

No. 12007

Supreme Court of Illinois

Mann, et al.

vs.

Russell.

71641  7

41
John E. Mann et al.
vs
Charles H. Russell
850

Prepared
E.L.

12007

United States of America

State of Illinois }
McHenry County } S.S.

Shew before the Honorable Hugh
Wenderson presiding Judge of
the Eleventh Judicial Circuit of the State of Illinois
of which McHenry County forms a part, at a Circuit
Court begun and held at the Court house in Woodstock
in said County on the eighth day of April in the year
of our Lord one thousand eight hundred and fifty
and of the Independence of the United States the
seventy fourth.

Present the Hon Hugh Wenderson
Judge

Attest J. M. Johnson
Clerk

P. W. Platt
State Attorney
Null Comally
Sheriff

And heretofore to wit on the 27th day of February in the
year of our Lord one thousand eight hundred and
forty nine a certain writ of Summons was issued out
of the office of the Clerk of the Circuit Court of the County
of McHenry and State of Illinois. which said Summons
is in the words and figures following that is to say

State of Illinois }
McHenry County } The People of the State of Illinois
to the Sheriff of said County Greeting.

The
Command you that you summon John C. Mayne
Rachael Stevin and Joseph Rice if they 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 Woodstock in said County on the first Monday of
April next to answer unto Charles H. Russell in a
plea of trespass on the case for flowing & letting back
water on his machinery and mill to the damage
of the said plaintiff as he says in the sum of Three thousand
and dollars. And have you then and there this writ
with an endorsement thereon in what manner you
executed the same. Witness Joel H. Johnsons Clerk of our
said Court and the seal thereof at Woodstock
this 27th day of February Anno Domini
1849.

(Seal)

J. H. Johnsons Clerk

Which said Summons has undergone thereon
executed by reading in hearing of the within named
defendants this 16th day of March A. D. 1849.
Alice Donnelly
Shff of McHenry County Ill.

Filed March 19th 1849. J. H. Johnsons Clerk

And thereafter to wit, on the 20th day of March A. D. 1849,
the said plaintiff filed in the office of the Clerk of said
Court his declaration in the merits and figures following
to wit:

State of Illinois }
McHenry Circuit Court } Of the April Term in the year of our
Lord One thousand eight hundred

& forty nine.
McHenry County ss: Charles H. Russell plaintiff in this suit
by Isaac N. Arnold his attorney complains of John E. Mann
Rachel Blivins & Joseph Rice defendants in this suit of
a plea of trespass on the case.

For that whereas the said plaintiff was heretofore to wit in
the first day of September in the year of our Lord One
thousand eight hundred and forty six in the said
County of McHenry lawfully and actually possessed of
his own property to wit of a certain piece or parcel of
Land to wit: The North West Quarter of section number
twenty six in Township forty six North of Range Eight
East of the third principal meridian. & of a certain Water
Mills situated thereon, to wit a saw mill, machine
mill and grist Mill, all situated in said County
of McHenry and the said plaintiff on said Land
and mill, from time whereof the memory of man runneth
not back to the contrary have had until obstructed
by the said defendants the full course and use of
said Stream of water called the Nippersink creek, running
across and over said premises and away from their
said mills and the plaintiff still ought to have and
hold the same free and unobstructed and without
any back water flowing to the same whereof the said
defendants ^{was} well knowing; yet the said defendants contriving
to deprive the plaintiff of the profits of his said mills and premises
heretofore to wit in the first day of September A.D. 1846, to wit
at McHenry aforesaid did erect a dam across said
Nippersink Creek below the dam of said plaintiff to wit
on the North West Quarter of section number thirty in
Township forty six North of Range number nine East; and
thereby then and there raised said stream fourteen feet above
its usual and due height and caused a back water, and thereby
hindering the free course of said stream from said
Mills; to the great damage and injury thereof, and thereby
filled up the channels and race and water courses of
the said plaintiff, and obstructed the plaintiff in the
use of his said mills and deprived them of the

