No. 12347

Supreme Court of Illinois

Panton

---

vs.

Norton, et al

71641

(Exemplification)

The People of the State of Illinois — By the Grace of God free and independent, To all & whom these presents may come, Greeting;

Know Ye that we having caused to be inspected the Records and proceedings now remaining in the office of our clerk of our Circuit Court in and for our County of Will; do find there certain record in words and figures following: to wit

"Will County Circuit Court

September Term A.D. 1853

United States of America
State of Illinois } ss
Will County }

Pleas before the Honorable Hugh Henderson, Judge of the Eleventh Judicial Circuit of the State of Illinois at the September Term of the Will County Circuit Court Began and Held at the Court House in the City of Joliet in said County, on the first Monday of September (the same being the Fifth day of said month of September) in the Year of our Lord One thousand Eight Hundred and Fifty Three and of the Year of the Independence of said United States the Seventy Eighth.

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Present the Hon. Hugh Henderson Judge as aforesaid

Sherman W. Bowen States Attyl Sud. Cir. Ct
Alonzo Leach Sheriff of Will County
Royal E. Barber Clerk Will County Circuit Court

And therefore (to-wit) on the Fifth day of August in the year of our Lord one thousand eight hundred and fifty-three. A certain Precipe for summons was filed in the office of said Clerk of said court in words & figures following (to-wit

"In the Will County Circuit Court
September Term A.D. 1853

Henry Canton
vs.
Liram Norton
Samuel D. Norton
Samuel W. Norton
} Trespass on the Case

The Clerk will issue summons in the above case, returnable according to law
Lay the damages at $1500,00
and oblige
Norton & McRoberts
Attys for Plff."

Aug. 4, 1853

Whereupon the said clerk issued a writ of summons in words and figures following (to-wit)

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State of Illinois }
Will County } ss

The People of the State of Illinois, to the Sheriff of said County — Greeting!

We command you, that you summon Hiram Norton, Lemuel D. Norton, and Samuel W Norton If they be found in your County, personally to be and appear before our Circuit Court of our said Will County, on the first day of the next Term thereof, to be holden at the Court House in Joliet in said Will County, on the first Monday of September, 1853 to answer Henry Benton of a plea of Trespass on the case to the damage of him the said Plaintiff fifteen hundred dollars as is said!

And have you then there this writ

Seal

Witness Royal E. Barber Clerk of our said Court, and the seal thereof hereto affixed in said Will County, this 5th day of August, A. D. 1853.

R. E. Barber Clerk."

"Which said summons was returned by the said Sheriff as following (to-wit)

"I have executed the within writ by reading the same to Samuel W. Norton, Hiram Norton. I return Lemuel Norton not found in my Co. August 18th 1853. Fees 2 Services $1.00

" 10 M. Trav. 50 A. Leach

" 1 Rel 10 Shff."

$1.60

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And afterwards (to-wit) on
the Twenty-sixth day of August in the year of our
Lord one thousand eight hundred and fifty-three a
certain declaration was filed in the office of our said
Clerk in words and figures following (to-wit)

State of Illinois } ss. In the Will County Circuit
Will County } Court September Term, 1853.

Henry Panton Plaintiff complains of Hiram Norton ~~and~~ Samuel D Norton & Samuel W. Norton having been summoned &c in a plea of trespass on the case. For that whereas before and at the time of the said of the said grievances by the said defendant hereinafter mentioned the said plaintiff was and from thence hitherto hath been lawfully possessed of a certain flouring mill & premises, commonly called the Rockport Mill property" with the appurtenances, mills, dams, races, flumes, & other fixtures thereto belonging, situate and being in the said county of Will, and by reason thereof before and at the time of committing of the grievances hereinafter mentioned, of right ought to have had and enjoyed and still of right ought to have and enjoy the benefit and advantage of the water of a certain water course or stream, in the county aforesaid, which ~~was~~ during all that time ought to have run and flowed, and until the obstruction thereof thereof hereinafter mentioned of right had run and flowed and still of right ought to run and flow, unto the said mill of the said plaintiff, for the supplying the same with water, for the working thereof to = wit: at the county aforesaid, Yet the said defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the said Plaintiff in this respect, and to deprive him of the use, benefit and advantage of the water of the

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said stream and to hinder and prevent the said plaintiff from working & running his said Mill in so ample and beneficial a manner as he had theretofore done, and of right ought to have done, and to injure him in the way of his trade & business as a miller and manufacturer of flour and in grinding wheat, corn and other grain, which he during all the time aforesaid, exercised and carried on and still doth exercise and carry on, at the said mill & premises, and to put him to great expense, trouble and inconvenience while the said plaintiff was so possesed of his said Mill & premises with the appurtenances aforesaid and so exercised and carried on his said trade and business as aforesaid therein, to-wit: on the first day of May A.D. 1853. And on divers other days and times between that day and the day of the commencement of this suit to wit: at the county of Will aforesaid wrongfully and unjustly turned obstructed, and diverted large quantities of the water of the said stream and water course out of the same and away from plaintiffs said mill & hindered and prevented the water of the said stream or water course from running or flowing in its usual course to said Plaintiffs mill and from supplying the same with water for the necessary working thereof, as the same ought to have done and otherwise would have done, And the said Plaintiffs for want of such sufficient water could not during that time use his said Mill, or follow, use, or exercise his said trade and business therein, in so large extensive and beneficial a manner as he ought to have

done, and otherwise would have done, but was thereby during all that time deprived of the use and enjoyment of the said Mill and premises and the appurtenances thereto and of all benefit-profit-gain and advantage which he otherwise might and would have made by ~~xxxx~~ carrying on his said trade and business therein to wit: at the county aforesaid to the damage of him the said plaintiff fifteen hundred dollars, and therefore he sues &c.

Norton & McRoberts, for plffs.

And whereas also the said plaintiff before and at the time of the committing of the grievances hereinafter next mentioned and from thence hitherto hath been and still is lawfully ~~xxxxxx~~ possessed of certain other premises in said county of Will and described as follows to: wit: Lots number three (3) four (4) and five (5) in block eighty three (83) in the village of West Lockport and also such portion of the west fraction of the south east quarter of section twenty two (22) in township thirty six (36) north range ten (10) east of the 3d principal meridian as are not embraced in the said village of West Lockport, and the mills situate thereon, & the dams, races, flumes, and other fixtures and appurtenances belonging or appertaining to said mills, being in the said County of Will and by reason thereof before and at the time of the committing of the grievances hereafter mentioned, of right ought to have

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had and enjoyed and still of right ought to have and enjoy the benefit and advantage of a certain other water course in the county aforesaid which during all that time ought to have run and flowed and until after the diversion and obstruction hereinafter mentioned of right had run and flowed and still of right ought to run & flow unto the said last named mill ran said mills of the said plaintiff for the supplying the same with water for the working of said last named Mills to-wit: at the county aforesaid. Yet the said plaintiff well knowing the premises, but wrongfully intending to injure and prejudice the said plaintiff in this respect and to deprive him of the use benefit and advantage of the water of the said last named stream, and to hinder and prevent the said plaintiff from working his said mills in so ample and beneficial a manner as he had theretofore done and of right ought to have done and to ~~xx~~ injure him in the way of his trade and business as a miller and manufacturer of flour, which he during all the time last aforesaid exercised and carried on and still doth exercise and carry on at the said last named mill & premises and to put him to great expense trouble and inconvenience whilst the said plaintiff was so possessed of said last named Mill and premises with the appurtenances as aforesaid and so carried on his said trade and business therein to wit: on the first day of May 1853, and on divers other days between that day and the day of commencing this suit to-wit: in the county aforesaid ~~xxxxxxx~~ wrongfully and injuriously

deposited in the said last-named stream, a large quantity of corn cobs, to-wit: one hundred thousand bushels of corn cobs and thereby then & there filled up the bed of said last-named stream and of said last-named race and diverted and obstructed large quantities of the water of said last-named stream from said last-named race and from said last-named mills, and stopped and prevented large quantities of said water of said last named stream from running & flowing along its usual course to said mills and from supplying the same with water for the working thereof, as the same of right ought to have done and by reason thereof the water of the said last named stream or water course sufficient for the supplying the said last named mills of said Plaintiff during all or any part of that time could not nor did run or flow to the same as the same ought to have done and otherwise would have done and the said plaintiff thereby for want of such sufficient water could not during said last named time, use his said mills and premises or follow use or exercise his said trade or business therein in so large, extensive and beneficial a manner as he might and otherwise would have done, but was thereby during all said last named time deprived of the use of his said mills and premises with the appurtenances and of all the benefits profits gains & advantages which he otherwise might and would have made by carrying on his said trade and business to-wit: at the county aforesaid To the damage of said plaintiff of fifteen hundred dollars and therefore he sues &c.

Norton & McRoberts for Plff.

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And afterwards (to-wit) on the eighth day of September in the year of our Lord one thousand eight hundred and fifty-three it also being one of the regular days of said September Term of said Court for the said year aforesaid and the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and entered of Record by the said Court in words and figures following (to-wit)

"Henry Canton
vs.
Hiram Norton,
Samuel D. Norton,
Samuel W. Norton } Trespass on the Case

And now comes the said Plaintiff by Norton and McRoberts his Attorneys and enter his motion for a Rule on the said Defendants to Plead herein. Whereupon it is ordered by the Court that the said Defendants do Plead to the said Plaintiffs Declaration herein by next Tuesday morning at eight O'clock"

And afterwards (to-wit) on the twelfth day of September in the year of our Lord one thousand eight hundred and fifty-three a certain Demurrer was filed in the aforesaid entitled cause in words and figures following. (to-wit))

Hiram Norton & Samuel D Norton } Will Circuit Court of
and Samuel W Norton } the September Term
ats } 1853.
Henry Panton

And the said defendants by Osgood and Paddock their attornies come and defend the wrong and injury when &c and say that the said first counts of the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants and that the said defendants are not bound by law to answer the same and this they the said defendants are ready to verify, wherefore by reason of the insufficiency of the said first count of said declaration in this behalf the said defendants pray judgment and that the said plaintiff may be barred from having or maintaining his aforesaid action against them &c.

