No. 12493

Supreme Court of Illinois

Board of Trustees of the Ill& Michigan Canal.

vs.

Granger.

State of Illinois
County of Cook ss.

Pleas before the Honorable Isaac G. Wilson Judge of the thirteenth Judicial Circuit Court of the State of Illinois in the vacancy of the office of Judge of the seventh Judicial Circuit Court caused by the resignation of the Honorable Hugh T. Dickey at a term of the Circuit Court of the County of Cook in said State begun and held at Chicago in said County of Cook on the first Monday it being the second day of May in the year of our Lord One thousand Eight hundred & fifty three and of the Independence of the United States the Seventy Seventh.

Present

The Honorable Isaac G. Wilson Judge of the thirteenth Judicial Circuit Court.

Daniel McIlroy States Atty.

Cyrus P. Bradley Sheriff

Attest.

Louis D. Hoard Clerk.

Be it remembered that on the 28th day of February in the year of our Lord One thousand Eight hundred and fifty three — The Board of Trustees of the Illinois & Michigan Canal by their Attornies, filed in the office of the Clerk of the Circuit Court of Cook County their certain

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precipe for a summons which is in the words & figures following to wit,

Cook Circuit Court
May Term A.D. 1853

State of Illinois }
Cook County } ss.

The Board of Trustees of the Illinois & Michigan Canal
vs
Elihu Granger

Debt
Demand $4000
Damages $1000

The Clerk will please issue a writ of summons directed to Sheriff of Cook County to execute in form of The Board of Trustees of Illinois & Michigan Canal plaintiffs against Elihu Granger Deft. in a plea of debt that the said Defendant render unto the said plaintiff the sum of Four Thousand Dollars which he owes and unjustly detains from them, and lay the damages at one Thousand Dollars.

Pricipe

Yr. Obt. Sert.
Larned & Woodbridge
Attys. for Plff

To the Clerk

And thereupon on the day & year aforesaid the said Clerk issued a summons under the seal of the Court aforesaid directed to the Sheriff

of Cook County & clothed in the words & figures following to wit.

State of Illinois }
Cook County } ss.

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

We command you that you summon Elihu Granger if he shall be found in your county, personally to be and appear before the Circuit Court of said county on the first day of the next Term thereof, to be holden at the Court House in Chicago, in said county, on the first Monday of May next, to answer unto The Board of Trustees of the Illinois & Michigan Canal in a plea that he render unto said plaintiff the sum of Four thousand dollars which he owes to & unjustly detains from them to the damage of the said plaintiffs as they say in the sum of Four thousand Dollars.

Summons

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

Witness, Louis D. Hoard Clerk of our said court and the seal thereof at Chicago aforesaid this 28th day of February A. D. 1853

L. D. Hoard Clerk

seal

The aforesaid writ was afterwards returned into the office of the Clerk aforesaid with an endorsement thereon, which is in the words & figures following to wit,

Served by reading to the within named Elihu Granger March 10th 1853

1 service	,50
1 mile	5
Return	10
	,65

C. P. Bradley Sheriff
by M. Pegan Deputy

And the said plaintiffs afterwards to wit, on the 22d day of March in the year last aforesaid filed in this cause their certain declaration together with a certain lease which declaration & lease are in the words & figures following to wit,

Cook County Circuit Court

Of the May Term of the Cook Circuit Court in the year of our Lord One thousand Eight hundred and fifty three (A. D. 1853)

(A) State of Illinois }
County of Cook } ss.

(A) The Board of Trustees of the Illinois and Michigan Canal plaintiffs in this suit by Larned and Woodbridge their Attorneys complain of Elihu Grangu defendant in this suit who was duly summoned &c. of a plea that he render to the plaintiffs the sum of Four Thousand Dollars which he owes to and unjustly detains from them

For that whereas the defendant before and at the time of the giving of the notice and making the demand as hereinafter mentioned held and enjoyed a certain messuage and lands tenements and premises with the appurtenances situate in the County of Cook aforesaid as tenant thereof to the plaintiffs, that is to say as tenant thereof from year to year for so long a time as the plaintiffs and the defendant should respectively please the reversion of the said premises with the appurtenances during all that time belonging to the plaintiffs to wit at Cook County aforesaid and thereupon whilst the defendant so held and enjoyed the said tenements with the appurtenances as tenant thereof to the plaintiffs as aforesaid and whilst the said reversion so belonged to the plaintiffs as aforesaid to wit, on the twenty fifth day of June A. D. 1850 at Cook County aforesaid they the plaintiffs gave a notice in writing to the defendant and then

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and there demanded and required him the defendant to deliver up the possession of the said tenements with the appurtenances to the plaintiffs on the twenty sixth day of June A. D. 1850 on which day the term estate and interest of the defendant in the said tenements with the appurtenances determined to wit at Cook County aforesaid.

Nevertheless the defendant not regarding the Statute in such case made and provided did not nor would on the determination of the said term as aforesaid deliver the possession of the said tenements with the appurtenances to the plaintiffs according to the said notice so given and the said demand so made as aforesaid but wholly neglected and refused so to do and on the contrary thereof he the defendant wilfully held over the said tenements with the appurtenances after the determination of the said term and after the said notice so given and the said demand so made as aforesaid for a long space of time to wit, for the space of two years and six months then next following during all which time the defendant did keep the plaintiffs out of the possession of the said tenements with the appurtenances (they the plaintiffs during all that time being entitled to the possession thereof to wit, at Cook County aforesaid contrary to the form of the Statute in such case made

and provided. And the plaintiffs aver that the said tenements with the appurtenances during the said time of holding over the same and keeping the plaintiffs out of the possession thereof as aforesaid were of great yearly value to wit of the yearly value of Eight Hundred Dollars and by reason of the premises and by force of the Statute in such case made and provided the defendant became liable to pay to the plaintiffs a large sum of money to wit, the sum of Four Thousand Dollars being at the rate of double the yearly value of the said tenements with the appurtenances for so long a time as the same were so detained as aforesaid, to wit, at Cook County aforesaid and thereby and by force of the said Statute an action hath accrued to the plaintiffs to demand and have from the defendant the said sum of Four Thousand Dollars parcel of the said sum above demanded. (B)

And whereas also the defendant afterwards to wit, on the twenty sixth day of January A. D. 1853 at said Cook County was indebted to the plaintiffs in the sum of Three Thousand Dollars for the use and occupation of a certain messuage buildings tenements and premises with the appurtenances of the plaintiffs by the defendant

and at his special instance and request and by the sufferance and permission of the plaintiffs for a long time before then elapsed had held used occupied possessed and enjoyed and to be paid by the defendant to the plaintiffs when he the defendant should be thereunto afterwards requested whereby and by reason of the said last mentioned sum of money being and remaining wholly unpaid an action hath accrued to the plaintiffs to demand and have of and from the defendant the sum of Three Thousand Dollars parcel of the said sum above demanded.

And whereas also the defendant afterwards to wit on the twenty sixth day of January A. D. 1853 aforesaid at Cook County aforesaid accounted with the plaintiffs of and concerning divers other sums of money before that time and then due and owing from the defendant to the plaintiffs and upon that accounting the defendant was found to be in arrear and indebted to the plaintiffs in the further sum of Four Thousand Dollars to be paid by the defendant to the plaintiffs when he the defendant should be thereunto afterwards requested whereby and by reason of the said last mentioned sum of

Pltffs. waive the third count, as no evidence was offered under it.

money being and remaining wholly unpaid an ~~account~~ action hath accrued to the plaintiffs to demand and have of and from the defendant the said last mentioned sum of Three Thousand Dollars residue of the said sum above demanded

Yet the defendant (although often requested so to do) hath not as yet paid the said sum of Four Thousand Dollars above demanded or any part thereof to the plaintiffs. But he to do this hath hitherto wholly refused and still doth refuse to the damage of the plaintiffs of One Thousand Dollars and therefore they bring their suit &c.

Larned and Woodbridge
Pltffs. Attys.

Elihu Granger
To the Board of Trustees
of the Ill. & Mich. Canal Dr.

"To double rent from June 26, 1850		
to Jan. 26, 1853		$ 4000
" use & occupation		3000
" account stated		3000

(Copy of Lease)

This Indenture made and entered into this Fourth day of Sept. in the year of

Copy of Lease

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our Lord one thousand eight hundred and forty five between the Board of Trustees of the Illinois and Michigan Canal of the first part, and Elihu Granger of the City of Chicago of the second part, Witnesseth, that the said party of the first part for the consideration hereinafter mentioned, agrees to let and lease unto the said party of the second part for the term of two years that is from the twenty sixth day of June in the year of our Lord one thousand eight hundred and forty five until the twenty sixth day of June A. D. 1847 the Tract or Parcel of Canal Land situated in the County of Cook State of Illinois, and known and described as follows to wit, Lots two, three and four Old Town of Chicago and the House thereon now occupied by the party of the second part.

And the said party of the second part, for the use and occupation of said Tract of land does hereby covenant and agree to and with the said party of the first part, that he will pay to the said party of the first part, as rent, the sum of two hundred and twenty five dollars per annum payable in instalments of one hundred and twelve $\frac{50}{100}$ dollars each respectively on the 26th December 1845

on 26th June 1846, on 26th Dec. 1846, on 26th June 1847, for which said rent he has executed to the said party of the first part four promissory notes falling due at the same time the rents become due, according to the terms of this lease.

And it is covenanted and agreed, on the part of the said party of the second part, that if at any time he shall fail to pay to said party of the first part the rent above stated, as the same becomes due, the said party of the first part may at its option, declare this lease at an end, and the said party of the second part shall quit and surrender said tract of land to said party of the first part.

It is further covenanted and agreed between the said parties, that in case of non-payment of rent, or any part thereof, as the same falls due, according to the terms of this lease, the said party of the first part, by its agent or attorney shall possess the right to enter and distrain any property belonging to the said party of the second part, whether the same be exempt from execution and distress by law or not, for such rent, and a lien on said property is hereby created in favor of said party of the first part, for said rent.

And the said party of the second part, further covenants and agrees, that in case

default shall be made in the payment of the rent, or any part thereof as above stated, that from the date of such default, for and during the time the said party of the second part shall remain in possession of said leased premises thereafter, there shall be paid by the party of the second part, double the amount of rent hereinbefore stipulated to be paid, and the said party of the first part shall have and may use all the remedies for enforcing the collection of the same given for the collection of rent by this lease.

