

No. 3094

Supreme Court of Illinois

John B. Hunter.

vs.

and other cases.

Nesley A. Ladd.

(379)  7

+
EVANS V. MERRIWETHER

+
LEA V. VAIL

+
WHEELER V. GREEN

+
BILLHAM V. STATE BANK

State of Illinois
Green County

Pleas before the Honorable William Thomas
Judge of the first Judicial Circuit of the
State of Illinois

Be it remembered that heretofore to-wit on the 22nd
day of October 1838 there was filed in the clerk's office of
the Circuit Court of said County the following process
"State of Illinois, Green County & Circuit

Henry W Menivethen
vs J Presap on the case Damages \$5000—
John Evans

Principal The clerk of the Green Circuit Court will issue a
summons in the above entitled cause returnable to
the next term of the Court

Oct 22nd 1838

Woodson & Hodges
attys for Petiff

And afterwards to-wit on the said 22nd October 1838
there was issued the following summons to-wit

"State of Illinois

Green County To the People of the State of Illinois to
the Sheriff of Green County Greeting— We command
you to summon John Evans if he can be found in
your County, to be and appear before the judge of our
Circuit Court to be holden at Carrolton within and
for the County of Green, on the 1st Monday of Novem-
ber next, to answer unto Henry W Menivethen
in a plea of Trespass on the case Damages Five
Thousand Dollars. And of this writ make legal ser-
vice and due return at the time and place afore-
said

Witness Moses W Cleason clerk of our said

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Court at Carrahton this 22nd day of October 1838
L. B. 3
M. B. L. L. L. Clerk

Which summons was afterwards returned with
an endorsement thereon in the words and figures following

Return: "Served the within summons on the 2nd Nov by reading
the same to the within named John Evans on the 2nd day
of November 1838 I J Fry Shff Clk"

And afterwards took on the 15th day of March
1839 the Plaintiff filed his declaration in the words and
figures following to wit

"State of Illinois, Green County

In the Circuit Court of said County

Henry W. Menwether (plaintiff) complains of John Evans
(Defendant) in custody &c of a plea of Trespass on the case
For that whereas the said plaintiff before and at the
time of the committing of the grievance herein after men-
tioned, was and from thence hitherto hath been, and still
is lawfully possessed of certain steam grist and saw mills
with the appurtenances, situate and being at the County and
State aforesaid near to a certain stream or watercourse
there, and which said stream or watercourse, before and
at the time of committing of the grievance herein after
mentioned, had run and flowed, and been used and
accustomed to run and flow, and of right ought to have
run and flowed, and still of right ought to run and
flow in great plenty and abundance, unto the said mills
of the said plaintiff for the supplying of the same with
necessary water for the working thereof to wit at the Coun-
ty and State aforesaid. Yet the said defendant well
knowing the premises but contriving and intending to
injure and prejudice the said plaintiff in this behalf

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and to deprive him of the use benefit and advantage
of the water of the said stream or water course, and to deprive
him of the benefit and profits of his said mills, and of his
trade and business, and to put him to great charge, trou-
ble expense and inconvenience whilst he the said plaintiff
was so possessed of the said last mentioned mills with the
appurtenances as aforesaid, and carried on his said
business therein, to wit on the first day of September in
the year eighteen hundred and thirty seven and on di-
vers other days and times, between that day and the com-
mencing of this suit, wrongfully and unjustly diverted
and turned divers large quantities of the water of the
said stream or water course out of the same and away
from the said mills of the said plaintiff and hindered
and prevented the water of the said stream or water =
course from running or flowing along its usual course
to the said mills of the said plaintiff and from supply-
ing the same with water for the necessary working thereof
as the same ought to have done, and otherwise would
have done, and by reason thereof the water of the said
stream or water course, sufficient for the supplying of the
said mills during that time, could not, nor did run
or flow to the same as the same ought to have done, and
otherwise would have done, and the said plaintiff for
want of such sufficient water could not during that
time use his said mills, or follow, use or exercise his
trade and business therein, in so large extensive and bene-
ficial a manner as he ought to have done, and other-
wise would have done, but was thereby all that time
deprived of the use and enjoyment of ^{the} said mills
and of all benefit, profit, gain and advantage, which
he otherwise might and would have made, by carry-
ing on his said trade and business therein to wit at the