profits thereof, for divers days and times to wit from the day of
its erection hitherto whereby the said premises and mills of
the plaintiff have been greatly depreciated in value &
the plaintiff been prevented from selling the same &c.
2 For that whereas the said plaintiff was heretofore to wit
in the first day of September in the year of our lords
One thousand Eight hundred and forty six in the
said county of Missouri, lawfully and actually possessed
of a certain piece or parcel of land to wit, the North
West Quarter of Section number twenty six, in Township
forty six North of Range Eight East of the third principal
meridian, and of certain water mills situate thereon
to wit a saw mill, machine mill, and grist mill, all
situate in said county of Missouri, and the said plaintiff
on said land and mills from time whereof the memory
of man runneth not back to the contrary have had, the
free course and use of said stream of water called
the Nippersink creek, running across over and upon
said premises, and away from his said mills, and the
plaintiff still ought to have and hold the same free and
unobstructed, and without any back water flowing to the
same, & whereof the said defendants were well knowing:
yet the said defendants contriving to deprive the plaintiff
of the profits of his said mills and premises heretofore
to wit in the first day of September A.D. 1846 to wit,
at Missouri aforesaid, did continue to obstruct the free and
voluntary course of the Nippersink creek by their said
dam erected across said stream to wit on the North
West Quarter of Section Number thirty, in Township
number forty six, North of Range Number nine
East, and the said defendants not regarding the
wrong and injury in this behalf, willfully allowed
their said dam so erected and constructed across
said Nippersink ^{Creek} as aforesaid to remain and

3
thereby then and there caused said stream to be fourteen
feet above its usual and due height, and caused a back
water, and thereby hindering the free course of said stream
from the said mills to the great damage and injury thereof
and thereby filled up the channels and race and water
courses of the said plaintiff, and obstructed the plaintiff
in the use of his said mills and deprived him of the profits
thereof for divers days and times, to wit, from the day
of its continuance hitherto, whereby the said premises
and mills of the plaintiff have been greatly depreciated
in value and the plaintiff been prevented from selling the
same &c. And for that whereas the said plaintiff heretofore
to wit, in the first day of of September A.D. 1846 to wit, in the
County of McHenry, and long before, Dever since was and
is seized and actually possessed of a certain piece of land
parcel of Land known and described as the north West
Quarter of Section number twenty six, in Township forty
Six North of Range Eight East, and whereas the water of
Shippensink Creek was wont to run upon and over the
same and whereas the said plaintiff had before that time
cut a race away on said premises and erected Water
mills on the same, to wit, A Saw Mill, Grist Mill, and Ma-
chine Shop, and had dug and excavated a race course
and race courses to conduct said water, from said
mills to its original channel, through which said stream
was accustomed and ought to have run yet the said
Defendants not ignorant of the premises, but intending
to deprive the plaintiff of the use and profit of his said
Mills and the value of the said premises, mills and water
power, on the day and year last aforesaid on said Stream
to wit below the dam of said plaintiff erected and constructed
a dam across said stream by means whereof the water
in said stream was raised above its naturall height

to wit. to the extent of ten feet, and threw back upon the lands and mills and race courses and streams of the said plaintiff overflowing the same, & hindering the free course of said stream from said Mills, and thereby obstructing and preventing the plaintiff in the use of his said Mills and deprived him of the profits thereof and prevented him from making a good sale thereof and greatly depreciated the same in value to wit at McHenry aforesaid.

4

And whereas also the said plaintiff was heretofore to wit. in the first day of September AD 1846, in the said County of McHenry lawfully possessed of a certain piece or parcel of land to wit. The North half of section twenty six, township forty six North of Range Eight, East of the third principal meridian and of certain Water mills situate thereon to wit: a saw mill, machine mill, and grist mill, all situate in the said County of McHenry and this plaintiff on said land and mill from time whereof the memory of man runneth not back to the contrary have had, until obstructed by the said defendants the free course and use of said stream of water called the Nippersink Creek, running across and over said premises and away from his said mill and the said plaintiff still ought to have and hold the same free and unobstructed, and without any back water, flowing to the same whereof the said defendants were well knowing. Yet the said defendants continuing to deprive the plaintiff of the profits of his said mill & premises heretofore to wit in the first day of September AD 1846, to wit. at McHenry aforesaid, did erect a dam across said Nippersink Creek, and thereby then and there raised said stream fourteen feet above its usual and low height and caused a back water, and thereby hindering the

the course of said stream from said mills to the great damage and injury thereof and ^{thus} filled up the channels and races and water courses of the said plaintiff and obstructed the plaintiff in the use of his said mills and deprived him of the profits thereof for divers days and times to wit from the day of its erection hitherto whereby the said premises and mills of the plaintiff have been greatly depreciated in value and the plaintiff been prevented from letting the same &c.

