No. 12300

Supreme Court of Illinois

Exachus.

vs.

Canal Trustees.

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V. H. Eachus
vs
Canal Trustees

1856

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12300

1856

State of Illinois }
County of Cook } SS

Pleas before the Honorable John M Wilson Judge of the Cook County Court of Common Pleas within and for the County of Cook and State of Illinois at a regular term of the Cook County Court of Common Pleas begun and holden at the Court House in the City of Chicago in said County on the Second Monday being the Eleventh day of September in the Year of our Lord one thousand eight hundred and fifty four, and of the Independence of the United States the Seventy ninth.

Present the Hon John M Wilson Judge
Daniel McDeroy Prosc Attorney
Cyrus P Bradley Sheriff
A West, Walter Kimball Clerk

Be it Remembered that heretofore to wit on the Twelfth day of September in the Year of Our Lord One thousand Eight Hundred and fifty one Virgil H Eachus plaintiff by E. W Tracy his attorney and filed in the office of the Clerk of the Cook County Court of Common Pleas a Precipe for Summons against the Trustees of the Illinois & Michigan Canal, defendants, which said precipe is in words and figures as follows to wit

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Precipe:

Virgil H. Eachus
vs
The Trustees of the
Illinois & Michigan Canal

Cook County Court of
Common Pleas.
Trespass on the case
Dam: $2500.

Clerk please issue Summons returnable &c directed to the Sheriff of Will County

C. W. Tracy
Atty for Pltff

Sept. 12. 1851.

And afterwards, to wit on the fifteenth day of October in the year last aforesaid, a Summons issued in said Cause in words & figures as follows, to wit.

Summons.

State of Illinois
Cook County } S.S.

The People of the State of Illinois to the Sheriff of Will County Greeting. We command you that you summon the Trustees of the Illinois and Michigan Canal if they shall be found in your County personally to be and appear before the Cook County Court of Common Pleas of said Cook County on the first day of the next Special Term thereof, to be holden at the Court House in the City of Chicago in said County on the 4th Monday of October instant to answer unto Virgil H. Eachus in a Plea of Trespass on the case to the damage of the said Plaintiff as he says in the sum of Twenty five hundred dollars

And have you then and there this Writ, with an Endorsement thereon, in what manner you shall have executed the same,

Witness Walter Kimball Clerk of our said Court and the Seal thereof at the City of Chicago in said County this 15th day of October A. D. 1851.

L. S.

Walter Kimball Clerk

Sheriffs Return on Sum.

I return this Summons executed and that I executed the same by reading and leaving a copy of the within Summons to and with William Gooding Secretary of the Board of Trustees of the Illinois and Michigan Canal, this this 17th day of October 1851.

R. Cunningham
Sheriff of Will County
Illinois.

And afterwards to wit on the Twenty Seventh day of October in the Year aforesaid, said day being one of the days of the October Special Term of said Court in the Year aforesaid the following proceedings were had in said Cause & entered of Record, to wit,

Virgil H Eachus
vs
The Trustees of the Illinois & Michigan Canal
} Trespass on Case

Order leave to Amd Decl.

And now upon this day comes the said plaintiff by E. W. Tracy his attorney and on his motion It is Ordered that leave be granted to file an amended declaration in this Cause.

And thereafter to wit on the twelfth day of November in the Year aforesaid, said Plaintiff filed in said Cause an amended declaration in words and figures as follows to wit

Declaration.

Virgil H. Eachus
vs
The Trustees of the Illinois & Michigan Canal
} In the Cook County Court of Common Pleas, of the October Special Term A. D. 1851.

State of Illinois
County of Cook } S.S.

The Trustees of the Illinois and Michigan Canal were summoned to answer unto

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Virgil H. Eachus who is the Sole heir of Mary Eachus who died before the commencement of this suit, in a Plea of Trespass on the case. And thereupon the said Virgil H. Eachus by E. H. Tracy his Attorney complains.

