re-appointment, and that said Hitchcock said that he had some recollection of something being said about such a bond, but nothing particular or definite, that he did not say that he had sent such bond to the School Com^r - that said Holbrook on behalf of defendants had a few days

since given him a written notice to produce said bond on trial of this cause, and that he was attorney in this suit for plaintiff, but that he, Hough had never had any such bond in his possession - had never seen any such bond & never knew anything about it.

E. S. Holbrook, one of defendants, being sworn testified that within about six months after the commencement of this suit he called on D. P. Jones the then School Comr at his office and requested him to produce said bond now spoken of by Haze, that said Jones searched for the same among his papers and told him that he could find no bond of said Holbrook of a later date than the one he gave to Mr Hough, that he, said Jones, stated that he kept all the papers of Townships 33, 1 in a certain pigeon hole and handed them to said Holbrook, said Holbrook looked them through particularly and he could not find the bond which he gave on his re-appointment, and spoken of by witness Haze; that afterwards he called upon Wells Wait who succeeded Jones as School Commissioner while he was such Commissioner and requested him to look for such bond, and gave him a written memorandum describing such bond requesting him to make search for it, that afterwards he saw said Wait who told him that he had made search for such bond among the papers of his office and that he could not find it.

O. P. Jones was called, and sworn, said he was School Commissioner of LaSalle County for four years previous to Nov 1857, that while such commissioner he could not tell the precise time, but within the last two years Mr. Hough called upon him for the bonds given by Holbrook as School Treasurer, that he had a system of arranging and keeping his papers, that he kept the papers of each Township (except the census reports) in pigeon holes, one for each Township and marked by their appropriate numbers, that he was afterwards called upon by Holbrook who asked for a bond given by him as Township Treasurer of a later date than the one he, witness, had given to Hough, that he thereupon looked through the papers of Township 33.1, and also through the papers of other pigeon holes near that in which the papers of 33.1 were kept, that he did not find such a bond; that he handed down the papers of 33.1 to said Holbrook for him to look through, that he did not recollect of receiving a bond from Hitchcock by mail or otherwise and if he did he must have put it among the papers of 33.1. that he, himself, was satisfied that there was no such bond in his office.

Defendants then put the same questions to said witness Mearns, plaintiffs objected on the ground that Wells Wait the present School Commissioner should be called as

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a witness. The Court sustained the objection and would not permit said witness to answer, to which decision defendants then & there excepted.

Defendants then offered to prove by said Marx that soon after said Stolbrook's re-appointment in January 1855, the then Trustees were together and had a paper before them which they treated as a proper bond given by said Stolbrook on his said re-appointment as Treasurer, and that they verbally approved of the same as such a bond. to which plaintiffs objected, and the Court sustained such objection and refused to hear such testimony, to which decision defendants then and there excepted.

This was all the testimony in the case ~

The Jury having found for the Plaintiffs, defendants moved for a new trial, on the ground that the Court had admitted improper evidence offered by plaintiffs, and excluded proper testimony offered by the defendant, which motion was overruled by the Court, to which decision defendants then and there excepted ~

All of said defendants then moved for an arrest of judgment on the ground that the declaration does not show good cause of action and that plaintiffs were not entitled to judgment, which motion was overruled by the Court.

The defendant thereupon tenders this his

bill of exceptions & prays the Court to Sign and seal the same, and that it may be made a part of of the record, which is accordingly done.

M. E. Hollister 
Judge &c "

And afterwards, to wit: On December 28th 1858 Defendants filed their Appeal Bond herein in the words and figures following, to wit—

"Know all men by these presents that we Edmund S. Holbrook, Ebenezer Higgins, William Paul and Therson D. Brewster, are held and firmly bound unto the Trustees of Schools of Township thirty three north of range one East of the 3^d P.M. of LaSalle County in the Penal sum of three thousand five hundred dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves, our heirs and administrators, jointly, severally and by these presents.