It is further covenanted and agreed, on the part of the said party of the second part, that he will not re-let said tract of land, without the consent in writing of the said party of the first part.

It is further covenanted and agreed between the said parties that no presumption of an extension of this lease shall be raised should the said party of the second part remain upon and occupy said tract of land, after the expiration of the time for which the same is let to him by the terms of this lease, but any such retaining of possession shall be considered a holding over after the determination of the time said lands were let to him and it is expressly understood that the party

of the second part does not hereby waive any pre-emption right he may have to the above premises or any part thereof.

For the full, true, and faithful performance of the covenants and stipulations herein contained to be performed on his part, the said party of the second part binds himself, his heirs, executors and administrators, firmly by these presents.

In Testimony Whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

Board of Trustees of the Ill. & M. Canal
By E. S. Prescott Agt. L. S.
Elihu Granger L. S.
(Clerk of Trust)

Whereupon the said defendant afterwards to wit, on the 25th day of November in the year last aforesaid filed his certain plea in this cause together with an affidavit of merits which are in the words & figures following to wit.

Elihu Granger
ads
The Board of Trustees &c.
} Cook Co. Court Com. Pl.

And the said defendant by E. W. Tracy his attorney comes and defends the wrong and injury, when &c. and says that he does not owe the said several sums of money above demanded

Grant
Issue

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or any or either of them, or any part thereof in manner and form as the said plaintiffs have above thereof complained against him, and of this the said defendant puts himself upon the Country &c.

E. W. Tracy
Defts Atty

The Board of Trustees &c.
vs.
Elihu Granger

Cook Co. Court of Com. Pleas
deft.

State of Illinois
County of Cook ss.

Elihu Granger who is the defendant above named being first duly sworn deposes and says that he has as he verily believes a good and substantial defense upon the merits to said action.

E. Granger

Subscribed & sworn
to before me this 18th Nov.
A.D. 1853

L. D. Hoard Clk

And afterwards to wit, on the 18th day of November A. D. 1856 the said defendant filed his certain other plea in this cause

which is in the words & figures following to wit,

State of Illinois }
Cook County } ss.

Elihu Granger ads The Board of Trustees of the Illinois & Michigan Canal	In the Cook County Circuit Court at the November Term A. D. 1856

Special Plea

And now comes the said defendants by Wilkinson & McGilvra his attorneys and says that the said plaintiffs ought not further to maintain this action against the said defendant, because he says that after the commencement of this suit and after the Plea of the general issue filed therein, to wit, on the first day of January A. D. 1854 an action of Ejectment was pending between the parties to this suit in the Cook County Court of Common Pleas in the State aforesaid, which said action of Ejectment was commenced by the plaintiffs in this suit against the defendant in this suit to recover the possession of the premises referred to by the said plaintiffs in their declaration in this suit to wit, lots two, three and four in Block four in the old Town of Chicago State aforesaid. That while the said action of Ejectment was so pending in said Court and before default or judgment therein to wit, on the

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day and year last aforesaid, there was a verbal agreement made and entered into by and between the Board of Trustees of the Illinois and Michigan Canal by Isaac N. Arnold the duly authorized and acting Attorney for the said plaintiffs in the said action of Ejectment and also in this suit, and Eli S. Prescott the duly authorized and acting agent of the said plaintiffs, on the one part, and the said defendant on the other part, that if the said defendant would withdraw his defense to said action of Ejectment, allow a judgment therein to be entered against him, and deliver up the possession of the said premises, that the said plaintiffs in consideration thereof among other things would dismiss, discontinue and abandon this suit and all other suits then pending, and all claims for rents and use of the said premises which had accrued to the said plaintiffs from or against the said defendant prior to the time of making said verbal agreement.

That on the 13th day of February A. D. 1854, the said Elihu Granger defendant as aforesaid did withdraw his defense and did by stipulation allow a judgment to be entered against him in the said action of Ejectment, and that on or about the first day of May A. D. 1854, did deliver up the possession of the said premises to the said plaintiffs according to the true intent and meaning of said verbal agreement.

Yet the said plaintiffs not regarding their said several promises and undertakings in this behalf have not dismissed this suit, but still continue to prosecute the same.

And this the said defendant is ready to verify wherefore he prays judgment, if the said plaintiff ought further to have or maintain their action against him,

Wilkinson & McGilvra
Defts. attys.

(Case of special plea)

Elihu Granger the above named defendant maketh oath and saith that the above Plea is true in substance and in fact

E. Granger

Sworn to & subscribed before me this 18th day of Nov. 1856
L. D. Hoard
Clerk

And the said plaintiffs thereupon on the day and year last aforesaid filed their certain replication to the said defendant's Plea in this cause which is in the words & figures following to wit,

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Cook Cir. Court

Replication

Board of Trustees &c.
vs.
Elihu Granger

Replication

And now at this day comes the plaintiff by leave of Court &c & by I. N. Arnold their Atty. & says precludi non because they say there was no such agreement made and entered into between the said plaintiff & the said defendant as is alledged in said Plea & that the said plaintiffs never did promise & agree in manner & form as alledged in said Plea & of this they put themselves upon the Country &c.

And the said plaintiffs for a further replication in this behalf by leave &c. say precludi non because they say that the said Deft. did not nor would he on or about the first day of May 1854 deliver up the possession of said premises according to the true intent & meaning of said supposed agreement & of this the plaintiffs put themselves upon the Country &c.

I. N. Arnold
Atty. for Plff

and Deft. doth the like &c.

(Also Def Replication)

And afterwards, to wit, on the 28th day of November A.D. 1856, it being one of the days of the regular November Term of our said Circuit Court the following, among other proceedings in said Court, were had and entered of record in this cause to wit,

The Board of Trustees of the Illinois & Michigan vs. Elihu Granger } debt.

And now at this day comes the said plaintiff by Isaac N. Arnold its Attorney and the said defendant by Wilkinson & McGilra his Attorneys also comes and issue being joined in this cause it is ordered that a Jury come and thereupon comes the Jurors of a Jury of good and lawful men to wit,

Joel Hurd	Aso Gannis	Saml. Miles
Hugh McMurray	G. G. Chillcoh	Peter Dox
J. Nichols	Charles Swet	W. S. Swan
C. Rosenberg	S. A. Sheppard	Joseph Hawly

who being duly elected tried and sworn well and truly to try the issue aforesaid after hearing a portion of the evidence and the hour of adjournment having arrived it is ordered that they be allowed to separate to meet the Court at the coming in thereof to-morrow morning.

And afterwards to wit, on the third day of December in the year last aforesaid it being as yet of the said November Term of said Circuit Court – the following further proceedings were had and entered of record in this cause to wit,

The Board of Trustees of the Illinois & Michigan Canal
vs.
Elihu Granger
} Debt

And now again come the said parties by their respective attorneys and the Jurors of a Jury heretofore Empannelled in this cause also come and they having now heard all the testimony adduced, arguments of Counsel and Instructions of the Court retire under charge of an officer of this Court to consider of their Verdict & afterwards come into Court and say – "We of the Jury find for the Plaintiff and find the said defendant to owe and be indebted unto the said plaintiff in the sum of One thousand two hundred and thirty four Dollars and Sixty cents."

Verdict

And thereupon the said Defendant enters his motion for a new trial and an arrest of Judgment.

And afterwards to wit, on the 22d day of December in the year last aforesaid the said defendant by his Attorneys came into open Court and filed his motion in arrest of judgment which motion is in the words & figures following to wit,

Elihu Granger vs. Trs. of Ill. & Mich Canal	Cook Circuit Court Nov. Term 1856

Motion in arrest of judgment

And now comes the said defendant, after verdict and before judgment in said cause and moves the Court that judgment be arrested for the following among other reasons.

1st Because the said Trustees were not authorised to lease the said canal lands.

2d Because the said Trustees were not authorised to collect rents for the said canal lands

3rd Because the said Trustees were by Statute, expressly prohibited from leasing, or collecting rents for said canal lands

4th Because said Trustees, were not authorised to sue for or sustain suits for rent for said canal lands.

5th Because said Trustees are a corporation and can do nothing except what the power creating them has given them authority to

do, and such power has given them no authority to lease, collect rents, or sue for rents of said canal lands.

6th Because said Trustees as such corporation having in this case stepped outside the bounds of their corporate powers have for all the purposes of this case ceased to exist as such corporation.

7th Because said Trustees are not a legal party plaintiff in this case.

8th Because there never has been and is not now a legal party plaintiff in this case.

9th Because there is no party entitled to take the benefit of a judgment as plaintiff in this case.

10th Because there is no party plaintiff for whom the Court can legally render judgment in this case.

11th Because there is no sufficient record in this case upon which the Court can render judgment as for plaintiff and against defendant.

12th Because the Court has no legal jurisdiction under which it can render judgment against defendant in this case.

By his Attys.

Wilkinson & McGilvra

(Defense of Wilkin)

And afterwards to wit, on the 24th day of March in the year A. D. 1857 and of the March Vacation Term of our said Circuit Court the following among other proceedings were had and entered of record in said Court, to wit.

The Board of Trustees of the Illinois & Michigan Canal
vs.
Elihu Granger } Debt.

This day come again the said plaintiff by Arnold and the defendant by Wilkinson & McGilvra and the motions for a new trial and in arrest of judgment are taken up to be considered and thereupon the defendant waives and abandons all the special grounds argued for a new trial and relies only upon the two following viz,

That the Court erred in excluding testimony of Prescott's statements which the defendant offered for the purpose of impeaching him or affecting his credibility, and Secondly— That the Court erred in admitting the Copy in evidence and after argument on these points and the Court being sufficiently advised in the premises the motion for a new trial is overruled and thereupon the motion in arrest of judgment is argued and

submitted to the Court and the Court not being sufficiently advised in the premises takes the same under advisement.

And afterwards to wit, on the 30th day of March in the year last aforesaid and of the March special term of said Court the following further proceedings were had and entered of record in said Court in this cause to wit,

The Board of Trustees
of the Illinois & Michigan Canal
vs.
Elihu Granger } Debt

This day again come the said parties by their attorneys and the Court, having considered and being now fully advised of & concerning the said defendant's motion for arrest of judgment in this cause, doth now overrule the same; and to the ruling of the Court in overruling his said motion the said defendant by his counsel now here excepts.