Osgood & Paddock,
Atty for Defts

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And afterwards (to wit) on the thirteenth day of September in the year of our Lord one thousand eight hundred and fifty-three it also being one of the regular days of said September Term of said Court for the said year aforesaid and the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and a certain demurrer filed in said cause in words and figures following (to wit)

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Hiram Norton Samuel D Norton and Samuel W Norton
vs
Henry Panton

Will Circuit Court of the September term 1853,

And the said defendants by Osgood & Paddock their attornies come and defend the wrong and injury when &c and say, that the said second count of the said declaration, and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants and that the said defendants are not bound by law to answer the same, and this they the said defendants are ready to verify wherefore by reason of the insufficiency of the said second count of said declaration in this behalf the said defendants pray judgment and that the said plaintiff may be barred from having or maintaining his aforesaid action against them &c,

Osgood & Paddock
Attys for Defts,

And afterwards to wit on the sixteenth day of September in the year of our Lord one thousand eight hundred and fifty three it also being one of the regular days of said September Term of said Court for the said Circuit as aforesaid and the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had

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and entered of Record by the said Court in words and figures following. (Towit)

Henry Lenton
vs.
Hiram Norton,
Lemuel D. Norton,
Samuel W. Norton } Trespass on the Case

And now come the said parties to this suit by their respective attorneys, and now comes on to be heard the arguments of Counsel upon the said Defendants Demurrer to the said Plaintiffs Narr herein. And the Court being fully advised in the premises it is ordered that the said Demurrer. Be and the same is overruled. Whereupon the said Plaintiff by Norton and McRoberts his attorneys enter his motion for a Rule on the said Defendants to Plead to the said Plaintiffs Declaration herein and that this cause be continued. Whereupon it is ordered by the Court that the said Defendants do Plead to the said Plaintiffs Declaration herein by the first day of November next and that this cause be and the same is continued."

And afterwards (to-wit) on the first day of December in the year of our Lord one thousand eight hundred and fifty-three. Defendants filed their pleas in the aforesaid entitled cause in words and figures following. (To-wit)

Will County Circuit Court

Heirana Norton, Samuel D Norton & Samuel W Norton

ads

Henry Panton

And the said defendants come and defend the wrong and injury when &c and say that they are not guilty of the said supposed grievances above laid to their charge or any or either of them or any part thereof in manner & form as the said plaintiff hath above thereof complained against them — And of this the said defendants put themselves upon the country &c.

John W Paddock & Osgood & Streeter

And the plaintiff doth the like Norton & McRoberts pro plffs) Attys. for Defts.

And for a further plea in this behalf the said defendants say that the said plaintiff actio non, because they say, that the said stream of water in said Plaintiffs declaration mentioned at said several times when &c and still is a navigable stream under and by virtue of the Laws of the United States and right at the said times when &c and still of right ought to be free for the use of each and every person of the said United States, and they the said defendants at said times when &c in said declaration mentioned being citizens of said United States and residents of said Will County in the State of Illinois and having occasion to place in said stream or water course ~~in said stream or water course~~ in said declaration mentioned, certain logs and other things to be carried down the said stream

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or water course as they had a right to do they the said defendants did then and there at the said several times when in said declaration mentioned place in the said stream or water course the said corn cobs to be carried down the said water course and stream of water (the same being by Law declared a navigable stream and being a common highway for all the people of these United States) as they the said defendants had a right to do – Yet the said Plaintiff well knowing the premises had created a dam across said stream below the place where said Defendants put their said corn cobs in said stream or water course & kept and continued the said dam across the said stream or water course and thereby hindered and prevented the water from flowing freely in said stream or water course as the same ought to have done and thereby also hindered and prevented the said corn cobs from paping down the said stream or water course & thereby of his own wrong turned the said corn cobs from the natural channel of said stream or water course and caused the same to be deposited at & in the said race of said plaintiff and to obstruct the water from running into his said flume – All which they the said defendants are ready to verify. Wherefore &c they pray judgment &c.

John W Paddock, Osgood & Streeter
Attys for Defts.

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And for a further plea in this behalf, the said defendants say that the said plaintiff "actio non" because they say that the said obstruction complained of by said Plaintiff in his said Declaration mentioned in said stream or water course at said several times when &c were caused by the wrong of the said Plaintiff & not by the wrong of the said defendants or any or either of them and this they are ready to verify = Wherefore &c they pray Judgment &c

John W Paddock & Osgood & Streeter.
Attys for Defts.

And afterwards (to-wit) on the twenty-third day of December in the year of our Lord one thousand eight hundred and fifty-three, the said Plaintiff filed his Demurrer said 2nd and 3d Pleas in the said cause in words and figures following (To-wit)

"In the Will County Circuit Court
"
December Term A.D. 1853

"Henry Lawton
vs.
Miram Norton,
Samuel D. Norton,
Samuel W. Norton } ss

And the said Plaintiff comes and says that the said second and third pleas of the said defendants in manner and form as the same are above pleaded, and the matters and things therein contained, are not

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sufficient in law to bar the said plaintiff of his aforesaid action against them, and that he is not bound by law to answer the same, and this he is ready to verify. Wherefore he prays judgment and his Damages aforesaid.

Norton & McRoberts
Pds. Offs.

Joinder in Demurrer

J. W. Paddock, Clymer & Streeter, Attys. for Defts.

And afterwards (To-wit) on the ~~4th~~ fourth day of January in the year of our Lord one thousand eight hundred and fifty-four it being also being one of the regular days of said December Term of said Court for the said year one thousand eight hundred and fifty-three aforesaid and the said court being duly organized and sitting in open Court for the transaction of business the following proceedings were had and entered of Record by the said Court in words and figures following: (To-wit)

Henry Benton
vs.
Hiram Norton,
Samuel D. Norton,
Samuel W. Norton
} Trespass on the Case

And now come the said Parties to this suit by their respective attorneys and now comes on to be heard the argument of Counsel upon the said Plaintiffs Demurrer to the

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said Defendants Second and Third Pleas herein, and after hearing the arguments of Counsel it is ordered by the Court that the said Plaintiffs Demurrer be and the same is sustained. And the said Plaintiff enter his motive for judgment against the said Defendants for his costs and his charges of his said Demurrer herein. Whereupon it is ordered by the Court that the said Plaintiff do have judgment against the said Defendants for his costs and charges of his said Demurrer herein.

It is thereupon considered by the Court that the said Plaintiff do recover of the said Defendants his cost and charges herein of his said Demurrer by him about his suit in this behalf expended and that he have execution therefore

And the said Defendants their motion for leave to amend their said second and Third Pleas by the first day of the next Term hereof and that this cause be continued. Whereupon it is ordered by the Court That said leave be and the same is Granted and that this cause be and the same is continued."

And afterwards (To-Wit) on the nineteenth day of December in the year of our Lord one thousand eight hundred and fifty-four it also being one of the regular days of said December Term of said court for the said year A.D. 1854. and the said court being then duly organized

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and sitting in open Court for the transaction of
busines the following proceedings were had and entered
of Record by the said Court in words and figures
following. (To-Wit)

"Henry Norton
vs.
Hiram Norton
Samuel D. Norton
Samuel W. Norton } Trespass on the Case,

And now come said Defendants by Mr. Osgood their attorney
and enter their motion to continue this suit.
Thereupon it is ordered that the cause be continued
and that the costs thereof abide the event of suit."

And afterwards (To-wit) on the
thirteenth day of March in the year of our Lord
one thousand eight hundred and fifty-five, it
also being one of the regular days of said March
Term of said Court for the said year A.D. 1855
and the said Court being then duly organized
and sitting in open Court for the transaction
of busines the following proceedings were had
and entered of Record by the said Court in words
and figures following. (To-Wit)

Henry Cantor
vs
Hiram Norton Samuel D. Norton & Samuel H. Norton

Trespass on the Case

And now came the said Parties to this suit by their respective Attorneys. And by Agreement enter their motion that this Cause be continued. Whereupon it is ordered by the Court that this Cause be and it is continued as per said Agreement.

And afterwards Towit, on the Fourth day of September in the Year of our Lord one Thousand eight Hundred and fifty five it also being one of the regular days of said September Term of said Court for the said Year A.D. 1855. aforesaid And the said Court being duly Organized and sitting in open Court for the Transaction of Business the following proceedings were had and entered of Record by the said Court in words and figures following Towit,

Henry Cantor
vs
Hiram Norton Samuel D. Norton & Samuel H. Norton

Trespass on the Case

Now Come said Parties to this Suit and enter their motion by their respective Attorneys to set this Cause for Trial. Whereupon by Agreement and Consent of the Bar it is ordered that the Trial of this Cause be set down for next Wednesday morning at ten oclock."

And afterwards Towit, on the Fifth day of September Eighteen Hundred and fifty five it Also being one of the regular days of said September Term of said Court for the said Year A.D. 1855 aforesaid And the said Court being then duly Organized and sitting in open Court for the Transaction of Business. the following proceedings

were had and entered of Record by the said Court in words and figures following, To Wit,

"Henry Canton

vs

Miriam Norton Samuel D. Norton & Samuel M. Norton } Trespass on the Case And now comes the said

"Plaintiff by Norton and McRoberts his Attorneys and enters his motion for a Rule on the said defendants to file a Copy and in substance of the last Pleas in this case. Whereupon it is ordered by the Court that the said defendants do file a Copy in substance of their said last pleas heretofore filed herein and which have been lost by Friday morning next at eight o'clock." And afterwards, To Wit, on the Tenth day of September Eighteen Hundred and fifty five it also being one of the Regular days of said September Term of said Court for the said year A.D. 1855 aforesaid and the said Court being then duly organized and sitting in open Court for the transaction of business. The following proceedings were had and entered of Record by the said Court in words and figures following, To Wit,

"Henry Canton

vs

Miriam Norton Samuel D. Norton & Samuel M. Norton } Trespass on the Case And now come the said defendants

by Osgood and Streeter their Attorneys and file their Amended substituted Pleas herein in obedience to said Rule of Court requiring them so to do. And enter their motion that the same be substituted. And the Court being fully advised in the premises

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It is ordered that said Plea be and it is substituted for the Plea heretofore filed herein which is last."

And afterwards, To-Wit, on the same day last aforesaid the said defendants in obedience to said order of Court. And file their said Amended Plea herein in words and figures following, To-Wit,

2 3

Will County Circuit Court

Hiram Norton, Samuel D Norton and Samuel W Norton, } 2d amended Plea

ads

Henry Paxton

And for a further and amended plea in this behalf, the said defendants say that the said Plaintiff "actio non" because they say that the said water course or stream in said Plaintiffs Declaration mentioned at said several times when &c was and still is by law, a common highway for all the citizens and residents of the Republic of the United States, in the prosecuting and carrying on of all mercantile and other necessary and legitimate business and as such common highway was & still is and of right ought to be free for the passage of all persons & citizens of the Republic of the United States and their property goods and effects for mercantile and other necessary and legitimate business, without hindrance, molestation or obstruction that they the said Defendants at the said several times when &c in said declaration mentioned were and still are residents of Lockport in the county of Will aforesaid in the State of Illinois & citizens of the ~~State of Illinois~~ United States and were then and there at said several times when &c in said declaration mentioned to-wit: at & in the said county of Will at Lockport aforesaid, engaged in mercantile and produce business, buying & selling corn & in commission and forwarding business, and were possessed of certain mills & machinery for manufacturing flour, & for