5 And for that whereas also the said plaintiff herebefore to wit in the first day of September AD 1846 to wit in the County of McHenry & long before and ever since was and is actually possessed of a certain piece or parcel of land known and described as the North half of Section twenty six Township forty six North Range Eight East of the third principal Meridian, and whereas the Water of the Upper-sink creek was wont to run over the same and whereas the said plaintiff had before that time cut a race away on said premises, and erected water mills on the same to wit a saw mill, grist mill, and machine shop, and had dug and excavated a race course and race courses to conduct said water from said mills to its original channel, through which said said stream, was accustomed and ~~had~~ ought to have run: Yet the said defendants not ignorant of the premises but intending to deprive the plaintiff of the use and profit of his said mills, and the value of the said premises, mills and water power, on the day and year last aforesaid, on said stream erected and constructed a dam across said stream below said plaintiffs premises by means whereof the water in said stream was raised above its natural ~~level~~ height to wit: to the extent of ten feet, and threw back upon the lands and mills and race courses and

Stream of the said plaintiff overflowing the same, hindering
the free course of said stream from said Mills and
thereby obstructing and preventing the plaintiff in the
use of the said mills and deprived him of the profits
thereof, and preventing him from making a good sale
of them and greatly depreciated the same in value,
to wit, to the amount of two thousand Dollars, by which
said several premises herein and before set forth, the plaintiff
has been injured and hath sustained damage to the
amount of three thousand Dollars and therefore he brings
suit &c.

Which has endorsed thereon
Filed March 20th 1849.

Isaac N. Arnold

Atty for Plff

J. H. Johnson Clerks

and afterwards to wit on the 24th day of September in
the year 1849. it being in term time the following proceed-
ings was had to wit.

Charles H. Russell

vs
John A. Mann
Rachel Bloom
Joseph Rice

Case

And now come Arnold the
plaintiffs attorney and on his
motion it is ordered that the
defendants plead herein by the 15th day of November
next and that they serve a copy of their said plea
on one of the plaintiffs attorneys.

And thereafter to wit on the 6th day of November in the year
last aforesaid the said defendants filed their said
plea in the office of the Clerk of the District Court
of said County in the name and figures following
thus to wit.

State of Illinois } S. }
McHenry County & Circuit }

Of the April Term of the
McHenry County Circuit

Court for AD 1850.

John O Mann, Rachel Bliven } And the said defendants
& Joseph Rice }
act } ~~Prepass on the case~~ } by Strode & Bush their
Charles Russell. } } attorneys, come and
} defend the wrong &
} injury when &c

and say they are not nor is either of them guilty of
the said supposed grievances above laid to their charge
or any or either or any part thereof in manner & form
as the said plaintiff hath above thereof complained
against them. And of this they put themselves upon
the Country &c. & Plff doth the like &c

Arnold & Platt.

Strode & Bush for Defts

And the said plaintiff will please to take
notice that on the trial of the above entitled cause on the
plea of the general issue the said defendants will offer
proof & give in evidence that on the 14th day of June AD 1848
the said plaintiff acknowledged himself to claim no
damages of the said defendants for all damages that
might have accrued prior the said day of May AD
1848, ^{provided} the said ~~defendants~~ would within a reasonable
time thereafter draw the water off of their dam which
they did and the defendants will give evidence also
as to the first & second counts of the plffs declaration
that on the 14th day of June AD 1848, the said
plaintiff did not pretend to be the owner or possessor
in his own right of the said premises in the said
plaintiffs declaration mentioned or any part thereof but only as "Agent."

Nov 6, 1849.

John O Mann Rachel Bliven &

Joseph Rice

And heretofore to wit. on the 16th day of April in the year of our Lord one thousand Eight hundred and fifty it being one of the days of the late usual term of the said Circuit Court of said County the following proceedings were had to wit.

Charles A. Russell } Plespa on the case.

^{vs}
John C. Mann
Rachel Bliven
Joseph Rice

And now came the plaintiff by Arnold and Platt his attorneys and the defendants by Strode Bush and Loope their counsel also came and issue

being joined it is ordered that a Jury ~~come~~ and ~~thereupon~~ come a Jury of good and lawful men to wit: Nelson Higgins S. P. Parker. Rip Church. John D. Hill. Intze Wm Henry Anson Rodger Daniel Lush John C. Dixon. Joseph Stone Josiah Walkup John V. Buebe and C. A. Russell who being duly empannelled and sworn well and truly to try the issue joined and having heard a portion of the evidence it is thereupon agreed that the Jury may disperse and meet the Court tomorrow morning at 8 o'clock

And thereafter to wit. on the 17th day of April in the year last aforesaid. the said Court being in session as aforesaid the following proceedings were had to wit.