For that whereas before and at the time of the ~~commencement~~ committing the grievances by the said Defendants hereinafter mentioned, the said Mary Eachus of whom the said Plaintiff is sole heir as aforesaid was and until her decease continued to be and ever since her decease the said Virgil H. Eachus hitherto hath been and still is lawfully possessed of certain messuages, lands and tenements in Porter County in the State of Indiana, one tract of said lands being known and described as the fractional South West quarter (North and South of the Calumet River) of Section Eighteen in Township Thirty six North of Range Nine West of the Second Principal Meridian and another tract of said Land being known and described as Lot number two of Section Thirteen in Township Thirty six North of Range Ten West of the Second principal Meridian

Yet the Defendants well knowing the premises but contriving and intending to injure and aggrieve the said Mary Eachus in her lifetime and the said Plaintiff, since her decease, heretofore to wit on the 1st day of June A. D. 1848 caused to be erected a certain dam across the said Calumet River in the said County of Cook, and have ever since kept the said dam there up to the time of the commencement of this suit, whereby and by reason of the erection and continuing of said dam, the Water flowing in and into said River, and the Water which was wont to flow and otherwise would have flowed therein was, and up to

the time of the commencement of this suit hath been caused to accumulate and collect and be retarded and flow back and upon said Lands and inundate and submerge them, and render them wholly useless And said Plaintiffs avers that the inundation and flow and submergement so occasioned as aforesaid at the time aforesaid is still continued and ever since has been by the cause aforesaid and then and there inundated and overflowed and submerged and rendered wholly useless and ever since have done to the commencement of this suit, a large portion of said lands to wit one hundred and sixty acres of great value to wit of the value of One thousand dollars, and rendered the same wholly useless, and by reason thereof the same has been wholly useless up to the time of the commencement of this suit, and that said inundation and flow so occasioned as aforesaid, also swept away and destroyed Twelve hundred rods of fence, on said lands, of great value, to wit, of the value of Three hundred dollars, and a large and commodious Dwelling house on said lands of great value, to wit, of the value of Six hundred dollars, and a bridge of great value, to wit, of the value of Two hundred dollars, and a barn on said premises of great value to wit of the value of Two hundred dollars and a shed of great value to wit of Two hundred dollars and divers other buildings of great value, to wit, of the value of Two hundred dollars, all situated and being upon said Lands and premises, and rendered wholly useless, a valuable and good well of the value of Fifty dollars thereon, and a valuable orchard thereon of the value of 200 dollars all in the lawful possession then and there of said Mary Eachus Whereby Mary Eachus was deprived during her life time, and said Plaintiff since her decease has been deprived of his said property and

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deprived of the profits and advantages he otherwise might and would have derived and acquired from said lands and tenements and bridge, and orchard, and well, and fences to wit in the County of Cook aforesaid.

And whereas also long before and at the time of the committing of the grievances hereinafter next mentioned the said Mary Eachus was and up to the time of her decease continued to be lawfully possessed of certain other messuages and lands in Porter County aforesaid, one tract of said Lands being known and described as the fractional South West quarter (North and South of the Calumet River) of Section Eighteen in Township Thirty Six North of Range Nine West of the Second Principal Meridian, and another tract of said lands being known and described as Lot Number Two of Section Thirteen in Township Thirty Six North of range Ten West of the Second Principal Meridian, and since her decease the said Plaintiff, who was and is sole heir of the said Mary, hath hitherto continued to be and still is lawfully possessed of said messuages and lands.