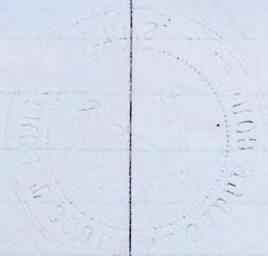
Witness our hands and seals this 27th day of December A.D. 1858.

The condition of the above obligation is such that whereas the said Trustees of Schools did at the November Term of the Circuit Court of LaSalle County A.D. 1858, recover a judgment against the above bounden Holbrook, Higgins and Paul for the same of two thousand dollars debt, and one thousand six hundred and ninety three dollars and thirty nine cents damages,

2/4

(to be discharged by the payment of the sum last named), and costs, from which judgment the said Holbrook, Higgins, and Paul have prayed an appeal to the Supreme Court of the State of Illinois, and the same has been allowed by order of said Court with Sheron D. Brewster or Frederick S. Day as security, now if the said Holbrook, Higgins and Paul shall prosecute their appeal with effect and shall pay and perform whatever judgment may be entered by said Supreme Court together with all costs interest and damages that may be awarded in case said judgment shall be affirmed or said appeal be dismissed, then this bond to be void - otherwise to remain in full force and virtue.

Edmund S. Holbrook Seal
 Ebenezer Higgins Seal
 J^{no} Paul Seal
 Sheron D. Brewster Seal



State of Illinois } I John H. Nash Clerk of the
Sasale County } Circuit Court in and for said
County and State do hereby certify that
the above and foregoing comprise a true full perfect
and complete record of all the papers on file and all
the orders of said Court as the same appear on file
and of record in the said cause of Trustees of Schools
of Farm 33, N. R. 1 E. S. P. No. 10 Edmund S.
Woolbrook & others

On Testimony Whereof I have personally seen
and the seal of said Court is
Attain this 12th day of April A.D. 1839
J. H. Nash Clerk

Assignment of Errors

- The appellants now come by Edmunds
& Aldridge & Woolbrook and say that in
the records and proceedings there is man-
ifest error & assign for error
1. Said court erred in overruling the
demurer by Part 1st of the declaration
 2. The court erred in not carrying back
plaintiffs demurer to defendants 3rd & 4th
pleas to the declaration
 3. The court erred in permitting illegal
testimony on the part of plaintiffs
below to be given to the jury
 4. The court erred in excluding proper
testimony offered by defendant from
the jury.
 5. The court in overruling defendants
motions for a new trial & in award
of jury &
 6. The court erred in entering judgment for plaintiffs

¶ Said proceedings are otherwise
erroneous & unclear
and appellants pray that they may
be set aside

Amicus J.C.
Judge W. H. Hollbrook
for app^s.

1857 202
Edmund S. Johnson
William Paul &
Edw. Higgins

¹⁰
Trustees of Schools
of Town 33, N. R.
D. E. 3^d P. M.

Recd

H. S. pd Clerk

Filed April 17, 1859
L. Leland
Clerk

Fees \$10.00 paid
By E. S. Johnson

State of Ill's--Supreme Court.

THIRD GRAND DIVISION—APRIL TERM, 1859.

EDMUND S. HOLBROOK,
EBENEZER HIGGINS, and
WILLIAM PAUL,
vs.
THE TRUSTEES OF SCHOOLS, OF
TOWNSHIP 33, R. 1.

} Appeal.

ABSTRACT OF RECORD.

This was an action of debt, commenced Oct. 27, 1856, by appellees vs. appellants, on bond given by Holbrook as School Treasurer, with Higgins and Paul as security.

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The declaration is in these words, (after the usual commencement):

"For that whereas the said defendants heretofore, to wit, on the 3d day of April A. D. 1850, executed and delivered to said plaintiffs their writing obligatory, which writing obligatory is in substance as follows:

STATE OF ILLINOIS,
LaSalle County.

" 7

KNOW ALL MEN BY THESE PRESENTS, That we, Edmund S. Holbrook, Ebenezer Higgins and William Paul, are held and firmly bound, jointly and severally, unto the Trustees of schools of township thirty-three, north of range one, east, of said county, in the penal sum of two thousand dollars, for the payment of which we bind ourselves, our heirs, executors, and administrators, firmly by these presents. In witness whereof we have hereunto set our hands and seals this 3d day of April, A. D. 1850.