Charles A. Russell } Case

^{vs}
John C. Mann
Joseph Rice and
Rachel Bliven

And now come the parties by their respective attorneys and the jurors formerly empannelled herein also come and they having heard the evidence and a portion of the arguments of counsel it is therefore

ordered by the Court by the agreement of the parties that the Jury may dispense under the usual charge of the Court and meet the Court tomorrow morning at the hour of half past Seven O'clock.

And thereafter to wit, on the 18th day of April in the year last aforesaid the said Court being in session as aforesaid the following proceedings were had, to wit:

Charles W. Russell } Case
John C. Mann } And now ^{again} come the parties
Joseph Rice and } by their respective attorneys and
Rachel Blivin } the Jurors formerly empanelled
therein also come and having

heard the arguments of counsel and instructions of the Court they retired to consider upon their verdict and thereafter they returned into Court and delivered the following verdict to wit:
We The Jury find the defendants guilty and assess the plaintiffs damages at the sum of Eight hundred and thirty five Dollars and twenty cents, and thereupon the defendants by Strode their attorney move the Court for a new trial.

The following are the instructions on the part of the plaintiff given on the trial of said cause.

Plff. Instructions.

1st If the Jury believe from the testimony of the Witnesses that the defendants ^{have} caused an impediment in the stream in question by which the water is retarded or thrown back & that thereby the plaintiff mill was stopped from grinding in any state of the

Given

water or made to grind slower or worse than it otherwise would
the law is for the plaintiff.

2nd. If the Jury believe from the testimony that the
defendants dam prevents the escape of ~~the~~^{the} water
from the plaintiffs mill and so retards it as in
any stage of the water to injure the action of the mill
occupied by the plaintiff he is entitled to recover.

3d. If the Jury believe from the testimony that the ordinary
course of the Mississippi Creek has been so obstructed by
the defendants dam as to prevent the escape of the
water from the mill of the plaintiff or race and
thereby the mills of the plaintiff were retarded then
the law is for the plaintiff.

4th. If the Jury believe from the evidence that the
plaintiff has been in the possession of the land
and mills in his declaration described since
the 20th of Sept 1846 up to the time of the commencement
of this suit and that the defendants mill dam has
caused the water to flow on to said premises he is
entitled to recover

5th. If the Jury believe from the testimony that there
was two stakes set near the line in the creek one by
the persons who drew the water in June 1848,
and one by some other person and that the
witnesses of the defendant measured the last
mentioned stake and that - that was the stake
referred to by them and not the stake
set by the referees that it is ~~their~~^{their} duty to reconcile
the testimony of the Witness and in so doing to

take into consideration the respective means of knowledge of the different witnesses.

6th If the Jury believe from the evidence that the water is caused to flow back upon the plaintiff mills so as to obstruct the action of the same by means of bars or other obstructions in said Mepersink creek and that the plaintiffs dam is the cause of such obstructions in said stream they will find the law is for plffs. Filed April 18. 1850.

J. A. Johnson clk

Defendants Instructions

1st. That every owner of the land through which the stream passes has a right to use the whole fall of the stream on such land or on the land which he had a right to flow and that the fall is the difference in level between the surface where the stream enters upon & where it leaves his land and that if the jury believe that the defendants dam was not higher up than the fall on their land above the dam the law is for the defendants
Filed April 18 1850.

J. A. Johnson clk

2nd

By Defts

That if the Jury believe that the pit of the Plaintiffs Wheel was dug too low, and the Wheel placed too low, and that the back water in which the wheel labored was produced by the natural reflux of the water and not by the dam of the defendants, they should find for the defendants.
Filed April 18 1850.

J. A. Johnson clk

Given

Refused

Given

Def's Instructions

Given with the modification
Ans 3

3^d That if the jury believe from the evidence that the flowage or back water upon the Solon Mills was occasioned by obstructions in the stream above the defendants dam, and not by the dam erected ^{or used} by the defendants, the defendants are not responsible therefor, and the jury should find for the defendants.

To the 3^d add

Unless the jury believe that such obstructions were also caused by the def's dam

Given with the modification
Modification by
Ans.