Yet the said Defendants well knowing the premises but contriving and intending to injure and aggrieve the said Mary Eachus in her life time, and the said Plaintiff, since her decease, heretofore to wit, on the 1st day of June A. D. 1848 caused to be erected a certain dam across the said Calumet River in the said County of Cook, and have ever since kept and continued the said dam there up to the time of the commencement of this suit, whereby and by reason of the Erection and continuance of said dam the Water flowing in and into said river, and the water which was wont to flow and would otherwise have flowed therein was, and up to the time of the co-

commencement of this suit hath been caused to accumulate and collect, and be retarded and flow back upon said lands and inundate and submerge them and render them wholly useless And said Plaintiffs avers that the inundation and flow and submergement so occasioned as aforesaid at the time aforesaid is still continued and ever since has been by the cause aforesaid and then and there inundated and overflowed and submerged and rendered wholly useless, and ever since hath done up to the commencement of this suit, a large portion of said lands, to wit, One hundred and sixty acres of great value to wit, of the value of One thousand dollars.

Whereby said Mary Eachus was deprived during her lifetime, and said Plaintiff has been since her decease, deprived of said property and lands, and of the use thereof, and of the profits and advantages which might otherwise have been derived therefrom to wit in the County of Cook aforesaid.

And whereas also the said Plaintiff long before and at the time of committing the grievances, hereinafter next mentioned was and from thence hitherto hath been, and still is lawfully possessed of certain other messuages and lands in Porter County aforesaid, one tract of said Lands being known and described as the fractional South West Quarter (North and South of the Calumet River) of Section Eighteen in Township Thirty six North, of Range Nine West of the Second Principal Meridian, and another tract of said Land being known and described as Lot Number Two of Section Thirteen in Township Thirty six North, of Range Ten, West of the Second Principal Meridian

Yet the said Defendants well knowing the Premises, but contriving and wrongfully and unjustly

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intending to injure and aggrieve the said Plaintiff and to annoy and incommode him in, and deprive him of the use possession and enjoyment of said Messuages and lands heretofore to wit on the 27th day of September A.D. 1849 Kept and continued, and caused to be kept and continued, a certain dam across the said Calumet River in said County of Cook, before then wrongfully erected and caused by them to be built and erected, for a long space of time to wit, hitherto to wit, from the day and year aforesaid to the time of the commencement of this suit. By means of which said Premises the Water flowing in and into said River, and the Water which was wont to flow and otherwise would have flowed therein was, then and there, and ever since, to the time of the commencement of this suit, hath been caused to accumulate, and collect and be retarded, and flow back upon said lands and inundate and submerge them, and render them wholly useless And said Plaintiff avers that the inundation and flow and submergement so occasioned as aforesaid is still continued and ever since has been by the cause aforesaid, and then and there inundated and overflowed and submerged, and rendered wholly useless, and ever since hath done up to the commencement of this suit, a large portion of said lands to wit, One hundred and sixty acres, of great value, to wit, of the value of One thousand dollars, Whereby the said Plaintiff hath been for a long space of time to wit for the time aforesaid, deprived of said property and Lands, and the use thereof, and of the profits and advantages which he might otherwise have derived therefrom, to wit in the County of Cook aforesaid. Wherefore the said Plaintiff saith that he is injured and hath sustained damage to the

amount of Two thousand five hundred dollars and therefore he brings his Suit.

E. N. Tracy

Pltffs Atty.

And afterwards to wit, on the Ninth day of February AD 1852 the said Defendants by J. N. Arnold their Attorney files their Demurrer to said Plaintiffs Declaration in said Cause, as follows to wit,

Cook County Court of Common Pleas:

The Trustees of the Illinois and Michigan Canal . .
as
Virgil H. Eachus . . . . .

And the said Trustees defendants in this suit by J. N. Arnold their Attorney, come and demur to the said Plaintiffs declaration and say that the matters and things therein contained in manner and form as therein set forth are insufficient in law and that they, the said Defendants are not bound to answer the same. Wherefore for want of a sufficient declaration they pray Judgment thereon.

And the said Defendants assign the following special causes of Demurrer to the whole Declaration and to each count thereof severally. First. The process in this cause was served upon the Defendants in the County of Will, where the said Corporation is located, there being no averment in the declaration that the cause of action accrued in the County of Cook, nor that the Plaintiff resides in the County of Cook, the declaration does not show that this Court has jurisdiction of the cause.