The condition of the above obligation is such that if the above bounden Edmund S. Holbrook, township treasurer of township thirty-three north, range one, east of the third P. M., in the county aforesaid, shall faithfully discharge all the duties of said office according to the laws which now are or may hereafter be in force, and shall deliver to his successor in office all monies, books, papers, securities and property in his hands as such township treasurer, then this obligation to be void, otherwise to remain in full force and virtue.

EDMUND S. HOLBROOK, } SEAL.
WILLIAM PAUL, } SEAL.
E. HIGGINS, } SEAL.

Approved and accepted by us.

Theron D. Brewster, } Trustees of Schools.
G. A. Lindley, }

" 8

And the plaintiffs aver that said Edmund S. Holbrook continued to hold said office of township treasurer until the appointment of David L. Hough as his successor, as hereafter mentioned, and that as such township treasurer said Holbrook did receive a large sum of money, to wit: the sum of two thousand dollars, which sum came to and was in the hands of said Holbrook, as such township treasurer; and that afterwards, to wit: on the first day of April, A. D. 1856, David L. Hough was duly appointed treasurer of said township, and accepted said appointment, and gave the bond required by law, and was duly qualified to act as such township treasurer, and then and there became the successor of said Edmund S. Holbrook as township treasurer of said township, of all which the said Holbrook had notice. And said Holbrook then and there had in his hands as such township treasurer, the sum of money aforesaid; and afterwards, to wit: on the same day the said David L. Hough demanded said sum of money of said Holbrook, then and there refused and neglected to pay said sum of money to David L. Hough, though often requested to do so, nor have the said defendants, or either of them, ever paid the said sum of money to said Hough," &c., with the usual conclusion.

" 10

" 12

" 13

Defendants filed a general demurrer, which was overruled by the Court. Paul abided by the demurrer. Holbrook and Higgins filed pleas.

1. That Hough did not become the successor of Holbrook as alleged: issue to the country.

2. That Holbrook did not neglect and refuse to pay &c., in manner and form &c., to his successor in office: issue to the country.

To the 3d and 4th pleas as first filed, plaintiffs filed a general demurrer which was sustained by the court. Leave to amend was granted.

The third plea as amended, was as follows:

" 11

"That the said Holbrook was appointed to the said office of township treasurer, by Theron D. Brewster, Giles A. Lindley and John L. McCormick, which is the same appointment mentioned in said declaration, who were then the trustees of said township: that it was to said board of trustees, represented by said Brewster.

Paul's demurrer

Lindley and McCormick, that said bond in said declaration mentioned was given; that afterwards, A. D. 1855, to wit: on the day appointed by law for the election of school trustees, Alexander Hitchcock, William C. Smith and Samuel N. Maze were duly elected trustees of schools of said township, and entered upon said office and became the successors of said Brewster, Lindley and McCormick, whose term of office then expired; and afterwards, to wit: on the 15th day of January, A. D. 1855, the said Hitchcock, Smith and Maze, as the board of trustees, re-appointed said Holbrook as treasurer of said board; that said Holbrook thereupon gave to said board the bond required by law, that is to say a penal bond, signed by said Holbrook and two freeholders, who were not members of said board, so appointing him, conditioned that said Holbrook should faithfully perform all the duties of treasurer of said township according to law; which was duly received and approved by a majority of said trustees last aforesaid; whereby the said Holbrook, thus duly re-appointed and qualified, became as the treasurer of said board represented by said Hitchcock, Smith and Maze, the successor of himself as the treasurer of the said board of trustees represented by Brewster, Lindley and McCormick. And said defendants aver that said Holbrook, while acting as treasurer as first aforesaid, under the trustees first aforesaid, did not, before said re-appointment and the execution of said bond last aforesaid, receive any of the monies in said declaration mentioned, (with verification).