Therefore it is considered by the Court that the said plaintiff do have and recover of & from the said defendant its debt amounting to the sum of One thousand two hundred and thirty four Dollars & sixty cents in form aforesaid by the Jury

aforesaid found to be due and owing from the said defendant to the said plaintiff together with its proper costs and charges in this behalf expended & that execution issue therefor.

And afterwards to wit on the 6th day of April in the year last aforesaid and of the term of said Court last aforesaid the following further proceedings were had & entered of record in this cause to wit,

The Board of Trustees of the Illinois & Michigan Canal vs. Elihu Granger } Debt.

And now again comes the said defendant by Wilkinson & McGilvra his attorneys, and here in open Court expressly waives his motion heretofore made for a new trial of this cause & says, he will rely only upon his motion made in arrest of judgment and prays an appeal from the judgment and decision of this Court in overruling his motion made in arrest of judgment, to the Supreme Court of the State of Illinois, which is allowed upon his entering into bonds in the penal sum of $2500 within six days, conditioned

as the law directs.

And afterwards to wit, on the 11th day of April in the year last aforesaid the said defendant came & filed in this cause his certain appeal bond which is in the words & figures following to wit,

Know all men by these presents that we Elihu Granger as principal and Washington G. Granger as surety are held and firmly bound unto the Trustees of the Illinois and Michigan Canal in the penal sum of three thousand dollars to the payment of which we bind ourselves jointly and firmly by these presents — also our heirs executors and administrators

Sealed with our seals and dated this seventh day of April A. D. 1857

The condition of this obligation is such that whereas at the November Term of the Circuit Court of Cook County, the said Trustees recovered judgment against the said Elihu Granger in a certain action of debt for the sum of twelve hundred thirty four dollars and sixty cents ($1234\frac{66}{100}$) and also for costs of ~~said~~ suit,

from which judgment the said Granger has prayed an appeal to the next term of the Supreme Court for the third grand division of Illinois

Now if the said Elihu Granger shall well and truly prosecute his said appeal with effect, and pay all such damages and costs as the said Trustees shall recover against him on a final adjudication of the matter in suit by said Supreme Court, then this obligation to be null and void - otherwise to be and remain in full force and virtue

E. Granger (Seal)
W. T. Granger (Seal)

State of Illinois
Cook County ss.

I William L. Church Clerk of the Circuit of the County of Cook in the State aforesaid do hereby certify that the above and foregoing is a true and perfect copy of the Plaintiffs precipe, the Summons & Sheriffs return endorsed thereon, the said plaintiffs declaration & the bond mentioned therein, the said defendant's Plea & the said plaintiffs replication thereto, together with the proceedings had and entered of record

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so far as the same relates to the empanneling of the Jury, the finding of the Jury, the defendants motion for a new trial and the motion in arrest of Judgment the ruling of the Court in overruling each of said motions, the Judgment of the Court and the non granting an appeal & also the appeal bond, in a certain cause lately pending in said Court wherein the Board of Trustees of the Illinois and Michigan Canal against Elihu Granger

Witness my hand and the seal of our said Court at Chicago this 25th day of April A.D. 1857

Wm L. Church
Clerk of Cir. Ct. Cook Co.

Clerks fees for Record $6.75/100

Board of Trustees of Illinois & Mich. Canal
vs.
Elihu Granger

Record

Filed May 15 1857
E. Leland
Clerk

Fees $6.75

SUPREME COURT OF ILLINOIS.

THE BOARD OF TRUSTEES OF ILLINOIS AND MICHIGAN CANAL *vs.* ELIHU GRANGER.	Debt Demand, $4,000. Damages, $1,000.

ABSTRACT.

Record, Page 2.

PRECIPE.

3. SUMMONS TO DEFENDANT.

4. RETURN OF SUMMONS.

DECLARATION.

5. STATE OF ILLINOIS, County of Cook, } ss.

FIRST COUNT—The Board of Trustees of the Illinois and Michigan Canal, plaintiffs, in this suit by Larned & Woodbridge, their Attorneys, complain of Elihu Granger, defendant in this suit, who was duly summoned, &c., of a plea that he render to the plaintiffs the sum of Four Thousand Dollars, which he owes to and unjustly detains from them.

For that whereas the defendant, before and at the time of the giving of the notice and making the demand as hereinafter mentioned, held and enjoyed a certain messuage and lands, tenements and premises, with the appurtenances, situated in the County of Cook aforesaid, as tenant thereof to the plaintiffs, that is to say, as tenant thereof from year to year, for so long time as the plaintiffs and the defendant should respectively please, the reversion of the said premises, with the appurtenances, during all that time belonging to the plaintiffs, to wit at Cook County aforesaid; and thereupon, whilst the defendant so held and enjoyed the said tenements, with the appurtenances, as tenant thereof to the plaintiffs as aforesaid, and whilst the said reversion so belonged to the plaintiffs as aforesaid, to wit, on the twenty-fifth day of June A. D. 1850, at Cook County aforesaid, they, the plaintiffs, gave a notice in writing to the defendant, and then and there demanded and required him, the defendant, to
6. deliver up the possession of the said tenements, with the appurtenances, to the plaintiffs on the twenty-sixth day of June A. D. 1850, on which day the term, estate and interest of the defendant in the said tenements, with the appurtenances, determined, to wit, at Cook County as aforesaid. Nevertheless, the defendant not regarding the statute in such case made and provided, did not nor would, on the determination of the said term as aforesaid, deliver the possession of the said tenements, with the appurtenances, to the plaintiffs according to the said notice so given and the said demand so made as aforesaid, but wholly neglected and refused so to do, and on the contrary thereof, he, the defendant, wilfully held over the said tenements, with the appurtenances, after the determination of the said term, and after the said notice so given and the said demand so made as aforesaid, for a long space of time, to wit, for the space of two years and six months then next following, during all which time the defendant did keep the plaintiffs out of the possession of the said tenements, with the appurtenances, (they, the plaintiffs, during all that time being entitled to the possession thereof,) to wit, at Cook County aforesaid, contrary to the

form of the statute in such case made and provided. And the plaintiffs aver that
7. the said tenements, with the appurtenances, during the said time of holding over the same and keeping the plaintiffs out of possession thereof as aforesaid, were of great yearly value, to wit, of the yearly value of Eight Hundred Dollars, and by reason of the premises and by force of the statute in such case made and provided, the defendant became liable to pay to the plaintiffs a large sum of money, to wit, the sum of Four Thousand Dollars, being at the rate of double the yearly value of the said tenements, with the appurtenances, for so long a time as the same were so detained as aforesaid, to wit, at Cook County aforesaid, and thereby, and by force of the said statute, an action hath accrued to the plaintiffs to demand and have from the defendant the said sum of Four Thousand Dollars, parcel of the said sum above demanded.

Second Count—Common count for use and occupation prior to January 26, 1853.

Third Count—Plaintiffs offered no evidence under this count, and the same was waived.

Copy of Lease.

9. This Indenture, made and entered into this fourth day of September, in the year
10. of our Lord One Thousand Eight Hundred and Forty-five, between the Board of Trustees of the Illinois and Michigan Canal, of the first part, and Elihu Granger, of the City of Chicago, of the second part, witnesseth, that the said party of the first part, for the consideration hereinafter mentioned, agrees to let and lease unto the said party of the second part, for the term of two years, that is from the twenty-sixth day of June, in the year of our Lord One Thousand Eight Hundred and Forty-five, until the twenty-sixth day of June A. D. 1847, the Tract or Parcel of Canal Land situated in the County of Cook, State of Illinois, and known and described as follows, to wit: Lots two, three and four Old Town of Chicago, and the House thereon now occupied by the party of the second part.

And the said party of the second part, for the use and occupation of said tract of land, does hereby covenant and agree, to and with the said party of the first part, that he will pay to the said party of the first part, as rent, the sum of Two Hundred and Twenty-five Dollars per annum, payable in instalments of One Hundred and Twelve Dollars and Fifty Cents each respectively on the twenty-sixth December
11. 1845, on twenty-sixth June 1846, on twenty-sixth December 1846, on twenty-sixth June 1847, for which said rent he has executed to the said party of the first part four promissory notes falling due at the same time the rents become due, according to the terms of this lease.

And it is covenanted and agreed, on the part of the said party of the second part, that if at any time he shall fail to pay to said party of the first part the rent above stated as the same becomes due, the said party of the first part may, at his option, declare this lease at an end, and the said party of the second part shall quit and surrender said tract of land to said party of the first part.

It is further covenanted and agreed between the said parties, that in case of non-payment of rent, or any part thereof, as the same falls due, according to the terms of this lease, the said party of the first part, by its agent or attorney, shall possess the right to enter and distrain any property belonging to the said party of the second part, whether the same be exempt from execution and distress by law or not, for such rent, and a lein on said property is hereby created in favor of said party of the first part for said rent.

And the said party of the second part further covenants and agrees, that in case
12. default shall be made in the payment of the rent, or any part thereof, as above stated, that from the date of such default, for and during the time the said party of the second part shall remain in possession of said leased premises thereafter, there shall be paid by the party of the second part double the amount of rent hereinbefore stipulated to be paid, and the said party of the first part shall have and may use all the remedies for enforcing the collection of the same given for the collection of rent by this lease.

It is further covenanted and agreed, on the part of the said party of the second part, that he will not relet said tract of land without the consent in writing of the said party of the first part.

It is further covenanted and agreed between the said parties, that no presumption of an extension of this lease shall be raised should the said party of the second part remain upon and occupy said tract of land after the expiration of the time for which the same is let to him by the terms of this lease, but any such retaining of possession shall be considered a holding over after the determination of the time said lands were let to him; and it is expressly understood that the party of the second part
13. does not hereby waive any pre-emption right he may have to the above premises or any part thereof.

For the full, true and faithful performance of the covenants and stipulations herein contained, to be performed on his part, the said party of the second part binds himself, his heirs, executors and administrators, firmly by these presents.

In testimony whereof, the said parties have hereunto set their hands and seals the day and year first above written.

BOARD OF TRUSTEES OF THE ILLINOIS
AND M. CANAL,
By E. L. PRESCOTT, Agent. [SEAL.]
ELIHU GRANGER. [SEAL.]

13. GENERAL ISSUE.

SPECIAL PLEA.