Second. The Defendants being a Corporation located in the County of Will, and process being served upon them there, there is no averment in the declaration

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giving, nor has this Court jurisdiction of the cause
Third. The Legislature of the State of Illinois, authorizing the construction of the Illinois & Michigan Canal having provided by law for a Board of Appraisers to assess damages caused by the construction thereof, the Board of Appraisers is the proper tribunal to assess Plaintiffs damages, if any - and the Plaintiff has no right to sue the Defendants in an action at law thereof
Fourth. The said Plaintiff does not aver with sufficient particularity, the said dam mentioned in his said Declaration.
Fifth. No action lies in this Court for an injury to lands situate in the State of Indiana by the erection of a dam in the State of Illinois, especially when said erection, as in this case, was made in and by authority of the laws of said State of Illinois.

And the said Defendants further assign the following especial causes of Demurrer to the first and second counts in the declaration of said Plaintiff namely
The said Declaration not showing Title in Mary Eachus and the injury, if any) being to her possession simply as to so much of the said Declaration as seeks to recover damages for the injury in her lifetime no action can be maintained in the name of Virgil H. Eachus therefor, as her at Law, because the action does not survive, and if it did, the action should be brought in the name of her Administrator

And so far as Virgil H. Eachus seeks to recover damages for an injury to the premises, whilst in his possession, the allegation should be for the continuance of a nuisance and not for its erection. and again it does not appear from the declaration what time Mary Eachus died, what time Virgil H. Eachus went into possession, nor from what time, if at all, he is entitled

to recover and therefore the Declaration is defective in not alleging time.

And each said Count is defective in not averring time and place of the material allegations.

Wherefore the said Defendant prays judgment on each of the said Counts severally, and whether they are bound to answer the same

J. N. Arnold. Defts Atty.

And thereafter to wit on the sixth day of February A. D. 1852 the said Plaintiff filed his Joinder to the above Demurrer, which is in the words and terms following, namely.

Virgil H. Eachus
vs
The Trustees of the Illinois and Michigan Canal } In Cook County Court of Common Pleas.

And the said Plaintiff says that the said Declaration is sufficient in Law.

J. A. Collins & E. W. Tracy
Pltffs Attys.

And afterwards to wit on the Eleventh day of September in the year of Our Lord one thousand eight hundred and fifty four, said day being one of the days of the September Term of said Cook County Court of Common Pleas in the year aforesaid, the following proceedings were had in said Cause and entered of Record, to wit.

Virgil H. Eachus
vs
The Trustees of the Illinois and Michigan Canal } Trespass on Case

This day comes the

said plaintiff by E. W. Tracy his attorney, and the defendants by Annsel & Day their attorneys also came, and the Court after hearing the argument of Counsel on the said defendants demurrer to said plaintiffs declaration in this cause, and after due consideration, and being now fully advised in the premises sustains said demurrer. And the plaintiff thereupon then enters his exceptions to the opinion of the Court herein.

Therefore it is considered that the said defendants do have and recover of the said plaintiff their costs and charges by them about their defense in this suit expended and have execution therefor.

State of Illinois }
County of Cook } S.S.

I Walter Kimball Clerk of the Cook County Court of Common Pleas within for said County and State do hereby certify that the foregoing is a true and correct transcript of the precipe, Summons, pleadings and order entered of Record in said Court in the case of Wm H Eachus Plaintiff and The Trustees of the Illinois & Michigan Canal defendants, as the same appear from the original papers in said Cause now on file in my office.

In Testimony whereof I have hereunto subscribed my name and affixed the Seal of said Court at the City of Chicago this 7th day of May A.D. 1855.