4 That if the defendants as owners of land through which the Neversink creek passes, have a right to use the stream for hydraulic purposes on their own land, and have a right to use the whole fall of the stream from the place where the stream enters upon the land owned by them or which they have a right to flow to the place where it leaves their land which is the difference of level between the surface where it first touches their land, or land which they have a right to flow and the surface where it leaves their land.

Unless the jury also believe from the evidence that the water set back beyond that point at any time during the time mentioned in plffs declaration Filed April 18, 1850.

J. H. Johnson cly

Given

5 Def's instructions

That unless the jury believe from the evidence that the land below the mills as well as the mills was leased from Nichols to the plaintiff, that the plaintiff is not entitled to recover any thing for the setting back of any water on such land below the plaintiff's mill.

Filed April 18, 1850

J. H. Johnson cly

6.

Defts Instructions

The Court will instruct the jury that if they believe from the evidence that the plaintiff was in possession of the mill property merely as the agent of John H. Nichols the proprietor, and not in any other capacity during the time for which he claims damage in this action he is not entitled to maintain an action for flowing the land or the mill in his name, and they must find for the defendant

Filed April 18, 1850.

J. H. Johnson cllk

7th That if the Jury believe from the evidence that the back water on the plaintiffs mill wheel if any was there was caused by the running of his own mills, and not by the dam of the defendants, they must find for the defendant.

Filed April 18, 1850

J. H. Johnson

clerk

And thereupon on the day and upon last aforesaid the said defendants filed their motion for a new trial and arrest of Judgment in the words and figures following that is to say

John C. Mann Rachel Blivin
and Joseph Rice

ads 3 case

Charles H. Russell

April term of the McHenry
Circuit Court at 1850.

April 18, 1850.

The defendants by their counsel come and now here move the Court in arrest of Judgment, for a new trial in the above entitled cause, on the following grounds and for the following causes viz,

Given

Given

- First. The Verdict of the Jury is against the evidence
- Second. The verdict of the Jury is contrary to law.
- Third. The Court misdirected the Jury as to the law
of the case
- Fourth. The verdict of the jury is against manifest
preponderance of the proof.
- Fifth. The Court should have given the 8th instruction
to the Jury, asked Defts counsel
- Sixth. The amount of damages found by the Jury in their
verdict, is excessive
- Seventh. The Jury misapprehended the evidence in regard
to the character of the plaintiffs right to the premises
- Eighth. The plaintiffs declaration counts for damages
for the flowage of water on the plaintiffs possessory
right to the land on which the mills were situate,
below the outlet of the tail Race
- Ninth. The verdict is a general verdict without distinguishing
on which the Count or counts of the plaintiffs declaration
they founded their verdict, inasmuch as the plaintiff
abandoned his first count on the trial, whereby
defts were surprised.
- Tenth. The finding of the Jury is contrary to the instructions
of the Court
- Eleventh. The verdict of the Jury is especially against that
portion of the Defts testimony, wherein they proved
that, in pursuance of the plffs proposition as
agent of Jno. M. Nichols, the Defts dam was drawn
down, in which alternative the said John M. Nichols
by & through his said agent agreed to prosecute no
suit for the damages that had accrued up to
the time of drawing said dam on the 22nd
of June Ad 1848, yet the verdict is general and
goes back to the 20th Sept 1846 up to Feb. 1849.

12th The instructions of the Court as asked & given on the part of the plaintiff misled the Jury as to the extent of the defendants right to use & flow the water of the stream

13th That the Court erred in refusing the instructions asked by the defendants, and also in modifying those given, by means of which the Jury was misdirected as to the law of the case

14th The Court erred in refusing to allow the defendants to prove that the property was sold to plffs lessor by the White for a less price by reason of the back water; and also that the plff rented the property at a less price on the same account

15th Because of the improper conduct of the Jury in arriving at their verdict.

Filed April 18th 1850.

J. H. Johnson

clerk

And thereupon the said defendants filed the following affidavits in support of their said motion to wit

John E Mann et al

ads

Chas C Russell

Edw W Smith being duly sworn

deposes and says that he knows of his own knowledge that the

mode adopted by the Jury in the above entitled cause in arriving at the verdict to day was for each juror to ballot for the sum he was in favor of then add the several sums together, and divide the total amount by Twelve the Quotient to be the verdict. this mode was agreed to by a vote of the Jury before the ballot was had for the amount of damages, and that any one could have known the same by being in my office while the

And thereupon the said plaintiff filed the following affidavits in opposition to said motion to wit

McHenry Cir Court

Charles W. Russell

Ino & Mann doctus

McHenry County ss.