15. *Elihu Granger* ads. *The Board of Trustees of the Illinois and Michigan Canal*—
In the Cook County Circuit Court, at the November Term, A. D. 1856.

And now comes the said defendant, by Wilkinson & McGilvra, his attorneys, and says that the said plaintiffs ought not further to maintain this action against said defendant, because he says that after the commencement of this said suit, and after the plea of the general issue filed therein, to wit, on the first day of January, A. D. 1854, an action of Ejectment was pending between the parties to this suit in the Cook County Court of Common Pleas, in the State aforesaid, which said action of Ejectment was commenced by the plaintiffs in this suit against the defendant in this suit to recover the possession of the premises referred to by the said plaintiffs in their declaration in this suit, to wit, lots two, three and four in block four in the old Town of Chicago, State aforesaid; that while the said action of Ejectment was so pending in said Court, and before default or judgment therein, to wit, on the day
16. and year last aforesaid, *there was a verbal agreement* made and entered into by and between the Board of Trustees of the Illinois and Michigan Canal, by Isaac N. Arnold, the duly authorized and acting attorney for the said plaintiffs in the said action of Ejectment and also in this suit, and Eli S. Prescott, the duly authorized

and acting agent of the said plaintiffs, on the one part, and the said defendant on the other part, that if the said defendant would withdraw his defence to said action of Ejectment, allow a judgment therein to be entered against him, and deliver up the possession of the said premises, that the said plaintiffs, in consideration thereof among other things, would dismiss, discontinue and abandon this suit and all other suits then pending and all claims for rents and use of the said premises which had accrued to the said plaintiffs from or against the said defendant prior to the time of making said verbal agreement.

That on the thirteenth day of February A. D. 1854, the said Elihu Granger, defendant as aforesaid, did withdraw his defence and did by stipulation allow a judgment to be entered against him in the said action of Ejectment, and that on or about the first day of May A. D. 1854, did deliver up the possession of the said premises to the said plaintiffs according to the true intent and meaning of said verbal agreement.

17. Yet the said plaintiffs, not regarding their said several promises and undertakings in this behalf, have not dismissed this suit, but still continue to prosecute the same.

And this the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiffs ought further to have or maintain their action against him.

WILKINSON & McGILVRA, Deft's Att'ys.

REPLICATION.

18. *Board of Trustees, &c.*, vs. *Elihu Granger*—Cook Circuit Court.

And now at this day comes the plaintiff, by leave of Court and Jury, and by I. N. Arnold, their attorney, and says *precludi non*, because they say there was no such agreement made and entered into between the said plaintiff and the said defendant, as is alleged in said plea, and that the said plaintiffs never did promise and agree in manner and form as alleged in said plea, and of this they put themselves upon the country, &c.

And the said plaintiffs, for a further replication in this behalf, by leave, &c., say *precludi non*, because they say that the said defendant did not nor would he, on or about the first day of May 1854, deliver up the possession of said premises according to the true intent and meaning of said supposed agreement, and of this the plaintiffs put themselves upon the country, &c.

I. N. ARNOLD, Att'y for Pltf.

And defendant doth the like, &c.

VERDICT.

20. "We of the Jury find for the plaintiff, and find the said defendant to owe and be indebted unto the said plaintiff in the sum of One Thousand Two Hundred and Thirty-four Dollars and Sixty Cents."

MOTION IN ARREST OF JUDGMENT.

21. *Elihu Granger* ads. *Trustees of Illinois and Michigan Canal*—Cook Circuit Court, November Term, 1856.

And now comes the said defendant, after verdict and before judgment in said cause, and moves the Court that judgment be arrested for the following, among other reasons:

1st. Because the said Trustees were not authorized to lease the said Canal lands.

2d. Because the said Trustees were not authorized to collect rents for the said Canal lands.

3d. Because the said Trustees were by statute expressly prohibited from leasing or collecting rents for said canal lands.

4th. Because said Trustees were not authorized to sue for or sustain suits for rent for said canal lands.

5th. Because said Trustees are a corporation, and can do nothing except what the power creating them has given them authority to do, and such power has given them
22. no authority to lease, collect rents, or sue for rents of said canal lands.

6th. Because said Trustees, as such corporation, having in this case stepped outside the bounds of their corporate powers, have for all the purposes of this case ceased to exist as such corporation.

7th. Because said Trustees are not a legal party plaintiff in this case.

8th. Because there never has been and is not now a legal party plaintiff in this case.

9th. Because there is no party entitled to take the benefit of a judgment as plaintiff in this case.

10th. Because there is no party plaintiff for whom the Court can legally render judgment in this case.

11th. Because there is no sufficient record in this case upon which the Court can render judgment as for plaintiff and against defendant.

12th. Because the Court has no legal jurisdiction under which it can render judgment against defendant in this case.

By his Attorneys,

WILKINSON & McGILVRA.

24. Judgment of the Court, overruling the motion in arrest of judgment, to which defendant then and there excepted by his counsel.

25. Defendant waives the motion for a new trial, and relies only upon his motion in arrest of judgment.

ASSIGNMENT OF ERRORS.

The defendant, by his counsel, Wilkinson & McGilvra, says that the Circuit Court erred in overruling the motion in arrest of judgment.

By his Attorneys,

WILKINSON & McGILVRA.

The appellee, the Canal Trustees, say there is no Error in said record in the Motion to arrest & per the Motion & with costs are affirmed. J. K. Arnold Atty. Gen'l.

Supreme Court

The Board of Trustees
of Ills. & Mich. Canal, appellee
ads
Chas Granger —

This was an action of debt for rent;
also count for use & occupation of "divers lands, houses &c."
A general count.

There is no Bill of Exceptions.

There is simply a motion in arrest of judgment, & the only question which can arise on the record, is whether Canal Trustees can under any possible circumstances recover in an action of debt for rent; or use & occupation of land, or buildings owned by them.
If they can, as there is no Bill of exceptions, & as the Court can have no knowledge of what the evidence was, the Court will sustain & affirm the judgment below.

The court is requested to look at the record, & not at the abstract for the facts in the case -

Record. 8 News -

1. Declaration

1st Count for double rent, under Statute -

2. General common counts for use & occupation -

Plea

1. General issue -

2. This is withdrawn & plea, puis darrein continuance filed.

& 3 Replications to this plea -

4. Trial, verdict for plaintiff -

5. Motion in arrest, overruled, & judgment.

The General power of Canal Trustees, to lease Canal lands is not necessarily involved; because, if they can recover a reasonable compensation for use, & occupation of Canal office - or any other structure, this judgment will be sustained.

Now suppose, that Canal Com^rs, after ~~Ch~~ having erected at Chicago, a suitable building for Canal office, or, removing to Lockport, allow Mr Granger to occupy it, & he refuses to pay a reasonable rent therefor, can they recover, or can he occupy without pay?

It is not a chargeable question.

He as their tenant cannot deny his Landlords title. is familiar principle.

2. Suppose Plff proved, on trial, a lease under seal of Granger, to Canal Trustees, he is called he Estopped, from denying their power to lease. As there is no Bill of exceptions, if Plaintiffs could recover under any proof, the judgment will be affirmed.

The whole argument of Granger's Counsel, is directed to first Count for double rent; apparently overlooking the general Count for use & occupation.

The foregoing suggestions must be decisive of the Case: & it must be affirmed.

But the Canal Trustees have the power to lease Canal lands & Collect rents.

This general power is subject to the statutes requiring them, as soon as Canal was completed to offer the lands & lots for sale, & to continue to offer them once in each year.

Sec 13. of Act of Feb 21. 1843. 1. Purdon's Statute p. 466 - Sec. 13

Intermediate the time which law required them to sell, or offer for sale, they could lease, & receive for use & occupation.

Sec. 10. 1 Purdon Stat. p. 465 Sec 10

The Canal Trustees, "have, hold, possess, & enjoy the said lands as fully & absolutely in all respects, as the state here can, or could &c.

The grant is broad enough to include the power to lease.

[12493-a]

The object & policy was to make the lands productive. The grant should be favorably construed to effect this object. Certainly it was never intended to deprive the State, or Canal Trustees of the rents, which would accrue, in leasing such lots in Chicago or elsewhere.

Hundreds of leases were made by State, & Canal Trustees, & their right to collect rent is now for the first time questioned.

This power is expressly conferred.

See sec. 16. of Act of Jany 9. 1836

sec. 16, Law of Jany 1836

"Persons shall be permitted to lease from said Board the grounds on Each side of Canal, from Year to Year, or until wanted."

The land leased by Granger was on side of Canal, & comes directly within this express authority. This is true in fact, but if it were not, I have a right to assume it, because no bill of exceptions, & this Court in absence thereof will presume the evidence warranted the judgment.

[3493-94]

The validity of this Lease set out in the first Count is recognized as good & valid in case of

Granger vs Canal Trustees
13 Illinois Rep. 742.

Again. Granger is estopped from denying Plaintiffs right of action.

1. By his Lease under his Seal.

2. By ~~Pleas~~ withdrawing his plea of the General issue, & filing his plea puis darrein continuance.

See —

3. As tenant he cannot deny landlords title —

[12493-23]

It is admitted that the Board of Trustees are expressly authorized to lease the water power, & the land on which it is situated - & this is regulated by law -

If there is any case, in which the Trustees may lease, or collect rent, than a right to assume that such was the case proved in this case, as there is nothing in the record to show to the contrary, & the Court will presume if a good cause of action could be proved, under the pleadings, it was proved -

Isaac N. Arnold

Atty for Canal Trustees

[12473-24]

202

Sup. Court

Elihu Granger

vs

Canal Trustees,

Mr Arnold's

Argument for

Canal Trustees

Filed May 14. 1857

S. Leland

Clerk

SUPREME COURT OF ILLINOIS.

THE BOARD OF TRUSTEES OF ILLINOIS AND MICHIGAN CANAL *vs.* ELIHU GRANGER.	Debt Demand, $4,000. Damages, $1,000.

ABSTRACT.

Record, Page 2.

PRECIPE.

3. SUMMONS TO DEFENDANT.

4. RETURN OF SUMMONS.

DECLARATION.