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Shelling corn and were also lawfully possessed of a certain mill race leading from their said mills and machinery at Lockport aforesaid into the said water course or stream in said plaintiffs declaration mentioned, that in the prosecution and carrying on of their said business of produce dealers buying and selling corn and preparing and forwarding the same to market, at the said several times when &c in said declaration mentioned, it became and was necessary for them the said defendants to shell their said corn & said defendants did at said several times when &c by means of their said machinery shell large amounts of corn & deposit the cobs thereof in their mill race aforesaid to be carried off from their said mills & machinery by the water passing through their said mill race to said water course or stream in said Plaintiffs declaration mentioned, which said water course was & is the Des Plaines River & no other stream to-wit: in the County of Will and State of Illinois aforesaid, which said corn cobs were the same and no other mentioned in said plaintiffs declaration, and the said defendants aver that the water in said water course or stream (the same being the Des Plaines river aforesaid) during all the said times when &c in said declaration mentioned, was sufficient, while unobstructed to carry off all the said corn cobs without obstruction to said water course, or injury to said plaintiffs mills or mill property and that they had the right to deposit their cobs as aforesaid

to be carried off through their said mill race and
through said water course or stream the same being a
common Highway and free for the use of the citizens and
residents of the United States, all of which was well
known to said plaintiff, to-wit: at the county of Will
aforesaid; Yet the said Plaintiff well knowing the
facts & being well advised in the premises wrong fully
had and kept up & across the said water course or stream
during all the said times when &c in said declaration
mentioned a dam for the damming up & obstructing the
natural course & flow of the water in said water course
or stream, at a distance to-wit: at the distance of one
half mile below the point in said stream or water course
where the mill race of said defendants enters said water
course or stream (the same being the Des Plaines river
aforesaid) to-wit: at the county of Will aforesaid; by
means of which said dam being kept up, across said
water course or stream by said Plaintiff as aforesaid
the water in said water course or stream in said
declaration mentioned during all the times in said
declaration mentioned became & was hindered and
obstructed from freely running & passing off in its usual &
natural channel & thereby became & was diverted and
~~hindered~~ changed from its usual & natural channel as
into & through an artificial channel which had been constructed
aforesaid and was kept open by said Plaintiff during
all the time aforesaid leading from said main channel
to the mill & property occupied & possessed by said plaintiff
and also by means of said dam being kept up across said

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water course or stream as aforesaid wrongfully by said plaintiff, the said corn cobs of said defendants were hindered & prevented from passing off in & through the usual and natural channel of said water course & stream during all the said times therein in said declaration mentioned, & thereby became and were diverted from said usual and natural channel of said water course and stream into & through the said artificial channel kept open by said Plaintiff as aforesaid, which said cobs formed the sole and only obstruction & diversion of said water in the said water course or stream in said plaintiffs declaration mentioned & which constitutes & is the sole & only supposed cause of said Palaintiffs action herein, and so the defendants say that the supposed damages in said plaintiffs declaration alleged to have been sustained were caused by the wrongful acts of said plaintiff as aforesaid and not otherwise, All which said defendants are ready to verify - Wherefore they pray judgment &c.

Osgood & Streeter,
Attys for Dfts.

State of Illinois } ss
County of Will }

Uri Osgood of said Will County & one of the attorneys of defendant in the above entitled suit being duly affirmed according to law saith that the foregoing plea is in substance like the former amended (2d plea) in this suit according to his best knowledge & belief, he this affirmant having drawn the pleas himself

Subscribed & affirmed to the 10th day of September A. D. 1855 before me } Uri Osgood

R. E. Barber Clk.

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And

And afterwards To Wit, on the Eleventh day of September Eighteen Hundred and Fifty five the said Plaintiff files his Demurrer to the said Amended Plea in the said Cause which said Demurrer is in words and figures following, To Wit,

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State of Illinois Will County

Henry Paulton
vs
Hiram Norton et al } And the said plaintiff as to the said amended plea of the said defendant by him secondly above pleaded, saith that the same and the matters and things contained therein in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude him the said plaintiff from having & maintaining his aforesaid action thereof against the said defendant and that he the said plaintiff is not bound by law to answer the same. And this he the said plaintiff is ready to verify. Wherefore by reason of the insufficiency of the said plea the said plaintiff prays judgment and his damages by him sustained on occasion of the committing of the said grievances to be adjudged to him.

Norton & McRoberts
Parks & Elwood
Pros. Pltffs.

Joinder in Demurrer.
Osgood & Streeter.
Attys for Defts.

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And afterwards, To Wit, on the Eleventh day of September in the Year Eighteen Hundred and Fifty five it Also being one of the regular days of said September Term of said Court for the said Year A.D. 1855 aforesaid. And the said Court being then duly organized and sitting in open Court for the Transaction of business the following proceedings were had and entered of Record by the said Court in words and figures following To Wit,

" Henry Canton

vs

Trespass on the Case

Miam Norton & Samuel D. Norton & Samuel H. Norton

And now came the said Parties to this suit by their respective Attorneys. Norton & McRoberts Attorneys for the said Plaintiff And Osgood And Streeter attorneys for the said defendants. And now comes on to be heard the Arguments of Counsel upon the said Plaintiffs demurrer to the said Defendants Amended Substituted Plea herein And the Court being fully Advised in the premises It is ordered that said demurrer be and it is sustained. Thereupon the said Plaintiff enters his motion for Judgment against the said defendants for his Costs of his said demurrer Whereupon it is ordered by the Court that the said Plaintiff do have Judgment against the said defendants for his Costs and Charges of his said demurrer And that he have Execution Thereon. It is Thereupon Considered by the Court that the said Plaintiff do recover of the said defendants his costs and charges of his said demurrer by him about his suit in this behalf expended and that he have Execution Therefor

Thereupon the said Defendants Plaintiff says that he stands by his said Plea and Exceptions to the opinion of the Court in sustaining said Demurrer."

And afterwards, to wit, on the Seventeenth day of December in the Year of our Lord one Thousand Eight Hundred and Fifty five it Also being one of the regular days of said December Term of said Court for the said Year A.D. 1855. aforesaid. And the said Court being then duly organized and sitting in open Court for the Transaction of business. the following proceedings were had and entered of Record by the said Court in words and figures following to wit

Henry Canton
vs
Wiam Norton Samuel D. Norton & Samuel K. Norton

Trespass on the Case

And now this Cause is called in its order for Trial. And the said Plaintiff comes by Norton and McRoberts his Attorneys and says that he is not ready to proceed to Trial and enters his motion to Continue this Cause from day to day. And the said defendants Also Come by Reppod and Streeter and enter their Cross motion that this Cause be Continued from day to day at the Costs of the said Plaintiff, and for a Judgment against the said Plaintiff for the said Costs. Thereupon the said Plaintiff enters his motion by his said Attorneys that the said defendants do have Judgment against the said Plaintiff for their Costs of Continuance herein from day to day. Thereupon it is ordered by the Court that the said defendants do have Judgm-

Ent against the said Plaintiffs for their Costs and Charges herein
for Continuance from day to day. And the said Defendants
Enter their motion for Execution on their said Judgment for
Costs as aforesaid. And the said Plaintiff by his said Attorney
Enter his Cross motion that the said Defendants do have
Execution on their said Judgment for costs from day to day
Whereupon it is ordered by the Court that the said Defen-
dants do have Execution on their said Judgment for costs
of Continuance herein from day to day. Against the said
Plaintiff It is Thereupon considered by
the Court that the said Defendants do recover of the said
Plaintiff their Costs and Charges herein from day to day
by them about their suit in this behalf Expended and that
they do have Execution Therefor.

And afterwards Towit on the Eighteenth
day of December in the Year Eighteen Hundred and
Fifty five it also being one of the regular days of said
December Term of said Court for the Year A.D. 1855 aforesaid
And the said Court being then duly organized and
Sitting in open Court for the Transaction of business the
following proceedings were had and entered of Record
by the said Court in words and figures Following Towit,

Henry Canton

vs

Trespass on the Case

Miram Norton Samuel L. Norton & Samuel H. Norton

And now
Comes the said
Plaintiff by Norton and McRoberts his Attorneys and
Enter his motion that the Rule for Costs from day to day

heretofore entered in this cause be applied to the costs of yesterday. And the said defendants by Osgood and Streeter their Attorneys enter their cross motion that the Rule for costs from day to day heretofore entered herein be applied to the costs of yesterday. Whereupon it is ordered by the Court that the Rule for costs from day to day heretofore entered herein in this cause be and they are applied to the costs of yesterday. Thereupon the said Plaintiff enters his motion that this cause do now proceed to Trial. And the said defendants by their said Attorneys enter their cross motion that the trial of this cause do now proceed. Whereupon it is ordered by the Court that this cause do now proceed to Trial. And then the said Plaintiff by his said Attorneys enter his motion that a Jury now come for that purpose And the said defendants by their said Attorneys enter their cross motion that a Jury do now come. Whereupon it is ordered by the Court that a Jury do now come. Thereupon came the Jurors of a Jury of good and lawful

Wm. Tobin,	George Freeman	Horace Carpenter
Horace Haff	R. F. Bartlett	David Wilder
W. B. Arvin	Charles Stowell	N. W. Cutter
John McKenzie	John Royce Jr	John Kelly and

John Baird who being duly empannelled and sworn to well and truly try the issues Joined between the said Parties and a true Verdict give according to Evidence. And after hearing the Evidence this day addressed. The said Plaintiff enters his motion that said Jury have leave to seperate and meet the Court

Tomorrow morning. And the said defendants by their said Attorneys Enter their cross motion that said Jury have leave to seperate. Whereupon it is ordered by the Court that said Jury do have leave to seperate and meet the Court tomorrow morning at nine oclock &

And afterwards to wit, On the nineteenth day of december in the Year Eighteen Hundred and fifty five it Also being one of the regular days of said december Term of said Court for the said Year A.D. 1855. aforesaid the said Court being then duly Organized And sitting in open Court for the transaction of business the following proceedings were had and Entered of Record by the said Court in words and figures following to wit

Henry Canton

vs

Trespass on the Case

Miriam Naton Samuel M. Naton & Samuel W. Naton

And now

Again come the said

Parties to this suit. And the said Jury heretofore empannelled herein

Also again come. And after hearing the remainder of the Evidence

The said defendants Enter their motion to Exclude the Testimony of the said Plaintiff herein from the Jury. And the Court being fully advised in the premises it is ordered that said Motion be and it is sustained. Thereupon the said Plaintiff by his said Attorneys Enters his exceptions to the opinion of the Court in sustaining said motion to exclude said Testimony of the said Plaintiff from said Jury. And after hearing the Arguments of Council and receiving the instructions of the Court said Jury retire in Charge of an Officer to Consider of their Verdict. And said Jury returning

into open Court for Verdict say We of the Jury find "No Cause of Action"

And afterwards to wit, on the twentieth day of December Eighteen Hundred and Fifty five it also being one of the regular days of said December Term of said Court for the year A.D. 1855 aforesaid. And the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and Entered of Record by the said Court in words and figures following to wit,

Henry Banton

vs

Hiram Norton Samuel D. Norton & Samuel H. Norton } Trespass on the Case

And now comes the said Plaintiff by Norton and M. Roberts his attorneys and enter his motion for a new Trial herein. And the said Defendants by Osgood and Steeles enter their cross motion that said motion for a new Trial herein be overruled.