" 15.

To which plaintiffs filed replications.

" 18

1st. That said Holbrook was not re-appointed and qualified in manner and form &c.

2d. That he did not give such second bond &c.

" 19

3d. The said monies were received by Holbrook before his said re-appointment; and issue joined.

" 15

The 4th plea was much like the 3d, adding the names of the freeholders who signed the bond and the penalty of the bond, and alleging "that Holbrook, under said second appointment as successor of himself under said first appointment, received all of the moneys which said Holbrook had in his hands at the expiration of his said term of office, as township treasurer, under said first appointment."

1st. Replication to this plea that Holbrook was not re-appointed and did not file bond, &c.

2d. That Holbrook did not file such a bond under a re-appointment, &c.

3d. That the monies sued for were received by Holbrook prior to his re-appointment, and issues thereon.

On the trial before a jury the plaintiffs read in evidence from the records of the trustees of schools the following entries:

" 1850.

The newly elected trustees met at the office of E. S. Holbrook.

Present, T. D. Brewster, J. L. McCormick.

On motion voted that E. S. Holbrook be appointed treasurer of schools of township 33, 1."

Also the following:

" BOARD ROOM, April 6th, 1850.

Board of trustees met.

Present, T. D. Brewster, G. A. Lindley.

The bond of the treasurer was presented and approved."

The bond described in the declaration was read without objection.

Plaintiffs then offered to read in evidence the following entry:

" March 19, 1856.

Board met at office of E. S. Holbrook, at the call of the president—no meeting having taken place on the 10th.

Present, A. B. Hitchcock, James Armour and Samuel N. Maze.

E. S. Holbrook, Treasurer.

It was moved by James Armour, that we go into an election of a new treasurer. Carried. Jamer Armour voting aye and Samuel N. Maze voting no.

The treasurer, E. S. Holbrook, protested against the proceeding.

On motion, voted that the vote be had *VIVA VOSE*.

On motion, David L. Hough was elected treasurer and required to give bond in the sum of ten thousand dollars, to be approved by the *board*.

On motion, voted that the president be requested to notify D. L. Hough of his election.

On motion adjourned.

A. B. HITCHCOCK. Pres.

E. S. HOLBROOK, Treasurer."

to the reading of which defendants objected, on the ground that it did not appear that the office of said Holbrook as treasurer expired at that time by limitation of law—or that it was a proper time for such an election, or that there was any vacancy in the office of treasurer at that time.

On this point defendants then read from said records the following entries:

“Board Room, Jan. 15, 1855.

The board of trustees met, consisting of the newly elected members, A. B. Hitchcock, Samuel N. Maze and Wm. C. Smith, and E. S. Holbrook treasurer.

The board organized, and on motion voted that E. S. Holbrook be re-appointed treasurer of the board, and that he give the bond required by law.”

Also the following:

“Nov. 3d, 1855.

Board of trustees met at the office of E. S. Holbrook.

Present, A. B. Hitchcock and S. N. Maze.

E. S. Holbrook, Treasurer and clerk of the board.

“ 26

On motion voted that treasurer call an election of trustee, to fill the vacancy occasioned by the removal of Wm. C. Smith from the township.”

Several other entries were read, showing that Holbrook acted as treasurer till the meeting of March 19, 1856.

Also the following:

“Peru, Feb. 12th, 1856.

The board of trustees met at the office of E. S. Holbrook.

Present, A. B. Hitchcock, Samuel N. Maze, James Armour.

On motion, the board adjourned to meet on the 10th of March next.”

The court then permitted said entry of the 19th to be read, to which defendants excepted.

Plaintiffs then offered to read in evidence a bond given by said Hough to the board of education of said township, on which was written:

“ 27

“Approved by
A. B. Hitchcock, } Directors of the Board
James Armour, } of education.”
Sam'l N. Maze, }

To the reading of which defendants objected, on the ground that it did not appear that said bond was properly approved by the board of education.