Walter Kimball
Clerk

~~57~~ 24

Virgil W Cachet

vs

The Trustees of the

Illinois & Michigan Canal

Transcript

Filed May 30th 1855

L. Leland Clk.

E. W. Tracy Pltffs Atty.

Fees $3.50

Power of Attorney

February 22 1855 Filed May

STATE OF ILLINOIS, } ss. **The People of the Ssate of Illinois,**
Supreme Court,

To the Sheriff of the County of Will — **Greeting:**

BECAUSE in the record and proceedings, and also in the rendition of the judgment of a plea which was in the ~~circuit~~ court of *Common Pleas of Cook* county, before the Judge thereof, between *Virgil H Eachus plaintiff, and the Board of Trustees of the Illinois & Michigan Canal*

defendant, it is said that manifest error hath intervened, to the injury of the said *Eachus*

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 Ottawa, 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 ~~Board of~~ *Trustees of the Illinois & Michigan Canal*

that *they* be and appear before the Justices of our said Supreme Court, at the next term of said court, to be holden at Ottawa, in said state, on the *second* Monday in *June* next, to hear the records and proceedings aforesaid, and the errors assigned, if *they* shall see fit; and further to do and receive what said court shall order in this behalf; and have you then there the names of those by whom you shall give the said *Trustees* —

notice, together with this writ.

WITNESS, the Hon. ~~**Samuel H. Treat,**~~ *John D. Caton* Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *30th* day of *May* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*five.*

L. Leland Clerk of the Supreme Court.
By P. K. Leland Dep. Clerk.

L2300-2

24 47

Uriah H. Eddins

vs

Canal Trustees

Sci. fa.

Filed June 4. 1855.
L. Leland Clk.

I have served this writ by reading in the hearing and leaving a copy with William A. Gooding Secretary of Board of Canall Commissioners June 2d 1855

Fees

1 Service	50
1 Copy	50
5 Miles travel	25
Return	10
	$ 1.35

P. P. Scarritt Shff
Will Co

To be served on Secretary of Board immediately

Tipit H. Pachus
vs
Trustees of Illinois
Wesleyan Case

Supreme Court
of the State of Illinois
January Term
A.D.
Cook

And now comes the
said plaintiff in
Error and saith that
in the record and
proceedings herein and
in the judgment rendered
in said cause there is
manifest Error in
this, to wit; That the
said Cook County
Court of Common
Pleas Erred in sustaining
the demurrer of the
said defendants to the said plaintiffs
amended declaration
2. That said Cook County
Court of Common Pleas
Erred in rendering
judgment for costs
against the said
plaintiff

Wherefore the said plaintiff
prays that the said
judgment of the said
Cook County Court

[12360-9]

Common Pleas may be reversed & annulled for wholly taken for naught and for nothing estimated and that the defendants be in mercy, and that this cause may be remanded for further proceedings therein.

E. W. Stanton
Atty for
Defts in Error

and Opt in Error says there is no error & prays for an affirmance of the judgment.

July 11. 1855 Arnold for
Deft in Error

57

Eachus
v
Canal Trustees

Apt. of mers

Filed July 11 1855.
L. Leland Clk.

Order filed July 11. 55
L. Leland Clk.

WRIT OF ERROR.

STATE OF ILLINOIS, } ss. **The People of the State of Illinois,**
Supreme Court,

To the Clerk of the ~~Circuit~~ Common Pleas Court, for the county of Cook **Greeting:**

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the ~~circuit~~ said court of *Common Pleas* ~~county~~, before the Judge thereof, between *Virgil H. Eachus*

plaintiff, and *Board of Trustees of the Illinois & Michigan Canal*

defendants, it is said manifest error hath intervened, to the injury of the aforesaid *Eachus* 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 Ottawa, in the county of La Salle, on the *second Monday in June* 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. ~~**SAMUEL H. TREAT,**~~ *John D. Caton* Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *30th* day of *May* in the Year of Our Lord One Thousand Eigh Hundred and Fifty-*five*.