And afterwards to wit, on the third day of January in the year of our Lord one thousand eight hundred and fifty six it also being one of the regular days of said December Term of said Court for the said year A.D. 1855 aforesaid. And the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and entered of Record by the said Court in words and figures following, to wit,

(over)

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Henry Canton

vs.

Trespass on the Case

Miami Morton, Samuel D. Morton & Samuel M. Morton

And now comes the said Plaintiff by Morton and McRoberts his Attorneys and enter his motion that this Cause be now called up for hearing. And the said defendants by Osgood and Streeter their Attorneys enter their Cross motion that this Cause be now called up for hearing. Whereupon it is ordered by the Court that this Cause be and it now is called up for hearing. And now comes on to be heard the said Arguments of Counsel upon the said Plaintiffs motion for a new trial heretofore entered herein. And the Court being fully Advised in the premises it is ordered that said Plaintiffs motion for a new trial heretofore entered herein be and it is overruled. Thereupon the said defendants Enter their motion for Judgment against the said Plaintiff for their costs herein on said Verdict heretofore entered herein. Whereupon it is ordered by the Court that the said defendants do have Judgment against the said Plaintiff for their costs herein And the said defendants enter their motion that Execution issue on their said Judgment.

It is Thereupon considered by the Court that the said defendants do recover of the said Plaintiff their Costs and Charges herein by them about their suit in this behalf Expended. And that they do have Execution therefor

Thereupon the said Plaintiff enters his Exceptions to the opinion of the Court in overruling his said motion for a new trial herein and enters his motion for time to file

his said Bill of Exceptions thereto. Thereupon it is ordered by the Court that such leave be and it is given to said Plaintiff to file said Bill of Exceptions. And that such Bill of Exceptions be signed and sealed by the Court. And that time be and it is given to the said Plaintiff until the first day of March next to make up such Bill of Exceptions. Thereupon the said Plaintiff prays an Appeal from the Judgment of this Court to the Supreme Court of the State of Illinois. Thereupon it is ordered by the Court that the said Plaintiffs prayer of Appeal herein to the Supreme Court of this State be and it is granted on Condition that he do file an Appeal Bond in the usual form herein with James. McHarvey. George B. Martin. Josiah McRoberts And Harrison A. Sykes or either of them as Security thereon within sixty days in the sum of Four Hundred Dollars.

And afterwards (to-wit) on the first day of March in the year of our Lord one thousand eight hundred and fifty-six the following bill of exceptions was filed in the aforesaid entitled cause in the office of the Clerk of our said Court (to-wit)

Will Circuit Court

Of December Term A.D. 1855

Henry Penton
vs
Hiram Norton
Lemuel D. Norton &
Samuel W. Norton,

Be it remembered that on the trial of this cause in the Circuit Court of Will County, at the December Term thereof, A.D. 1855, before the Honorable S. W. Randall, presiding Judge thereof, the Plaintiff in support of his action adduced evidence which in substance was as follows:

William Gooding being sworn testified substantially

That he had resided in Lockport, Will County since the year 1836, and had been acquainted with the parties — the plaintiff some five or six years — the defendants since the year 1838, both residing at Lockport during the time:

That he was acquainted with the Lockport Mills, and that they were, (the flouring mill and saw mill,) erected by witness and another party. The flouring Mill built in 1838 or 1839.

Here a diagram the same attached to this bill of exceptions, marked "A," was offered in evidence without objections and exhibited to witness, on inspection of which he stated that it represented correctly the

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relative localities in the case. The mill of plaintiff was situated on the S.E. quarter of Sec. 22, Town. 36 N. of Range 10 East of the 3rd P.M. The mill of defendants was on lot marked "E" on the diagram. The distance from Norton's mill to Canton's mill was between 100 and 160 rods. Beff's mill is on the Des Plaines river below defendants, Defts. mill is on the canal basin in the village of Lockport

He further stated as his impression that the plaintiff Canton was in possession of the mill in the summer of 1853.

The defendants had a cornshelling machine attached to their flouring mill, propelled by the machinery attached to his mill. It was erected over or close by the side of the tail race, and below the machinery of the mill; and between that and the river. Never saw it in operation. From its location, witness judged the cobs from the machine would fall into or near the tail race. Thought the cobs would require to be removed in order to get them into the tail race, as they would not fall directly into it. The water from the Calumet and Des Plaines rivers were introduced into the canal above Athens,

That the S.E. quarter of section 22 was all laid out into town lots, except the land around the mill; That part of the quarter lying on the west side of the Des Plaines River described as the west fraction of the S.E. quarter of section 22. and on the East about 19¾ acres as the East fraction

Being cross-examined by the defendants counsel, he

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testified in substance that the saw mill dam and race were built in 1886,— the dam was originally built to the island— the water was permitted to flow the main channel is on the west side of the island— the water was permitted to flow around and enlarge the eastern channel— the original cost of the whole mill property between 20,000 and 25,000 dollars— exclusive of the land— saw mill cost 6. or 7,000 dollars— the dam or portions of it had been carried off frequently— the mill property deteriorated in value rapidly and greatly after building. The water power had been greatly overestimated in value.

That from the main channel of the river there were 30 or 40 rods of artificial race constructed through a natural depression— it was 30 or 40 feet wide and of unequal depths— the excavation ranged from 2 or 2½ to four feet generally; the river had no very distinct banks in that neighborhood— in ordinary stages, the water would pass entirely through the main channel west of the island— the dotted lines on the diagram indicated the meandered lines of the government surveys— Canton's mill and all its appurtenances are within the meandered lines — The defts, began their mills in 1852 and completed them in the Spring of 1853.

That the defendants tail race is 200 or 250 feet long — or perhaps 300. The distance from defts mill to to the river is from 2 to 300 feet. The race I think, is about 30 feet in width.

That he should consider Norton's mill worth

valuable. My impression is that Clefts flouring mill has been in operation some time before the corn-sheller was attached.

The stage of water in the river from first of June to August 1858 was very low, as it usually is at that season, when, as a general thing, there is but little water to propel machinery. The DesPlaines river is a stream that fluctuates. In a dry season, it discharges less than 1,000 cubic ft. per minute at the locality of Cliffs mill. Cliffs dam could not save all the water, would filter thro some. The rock I should suppose, in the place it was drawed substances into the race.

If the rock had been at the head of the race, it probably would have filled up the pool of the dam, and prevented the race from filling and kept the cobs off the race and from the wheels. The expense of placing the rock at at the head of the race would not have been more than ~~$25~~ $23.

Lawrence S. Parker being sworn certified substantially that Cliff took possession of the grist mill in question in 1852, in the spring and continued in possession till the fall of 1854.

That he was acquainted with Norton's mill, situated on the hydraulic basin in Lockport. That he saw defendants corn-sheller - it was erected directly over the tail race - saw it in operation in the spring and summer of 1858 - saw it in operation two or three times - when in operation, the cobs were

deposited in the water of the tail race.

That he had visited Paxton's mill two or three times, between the time the corn-sheller was put up and the 8th of August — observed right away after the erection of the corn-sheller, that a large quantity of cobs went from it directly into the Des Plaines River and floated down into the mill pond of plaintiff. Was at the plaintiff's mill on one occasion — when plaintiff particularly called his attention to the amount of cobs which had accumulated — witness went with plaintiff and Cliff. raked them up — there was a large quantity on the surface of the water on the upper side of the boom, a stick of timber which had been placed fifty or one hundred feet above the gate which admits the water to the mill — the surface of the pond was literally covered with cobs — the river above was covered also. Cannot tell from the examination on that occasion the depth of the deposit of cobs — at the ends of the boom there was a much larger deposit than a little way above, from the current or eddy — Should estimate there were 100 or 150,000 bushels of cobs in the ponds, enough, if spread out, to cover 3 or 4 acres — this was in June 1853.

That there were two run of stone in operation, I think the mill has three now; — that the distance between the plff's and dfts mill is about half a mile; I dont know of any other corn-sheller being located on the Des Plaines River.

The witness being then cross-examined by

dfts. counsel, testified substantially as follows:

That there is usually considerable current down as far as the little islands, from Norton's mill. In an ordinary stage of water I should think the river about 8 rods wide between Norton's mill and plaintiff's. From my stand point, I should think the cobs, extended full 15 rods up the race. The three or four acres spoken of in my direct examination was within the points indicated on the diagram in pencil.

Samuel Black being sworn testified substantially, That he resided at Lockport in the summer of 1853 — knew the parties and Canton's mill — and defendants mill, and their relative situation — is a miller by occupation —

That he saw Norton's shelling machine in operation in August 1853 — shelled pretty fast — was at work at Canton's mill in 1853 in the summer, a short time — commenced last of July or first of August — quit in September following — impression was that he commenced work before the fifth day of August

That when he first went there, there was plenty of corn-cobs — in the race of plaintiff's mill. Sometimes they extended as far as 20 rods up the race — sometimes not over 7 or 8. As you stood facing up the stream, it was at the right of the grist mill. the deposit was from 5 to 6 feet in

depth. The water was drawn off once. The deposit-
ives of that depth at one spot and sloped off grad-
=ually. The cobs had to be ~~worked~~ worked through the rock
and through the wheels, so as to get rid of them.
Had to keep a channel through them to do anything.
From the mill they lay 2 or 3 feet deep along the
right bank of the race. The water running thro'
the rock drew the cobs towards the rack. The
cobs would accumulate at the rack, so as to obstruct
the water and shut it off from the wheel. We
cleaned out the rack once as clean as we could,
and got out all the cobs from before it — we then,
to try the experiment how long it would take
to grind four bushels of wheat without remov-
=ing any more cobs, took four bushels of wheat — we
were an hour and fifty minutes grinding it —
when we first started the mill it run fast, but
before we got through the head was lost — and
the flour made was of an inferior quality — flour
made under a light power is of an inferior
quality — when we first started the flour was of
good quality. The effect of the obstruction was,
that we could not make so much or so good
flour. My opinion is that the mill was capa-
=ble of grinding 8 bushels per hour, at each run
of the stone, with a full head of water. I judge
from the action of the mill, when clear from
obstruction. If unobstructed I think there was
water to operate one run of stone. On an

average you could run one run of stone 24 hours. There were times when we could run two. The mill ought if unobstructed to grind 40 barrels per day. At the time we tried the experiment, after the expiration of the hour and fifty minutes, the cobs had accumulated as bad as at first. The cobs would float down to the boom at the head of the flume, become water soaked, sink — work under the boom — work into the rock and some of them through it. Once took two sticks out of the rock to let off the cobs. The cobs would then draw into the wheel, and fill it up. We then had to shut down the head gates and go down into the wheel to clear it out. A spout was made on the south side of the mill to pass off the cobs, but it did not work to any effect. The only way was to rake them out or let them through the mill, when the cobs got into the rock. Witness estimated damage per day at $20. A man would have to go as often as once in 25 or 30 minutes to clear out the rock. The time I was there the stage of water was tolerably fair for the season of the year.