5. STATE OF ILLINOIS, } ss.
County of Cook, }

FIRST COUNT—The Board of Trustees of the Illinois and Michigan Canal, plaintiffs, in this suit by Larned & Woodbridge, their Attorneys, complain of Elihu Granger, defendant in this suit, who was duly summoned, &c., of a plea that he render to the plaintiffs the sum of Four Thousand Dollars, which he owes to and unjustly detains from them.

For that whereas the defendant, before and at the time of the giving of the notice and making the demand as hereinafter mentioned, held and enjoyed a certain messuage and lands, tenements and premises, with the appurtenances, situated in the County of Cook aforesaid, as tenant thereof to the plaintiffs, that is to say, as tenant thereof from year to year, for so long time as the plaintiffs and the defendant should respectively please, the reversion of the said premises, with the appurtenances, during all that time belonging to the plaintiffs, to wit at Cook County aforesaid; and thereupon, whilst the defendant so held and enjoyed the said tenements, with the appurtenances, as tenant thereof to the plaintiffs as aforesaid, and whilst the said reversion so belonged to the plaintiffs as aforesaid, to wit, on the twenty-fifth day of June A. D. 1850, at Cook County aforesaid, they, the plaintiffs, gave a notice in writing to the defendant, and then and there demanded and required him, the defendant, to
6. deliver up the possession of the said tenements, with the appurtenances, to the plaintiffs on the twenty-sixth day of June A. D. 1850, on which day the term, estate and interest of the defendant in the said tenements, with the appurtenances, determined, to wit, at Cook County as aforesaid. Nevertheless, the defendant not regarding the statute in such case made and provided, did not nor would, on the determination of the said term as aforesaid, deliver the possession of the said tenements, with the appurtenances, to the plaintiffs according to the said notice so given and the said demand so made as aforesaid, but wholly neglected and refused so to do, and on the contrary thereof, he, the defendant, wilfully held over the said tenements, with the appurtenances, after the determination of the said term, and after the said notice so given and the said demand so made as aforesaid, for a long space of time, to wit, for the space of two years and six months then next following, during all which time the defendant did keep the plaintiffs out of the possession of the said tenements, with the appurtenances, (they, the plaintiffs, during all that time being entitled to the possession thereof,) to wit, at Cook County aforesaid, contrary to the

[12493-24]

form of the statute in such case made and provided. And the plaintiffs aver that
7. the said tenements, with the appurtenances, during the said time of holding over the same and keeping the plaintiffs out of possession thereof as aforesaid, were of great yearly value, to wit, of the yearly value of Eight Hundred Dollars, and by reason of the premises and by force of the statute in such case made and provided, the defendant became liable to pay to the plaintiffs a large sum of money, to wit, the sum of Four Thousand Dollars, being at the rate of double the yearly value of the said tenements, with the appurtenances, for so long a time as the same were so detained as aforesaid, to wit, at Cook County aforesaid, and thereby, and by force of the said statute, an action hath accrued to the plaintiffs to demand and have from the defendant the said sum of Four Thousand Dollars, parcel of the said sum above demanded.

SECOND COUNT—Common count for use and occupation prior to January 26, 1853.

THIRD COUNT—Plaintiffs offered no evidence under this count, and the same was waived.

COPY OF LEASE.

9. This Indenture, made and entered into this fourth day of September, in the year
10. of our Lord One Thousand Eight Hundred and Forty-five, between the Board of Trustees of the Illinois and Michigan Canal, of the first part, and Elihu Granger, of the City of Chicago, of the second part, witnesseth, that the said party of the first part, for the consideration hereinafter mentioned, agrees to let and lease unto the said party of the second part, for the term of two years, that is from the twenty-sixth day of June, in the year of our Lord One Thousand Eight Hundred and Forty-five, until the twenty-sixth day of June A. D. 1847, the Tract or Parcel of Canal Land situated in the County of Cook, State of Illinois, and known and described as follows, to wit: Lots two, three and four Old Town of Chicago, and the House thereon now occupied by the party of the second part.

And the said party of the second part, for the use and occupation of said tract of land, does hereby covenant and agree, to and with the said party of the first part, that he will pay to the said party of the first part, as rent, the sum of Two Hundred and Twenty-five Dollars per annum, payable in instalments of One Hundred and Twelve Dollars and Fifty Cents each respectively on the twenty-sixth December
11. 1845, on twenty-sixth June 1846, on twenty-sixth December 1846, on twenty-sixth June 1847, for which said rent he has executed to the said party of the first part four promissory notes falling due at the same time the rents become due, according to the terms of this lease.

And it is covenanted and agreed, on the part of the said party of the second part, that if at any time he shall fail to pay to said party of the first part the rent above stated as the same becomes due, the said party of the first part may, at his option, declare this lease at an end, and the said party of the second part shall quit and surrender said tract of land to said party of the first part.

It is further covenanted and agreed between the said parties, that in case of non-payment of rent, or any part thereof, as the same falls due, according to the terms of this lease, the said party of the first part, by its agent or attorney, shall possess the right to enter and distrain any property belonging to the said party of the second part, whether the same be exempt from execution and distress by law or not, for such rent, and a lein on said property is hereby created in favor of said party of the first part for said rent.

And the said party of the second part further covenants and agrees, that in case
12. default shall be made in the payment of the rent, or any part thereof, as above stated, that from the date of such default, for and during the time the said party of the second part shall remain in possession of said leased premises thereafter, there shall be paid by the party of the second part double the amount of rent hereinbefore stipulated to be paid, and the said party of the first part shall have and may use all the remedies for enforcing the collection of the same given for the collection of rent by this lease.

It is further covenanted and agreed, on the part of the said party of the second part, that he will not relet said tract of land without the consent in writing of the said party of the first part.

It is further covenanted and agreed between the said parties, that no presumption of an extension of this lease shall be raised should the said party of the second part remain upon and occupy said tract of land after the expiration of the time for which the same is let to him by the terms of this lease, but any such retaining of possession shall be considered a holding over after the determination of the time said lands were let to him; and it is expressly understood that the party of the second part
13. does not hereby waive any pre-emption right he may have to the above premises or any part thereof.

For the full, true and faithful performance of the covenants and stipulations herein contained, to be performed on his part, the said party of the second part binds himself, his heirs, executors and administrators, firmly by these presents.

In testimony whereof, the said parties have hereunto set their hands and seals the day and year first above written.

BOARD OF TRUSTEES OF THE ILLINOIS
AND M. CANAL,
By E. L. PRESCOTT, Agent. [SEAL.]
ELIHU GRANGER. [SEAL.]

13. GENERAL ISSUE.

SPECIAL PLEA.

Plea, puis darrein continuance

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16. and year last aforesaid, *there was a verbal agreement* made and entered into by and between the Board of Trustees of the Illinois and Michigan Canal, by Isaac N. Arnold, the duly authorized and acting attorney for the said plaintiffs in the said action of Ejectment and also in this suit, and Eli S. Prescott, the duly authorized

and acting agent of the said plaintiffs, on the one part, and the said defendant on the other part, that if the said defendant would withdraw his defence to said action of Ejectment, allow a judgment therein to be entered against him, and deliver up the possession of the said premises, that the said plaintiffs, in consideration thereof among other things, would dismiss, discontinue and abandon this suit and all other suits then pending and all claims for rents and use of the said premises which had accrued to the said plaintiffs from or against the said defendant prior to the time of making said verbal agreement.

That on the thirteenth day of February A. D. 1854, the said Elihu Granger, defendant as aforesaid, did withdraw his defence and did by stipulation allow a judgment to be entered against him in the said action of Ejectment, and that on or about the first day of May A. D. 1854, did deliver up the possession of the said premises to the said plaintiffs according to the true intent and meaning of said verbal agreement.

17. Yet the said plaintiffs, not regarding their said several promises and undertakings in this behalf, have not dismissed this suit, but still continue to prosecute the same.

And this the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiffs ought further to have or maintain their action against him.

WILKINSON & McGILVRA, Deft's Att'ys.

REPLICATION.

18. *Board of Trustees, &c.*, vs. *Elihu Granger*—Cook Circuit Court.

And now at this day comes the plaintiff, by leave of Court and Jury, and by I. N. Arnold, their attorney, and says *precludi non*, because they say there was no such agreement made and entered into between the said plaintiff and the said defendant, as is alleged in said plea, and that the said plaintiffs never did promise and agree in manner and form as alleged in said plea, and of this they put themselves upon the country, &c.

And the said plaintiffs, for a further replication in this behalf, by leave, &c., say *precludi non*, because they say that the said defendant did not nor would he, on or about the first day of May 1854, deliver up the possession of said premises according to the true intent and meaning of said supposed agreement, and of this the plaintiffs put themselves upon the country, &c.

I. N. ARNOLD, Att'y for Pltf.

And defendant doth the like, &c.

VERDICT.

$1234.60

20. "We of the Jury find for the plaintiff, and find the said defendant to owe and be indebted unto the said plaintiff in the sum of One Thousand Two Hundred and Thirty-four Dollars and Sixty Cents."

MOTION IN ARREST OF JUDGMENT.

21. *Elihu Granger* ads. *Trustees of Illinois and Michigan Canal*—Cook Circuit Court, November Term, 1856.

And now comes the said defendant, after verdict and before judgment in said cause, and moves the Court that judgment be arrested for the following, among other reasons:

1st. Because the said Trustees were not authorized to lease the said Canal lands.

2d. Because the said Trustees were not authorized to collect rents for the said Canal lands.

3d. Because the said Trustees were by statute expressly prohibited from leasing or collecting rents for said canal lands.

4th. Because said Trustees were not authorized to sue for or sustain suits for rent for said canal lands.

5th. Because said Trustees are a corporation, and can do nothing except what the power creating them has given them authority to do, and such power has given them
22. no authority to lease, collect rents, or sue for rents of said canal lands.

6th. Because said Trustees, as such corporation, having in this case stepped outside the bounds of their corporate powers, have for all the purposes of this case ceased to exist as such corporation.

7th. Because said Trustees are not a legal party plaintiff in this case.

8th. Because there never has been and is not now a legal party plaintiff in this case.

9th. Because there is no party entitled to take the benefit of a judgment as plaintiff in this case.

10th. Because there is no party plaintiff for whom the Court can legally render judgment in this case.

11th. Because there is no sufficient record in this case upon which the Court can render judgment as for plaintiff and against defendant.

12th. Because the Court has no legal jurisdiction under which it can render judgment against defendant in this case.