David Barker

being duly sworn says in addition to the statement

already made in this cause after the division by ~~judge~~ and of the amount of \$835.20. had been arrived at. it was ~~unanimously~~ ^{unanimously} decided by jurors that that sum should be the verdict before the motion was put some jurors proposed that the odd dollars & cents should be cut off. some opposed this & some in favor of it then after some discussion the motion to adopt \$835.20. as the verdict was ^{unanimously} carried

Subscribed & sworn to before } David Barker
me this 18th April A.D. 1850 }

Enos W. Smith

C. Clerk

Filed April 18, 1850.

J. H. Johnson clk

McHenry Cir Court

Charles W. Russell

Ino, E. Mann
& others

McHenry County ss. Ino. C. Dixon

being sworn states he was one of the Jurors who tried the above cause. after agreeing that the

plaintiff was entitled to recover. I proposed that each Juror should ^{write} ~~write~~ the amount he thought the plaintiff entitled to recover & put it in a hat & the amount

added up & was divided by twelve, some one proposed
that the amount average should be the verdict This
was objected to by several & was not adopted Then
the Jury proceeded to write on paper the several
amounts they were placed in a hat the amounts
added up & divided by twelve, I did not consider
myself bound by that result. Then I ^{moved} ~~proposed~~
that such sum be adopted by the Jury as the
verdict - this was **seconded** before the vote. Some
proposed to reduce by striking off the odd dollars
& cents this was objected to by others & after some dis-
cussion the jury unanimously agreed to the verdict
as rendered, it was then reduced to writing & each
juror signed it.

It was the understanding of the jury
that the result arrived at by the division should
not be binding - but was resorted to, to ascertain
each others minds

Subscribed and sworn to before J. John, C. Dixon,
me this 18th day of April 1850

Enos, W. Smith,
Co Clerk

Telid April. 18 1850

J. A. Johnson
Clerk

Missury cir court

Charles, M. Russell

Is
Jno E. Mann dothors

Missury County Jo. We the
subscribers jurors state that

each juror wrote down the amount of damages which
he thought the plaintiff entitled to recover divided

it by ~~the~~ after, this result had been thus obtained
it was moved and carried by vote of uplifted hands
that ~~the~~ that sum should be the verdict. Before that
vote was taken some Juror proposed to strike off the
odd cents & dollars. this was rejected & the other sum
adopted by vote. This mode was resorted to in order
to obtain a reasonable amount to be agreed on for
their verdict.

Sworn & subscribed before
me this 18th day of April
A.D. 1850

J. A. Johnson
clerk

Anson Rogers
John P. McIntire
John V. Beebe
J. Stone
Daniel Lusk
Rix B. Church
S. P. Parker
Josiah Walkup

Filed April 18, 1850

J. A. Johnson
clerk

And thereupon on the day and year last aforesaid
the following proceedings were had to wit.

Charles H. Russell

John E. Mann
Reynold Blinn
Joseph Rice

Cause Plowage.

And now come the parties
by their respective attorneys
and the Court having heard
the parties as well as the

arguments of Counsel on the motion for a new
trial & aist of judgment formerly entered herein
and being sufficiently advised in the premises
overules the same to which opinion of the Court
in overruling the said motion the defendant by
his Counsel excepts.

It is therefore ordered and considered by the Court
that the said plaintiff have and recover of the defen-
-dants the said sum of Eight hundred and thirty
five dollars and twenty Cents his damages as aforesaid
as also his costs and charges herein expen-
-ded and that he have execution therefor.

And therefore
the said defendants may an appeal herein to the
Supreme Court which is allowed by the Court upon
condition that they enter into an appeal bond within
fifteen days from this date conditioned according to
law in the sum of fifteen hundred dollars.

And by
the agreement of the parties the appeal bond
herein is to be entered into before, and approved
by the Clerk of this Court and William Slown Esq. as
to the securities thereon.

And it is further ordered by the
agreement of the parties that the bill of exceptions herein
be settled in ten days from this date.

And thereupon
on motion of the plaintiff's attorney it is certified that
by the Court that Eight of the plaintiff's witnesses be
taken in the bill of costs and returned against the
defendants.

The following is the bill of exceptions filed in
the above entitled Cause, and which is in the
words and figures following to wit.