L. Leland Clerk of the Supreme Court.
By P. K. Leland Deputy Clerk

42300-17

24

Virgil H. Eachus
vs,
Board of Trustees
Ill. & Mich. Canal

Writ of Error.

Filed May 30th 1855.
L. Leland Clk.
By P. K. Leland Dep.

Eachus v. Canal Trustees

Where, however, an injury has been caused by an act done in one County to land &c. situate in another, (Sutton v. Clarke 6 East 799 Gibbs 3 Taunt. 29.) or whenever the action is founded upon two or more material facts, which took place in different Counties, the venue may be laid in either.

2 Taunt. 252.
7 Co. 1.
3 Leon. 141.
2 T. R. 241.
7 id. 583.
Com. Dig. Action. N. 3, 11.
1 Ch. Pl. 269.

Bogert & Lewis v. Hildreth, 1 Caines's Rep. 2.
Marshall v. Hosmer, 3 Mass. Rep. 23.

Who may and who may not sue.

1. Ch. Pl. 69.
Sir W. Jones, 174;
1 B & P. 330, n. a
Laughlin v. Dorsey, 1 Harr & McHen. 224.
1 Ch. Pl. 66
Cro. Jac. 231.
1 Chit. Eq. Dig. 395.

[13380-12]

Eachus v Trustees of Canal

Tracy for Plff—

1 Chit Pl 269
6 Taunt R 29
2 do 252
7 Coke 1
2 Leon 141
2 Term 241
7 do 583
Comy Dig Act N. 311

1 Burrs & McHenry 224
4 Maul & Selw 53

10 Ohio R 210
3 Shepley R 89
9 Vermt " 411
15 Mass " 284
1 Brockenb R 203
1 Day R 263
1 Bos & Pull R 330 note a
Croft Jac 231
2 Denio R 639
1 Caine R 2
3 Mass R 23
Sir W. Jones 174

[12300-13]

24
1856
Lachus
v
Trustees of Canal

Brief

Supreme Court

The Board of Trustees of the Illinois & Michigan Canal

vs.

Virgil H. Euchus

This action was brought in the Cook County court of common Pleas to recover damages for back water resulting from a dam erected in Will County for the Purpose of feeding the Illinois and Michigan Canal with the water of Calumet River.

The land injured is alleged to be in La=
Take Porte County Indiana - and was the prop=
erty of Mary Euchus the mother of this Plaintiff, who claims damages as her heir at law.

To the declaration a general & special demurrer to each count was filed, and the demurrer sustained in the court below and from that decision this writ of error is brought.

The first cause of demurrer assigned is

1. That the process was served on the Defen=
dants in Will County, and there is nothing showing that Cook County court of Common Pleas had jurisdiction.

This court has jurisdiction only of mat=
ters "within the limits of Cook County"

[12300+4]

R. Stat. p. 74 –

The defendants are located in the county of Will, and cannot be sued out of that county, except when the cause of action is local, and in that event must be sued in the county where the property injured is located See Rev. Stat. p. 412.

The venue in this case is local
Angel on Water Courses p. 454 sec. 418

2. No action lies for an injury to the freehold when the act is done by authority of law, and the lands injured are in another State
Angel on Water courses p. 458. sec. 421

This point is expressly decided in
Watts adm^x vs Kinney 23. Wend. Rep. 484.
4. Term Rep. 563
6. Hill Rep. 82.

3. The declaration mingles incongruous liability. The Plaintiff as ~~ha~~ heir to
Mary Enchus sues for injuries to her in her life time, which if they survive would go to the administrator, and on this account the declaration is clearly bad

4. For special causes of demurrer the attention of the court is requested to causes enumerated in the demurrers.

S. N. Arnold
for canal Trustees

24 of 1856

Supreme Court

Board of Trustees of Illinois & Michigan Canal

ads.

Virgil H. Euchus

Points.

S. N. Arnold

[12200-15]