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County and State aforesaid To the damage of the said
plaintiff of Five Thousand dollars therefore he sues vs
Woodson & Hodge for Petff

And afterwards at a Term of the Circuit Court
began and held for said County on the 15th day of
April 1839 there was filed a plea in the words following
"John Evans Deft

ads

Henry Meriwether Petff

Plea ~ And the said defendant by his attorney Doyle comes &
defends the wrong & injury when he says actis now
because he says he is not guilty in manner & form
as charged in the plaintiffs declaration & of this he
puts himself upon the country

Doyle with pro vs

And the plaintiff does the like

Hodge for Petff

And afterwards at the said term of the Court
twit on the 25th day of April 1839 the following order
was made

"Henry W Meriwether Petff
against

John Evans

Deft

Trespass on the
lease

This day came the parties by their attorneys and the
defendant having filed his plea that he is not guilt
ty of the trespass as alledged in plaintiffs declara-
tion which was joined by the plaintiff It is ordered
that a Jury come to try the issue Whereupon came
a Jury twit, Morris Armstrong A L Ellis,
Meredith Ashlock, Lucius Norton, Joseph
Linden, David G Jackson, George Hollister, Ho-
ratio A Belt, John Green, Francis Keelen,

the law of the case and the court gave the following
 The plaintiff alleges that he was possessed of a ~~stream~~ Steam
 Mill which was supplied with water by a stream passing
 along a natural channel; that he had appropriated the
 water to the use of the mill; that being so possessed the
 defendant diverted the water from the mill whereby he
 was injured. The Defendant says he is not guilty.

Questions

- 1 Was the plaintiff possessed of the mill and had he appropriated the water to the use of the mill
- 2 Was the water necessary for the use of the mill
- 3 Is the defendant guilty of diverting the water to the prejudice of the plaintiff

If the jury believe that the plaintiff was possessed of the mill and had appropriated the water as alleged in the declaration, and that the water was necessary to the use of the mill, the plaintiff has a right of action against all who divert the water without right; and if the jury believe the defendant without right to the use of the water guilty of the disturbance they must in this action find for the plaintiff the damages sustained by reason of the diversion of the water. The question of wilfulness or malice is not necessarily involved in this case, and the defendant's liability does not depend upon the intent with which the act was done. If the water was diverted a right of action ~~also~~ exists, whether it was done maliciously or without malice; but in assessing damages the jury may take into consideration any evidence of malice or wantonness, or evidence of a contrary character, the damages are ^{for an} injury to the possession only, & not to the freehold, and the jury cannot assess damages for injuries which

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4 affect the freehold. In a ~~contest~~^{contest} between two persons
in regard to the right to use water neither of whom
shew an exclusive right by grant or prescription, the
5 first possessor is entitled to recover. In this case nei-
ther party has shewn any grant or any other right
except the mere possessory right. If the plaintiff or
those under whom he holds possession first appropriated
the water to the use of his mill, he had the right to
use so much of the water as was necessary in using
the mill &c. and if defendant diverted the water
6 he is liable for the injury sustained. The defendant
to justify the diversion of the water from plaintiff's mill
after the appropriation of it by plaintiff, must shew title
by grant or prescription to the water or its use; no evi-
dence of title by grant has been adduced, and title
by prescription can only be shewn by actual possession
7 and use for 20 years. In regard to water every man
has the right to use water passing over his own land, but
when a party justifies using water to the prejudice of a pri-
or possessor he must shew title to the land, or a right to
its use derived from 20 years possession; he can not jus-
tify such act without title to the land by grant or
prescription as aforesaid, through which the water pas-
8 ses. The prescriptive right which is an appropriation
and use of the water for twenty years would entitle
the possessor without legal title by grant to maintain
the action against the legal owner of the land. A man
9 owning a close bounded by a stream may use the wa-
ter for ordinary and lawful purposes, but an appro-
priation of the water below would exclude all persons
above to use the water to the prejudice of the possessor
except the rightful owner of the water above and a
possession and use for twenty year would exclude the