State of Missouri, McHenry County Circuit
McHenry County of Court April Term A.D. 1850.

Charles H. Russell

John C. Mann

Rachael Blinn &

Joseph Rice

Suspect on the Case
Plowage.

Be it remembered that on
the 16th day of April A.D. 1850
at said Term of said Court

the above cause came on to be heard before the
Hon. Hugh Henderson and a Jury to wit. William
Henry Nelson Diggins John C. Dixon John V. Bebe
David Lusk John M. Intype, Tracy J. Russell
Anson Rodgers S. P. Parker Joseph Stone Josiah
Walkup and Rip R. Church; when the plaintiff
called as witnesses John M. White James White Jesse
Buckner George W. Musdell C. J. Cotting Thomas C.
Sayles Solomon Aldrich who were severally and duly
sworn to give evidence in the cause; and John M. White
was called to the stand who testified that himself and
his brother James White were the former owners of the
N. W. qr. of section 26 in Township 44. N. R. 8, East in
McHenry County, being premises mentioned in declaration
on which the Solon Mills stand on the Defendants Cashes
that they continued to occupy said Mills from the time
of their erection in 1839 & 1840 until the 20th of September
1846 when they sold the said quarter section and Mills
to John H. Nichols and executed to Nichols a Warranty
Deed therefor at which time the plaintiff Russell took
possession of the said Mills and property and premises
and has continued in possession until the present
time. The Spring Grove Mills owned and occupied by
the Defendants are situated on the same stream, and
from a mile and three quarters to two miles below the
Solon Mills and are located on the quarter section as
stated in plaintiffs declaration. He stated on what

Section the Spring Grove Mills were situated and the
mills were erected and completed in the Spring of
1845 (The plaintiff Counsel after proving its execution here
offered in evidence an instrument in writing dated
January 25th 1847. signed by John W. Nichols and ack-
nowledging the receipt of one thousand dollars from
Charles W. Russell for the use of the Solon Mills for
five years from 20th Sept. 1846. which receipt is in the
words and figures following to-wit)

" Received South part January 25th 1847 of Charles
" W. Russell one thousand Dollars in full for the use
" of grist and saw mill now occupied by him at Solon
" McHenry County Ill. for five years from 20th September
" last he delivering up said mill at the expiration of
" said five years in as good repair as the same are
" now in natural wear and tear and calamity by
" the elements expected (Signed) Jno. W. Nichols

20
54 ept
(To the reading of which said receipt in evidence the
defendants by their Counsel objected which objection
was overruled by the Court and the said paper
admitted to be read to the Jury as evidence in said
Cause)

Said Witness John W. White further testified
as follows. The wheel which was first put in use
in the Solon Mills was a breast wheel of 12 feet
diameter and was set one foot clear of water. yet
the water sometimes flowed on said wheel at high
stages of water. In June or July 1845 the water
was drawn at the defendants mill when it fell
four inches on the Solon Mill wheel - 19 inches at
the East line of said gr Section (120 rods below Solon
Mills) and 21 inches at a bridge about 100 rods

above defendants mill dam. The Solon Mills would
grind 10 bushels per hour when the wheel run clear
and not more than 5 bushels per hour with the back
water on the wheel. The plaintiff (Russell) made considerable
and expensive improvements on said mill in 1847 & 1848.
He built flume which cost \$250. A reacting wheel in saw
mill cost \$400. A new dam which cost \$250 and new over-
shot wheel of 8 feet diameter to flouring mill cost \$1000,
and made various other improvements, was present in June
1848 when the water was drawn from Defts pond, and four
men chosen by the parties to witness the effect of ^{such} drawing.
The water fell at plaintiffs East line $8\frac{1}{2}$ inches. The line
above mentioned is $1\frac{1}{2}$ miles above the defendants mill and
120 rods below the plaintiffs mill on a straight line. When
the water was drawn down the plaintiff said to the defen-
dant Mann "you must be now satisfied that you have
reshaped upon me" to which Mann replied. "If I have"
I have not injured you" plaintiff answered. "of that
I will not let you be the judge". The damage to plaintiffs
mill from back water is from \$500 to \$600 per annum. The
Creek below plaintiffs mill is very crooked. The plaintiffs
mill would be worth from \$500 to \$600, more per annum
with the water in its natural condition, than set back
as it is by Defts dam. Defendant Mann after water was
drawn in June 1848 went and put flush boards on his
dam again, when the water raised at the aforesaid line
from $1\frac{1}{2}$ to 2 inches. The Spring Grove Mills occupied by
Defts were commenced in the fall of 1844 and finished
in the Spring of 1845 by Blinn Stiles Dickinson and
Coading; and the wives of said Defts Mann and Rice
are the only heirs at law of said Blinn, who died
in September A.D. 1846. Defts and their wives are present
owners of Spring Grove Mills. When water drawn in 1848