By his Attorneys,

WILKINSON & McGILVRA.

24. Judgment of the Court, overruling the motion in arrest of judgment, to which defendant then and there excepted by his counsel.

25. Defendant waives the motion for a new trial, and relies only upon his motion in arrest of judgment.

ASSIGNMENT OF ERRORS.

The defendant, by his counsel, Wilkinson & McGilvra, says that the Circuit Court erred in overruling the motion in arrest of judgment.

By his Attorneys,

WILKINSON & McGILVRA.

No error – Judgment affirmed
of course –
Samuel Miller

[12493-31]

Trustees of the Illinois and Michigan Canal vs Elihu Granger } Motion in arrest

Defts Brief

Pltffs are a Corporation existing by force of Statutes of Illinois, and in no other way; They have such powers as are granted them by such Statutes, and no other.

This was an action of Debt to recover double rent, under Chapt. 60 Sec 2 of the Rev. Statutes of Ill.

Verdict was for Pltffs; Deft. moved in arrest of judgment, on the ground that Pltffs had no authority to lease the Canal lands, and no authority to collect rents, sue for, or recover the same; therefore no power to recover double rent.

Deft contends that Pltffs can do nothing except what they are strictly authorized by statute to do; that they have no secondary powers, except such as grow out of primary powers specifically given.

1st. The first general powers are given to the "Board of Commissioners" and there is nothing relating to the question of leasing the lands.

Also, Common Counts for use & occupation in Nonassumpsit used

The word "Plaintiffs" in this argument means the plaintiffs as the Court below

[18493-95]

Purples Stat. Title "Canal", (Sec 5-6) St. 1 pp 430

2. The Trustees "shall possess all the powers and perform all the duties conferred upon the Board of Commissioners" &c. and there is nothing added as to leasing the lands &c.

Purples Statutes, Title "Canal" (Sec 254) St. 1. pp 464

3 There is no law of the State of Illinois authorizing Trus. of the Canal to rent the lands generally. and it is right, proper and politic that they should not have such powers

The Canal lands were given to the Canal or its Officers under a sort of power or trust, to sell the same, convert them into money and to appropriate the same to the building and completion of the Canal.

It is evident that the intention of the People, through the Legislature, and also the policy of the law, and the objects and best interests of the Company and its funds, could only be subserved and carried out, by the <u>sale</u> of the lands, and <u>not</u> by leasing or renting the same - because the expense and demands of the canal, required the full value of the land in <u>money</u>, and could not be satisfied with the mere fraction of the same which would be received in the shape of

rent, And it is very evident, from experience that in a new country, like this, and as this was twenty years ago, where a large portion of the population is floating, merely temporary Experimenters, seeking for a fortune, money scarce, present price of lands a contingent speculation, the future value a speculative theory, - that if men could, they would be far more prone to lease lands than to buy them, and under such circumstances, if all could be lessees there would be few or no vendees; this was well known and understood by the people, and by them provided for, through their Legislature in fixing the powers of the Canal Commissioners and Trustees,

Hence while there is any amount of specific provisions for the sale of the lands, and also for the prosecution and punishment of all trespassers on the canal lands, there is no provision for leasing said lands, except as hereinafter mentioned,

And yet if the Legislature had intended that the canal lands should be leased, it is strange that they should not have provided specifically for it, since the machinery and modus operandi of the same is made more intricate and complex between Landlord

and tenant, than the mere power of sale or the relation of Vendor & Vendee.

4 The Trustees have power to rent certain Water privileges for the purpose of propelling machinery, but the provisions of the statutes are of such a character, that such leasing was nearly or quite tantamount to a sale

Purples Statutes. Tit. "Canal" (Sec 157 to 163) Part 1 Pge 447-448.
" 275 " 352) " 1 " 486-471

and even Sec 157 speaks of this letting as a sale; and Sec. 158 provides that said titles shall be terminated whenever the interests of the Canal require it.

But there is no intimation of any power to lease any other of the canal lands.

If the Legislature had intended, or had given a general power of leasing, these special provisions would have been unnecessary

And the great caution with which even these leases are provided for, shows the policy and aversion of the law against leasing.

5 Certain agents, elected by the General Assembly were authorized to visit persons living on the canal lands, and to grant to such persons, written permits to remain upon and cultivate said lands" free

from any charge of rent," under certain conditions, bonds, and penalties,

Purples Stat. Title "Canal" (Sec 111 to 115) Pt 1st pp 437 to 440.

The prohibition of rent in Sec. 112 and the right of the agents, in the last clause of Sec 115, are positive proof of the policy of the law against leasing, and in favor of selling the lands,

The first was to prevent such occupants from obtaining any vested rights, for a valuable consideration, inconsistent with the right of the agents of the State to take possession under the latter; and both of them consistent precautions to facilitate a sale, and against leasing. This is perfectly inconsistent with a general power to lease - for, if the Trustees had a general power to lease and to collect rents from any and all persons, it was perfect folly, an infinite absurdity to prohibit them from leasing to, and receiving rents from such persons as might be upon said lands, & cultivating, and cutting & using the timber and wood off the same. - and a general power to lease would be perfectly inconsistent with all the provisions referred to above, under the 4th & 5th points

6th Pltffs being a Corporation, created, clothed and empowered by special Statutes, passed for them and them alone, - have no powers except what are to be found in such Statutes - and as there is an entire absence in all said Statutes, of any power necessary to sustain this suit, Deft assumes that such power does not exist.

7th The fact that Deft executed a lease of the premises long prior to the time covered by this suit, and for a definite term which had expired - and the fact that said lease is in a manner sustained ("over the left") by the Supreme Court of this State in 13th Ill. Rep 740, - can have no bearing upon this case, if such lease was not fully authorized by law.

For while it might be true that the said lease, considered as a special contract between the parties, under seal might at law operate as an estopel upon the Deft, yet it could have no such operation beyond the express term for which it was made, and could not, beyond its express terms and time, give to the Pltffs any power they did not by law possess. Although Deft, might be estoped

Now Constat but Pltffs. prove a Decree Lease Executed by

Grange - from denying Plffs right to receive rent under a special contract, he is not stopped from denying their right to receive rent, where there is no contract.

8th The Trustees of the Canal are not a Corporation with full and general powers, but only a limited corporation, to stand as trustee for the use of a more general corporation and to operate under and within certain powers and limitations, specifically enumerated and pointed out.

The body of the Deed of Trust is from the State to the Trustees, and contained in Purples Statutes, Tit "Canal - Sec 256 Art 1. Pge 465, and is so made in trust" for the uses purposes and trusts hereinafter mentioned". And those "uses, purposes & trusts" are so mentioned in Purples Statutes, Tit "Canal" Art 1st Sec. 259 & seq, and in all these powers and provisions, there are full directions for the sale of the lands, - the completion of the Canal & the payment of its debts, but not one word for leasing.

9th A fair construction of the different provisions of the act of Feb 21st 1843 will demonstrate more clearly the reason why the Trustees were prohibited from leasing.

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Sec. 260 of said Act, (as numbered in Purples Statutes) provides that the Canal shall be ready for use and navigation within two years and six months from the passage of said act, which time would expire on July 21st 1845.

Sec 259 of the same act provides that the lands shall not be offered for sale or be sold until three months after the completion of said Canal, and that the lands shall then be offered for sale, once or oftener in each year, for four years, which would be Oct. 21st 1849 and the same section provides that after the expiration of the four years, the Trustees shall sell the residue of said lands which may remain on hand. And the same section provides that "the said lands and lots shall be exempt from taxation of every description by and under the authority of any law of this State until after the same shall have been sold."

A lease for a long period would conflict with obligation to sell, but for a short period would be good

Now there is no specific power for the Trs. to lease the lands, and if they have the power by implication they would be unlimited as to the terms or time, and if they could lease for one year, they could for two, twenty, fifty or ninety-nine, or for any other period they please.

When they had made a contract of lease, if valid, with an individual that individual would have a vested right for a valuable consideration, and entitled to the quiet and peaceable enjoyment of the premises for the full term, and such vested right would operate as an express abrogation of the power or right of the trustees to sell the lands as required by their deed of trust, for the full term of such leases, unless the same should be declared null and void, and so the Trustees enabled to execute their trust,

But we need not search after speculation on this point, for we have a matter of fact demonstration in this very case. For the lease between these parties was made about the same time (to wit July 1845) which the Canal was required to have been completed, and consequently, if valid, kept the lots out of the market for the full term for which it was made; and if we could screw up our credulity to believe all the allegations on the part of the Plffs, it would appear that they were actually prevented for a great length of time, from selling the lots in question, in consequence of this lease in question.

Were prevented from selling by injunction obtained by Granger See 13 Ills 749

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Every inhabitant of the State has a direct interest that these lands should be sold and not leased.

In the very enactments, granting these lands and providing for their sale the State had *pari passu*, and on the credit of the proceeds of these same lands, created large State indebtedness, which the proceeds of the sale of these lands alone could meet and discharge.

Citizens of the State and Capitalists, both foreign and domestic have, on the strength of the pledge and sale of these lands, (as provided in the act of Feb 21st 1843) loaned money to the State, and therefore have an equitable lien upon these lands, and a right to say to the Trustees, that they shall sell the lands and pay these loans, and not to lease them, and thereby delay such payment, which would be an act of bad faith towards such creditors.

The State had begun large internal improvements which could only be completed by the sale of these lands, and without which the same would remain unfinished, and the resources of the State undeveloped, and all that had been done forfeited to uselessness, and as these lands could not be taxed until after sold, everyone would be forced to pay

a tax proportionately higher, to meet this de-
-ficiency and make up the revenue of the State.
So that on the one side of the picture we
should see a leasing of the Canal lands and
as a consequence non-completion of internal
improvements, non-development of the re-
-sources of the State, unequal taxation of
the inhabitants, repudiation of the State-
indebtedness, and lasting dishonor and
disgrace; While on the other side we
should see a Sale of the Canal lands, com-
-pletion of the internal improvements, devel-
-opment of the resources of the State- equal
taxation of the inhabitants, payment of the
State indebtedness, honor and prosperity-
and I think it is not claiming too much
that a large proportion of the ~~prosperity~~ of our
State, and especially the Northern portion, is
due to the fact that the Canal lands have,
with few exceptions) been thrown into the
market, converted into money, and not
tied up with a lease.