“ 28

D. L. Hough was then called as a witness, by plaintiffs, who testified that he was the school treasurer referred to in said bond; that he did not know that any record was made by the board of trustees of the approval of said bond; that he gave said bond to Hitchcock; don't know whether said Armour was present or not; don't know whether said trustees, when they wrote their approval on the bond, were together or not, or whether they ever acted together concerning the approval of it. Defendants admitted that said ~~Holbrook~~, Armour and Maze were the acting trustees at the date of said bond and that those names were in the handwriting severally. *there*

Hitchcock

On this proof the court permitted said bond to be read in evidence, to which defendants excepted.

Plaintiffs made proof of demand on said Holbrook, by Hough, on the 7th of April, A. D. 1856, for the township monies on hand which, with interest from that time, amounted to \$1693.39.

“ 29

Plaintiffs closed their case.

Defendants then called Samuel N. Maze as a witness, who said that he was elected school trustee in January, A. D. 1855, and continued to act till 1857; that said Holbrook, on his re-appointment as township treasurer in January, 1855, gave a bond to said board of trustees; that Hitchcock, one of the trustees, took such bond to send to the school commissioner by mail.

On being asked to state if such bond was approved by said trustees and whether the same was signed by freeholders, the plaintiffs objected, on the ground that the bond itself should be produced.

Hough being called as a witness on this point, stated that he once called on D. P. Jones, who was school commissioner of La Salle county sometime about the fall of 1856, and called for bonds given by said Holbrook, as treasurer of said township; that said Jones looked over his papers and gave him the bond now sued on; that said Jones told him that he could find no bond of said Holbrook of a later date; witness said that a few days before this trial he asked Hitchcock, who is still one of the trustees, about the bond claimed to have been given by said Holbrook on his re-appointment—and that said Hitchcock said that he had some recollection of something being said about such a bond, but nothing particular or definite; that he

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did not say that he had sent such bond to the school commissioner; that said Holbrook had a few days before given him a written notice to produce such bond on trial and that he was attorney for plaintiffs.

Said Holbrook being sworn said, that within about six months after the commencement of this suit he called on D. P. Jones, the then school commissioner, at his office, and requested him to produce said bond spoken of by witness, Maze; that said Jones searched for the same among his papers and told him that he could find no bond of said Holbrook of a later date than the one he gave to Mr. Hough; that he, said Jones, stated that he kept all the papers of township 33, 1, in a certain pigeon-hole and handed them to said Holbrook, said Holbrook looked them through particularly and he could not find the bond which he gave on his re-appointment and spoken of by witness, Maze; that afterwards he called upon Wells Wait, who succeeded Jones as school commissioner, and while he was such commissioner, and requested him to look for such bond, and gave him a written memorandum describing such bond requesting him to make search for it; that afterwards he saw said Wait, who told him that he had made search for such bond among the papers of his office and that he could not find it.

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D. P. Jones was called as a witness, who said that he was school commissioner of La Salle county for four years previous to Nov., 1857; that within the last two years Mr. Hough called on him for the bonds given by Holbrook as school treasurer; that he had a system of arranging and keeping his papers; that he kept the papers of each township (except the census reports) in pigeon holes, one for each township, and marked by their appropriate numbers; that Holbrook afterwards called on him for a bond, given by him as township treasurer, of a later date than the one he, witness, had given to Hough; that he thereupon looked through the papers of township 33, 1, and also through the papers of other pigeon holes near that in which the papers of 33, 1, were kept; that he did not find such a bond; that he handed the papers of 33, 1, to said Holbrook for him to look through; that he did not recollect receiving a bond from Hitchcock by mail or otherwise, and if he did, he must have put it among the papers of 33, 1; that he himself was satisfied that there was no such bond in his office.

Defendants then put the same question to said witness, Maze; plaintiffs objected, on the ground that Wells Wait should be called.

The court held that Maze could not answer, to which decision defendants excepted.

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Defendants then offered to prove by said Maze, that soon after said Holbrook's re-appointment in Jan., 1855, the then trustees were together and had a paper before them, which they treated as a proper bond, given by said Holbrook on his said re-appointment as treasurer; and that they ~~verbally~~ ^{verbally} approved of the same as such bond.