Being cross-examined, the witness testified in substance as follows:

That when he went to work at Pfff's, there was myself, plaintiff and William. William tended the mill — with dressed stone. Pfff was drawing off flour and superintending the milling generally. Pfff came

to Joliet with flour 3, 4, or 5 times a week. Took about 10 barrels to a load. He had some considerable custom. The custom would keep him grinding about 1/3 of the time. Have seen the water running over the dam. Cant say whether it was before the 5th of August or not, but to the best of my opinion it did. On an average the mill would grind 7 bushels per hour. The dam at the mill of plff's leaks some considerable — should'nt wonder if one quarter of the water of the stream wasted through the dam. A considerable portion of the water used at Canton's mill came from Norton's mill by the operation of the machinery. I should say one half. Had it not been for the water from Norton's mill there would not have been half as much at plff's mill, after taking into account the leakage. When I gave my estimate of the capacity of the mill, I did not mean 40 barrels per day as an average. I would estimate 33 barrels. The profit that year would be from 50 to 75 cts per bbl. With impression was that the experiment of grinding spoken of by him took place before the 5th of August. I dont pretend to state much that took place before the 5th day of August, and I did not pretend to place my damages before that date. — Up to that time cant state but the mill ground its usual quantity of grain.

Direct examination was here resumed by plff's counsel. The following question was asked: "State whether the business of the mill, the stage of water and de

and degree of obstruction from cobs were uniform dur-
=ing the whole time to which you refer in estimating
the damages which the plaintiffs sustained?" To
which question the defendants counsel objected, which
objection was overruled by the court. And the defen-
-dants counsel then and there excepted. The witness
answered in substance, they were very uniform from
the commencement to the time I quit.

Bernard Bersheid being sworn testified substantially
that he was employed as a hand in plaintiffs mill
in the spring, summer and fall of 1858, employed there
in the months of May, June, July and August, constantly
the cobs commenced coming down the latter part of May
or first of June and continued to come down and obstruct
the mill till September — the cobs would come against the
rack and stop the water — in order to grind a little we
would have to go every 15 or 20 minutes to clear the rack.
We had to throw some out of the water, and send some through
the rack. Sometimes we had to clear out the wheels, In
order to do this, we had to shut down the head gates. Sometimes
we would have to be detained a half a day and sometimes a day
doing this. I should say we had to do this about fourteen
times. We didn't grind more than from 30 to 35 bushels per day.
Pfff. was employed three days in constructing a boom and spout.
The mill was stopped during this work. The spout discharged the
water with the cobs. In some places the cobs were piled 5 or 6 ft.
Pfff. had a rack which was good enough for all purposes, but

to guard against cobs. With all the help we could get, the cobs accumulated faster than we could clear them out. Witness testified to several instances where grist was brought to plff's mill to be ground, and had to be sent away, because they could not be ground.

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The boom spoken of, was put up to lead the cobs into the spout. It kept the cobs away from the rack some, not entirely. The cobs continued to pile up by the rack after and before the boom was put up.

The damages per day from the obstruction by cobs to plff's mill, was estimated at from 20 to 25 dollars,

Being cross-examined by defts. counsel he testified in substance;

That the water that summer was not very high. It ran over the dam more than one quarter of the time. It ran over Monday mornings and other days, several times a day. Can't say how many times

Charles Butler being sworn testified in substance, That he tended mill for defts. in the summer of 1853. Didn't recollect the fact of plff's calling on defts. His impression was that he saw plff. at the mill.

Said witness was not cross-examined

The plaintiff then rested his case. Whereupon the defendants counsel moved the court to exclude the evidence offered by the plaintiff, from the consideration of the jury, on the ground that it did not tend to prove the cause of action alleged in the declaration, which motion was sustained by the court and said evidence excluded, whereupon the

counsel for the plaintiff did then and there on behalf of said plaintiff except to the opinion of the said court, and thereupon the jury empanelled in the cause rendered a verdict for the defendants.

Afterwards, during the same term of the court the plaintiff's counsel moved for a new trial, on the ground of error in excluding the plaintiff's evidence as aforesaid, which motion was overruled, whereupon the plaintiff's counsel did then and there except to the said decision of the court, and prays the court to sign and seal this his bill of exceptions, and make it part of the record in this case which is done.

T. W. Rendall, [Seal]

"A"

Plat of S.E. fr. ¼ Sect. 22. T. 36. N. R. 10. E.

Shewing the location of the Stone Flouring mill on the Right bank of the River below Lockport. Ills. also the old and new channels of the River- the location of the Dam, & the mill Race from careful measurements.

Also of a section of Canal Basin from the Lock to 9th Street Bridge, and of the Hydraulic Basin and the lots in Block 122 at the foot of the Basin, and the race from Hydraulic Basin to River. See Plan.

Note A is the location of the stone flouring mill, now used by Mr. Panton on River below Lockport. B. is the old location of Saw mill (now burnt) C.D. is the precise location of the Dam for said flouring mill, & the line of dots on each bank of the River are meander lines E (on lot no 1 Bl. 122) is the location of Norton's flouring mill.

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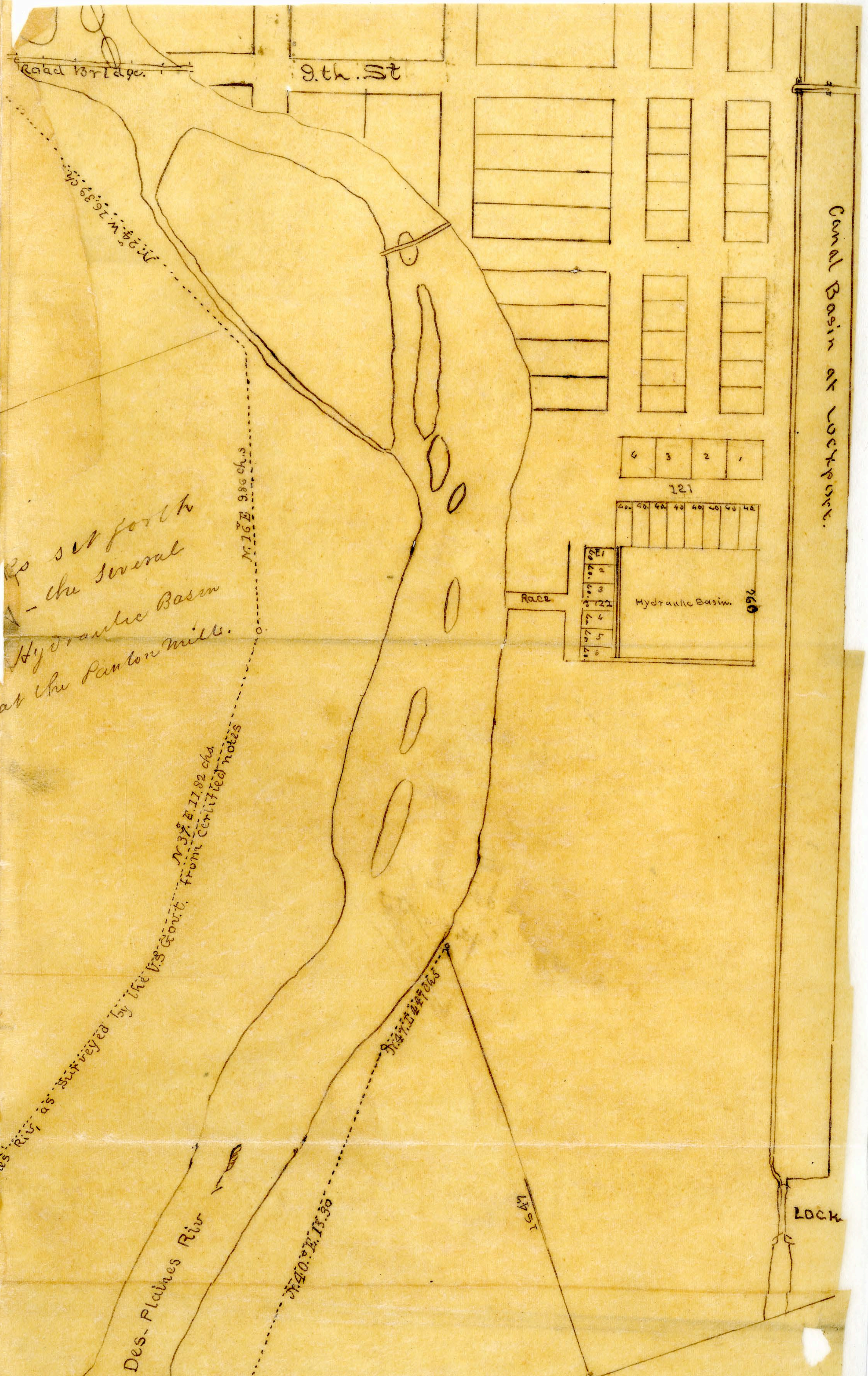
H Norton Esqr.

Dr Sir.

The within Plat, & the above remarks set forth the facts in regard to the matter of the lower stone mill - the several channels, &c &c & the location of both mills. the canal, Hydraulic Basin & the lots & race &c at the foot of the same & also of the race at the Panton mill.

A. J. Mathewson

Lockport Ills Dec. 12/53



Lockport Ills
N.38°E. 11.50 chs Old meander line of right bank of Des-Plaines Riv, as surveyed by the U.S. Gov
Des-Plaines Riv
N.40°E. 15.30
A
B
Artificial Race
4.27 chs.
N.03°E. 5.00 chs.
20.16
5.82
147
LOCK
Old Channel of the Des-Plaines before the stone mill was built.
New channel, formed mostly since the stone mill was built.

State of Illinois
Will County ss

I Royal E. Barber Clerk of the Will County Circuit Court in the State aforesaid do hereby Certify the foregoing to be a true correct and perfect Record of the said entitled cause, of the Record of the proceedings of the said Court therein and of the Bill of Exceptions filed therein

In attestation whereof I have hereto set & subscribed my name and affixed the Seal of said Court at office in Joliet in said County this 16th day of April A.D. 1856

R. E. Barber
Clerk

S/12347-PT

Henry Paxton
vs
Hiram Norton
Lemuel D. Norton &
Samuel W. Norton

The plaintiff in error in the above entitled cause, assigns the following as the causes of error in the court below.

1st The Court erred in excluding from the Jury the evidence offered by the plaintiff.

2nd The Court erred in overruling the plaintiffs motion for a new trial.

Parks & Elwood, Norton & McRoberts for plaintiff in error.

The motion to exclude the evidence of the plaintiff from the Jury, was improperly sustained.

The evidence sustained the allegations in the declaration. There was no variance.

The evidence showed that defendants were in the possession of of a mill and shelling machine, above the mill of the plaintiff; and that the cobs from the shelling machine, were deposited in the tailrace leading into the River; and that the cobs were carried down, and deposited in the mill pond of plaintiff.

This was sufficient to sustain the allegations

in the declaration, that the Coke was deposited in the River.

In actions sounding in tort, the act or injury is described generally is sufficient. 1 Chitty's Pleading 391.