10th. Chap. 60 of Rev. Stat. entitled "Landlord
and Tenant" does not apply to this case,
All the laws for the creation, powers and
government of the Canal, its officers and
property are acts of Special Legislature, and

no other general Statutes of the State are intended to apply.

None of the Rev. Statutes have any reference to the Canal interests, (and I am not aware that the word "Canal" can be found in the general public acts of the Revised Statute proper,) most or all of the acts or Statutes applicable to the Canal, passed prior to the Rev. Statutes, are to be found in the "Appendix" and are either "laws of a general and public nature passed at the" same session and referred to in Sec 5 of Chapt. 90. – or are "such acts and parts of acts of a general and public nature passed previous to" that session, and "neither repealed nor incorporated and made a part of the Revised Statutes" as referred to in Sec. 6 of said Chapt. 90, and the Act of Feb 21st 1843 is the No 48 of the Appendix, and the first in order under said ~~Chap 6~~ Sec 6 of Chap 90.

Now the fact, as stated in said Sec. 5 & 6 of said Chap 90 – that these laws, acts and parts of acts "are not revised nor incorporated in the several Chapters comprising the Revised Statutes" and "are neither repealed nor incorporated and made a part of the Revised Statutes" is conclusive proof that

the Legislature intended and meant to draw a strict line of demarkation between these laws, and the General laws of the Revised statutes; and to prevent all conflict or amalgamation of the same — and that they intended to give to the Canal a system, world, jurisprudence and government of its own —

11th "The relation of "Landlord and Tenant" could not exist between the Pltffs and Deft, by force of Sec 1. of said Chap. 60 because said Pltffs were neither "the owner or owners of such lands or his her or their executors or administrators". The State is and ever has been the real owner, in fee, of the Canal lands, and the Trustee have only a limited agency over the same, for certain specified purposes, as authorized by the Statute providing for the Deed of Trust to them — and no other powers or rights did they possess.

Upon this point I will cite to the Court the case of the "People of the State of Illinois Plaintiffs in error vs John Nichols defendant in error" 4th " of Gilman 307, including the written argument of C. B. Lawrence, for Pltffs in error, which so far as applicable, I adopt as a part of my own argument in this case.

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12th There are several reasons why the second section of said Chapt 60, does not apply to these parties

There was no relation of Landlord and Tenant between the parties, therefore the Deft could not be tenant to the Pltffs.

As the Deft was not tenant to the Pltffs, there could be no holding over, because there could be no holding over, unless there had been a previous tenancy, for a term which had expired.

This action, being for double rent, is based upon the premises that there had been a previous tenancy for a term which had expired; and that previous tenancy is based upon the lease above referred to, and both are based upon the premises that the lease was valid, and that the Trustees had the right to demand and execute the same, as the "owner or owners of such lands", and that by vertue of the same, the Deft was placed in the position of a tenant holding over under the provisions of said Sec. 2 of Chap 60,

Now although we should admit for the purposes of this argument (which we do not) that said lease, considered as a

special contract, might estop the Deft from refusing compliance with its terms, and for the time therein named, yet, it could possibly have no such effect beyond its express terms — and if either of the premises, upon which the Pltffs claim for double rent, is based should fail, the whole must go together.

This is Erroneous See Hand

The action is for double rent only, and that must be recovered, or nothing.

As the relation of Landlord and tenant, did not exist; as Plaintiffs were not owners of the land, as said Chap 60 does not apply, Pltffs can have no judgment in this case, — As there is no law of this State authorizing the same.

And furthermore, the "notice in writing was not given by the Defts "Landlord or Landlords" because that relation did not exist between them, nor by his "lessor or lessors" because Pltffs were not such — at anyrate, beyond the exact time of the lease, or special contract, Nor were they the "person or persons to whom the remainder or reversion of such lands, tenements, or hereditaments" belonged, because the belonged to the

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State, nor were they the "rightful owner", because the State was; nor were they the "person or persons so kept out of possession", because the State was the legal possessor, and the Pltffs had only a lien upon the lands, as security for a specific purpose – to wit; to sell, and pay the bond holders and creditors of the State and Canal fund –

Such is the whole tenor of the Statutes and law upon the subject, all actions for trespass in the name of the State, all penalties accrue to the State.

13th

In regard to making contracts, an individual and a corporation stand upon very different footing. Individuals may make any contracts, not inconsistent with the general good of Society; while corporations, being created for a specified purpose, not only can make no contracts inconsistent with its Charter, but can make no contracts which is not either expressly allowed by its Charter, or ~~as it~~ is absolutely necessary to carry out the purposes of the same, –

Angel & Ames on Contracts Chap 8 § 256,
also " " § 257 – 260

It may well be questioned in this case whether even the State, - who was the real owner of these lands - could rent them; - they were public lands; and who ever heard of the Government of the United States, or of a State, becoming a Landlord, to lease its public lands.

The Grant from from the General Government was for a specific purpose, and that purpose did not even imply leasing.

The Power from the owner - the State, to the Corporation of the trustees was for specific purposes - namely; to sell and pay the Canal debts, - and in order to do this, or to bring the lands into market, or to get a good price for them, it was not necessary to lease them — but on the contrary the leasing of the lands would, in many cases, operate as an incumbrance upon the lands, and an objection to their sale.

When a corporation has made an illegal or unauthorized contract, it is not estopped from denying the same; nor is the individual with whom it contracts so estopped, for if estopels applied in such cases, then Corporations might render their own powers unlimited, and in fact ride over, and repeal the acts of the Law-making-power that created them, and laugh at the

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foolish absurdity of a Legislature, in attempting to limit them, or a Court in attempting to restrain them.

Therefore, if there had been, even in this case a contract (which there was not) which the Charter of the Trustees did not fully authorize them to make; then such contract may be repudiated, either by the corporation itself, or by the Deft, and if the contract could not be made good in its inception, then no subsequent act of either party could make it good.

Angel & Ames on Corp, Chap 8 § 256.

Since a Corporation can make no contract but such as are allowed by its Charter, it can make no contracts which shall have the effect to bind its legislative faculties thereafter, and disable it from carrying out, to the best advantage, the purposes for which it was created — Angel & Ames on Corp. Chap 8 § 262. —

This being law, the Trustees could not have the power to lease — because if they had that power, and could make a valid lease for a term, then they could not, during that term, sell the lands, pay the Canal debt, and thereby discharge the purpose of their being.

When the Charter of a Corporation

is silent as to what contracts it may make, then it can make such as are necessary to enable it to attain and carry out the object for which it was created, and no other.

Was the Charter in this case silent? If so was it necessary for the Trustees to lease the lands, to carry out the object of their creation?

The answer is too palpable to need comment.

But, no fair construction of the Statute upon this subject, which constitute the Charter of these Trustees, can make it silent. The fair construction of the whole, from beginning to end, is that of Authority to Sell, and prohibition to lease.

Mr. Kent in his commentaries Vol. 2 Page 298, under the head of "Corporate powers strictly construed" lays down the same doctrine very strong, and in his usual clear and explicit manner, and cites numerous cases in support of the same.

The Case of Head, et. al, vs the Providence Insurance Co, is a case strongly in point. It is in 2° of Cranch Rep. page 167, and the decision is given by Chief Justice Marshal, who adopts, and lays down the same doctrine, and forcibly explains the same.

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The same doctrine is also laid down in "Trustees of Dartmouth College vs Woodward, in 4th Wheaton 519; in various portions of the opinion by Ch. Just. Marshal - See page 636.

In Beaty vs Knowler & Ewers the same doctrine is applied by Justice McLean, 4 Peters page 163 — on page 168, the Court say "That a corporation "is strictly limited to the exercise of those powers "which are specifically conferred on it, will not "be denied; the exercise of the Corporate franchise "being restrictive of individual right, cannot be "extended beyond the letter and spirit of the "act of incorporation". And again Page 169:—

"No argument drawn from convenience, "can enlarge the powers of the corporation"

Apply that doctrine to this case, and where is the power of the Trustees to sustain this suit?

In the Case "Bank of Augusta vs Earle, 13 Peters 587, the Supreme Court lay down the same rule, and use this language:

"And it may be safely assumed that a corporation "can make no contracts, and do no acts, either "within or without the State which creates it, except "such as are authorized by its Charter.

Is there any authority to lease, in the Charter of these Self constituted Affs?

In "Runyon vs Coslers Lessee" 14 Peter 129 — the doctrine is fully adopted and laid down in the strongest terms, The Court say: "The "Corporation must show that the law of its creation "gave it authority to make such contracts."

Ask the Corporation in this Case to do so and see what they can show; They can only point you to illegal and fraud colored acts of Eli S. Prescott in demanding and obtaining the lease, and nothing beyond and nothing this side.

In "Bank of U. S. vs Candridge, 12 Wheaton 68, the Court say" But whatever may be the implied powers of aggregate Corporations by the common law, and the modes by which those powers are to be carried into opperation, Corporations created by Statute must depend upon the true construction of the Statute itself.

Apply this to Plffs and where do they stand? They are not a Corporation agregate by the common law. — They are created by Statute, — created for a specific purpose, — therefore have no powers except what are given by such Statute, and necessary to carry out that purpose.

Ask them "Where are the powers"? and they can only give you a Yankee answer by asking you in return the same question — "Where are the powers"?

In N. Y. Firemens Insurance Co vs Sturges, the same question was discussed, and the Court say:- "The company have no rights except such "as are specifically granted, and those that are "necessary to carry into effect the powers so "granted" by Woodworth Justice, page 675 Cowen Rep. Vol 2.

Also Same vs Ely. 2 Cowen 699 by Justice Sutherland, the same rule is expressly adopted, and on page 709 Ch. J. Savage says:- "It can "have no other capacities than such as are "necessary to carry into effect the purposes for "which it was established" and again "It is a "creature of the Legislature and can have no "powers but such as are given to it by its "Creator, either at the time of its creation or "subsequently or such powers as are incidental "to those granted" —

Was the power to lease incidental to the power to sell and pay the bank debt?

If so, then every Trustee who takes a trust deed, to secure a debt, in the every day transactions of business, in this city, with power, and for the express purpose, to sell, pay the debt and refund the surplus to the grantor - would have a power to lease.

Can such a power, in such a case be contended for a moment! Such a position is an absurdity,

which needs no further comment.