Plaintiffs objected. The court sustained the objection and defendants excepted.

Verdict was found for the plaintiffs.

Motion for new trial was made by Holbrook and Higgins, which was overruled by the court and defendants excepted.

Motion in arrest of judgment was then made by all the defendants, which was overruled and defendants excepted.

POINTS AND AUTHORITIES BY APPELLANTS.

1. The Court erred in overruling defendant Paul's demurrer to the declaration. The declaration is defective in not showing more definitely in what way Hough became the successor of Holbrook. A lawful appointment on a lawful occasion for it—as the expiration of Holbrook's term of office or a vacancy—the execution of a bond with security according to the requirements of the law, and a proper approval thereof, were all to precede the succession, all these were matters of law and should have been set forth for the judgment of the court.

See 2 Gil. 426. Byrne vs McNulty, and authorities there cited. Com. Dig. Pleader, C. 60. 1 Ch. Pl. 326, and notes. 4 Day's (Conn.) Rep. 313. Wright vs. Tuttle 4 Wend. 553. ~~Thompson vs. Van~~ 24 Wend. 153. Glover vs Tuck, Thomas refs =

It should appear by allegation that Holbrook continued to act as treasurer until the time that Hough was appointed under the appointment on which the bond sued on was given. The presumption is that he did not—for the law requires an appointment every two years—and the presumption also is that officers perform their duty. (See Secs. 23 and 32 of the school law). Holbrook was appointed in 1850, Hough in 1856.

It should appear by allegation what the undertaking of the parties to the bond declared on was—which does not appear otherwise than by the bond itself which is set out "in substance"—leaving it for the court to find out by inspection what their undertaking was.

It should appear also that said bond was formally approved.

2. The court erred in permitting the entry of the 19th of March in the school records, to go to the jury. There was no vacancy in the office of treasurer, and Holbrook's term of office had not expired, nor was it about to expire by limitation of law. When the authority of appointment was once executed it could not be again exercised till there was a vacancy in the office.

See Sec. 32 of school laws.

Sec. 23, Miss. 556 and authorities there cited. 1 How. 479. ~~6 Yerg. 167, 169.~~ Thomas vs Burris, Bricks Hous vs City of Pittsburg, 8 Branch v. Griffith vs Fraser, 6 Yerg. (Secus vs Brooks) 767, 18 Wend 515. People vs John Thorne

3. The court erred in permitting the bond given by Hough without further proof of its approval by the board. The law (Sec. 55) and the order of appointment required its approval by the board. The approval of the bond was one of a judicial nature, and it should have been made to appear by proper testimony that the trustees met and that a majority in concert approved.

See 17 Com. Law, Rep. 291.

Power to three to assess property—all must meet. 85. do. 403.

Two arbitrators had power to select a third—a selection separately not good. 66. do. 944.

4. The court erred in excluding from the jury the testimony of Maze about the bond given by Holbrook on his re-appointment. Either the plaintiffs had this bond and failed to produce it on notice—or there was sufficient evidence of its loss—or that it was not in defendants' power.

3 Gil. 105, Rector vs Rector et al. 2 Gil. 125, Bester vs Powell et al. 15 Ills., 579, Doyle vs Wiley.

(2.)

The fact offered to be proved by Maze as to the action of the trustees concerning the bond given by Holbrook on his re-appointment, was sufficient to discharge his former bondsmen, at least taken in connection with the fact that Holbrook continued for over a year to act as the treasurer of that board after his re-appointment.

5. For the admission of such improper testimony offered by plaintiffs and the rejection of proper testimony offered by defendants, the court erred in overruling defendants' motion for a new trial.

6. The court erred in overruling defendants' motion in arrest of judgment, on account of the above named defects of the declaration.

Thomas A. Eldridge
L. C. Holbrook

187-1876
Waltham
Trustees of Schools
Abstract of Brief

Filed April 28, 1859
L. Leland
Clerk