In an action for diverting water from a Stream, or for disturbance of a right of common way &c, it is sufficient to allege a diversion or disturbance generally, without shewing the particular manner adopted. 1 d. 13 2d Raymond 4524 1 Saunders 346.

It is sufficient to state the substance of the tort 1 d.

If plaintiff needlessly describe tort & the means of effecting it, and the proof substantially differs, the variance will be fatal 1 Chitty Pleading 392.

Let a Supersedias issue upon the Plff in error filing with this record a bond with James M Hanson surety in the penal sum of five hundred dollars

Atlanta May 14 1856

I D Caton

~~2~~ 34

Henry Panton

vs

Hiram Norton et als

Filed May 23. 1856

L. Leland Clerk

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Henry Panton Plff in Error

vs

Hiram Norton & al Defts in Error

Error to Will.

Argument for Plff in Error.

The plaintiff in Error brought an action on the case against the defendants in Error, for obstructing the operation of plaintiff's mill, situated on the Des Plains River in Will County.

The declaration alleges that before, and at the time of committing the injuries complained of, the plaintiff was in the possession and use of a flouring mill, located on said Des Plains River; and that the defendants deposited large quantities of corn cobs in said River above the mill and dam of the plaintiff, which obstructed the operation of his mill, and destroyed its use.

The evidence set out in the bill of exceptions, shows that the defendants in Error were the owners of, and in possession of a certain mill and machinery, at the Hydraulic Basin on the Illinois and Michigan Canal, three fourths of a mile above plaintiff's

[1234-30]

mill, and that a tail race about 200 feet in length, led from said mill, and machinery to the Des Plaines River. The record further shows that prior to the commission of the injuries complained of, the defendants erected a Corn Shelling machine, which was attached to their mill, immediately over the tail race, so that the cobs were deposited in the tail race, and by the water from said mill, carried into the Des Plaines River, and were finally deposited in plaintiff's mill-pond, situated three fourths of a mile below, the point where the race entered the River, and there choaked up the flumes of plaintiff's mill, and stopped the operation of his mill.

The plaintiff having closed his case, the defendants by their Counsel moved to exclude the evidence from the jury, for the reason that it did not tend to prove the allegations in the declaration. This motion the Court sustained, and subsequently overruled a motion for a new trial. These decisions are assigned for Error.

The declaration sets out in a methodical form the circumstances

which constitutes the plaintiff's cause of action. It is a well settled rule, that in declaring upon a cause of action arising ex delicto, the tortious act or injury itself, may be described generally, without setting out the particulars of the defendants conduct, and without stating the particular manner of committing the injury, or the kind of agency employed.

1. Chit Pl. 391 – 2d auth. cited

The declaration charges the plaintiffs with obstructing the operation of his mill, by depositing a large quantity of corn cobs in the Des Plains River – does the evidence support the allegation? We think it does. The evidence shows that the defendants did cause a large quantity of cobs to be deposited in the River, by so operating their Shelling machine, that they should fall into the tail race, from where they were carried by the water discharged by defendants into the River.

Suppose the defendants had employed men with wheelbarrows, carts &c to carry the cobs from the machine, and deposit them in the River, above the plaintiffs mill dam, no one would deny but that the general allegation against

defendants, would be supported by evidence showing the relation of master and Servant, and the commission of the wrong by them, under the ~~direction~~ express or implied direction of the ~~master~~ defendants as masters, and there would be no variance.

Suppose that defendants had erected and made use of a Spout or an inclined plane, extending to the River, would not a general allegation such as is contained in the declaration in this case, be Sufficient? without stating that they had erected a Spout, or an inclined plane at such an angle, of such capacity, by means of which the Cobs were deposited in the River?

Whatever a party does by an agent he does himself. There are many kinds of agents which may be employed in performing labor. Water is as much an agent or Servant when conducted by man, as human being, or a Spout, or an inclined plane. The term "deposite", implies some sort of agency or cause to produce the effect. Any agent under the control of the principal whether it be a human being, a Stream of water, or machinery, is the representative

of the principal, for which he is liable to the extent of authority, or power given; and may be charged as the immediate cause of whatever effect may be produced.

If the plaintiff in this case had needlessly described the tort, and the means adopted in effecting it with minuteness & particularity — stating the lengths of the tail race, its depth, width &c, and the proof had failed to sustain such particular description, the variance would then unquestionably have been fatal. It would not be necessary to make such descriptions; but once being made, they would become material allegations, and must be proved as laid, so that the defendant may know what to answer to. Such is the current of the authorities.

We think that in declaring for a tort, that a general allegation, of the injury, charging it to have been committed by the defendant, is supported by evidence showing that the injury was committed by himself or agents, and such agents may be human, mechanical, or a natural agent such as water under the control of the defendant.

It is immaterial what kind of agency he employed; if he moved aid & abetted the agents, he is directly liable. The injury sustained by the plaintiff is the consequence of the defendants' wrongful act.

The declaration sets forth the cause of action so specifically that the defendants could successfully plead the pendency of the present suit in abatement, if sued again before its determination; or in bar, after final judgment rendered. The record in this case will protect him against future liability for the same cause of action.

We think the court erred in excluding the plaintiff's evidence from the jury; and in overruling the motion for a new trial.

Parks & Elwood
Norton & McRoberts
for Plff in Error.

39

Error to Wirt

Henry Paulson
vs
Hiram Norton et al

Argument for Plff
in Error.

Filed April 22. 1857
L. Leland
Clerk

State of Illinois, In the Supreme Court

Hiram Norton, Samuel D. Norton &
Samuel W. Norton Defts in Error

ads. Error to Will

Henry Panton Plff in Error

Argument for Defendants in Error.

This is an action the Case, brought originally in the Will County Circuit Court, by the Plaintiff in Error here, against the Defendants in Error, who are charged by the Plaintiff in Error, in his Declaration, with wrongfully obstructing & diverting the water of a certain water Course or Stream in said Will County out of its usual Course, & preventing the said water from running & flowing in its usual Course to said Plaintiff's Mill

The Plaintiff's Declaration contains two Counts — The Defendants in Error, (being Defendants in the Court below) interposed a general Demurrer to each Count of the Declaration — These demurrers were overruled by the Court below, & leave was given to Defendants to plead over

The Defendants then pleaded three pleas — 1st. the general Issue — 2dly — That the said Stream (being the Des Plaines River,) was by law a Navigable Stream & Common Highway — 3dly That the obstruction Complained of by Plaintiff was caused by his own wrongful acts & not otherwise &c —

To the 2d. & 3d. pleas the Plaintiff interposed a general demurrer, which was sustained by the Court & leave given to Defendants to Amend

[12347-3]

Subsequently the Defendants put in an Amended plea to the said 2d. plea, which was lost or mislaid, & a substitute, by order of the Court was filed, & Plaintiff interposed a general demurrer, to this amended plea, which demurrer was sustained by the Court, & the Defendants stood by their plea, & the Case was tried on the general issue -

I desire to call the attention of the Court to the said Amended plea of Defendants, which is noted on Plaintiffs Abstract as being filed September 10th. at Page 22. of the record -

The Plaintiff having interposed a general Demurrer to this plea, the Court below could not consider any informalities which might exist, (if any) in the plea By interposing a general demurrer, the Plaintiff admitted that the matters therein stated, were substantially true, & the question arose as to the sufficiency of the defence as therein pleaded - In sustaining the demurrer, the Court below decided the defence set up in said plea to be insufficient - The Defendants maintain that the defence set up by this plea, was & is a good defence, & that the Court improperly sustained the demurrer thereto

This Amended plea sets up that said water Course or Stream, at said several times when &c. was & is a common Highway for the passage of citizens, & residents &c - and for the carrying on of all Mercantile & other necessary & legitimate business; and as such common Highway, of right afforded a free & unobstructed passage for all citizens & residents of

this Republic, for themselves & their property, for all Commercial & legitimate business pursuits:- That Defendants were Citizens & residents, & Engaged in the Mercantile, produce, commission & forwarding business, buying, preparing for Market, & Selling Corn & other produce; That they were lawfully possessed of certain mills & machinery for Manufacturing flour & for Shelling Corn at Lockport in said Will County, with a race leading from their Mills & Machinery to the Des Plaines River; That in preparing their Corn &c. for market, it became & was necessary to shell their said Corn, & deposit their Cobs in their Mill race, & that the said Cobs were Carried by the Current of water in said race, into the Des Plaines River;- That the Current of water in said River, was sufficient if unobstructed, to Carry off said Cobs without injury or obstruction to Plaintiff's Mill:- That said Plaintiff, wrongfully kept up & across said River a dam which obstructed the passage of the water, & the said Corn Cobs, from the Natural & usual Channel, & Caused the water of said Stream, & the said Corn Cobs to pass into an artificial Channel, which had been wrongfully Constructed, & was wrongfully kept open by said Plaintiff; That said Corn Cobs being so wrongfully diverted from the said natural & usual Channel of said Stream, into said artificial Channel, so wrongfully Constructed & kept open by said Plaintiff, formed the sole & only obstruction, Caused by said Defendants to the waters flowing through said artificial Channel to said Plaintiff Mill-

[12347-35]

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and that by said wrongful acts & not otherwise, if said Plaintiffs, he sustained whatever of damage was caused to his Mill -

Now I submit to the Court, this proposition on said Plea:- That if the supposed damages of said Plaintiffs were caused by his own wrongful acts, as alleged in said plea, in diverting the water & the said Corn Cobs from the natural & usual Channel of said River, into & through his artificial Channel, wrongfully Constructed & kept open (and the demurrer to the plea admits this to be so) whether he can take advantage of his own wrongs & charge us with damages which he himself has caused -

Had the Plaintiffs taken issue on said plea & averred that he had rightfully Constructed & kept up his said dam, & had rightfully Constructed & kept open his said race, for proper legitimate, Commercial & business purposes, & had erected & kept up his said dam, at only a sufficient height to enable him to rightfully cause sufficient quantities of the water in said River to flow through his said race to his mill, to enable him successfully to run the same, & legitimately carry on his Milling business, the whole question would legitimately have come up before the Court & jury on the proofs, as to whether the defendants by depositing their Cobs in their race had been instrumental in producing an injury for which the Plaintiffs could call upon them for damages

and whether the Plaintiff had placed an improper unreasonable obstruction across said Stream by the Erection & keeping up of his dam, & whether he had by his said Artificial race, caused unreasonable, unnecessary & improper diversion of the water in said Stream & thereby wrongfully caused the said Corn Cobs to flow into his said race & obstruct the water from flowing to his said Mill

The demurrer to said plea admitting the Substantial matters therein pleaded to be true, & the same showing that if said Plaintiff sustained damages, such damages were occasioned by his own wrongful acts, the demurrer was improperly sustained by the Court below —

If the Defendants are right in this position, (& it seems to me there can be no question of it) it settles the whole case here, & the Plaintiff in Error must fail in ~~the~~ his Writ of Error, & there is no way for the Court to relieve him —

If the Court should differ with me on this branch of the case, & adjudge the demurrer to Defendants amended plea to have been properly sustained; then the question arises as to whether there are Errors apparent on the record & assigned by the Plaintiff in Error, sufficient to reverse the judgment of the Court below —

For the purposes of the argument on this branch of the case, I shall treat the bill of exceptions set out in the record, as properly & legitimately

before the Court; but before I close the argument I propose to show that the Bill of Exceptions is not properly before the Court, & cannot be considered by the Court.