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right of the legal owner of the land, through which the water passed to divert it from the paper? The Defendant by his counsel moved the court for the following seven instructions to the Jury

Instructions
asked

1st That they must believe from the evidence, that the grievances complained of in the declaration were committed by the defendant personally, or by some one at his instigation or directions before they can find a verdict in favor of the plaintiff

2nd That if they believe from the evidence that the grievances complained of in the declaration were wilfully committed by those in the employment of the defendant against his express direction that they must find a verdict for the defendant

3rd That if they believe from the evidence that those under whom the plaintiff claims, exercised or used the water privilege in question for one year before the defendant's mill was put in operation, that that did not give to them exclusive right to the use of the water privilege in question - and that they could not transmit any such right to the plaintiff

4th That if they believe from the evidence that the defendant had the use of the water privilege in question before the plaintiff came into possession of the mill in his declaration mentioned, that then the defendant has a right to the exclusive use of the water privilege in question if it be necessary to the purposes of running his mill

5th That if they believe from the evidence that the defendant had the use of the water privilege in question before the plaintiff came into possession of the mill in his declaration mentioned, that then

the defendant has a right to share the use of the water in question equally with the plaintiff

6th That if the jury believe from the evidence that the water mentioned in the plaintiffs declaration was used by the defendant without waste, or wanton ~~and~~ malicious obstruction, for the purpose of working his mill & for no other purpose, then they must find for the defendant

7th That if the jury believe from the evidence that the defendant caused no greater diminution in the quantity of water flowing in the channel of the branch than was necessarily incident to a proper use of the element for supplying a steam engine used by the defendant in propelling his mill then they must find for the defendant which the court refused to give as asked & gave the following instructions

1 & 2 given with this explanation and addition If the agent of the defendant did the act in carrying on the business of the defendant, and for the purpose of carrying on that business the defendant is responsible, as if defendants agent made a dam for the purpose of running water into the well which he was hauling, and by reason of that dam plaintiff was injured defendant is liable for the injury, or if the defendant assented to the act without giving direction he is responsible

3 given with this addition That to maintain this action it is not necessary to show an exclusive right to the use of the water, which implies a right against the rightful owner - the first appropriation of the water gives the right to its use against all the world, except the rightful owner, and the plaintiff in this case has the right to use the water under the appropriation made by the persons under whom he holds possession, and may recover in this action for the diversion of the water

to his prejudice, except as against a person who has right by grant or prescription

4 The defendant cannot justify the diversion of the water to the prejudice of the plaintiff unless he shows the first appropriation of the water by himself or those under whom he holds, or a right by grant or prescription and plaintiff has the right to the use under the appropriation by the persons under whom he holds possession

5th If defendant made the first appropriation of the water, he would have the right to use so much as was necessary for the purposes of the appropriation, but if plaintiff or those under whom he holds possession made the first appropriation, the plaintiff has the right to use so much of the water as is necessary to the purposes of the appropriation. And defendant can not justify the disturbance of Plaintiff's possession, unless he shows title by grant or prescription

6th Refused

7th This would be the law if the defendant made the first appropriation of the water to the use of his mill. To which refusal of the instructions asked for by the defendant's counsel they excepted - as also to the instructions given by the Court And prayed that this their bill of exceptions be signed sealed &c which is done

Wm Thomas



State of Illinois
Green County

I Moses Bledsoe Clerk of the Circuit
Court of said County do certify that the foregoing ten
pages (so far as they purport to be copied) are truly copied
from the record and files in the case of Henry W. Meri-
with against John Evans as the same is in my office
and that the said Evans on the 13th day of May 1839
filed in my office his bond according to law and the
order of the Court



In Testimony whereof I write at my
hand and affix the seal of the said
Court at Carrollton this 31st day of
May 1839

M Bledsoe clk

Essex

Henry W Meriveth
 against }
 John Evans apt

Copy of Record

Copy 5.00
 cert filed \$5.50

Filed July 9 1837
 J. M. Duman