

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

MARY SHERIDAN,

vs.

MARSTON M. DOYLE.

} Error to Hamilton.

ABSTRACT.

This was an action on the case commenced by the defendant in error against the plaintiff in error in the White County Circuit Court, and changed to Hamilton County.

5] The declaration avers that the Little Wabash river is a navigable
6] stream—that said Doyle had, on said river, two flat-boats loaded with
15] hoop-poles, and destined to the most advantageous market on the Mis-
16] sissippi river—that said plaintiff Sheridan had dammed up said Little
Wabash river so as to prevent the navigation thereof by flat-boats, &c.,
—that she suffered it to continue so obstructed and did thereby hinder and
prevent the said Doyle from descending said river with his flat-boats afore-
said; and that thereby said boats and poles were lost to said Doyle.

20] Plea, not guilty. On the trial the jury found a verdict for plaintiff
below for \$1,000, upon which verdict was entered.

18] The bill of exceptions shows that plaintiff below called a witness and
offered to prove by him what hoop-poles were worth *on the Mississippi river*
at the time of the injury complained of, deducting therefrom the expense of
transportation—to which defendant below objected; but the objection was
overruled by the Court and the witness allowed to answer; to which decision
defendant below at the time excepted.

The defendant below asked the Court to instruct the jury as follows:
“That unless Mrs. Sheridan (the defendant) built the dam across the river,
or the same was built by her orders, she is not liable under the pleadings in
this case, and the jury should find the defendant not guilty,” which instruc-
tion was refused by the Court and defendant below excepted thereto.

ASSIGNMENT OF ERRORS.

1st. The Court erred in overruling the objection of the said plaintiff
in error, and permitting the witness referred to in the bill of exceptions to
give in evidence and state what hoop-poles were worth on the Mississippi
river in the spring of 1855.

2d. The Court erred in refusing to instruct the jury at the request of
said plaintiff in error that unless Mrs. Sheridan (the defendant below) built
the dam across the river, or the same was built by her orders, she is not
liable under the pleadings in this case.

3d. The Court erred in refusing the instruction asked for by the plaintiff in error, and which is copied into the bill of exceptions.

4th. The Court erred in refusing to set aside the verdict and grant a new trial, and in giving judgment for said Doyle on said verdict.

JOHN M. CREBS, *for Plff in Error.*

BRIEF OF PLAINTIFF IN ERROR.

Under the first assignment of error, it is insisted that the evidence was improperly admitted. The measure of damages was what the hoop-poles were worth at the time and place of the injury complained of, and such necessary expenses as plaintiff below was subjected to by the wrongful act.

The second assignment of error is, we think, well taken, and in support of our views we submit the following propositions and authorities:

1st. Whatever facts are necessary to constitute the cause of action must be directly and distinctly stated in the declaration. Angell on Water Courses, Sec. 413, 412. *Wilbur v. Brown*, 3 Denio, 359.

2d. If there is a variance between the statement in the declaration and the proof it will be fatal. Angell on Water Courses, Sec. 426, 411. Saunders Pl. and Ev. 1234. *Fitzsimmons v. Inglis*, 5 Taunton, 534, (1 E. C. L. Rep. 275.) *Griffiths v. Marson*, 6 Price 1, (2 En. Ex. Rep. 349.) *Wilbur v. Brown*, 3 Denio, 359.

3d. An action for continuing a nuisance cannot be maintained against one who did not erect it, without a previous request to remove or abate it. *Pierson v. Glean*, 2 Green's (N. J.) Rep. 36. *Hubbard v. Russell*, 24 Barbour, 404. *Johnson v. Lewis*, 13 Conn. 303. Angell on Water Courses, Sec. 403. There must then be a material difference in declaring against a person for *erecting* or for *continuing* a nuisance.

4th. But we think it is clear that a declaration for *erecting* would not be sustained by proof of *continuing* a nuisance. 1 Ch. Pl. 392. *Fitzsimmons v. Inglis*, 1 E. C. L. Rep. 275. *Griffiths v. Marson*, 2 Eng. Ex. Rep. 349. *Beavers v. Trimmer & Cole*, 1 Dutcher 101.

If these propositions are true, then it follows that the plaintiff below could not recover under his declaration in this case without showing that the defendant below erected the dam or caused it to be erected, and a refusal so to instruct the jury was a palpable error.

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