The Declaration in the Case contains two Counts. The first Count alleges that the Plaintiff was possessed of a certain flouring Mill &c. & was entitled to enjoy the benefit & advantage of the water of a certain water Course or Stream in the County of Mill, & that the Defendant "wrongfully & unjustly hindered, obstructed & diverted large quantities of the water of the said "Stream or water Course, out of the same & away from "Plaintiffs said Mill, & hindered & prevented the water of the "said Stream or water Course from running or flowing "in its usual Course" &c.

The 2d. Count alleges that the Plaintiff was in possession of certain premises & the Mill Situate thereon, & the dams, races, flumes &c. and had the right to enjoy the benefit & advantage of a certain other water Course in the County aforesaid &c. And that the Defendant "wrongfully "deposited in the said last named Stream a large "quantity of Corn Cobs, to wit; one hundred thousand "bushels of Corn Cobs, & thereby there & there filled up the bed "of said last named Stream, & of said last named race, "& diverted & obstructed large quantities of the water of "said last named Stream from said last named race, "& from said last named Mill, & stopped & prevented large "quantities of said water in said last named Stream

"from running & flowing along its usual Course to said "Mills, & from Supplying the Same with water for the working "thereof" &c

The Evidence Set out, Shows the following State of facts viz:- That the Plaintiffs Mill was on the West Side of the Des Plaines River & was Supplied with water by an artificial race, Extending Some 30 or 40 rods from the main Channel of the River, Constructed through a natural depression, the Excavation of which ranged from 2 or 2½ feet to four feet in depth generally (See William Woodmans Evidence) - That Defendants Mill was Situate on the Hydraulic Basin of the Illinois & Michigan Canal in the Village of Lockport on Lot "6" as shown on the diagram attached to the record; that a race led from Defendants Mill & Machinery to the Des Plaines River, which race was from 200 feet to 300 feet long from Defendants Mill to the River, & about 20 feet wide & that it is about a half a mile from the point where the race from the Hydraulic Basin Enters the River, to Plaintiffs Mill; that the water in the River that Season (1852) was very low; That Defendants Shelling machine was attached to, & propelled by the Machinery of their flouring Mill, & was Situated over or nearly over the race leading from their Mill to the River, & that in Shelling their Corn, the Cobs fell from the Machine into the race, & were Carried by the water into the Des Plaines River; That Plaintiffs race leading from the river to his Mill was Constructed without any rack at the head of the race

Σ 12347-37

(or when the water is diverted from the River into it), Counsel for the race placed down near the Mill, in a manner Calculated to draw (floating) Substances from the River into the race — The Court on looking at the Diagram will readily perceive, the location of Plaintiffs & Defendants Mills, & the respective races, the natural Channel of the River, the Meandered lines &c — It will be Seen that the Defendants Mill is on Lot "E" at the Basin, & that the race runs a Southerly Course for a Short distance, & then turns at right Angles & runs to the River; And that Plaintiffs Mill is Situate at the end of a race leading from the River, & Some 30 or 40 rods from the River, & that the Plaintiffs dam is built diagonally across the River just above the Island —

The Evidence Shows the Defendants Mill to be Some 15 rods or more from the River, & that the Corn Cobs fell from Defendants Shelling Machine into the race, (or if you please were deposited from the Shelling Machine into the race,) & were Carried by the Current of the water in the race into the River; And that the Counsel for the Plaintiffs in Error insist was to all intents & purposes, the legal Contemplation & depositing in the River, & that it Supports the allegation in Plaintiffs declaration, that the Defendants deposited their Cobs in the River, & thereby diverted the water & prevented it from running or flowing in its usual Course on to Plaintiffs Mill —

Plaintiffs Counsel

Chitty Pldg. Vol. 1. P. 391

in order to support this position refer to 1st Chitty Pldg. P. 391. where the author holds the following language - "With regard to the statement of the particulars of "injurious or injury itself, it is frequently sufficient "to describe it generally without setting out the particulars "of the Defendants conduct"

Id -

"So in actions for diverting "water from a stream or for a disturbance of a right of "Common, ways &c. it is sufficient to allege a diversion or "disturbance generally, without showing the particular "means adopted" -

Taking this language in its broadest sense, & allowing for the sake of the argument that it is good authority, it does not sustain the Plaintiffs position, and the allegation in the Plaintiffs declaration that the Defendants deposited their logs in the River, is in no manner supported by the proof that the Defendants deposited their logs in their race some 15 rods or more from the River, & that said logs were carried into the River by the current of water in the race - It will be recollected by the Court, that it is only in Cases where the mode or manner of committing the injury is peculiarly & especially in the knowledge of the Defendant, & where the Plaintiff cannot reasonably be supposed to be cognisent of such mode or manner of committing the alleged injury, that this general mode is at all allowed of stating the injury in pleading - The Case under

5/2347-39

Consideration is not of that Class of Cases —

Neither is this a case where the act Complained of, is prima facie actionable — The Defendants had an undoubted right to deposit their Coke in their own, & no action for that act could be maintained against them.

It is a rule of pleading which has been long established & practised upon, that in actions on the Case, "When the act or non feasance Complained of, was "not prima facie actionable, it is in general necessary to state not only the injury Complained of, but "also the Circumstances & Manner of its Commission"

On the Succeeding page to that Cited by the Plaintiffs Counsel (1 Chitty Pld. 392) the Author holds the following language: "Where the Declaration stated that "the Defendant wrongfully placed & Continued a heap "of Earth, whereby a Water Course was obstructed, it "was decided that the allegation was not supported by proof "that the heap was not originally placed so as to Cause the "obstruction, but that in time the Earth from the heap fell, "& by changing its position, occasioned the injury — the Court "should have been for suffering the Earth to fall down"

1 Chitty Pld 392.

As in this Case the Court should have been for depositing the Coke in the Defendants Yard & suffering them to be Carried down the river into the Pltfs Plaintiffs Mines by the Current

To enable the Plaintiff to recover in this Case it was necessary for him to State & allege in his declaration only how the injury was Committed; and an allegation

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That the Defendants deposited their Corn Cobs in the Des Plaines River is not supported by the proof that they deposited their Cobs in their mill race, some fifteen rods or more from the river (in an entirely different Stream of water,) & that by the force of the current of water in the race, they were carried into the Des Plaines River —

Suppose a person to be in possession of mills on the Illinois River at Ottawa, half a mile below the Confluence of the Fox & Illinois Rivers, & another person to be in possession of Mills & Machinery for shelling Corn on Fox River 15 or 20 rods, or half a mile or a mile above the Confluence of the two rivers, (for the principle is the same whether the distance is 15 rods or a mile or 5 miles or more,) that in the carrying on of his business & preparing his Corn for Market the owner or possessor of the Mill & Machinery on Fox River deposits his Cobs, or suffers them to fall from his Shelling Machine into Fox River, and the Cobs are floated down by the Current of water in Fox River into the Illinois River, & the Mills on the Illinois river are Choked thereby & the water diverted therefrom; Can it be successfully contended that the owner of the Mill on the Illinois River could maintain a suit against the owner of the Mill & Machinery on Fox River by simply declaring against him for depositing his Cobs in the Illinois River, by which the water was obstructed

[12347-39]

And diverted from his Mill - The proposition seems to me to be preposterous - for it is identical with the doctrine contended for by the Counsel for the Plaintiff in Error in this Case - The doctrine contended for by the Plaintiff's Counsel in this Case would be a dangerous one to establish & would be productive of immense mischief - A party under such a rule might prosecute & declare for obstructing the water in a given Stream & prove the deposit of Substances in another Stream, which might be carried by the Current into the Stream where the diversion occured, & sustain his action - and the Defendant would be wholly unprepared to meet such a case -

The law requires that the pleadings show the parties what they are called upon to answer or defend, & the Courts are to enforce the laws as they find them - The Supreme Court of this State in the Case of Cork vs. Scott, 1st. Gill, 333, 1 Gill 333 on page 340 uses the following language - "The province "of the declaration is to exhibit upon the records the "ground of the Plaintiff's Cause of action, as well for "the purpose of notifying the Defendant of the precise char- "-acter of the grounds, as of regulating his own proofs "When it performs such office in such manner as "to leave no doubt on the mind of the Defendant "either as to the nature or origin of the Plaintiff's "Claim, it ought not on principle to be adjudged bad"

Here the principles of pleading are correctly stated by the Court - In the Case of White vs. Morrison et al. 11 Ills. Sup. Ct. Rep. 361. on page 366. the Court uses the following language - "He cannot allege one Cause for relief against "the purchase, & make out his Case by proof of a different "one - His proof must correspond with the allegations he has "made & not be inconsistent therewith - He must stand "or fall with the Case made in his bill" -

11 Ills. 331. on P. 366

In the Case of McKee vs. Bisset 5 Gill 499, on page 505. the Court uses the following language - "A Complain- "ant must recover on the Case made by his bill - He is not per- "mitted to state one Case in the bill & make out a dif- "ferent one in proof. The allegations & proofs must Cor- "respond - the latter must support & not be inconsistent "with the former - Although a good Case may appear "in the evidence, yet if it be variant from the one sta- "ted in the bill, the bill will be dismissed - The Defend- "ant has the right to answer & Contest the Case on which "the Complainant claims relief" -

5 Gill 499. on P. 505

In the Case of Harri- son & others vs. Nixon 9 Peters U.S Sup. Ct. Rep. 483. on page 509. the Court makes use of the following language "Every bill must contain in itself sufficient matter of fact "per se, to maintain the Case of the Plaintiff; so that the "same may be put in issue by the answer & established "by the proofs - The proofs must be according to the "allegations of the parties, & if the proofs go to matters "not within the allegations, the Court cannot judicially

9 Peters 483. on p. 509.

"act upon them as a ground for its decision, for the pleadings
"do not put them in Contestation - The allegata & probata
"must reciprocally meet to conform to each other"

10. Peter 177 on p. 207

In the Case of Boone & others vs. Chiles 10. Peters Rep. 177. on Page 207. the Court uses the following language -
"A party is not allowed to state one Case in a bill or
"answer & make out a different one in proof - The alle-
"gata & probata must agree"

Thus it will be seen, that in Suits both at Law & in Equity the Courts adhere rigidly to the rule, that the allegations & proofs must Correspond - Any other rule would enable parties to take undue advantage of each other, & wrongs & injuries would be the inevitable Consequences -

It Seems to me to be unnecessary further to Cite authorities - It is a general rule in actions of Tort, as well as in actions Ex Contractu, that the allegations & proofs must Correspond - In the present Case the fact of the Defendants depositing their Corn Cobs in the river, (the Raisin River) & thereby obstructing the free passage of the water to Plaintiffs Mill &c. is distinctly put in issue, & there is no issue or allegation whatever that the Defendants deposited their Cobs in their race & wrongfully permitted them to be Carried by the Current of water into the River, & thereby diverted the water from the Plaintiffs Mill - No such issue as this is made & the Defendants in Error were not Called upon to

meet or defend any such issue - The proofs introduced by the Plaintiff in no manner tended to sustain the allegations in his declaration, or to prove the issue made and the Plaintiff's Evidence was properly ruled out by the Court, & it is unnecessary for me to refer to authorities as to the correctness of the practice upon this point.