The same rule is adopted in "The People vs Utica Ins. Co, 15, Johnson 358, and in "The Utica Ins. Co. vs Scott, 19 Johnson, 1 — and also in 6 Cowen 606, & 3d of Pick 232 — and 3 Wend 482. and 7 Wend. 31 —. Same doctrine adopted in 9 Wheaton page 823 & Seq. and in every other case where the question has arisen, — I find no conflicting decision.

Apply the foregoing principles to the Pltffs, and we find that they have no power except by Statute. Beyond those powers they do not exist. — The Statute gives them no power to lease or collect rent for the Canal lands, — and therefore no power to sue for or recover rent, consequently no power to maintain this suit, therefore as to this suit they do not exist.

A Corporation is only a Corporation so long as it acts within its corporate powers, and as soon as it goes beyond them it ceases to exist as such Corporation. A Corporation is only such within the limit of the jurisdiction which creates it. It is limited by the Legislature, to the geographical bounds of the State creating it, — but its geographical limits are no more binding upon it, than its legal limits,

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and it can just as well exist beyond the limits of the State creating it, as beyond the limits of the Charter creating it.

The Plffs can assume to themselves no new power, or act in any ~~other~~ sphere, beyond the powers and sphere given them, — and if they undertake to do so, those powers would be void, and in such new sphere they would cease to exist as a corporation, although their acts might be binding upon them as individuals.

A Constable of the City of Chicago ceases to be such Constable, as soon as he steps beyond the limits of his Office,

A Justice of the Peace for Cook County ceases to be such Justice when he extends his jurisdiction — and becomes individually liable for his acts, — He may give judgment against a Debtor for One Hundred Dollars, and issue execution thereon, but he cannot go on and execute the execution, And if he should undertake to do so, and assume to act as a Constable he would, in that act, cease to be such Justice of the Peace, and would not become such Constable, and would be liable to a penalty for his assumption.

You, acting within the Sphere of your Judicial powers, are Judges of This Court, but as soon as you go outside of those powers, you cease to be such Judges.

Acting within your authority as Judges, you have the authority to pass Sentence of death upon a fellow man, in pursuance of a proper verdict of "Guilty of Murder", But you have no authority and cannot assume to yourselves the power to proceed further, and execute that sentence, — And if you should undertake to do so, and assume to take upon yourselves the official powers of Sheriff, and Should thereupon play the hangman, You would in that Sphere loose your quality as Judges of said Court, and would not become, or possess the powers of Sheriff, and would be liable to be hung, yourselves for your presumptuous and unlawful act.—

If the Serpent Should undertake to step beyond the limits of his Snakeship, and stand erect upon his tail, and assume to mingle in the Society of men, he would thereby gain nothing— but would loose the protection of his position as a "Snake in the grass"— would still be liable to the curse, to crawl upon his belly and eat his food, mingled with the dust, and still liable to have his head doubly bruised by the heel of the Seed of the woman.

If the ape, happily chattering & kindly petted, in his proper sphere, should step outside the limits of his Monkeydom, and assume to be a member of Christendom, employ his tailor and dress in the garb of a "fop", he would loose the favored protection of a Pet Monkey, and would be liable to be kicked out of human Society.

So it is with these Trustees; their proper sphere of action, in which their Creator has placed them, is that of agents to sell the Canal lands, and pay the Canal debts, and no more, and in that position they exist, have rights, and are protected by the laws, while in any other position, they do not exist, have no rights and are not protected by the laws.

In their proper capacity they can have and maintain actions at law, in subservience with the powers that created them, — and so far, it is the duty of this Court to sustain and protect them. But when they assume to step beyond the position of servants of the power that created them, and to act and become Landlords of the soil; they then cease to be such Trustees, loose the rights and protection thereof, and do not become such Landlords.

And then it is the duty of this Court,

to use the strong arm of the law, and hurl them back from their high and lofty position of Landlords to that of Servants, specifically, to the power that created them.

14th Assuming the foregoing positions to be correct, that the plaintiffs have no power to lease the Canal lands, — That the thing called a lease, was not such, in the eye of the law, and was either null and void, or at most a mere special contract between the parties, and could draw to itself none of the subsequent consequences of a lease,

And that the relation of Landlord and tenant, never existed between the parties, or at most, not beyond the exact time of said contract,

And that in their capacity as Trustees they had no authority to sue for rent of the Canal lands, consequently no legal authority to bring and maintain this suit,

That in assuming to bring this suit, and thereby to do an act which they were not created to do, and had no authority to do, they cease to exist as such Trustees. — Then what is the power and duty of this Court?

If the Trustees had no power to lease the lands, then they had no power to collect rents,

if they had no power to collect rents, then they had no power to maintain a suit for the same.

If they had no power to maintain a suit for the same, then they had no power to claim a judgment in this suit.

If they had no power to claim a judgment in this case, then the Court has no power to give them judgment.

If the Court has no power to give them judgment, then it must not do so.

If the whole record does not disclose a meritorious or legal cause of action, for the Plaintiffs, then the Court must arrest judgment, for to give a party judgment where he had neither legal nor meritorious cause of action, the Court would convert itself into a lawless instrument of inequality — instead of being a dispencer of justice between party and party.

The pleadings between the parties can make no difference with the duty of the Court upon this motion, for they cannot make a bad case good.

The General issue was first pleaded, and then a special plea, setting up an agreement to dismiss the suit. This was a waiver of the general issue, but admitted nothing, not even a

cause of action in the Plaintiffs.
If any presumption could arise from such a plea it would be, that there was no cause of action, hence the agreement to dismiss.

But the General issue was waived, and the special plea not found to be proved,, and therefore the verdict was much like one in an assessment of damages, following a default.

But I do not find from the authorities that the pleadings can make any difference.
The Question is: Whether the Plff is entitled to take the benefits of a judgment, If he is not he shall not have it.

"For no court should do
"so nugatory an act, as to render judgment, which,
"when rendered would be erroneous"
Goulds Pleadings Chap X Sec 10.

Mr. Blackstone in his Commentaries, Vol 3, page 394 in speaking of arrests of judgments says:—
"Or, thirdly, if the case laid in the declaration
"is not sufficient in point of law to found an action
"upon"

In an action of Slander, charging words that are not actionable, although there be a verdict for the Plff, still judgment must be arrested, because there is no legal cause of action
Goulds Pleadings Chap X §21
Blackstones Com Vol 3 Page 394.

"Thus, in an action of assumpsit, if the declaration "alleges no consideration, and the Jury find a virdict "for the Plantiff; Judgment must be arrested".

Goulds Pleadings Chap X, § 22.

"But if the thing omitted be essential to the action "or defence, as if the Plff does not merely state his title "in a defective manner, but sets forth a title that is "totally defective in itself" "these cannot be cured by "a virdict for the Plff" And judgment should "be arrested

Blackstones Com Vol 3 Page 395.

The same principal is adopted in Stennel vs Hogg, 1st Saunders Rep. page 228 Note 1.

In Stinson vs Doby 2 Mass. 522 which was an action of debt, and general issue pleaded, the Court Say:- "The general rule is, that if in the Count, there appears to be a good title to make the demand, which is defectively set out, the virdict may cure the defect," "But a virdict will not cure a bad title".

In, Bishop vs Haywood, 4 Term Rep pp. 472, which was assumpsit, General issue, virdict for Plff, the Court Say:- "But on a motion in "arrest of judgment we are bound to look at the "title which the Plff himself has stated, beyond "which no presumption can be admitted"

"And again, "But if the title be defective on "the face of it, the Court cannot sustain the judgment" — Judgment was arrested.

The case of Wright agt Bennet, reported in 3 of Scammon, page 259, was an action of Debt for cutting trees. There was a verdict for Plaintiff. Deft moved in arrest of judgment for the insufficiency of the declaration. The declaration alleged that the trees were cut and carried away from the Pltffs close, but did not set forth or show his title or allege ownership. It did not show that pltff had such right as the Legislature intended a party should have to maintain such an action. The Court say:— "For aught that "appears in the declaration, he may have only a "temporary right to the possession, while the title "is in another person, or in the Government, "the declaration being substantially defective, was "not aided by the verdict, and the motion in "arrest of judgment should have been sustained".

Our Statutes are silent upon the subject except as to the effect of arresting judgments and the subsequent proceedings

Rev. Stat. Practice act Sec 22.

Apply the foregoing principles to this case and what is the result?

[2493-47]

Have the Pltffs any powers beyond those given by the Statutes creating them? If so where are they to be found?

Do those Statutes give them any right or title to authorize them to lease or collect rent for the Canal lands?, If so, those Statutes have never been published,

Can they derive the power from any other source? Surely not.

Are such powers incidentally necessary to enable them to sell the lands and pay the proceeds of such sale to Canal Creditors?

I believe no fair construction of their powers, keeping in view the object of their creation, can justify any such an inference.

Can it be considered the case of a title defectively stated?

It is believed that no such a view can be reasonably entertained.

Does it not then, come within the rule most clearly, of no title at all?

I am unable to take any other view of the subject.

The State was the owner, She had given to Pltffs a limited power over the lands for a specific purpose— She gave them no

power to rent or sue for rent; and a power to rent was not necessary or incidental to the power she did give them; She gave them a right as agents with power to sell, but no title as Landlords with power to lease.

Therefore when they Steped from their position as Trustees to that of Landlords, they left behind them their powers, and carried with them no title.

The declaration only exhibits them in the character in which the Legislature has seen fit to place them; All the acts creating them and empowering them are public acts, and the Court will judicially take notice of the same.

Now if those acts do not empower the Plaintiffs, in their Capacities as Trustees, to sustain this Suit, then no judgment can be rendered for them against the Defendant, and therefore judgment must be arrested.

15th The Trustees may well be viewed in the light of Attys in fact acting under specific directions in the deed of powers, in which case all the foregoing arguments will apply to them with equal force.

D D Wilkinson

P.S. A power to collect rent is tantamount to a power to lease. If no power to lease, there can be no power to collect rent. If no power to collect rent, Plffs cannot recover under the second count for use and occupation, which is a count for rent.

D D W

[12493-4]

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" " " " " 1 " 157 to 163 " 447 & 448
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" " " " " 1 " 259 & seq
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Elihu Granger
vs
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of argument for
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Board of Trustees of
Illinois & Mich. Canal
vs
Elihu Granger

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