In relation to the bill of Exceptions, the Court will observe on looking into the record, that when the Plaintiff closed his Evidence the Defendants Counsel moved to exclude the Evidence of the Plaintiff from the Consideration of the jury, (no Evidence being offered by Defendants) and that the Court sustained said motion & excluded the Evidence - Plaintiff's Counsel then excepted to the ruling of the Court, but made up no bill of Exceptions, or asked for time to make up & file Exceptions at a future period - After the jury rendered their verdict, the Plaintiff's Counsel moved for a new trial, which motion was overruled by the Court, & Plaintiff's Counsel excepted to the ruling of the Court, & asked leave to make up & file his bill of Exceptions at a future period - The Court granted Plaintiff's Counsel until the 1st day of March next (March 1856) to make up & file his bill of Exceptions -

Nothing appears in the record to show that the bill of Exceptions was made up & filed in the time allowed by the Court, or at any time, & the fact of its appearing in the record does not make it a part of the record - There being nothing shown

[12347-41]

17 it to belong to the record it cannot be considered by the Court - The record is certified by the Clerk of Wdl County Circuit Court April 18th. 1856 -

In regard to making & filing bills of Exceptions the Court is referred to 13th. Md. Rep. 66th. Burst vs. Wayne 5th. Gill. 453. Evans vs. Fisher et. al - Other Cases might be cited but it is deemed unnecessary

Believing that the Court cannot under any view of the Case, find Cause to reverse the judgment below, the same is respectfully submitted

Wm Ogood atty &
Counsel for Defendants

34.

Error to Will

Supreme Court

Hiram Norton & others
Defendants in Error
adv
Henry Penton Plff
In Error

Argument of Defts
in Error

Mr Osgood atty &
of Counsel for Deft
in Error

Filed May 9. 1857
L. Leland
Clerk

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

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 Will ——— county, before the Judge thereof, between Henry Panton Plaintiff & Hiram Norton, Lemuel D Norton & Samuel W Norton ———

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

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 Hiram Norton, Lemuel D. Norton & Samuel W. Norton

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 Nortons

notice, together with this writ.

Walter B. Scates

WITNESS, the Hon. ~~Samuel H. Treat,~~ Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 23 day of May in the Year of Our Lord One Thousand Eight Hundred and Fifty-six.

L. Leland

Clerk of the Supreme Court.

By J. B. Rice Deputy.

12347-43

Henry Panton

vs

Hiram Norton & others

Scire Facias.

I have Executed this writ by reading the same to and in the hearing of the within named Hiram Norton & Samuel W Norton May 28th 1856 Lemuel D Norton not found in my County

Fees

2 Services — 1.00
10 Miles — — .50
Return — — .10
$1.60

P. P. Scarritt Shff
Will Co

Filed June 12 1856
L. Leland
Clerk

State of Illinois - Supreme Court

Hiram Norton, Samuel D. Norton
and Samuel W. Norton
ads. Error to Will
Henry Paxton

And thereupon afterwards, to wit, at the June Term of said Supreme Court A.D. 1856 Hiram Norton, Samuel D. Norton & Samuel W. Norton Defendants in Error, by Mr Osgood their attorney, come here into Court & say that there is no Error either in the record & proceedings aforesaid, or in the rendition of the judgment aforesaid; and pray that the justices of the said Supreme Court now here, may proceed to examine, as well the record & proceedings aforesaid, as the matters aforesaid above assigned for Error, & that the judgment aforesaid, in form aforesaid given, may be in all things affirmed &c.

Mr Osgood Attorney &
Of Counsel for Defts in Error

[12347-41]

Sup. Ct. 3d. Division
Hiram Semmel D. t
Saml. W. Norton Defts in Error
adv.
Henry Panton Plff. in Error

Joinder in Error

Filed June 12 1886
L. Leland
Clerk

Wm Osgood
atty n. for
Defts in Error

Know all Men by these presents, that we, Henry Panton and James M. Haven are held and firmly bound unto Hiram Norton, Lemuel D. Norton and Samuel W. Norton, in the penal sum of 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, Executors and administrators jointly severally and firmly by these presents.

The Condition of the above obligation is such, that whereas, the said Hiram Norton, Lemuel D. Norton & Samuel W. Norton, did on the 3d day of January A. D. 1856, in the Circuit Court of Will County, Illinois, recover a judgment against the above bounden Henry Panton for the Costs of Suit; And Whereas the said Henry Panton has prayed a Writ of Error and Supersedeas from the Third Grand Division of the Supreme Court of the State of Illinois, for the Suspension and reversal of said judgment,

Now if the said Henry Panton shall duly prosecute his said ~~Suit~~ Writ of Error, and pay or cause to be paid such judgments, Costs, interest and damages as the said Supreme Court shall adjudge against him in this behalf, in case said judgment is affirmed, then this obligation is to be void, otherwise to remain in full force and effect.

Witness our hands and Seals this

day of A. D. 1856.

Henry Panton Seals

James M. Haven Seals

12347-48

Henry Do Santoni
vs
Hiram Norton et al
Bond.

Filed May 23. 1856
L. Leland Clerk.

WRIT OF ERROR.

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

To the Clerk of the Circuit Court for the county of Will Greeting:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the circuit court of Will county, before the Judge thereof, between Henry Fanton

plaintiff, and Hiram Norton, Lemuel D Norton & Samuel W. Norton

defendant s it is said manifest error hath intervened, to the injury of the aforesaid Plaintiff 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 he done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly withot 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 inspeted, 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,~~ Walter B Scates Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 23 day of May in the Year of Our Lord One Thousand Eigh. Hundred and Fifty-Six

L. Leland
Clerk of the Supreme Court.
By J. B Rice Deputy

[12347-4]

Henry Paulson
vs 34
Hiram Norton et al

Writ of Error

This Writ of Error is
made a Supersedeas
& as such is to be obeyed
by all Concerned.
L. Leland Clerk

Filed May 23. 1856.
L. Leland Clerk.

Error to Will Circuit Court.

Henry William Lanton,
Plff in Error
vs.
Hiram Norton etal
Defts in Error.

Argument for Plff in Error.

This was an action on the case for obstructing the operation of the plaintiffs mill, situated on the Des Plaines River, by depositing in that stream large quantities of corn cobs, the refuse of a corn-shelling machine of the defendants in error, located on the tail race of their mill, which discharged into the Des Plaines River at a point above the plaintiffs mill.

The declaration charges in general terms that defendants deposited the corn cobs in the Des Plaines River. The record shows the proof to have been in substance, that the corn shelling machine of the defendants was attached to and propelled by the machinery of their flouring mill; that it was situated over the tail race thereof into which the cobs were discharged; that their mill was built on the Hydraulic basin of the Illinois and Michigan Canal about three fourths of a mile above the plaintiffs mill, and that a tail race about two hundred feet in length, led from their mill, discharging into the river. Upon the conclusion of the plaintiffs case, the counsel for the defendants moved to exclude the evidence on the ground, that it did not tend to support the allegations in the declaration. The court sustained the motion and afterwards overruled a motion for a new trial, which decisions are assign for error.

[2347-47]

2

I. The office of a declaration, chiefly is this — to point out to the defendant the identical subject matter of the suit, so that he may be enabled to prepare intelligently for his defence, and so that the record of the case may serve to protect him from future litigation on the same issues. It must fully meet this requirement, but the Courts encourage the most simple and compendious style of pleading, compatible with it.

In actions of trespass or case, for wrongs to the property of the plaintiff or its use, although the injury is effected by a series of acts, yet if the subject matter is identified with reasonable certainty by the qualities of time, place, names of parties, subject of injury, and general cause of injury, this will be sufficient, without giving the particulars of the injury. —

1 Ch. Pleadings 391. & cases cited in note "y".

Acts may be stated, not with historical accuracy, but according to their legal effect. The acts of the servant, are in legal contemplation the acts of the master and may be so charged. The operation of natural laws, under the will and direction of the defendant, may be charged upon him, as the legal and responsible agent. —

II — The whole question in this case evidently hinges on the meaning to be given to the term "deposit" as used in the declaration. We think the Circuit Court restricted it to limits unreasonably narrow; — indeed, that it virtually decided, that to deposit was a mere manual operation, by the direct personal agency of the defendants. We hold to a far wider signification.

To "deposit", in its simple and primary sense, means to throw down or accumulate materials at a given place. — But even in its common and popular acceptation, it has a much wider range of meaning than this.

The act may be performed in an infinite variety of modes. Scarcely any mode can be conceived, which does not involve the necessity of employing physical instruments, and none which does not imply the operation of physical laws. It may be performed by servants under the direction of the master, by direct manual operation, or with the aid of mechanical contrivances, — cars, wheelbarrows, waggons, or inclined planes. Or it may, as in this case, be effected by a current of water, running directly to the place of deposit.

We concede, that in order to make the term a proper one, the relation between the cause and the effect must be direct and certain. It is easy to state extreme cases, and it is easy for the defendants counsel here to suppose a case, when the primary cause would be so remote, and the chain of causation so complicated and doubtful, that no court could reasonably refer the final injury to the first act in the chain. We are not called upon to maintain our point against this species of attack. Each case must stand on it's own proper basis. From the nature of the subject, no fixed rule can be established to test such questions. —

III. — It is impossible to make a distinction on principle between the mode of depositing the cobs in question, as practised in this case, as shown by the proof, and any other mode. They might have been rolled down the bank of the river, thus descending at an angle of 45° under the law of gravitation, or they might for the sake of convenience, have been discharged through a shute erected for the purpose, at a much less angle of descent. Or they might have been impelled by some sort of physical force from the defendants mill — or they might have been transported in vehicles of various kinds; or they might have been carried by hand from the defendants mill to the

river. The defendants, consulting their convenience, resorted to none of these modes to relieve themselves of the accumulation of corn cobs, but sent them down by a stream of water. Is not this a depositing to all intents and purposes, the same as if any of the other modes were adopted to accomplish the result? It seems to us, there is no real chance for debate on this point. -

Parks & Elwood
Attorneys for pltff in
Error. with
Norton & McRoberts.

Error to Whit.

Henry Paxton.
Pltff in Error
vs.
Adams Norton & al
Defts in Error.

Argument for pltff in Error.

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Filed April 22, 1854
L. Leland
D. Clerk

Henry Paxton
by
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1857