Maam said he believed he could raise his dam
8 inches without letting back water at line of Peff
premises. He started down to put on slush boards
and before he got back the water began to rise at
said line, and had raised 1 1/2 to 2 inches before
he arrived. Water was not drawn down in 1848
as low as before, it was 12 or 14 inches higher than
it used to be

Thomas W. Sayles sworn. Has lived near Solon since 1844
his near Aspersinks Cuts one and a half miles above
defendants mill and a half a mile below the East line
of the gr. Section on which the Solon mills stand. Set two
stakes opposite my house in 1844 before defendants dam
was built and the water raised on those stakes from 24
to 26 inches after Spring Grove dam built. When the
water was drawn 1848. the water fell on those stakes 14
inches. There is a current all the time in the stream
opposite my house. The water was not drawn down to
its original state in 1848. within 14 inches. It was
still raised at points of my stake 10 inches higher
than before Spring Grove dam built. I measured
with a rule. In Spring of 1845 the race of Solon
mills clear of water, marked in it dry shod. Water in
natural state. when I first set stake it raised 24 to
26 inches by lower dam.

Sylvanus Aldrich sworn I worked a while on the Solon
Mills in 1842. in repairing them I saw a Miller &
have worked on mills. I then left and returned in
1847. The water was 14 inches higher in the race of
the Solon Mills in 1847 & 1848 than it was in 1842.
The new wheel was then in, and was retarded by
back water so that the mill would do from 1/3 to 1/4
less than it would have done if the wheel had run
clear. Water fell in the day time and raised at

night in full ^{and} first part of winter of 1847 & 1848
during which time I run plaintiffs mills, which I attrib-
uted to defendants mill running by day and standing
still at night. The water would be frequently from
ten inches on our wheel when Spring Grove Mills
run it would fall off partially. When they stopped
it would rise. It was generally higher in morning
than at night frequently 14 inches in morning
and fall to six at night. I am a Miller and have
run the Solon Mills since December 1847 till the
present time. After morn got back from putting on
the slush boards, the water raised on the stake at the line
1/2 of an inch, there were bars in the stream. That after
defendants dam was down, there was still ten inches
of back water on plaintiffs line which when the bars
was removed fell to about five inches thinks the dam
ago to plaintiff was \$500 per annum his judgment
is that the bar was ten inches higher in 1848 than it
was in 1842. There is a bar from 6 to 10 rods below the
mill of plff. in the race. The water runs over the dam
in a high time, and runs into the race ^{just} above
the bar. The water was 4 1/2 inches lower on the stake than
it was when it was set, he followed the stream a few
rods below the line, there was current enough to raise
the water away between the mill and the mouth
of the race, thinks the current run at the rate of three
miles to the hour. The width of the stream is sometimes
confined to the span of from 7 to 10 or 12 feet at several
places and is very crooked, all which tend to
retard the course of the current. There are some
ripples in the stream between the mouth of plaintiffs
tail race and defendants dam 15 or 20 rods above the line
of plff land there is a ripple in all two or three ripples.

The new wheel of the selfs mill cleared the water 5 inches
the old wheel was cleared when the bar was removed two
inches before the removal of the bar the water was 3 inches
on the old wheel in Sept. 1848. Saw the Slush boards
on Defts dam also in the fall and winter of 1848-1849.
the Slush boards ^{varied} ~~varied~~ from 8 to 14 inches wide. Three
men agreed to run the run of Stone, Coddling, Blavin
& Wateh & Musson men the viewers mutually selected
by parties to see result of drawing lower dam. They
drove stakes, stakes were driven at lower line of quarter
section on which Solon Mills situated the water fell 8
inches at that point when Defts pond was drawn. McClann
said he thought he could put in Slushy boards on Defts
dam & raise it 8 inches at dam without raising the
water at the line. He got into his buggy & started
down to try it. He ^{no} stand to see the result. Before he got
back the water commenced rising on the stake and
had risen $\frac{3}{4}$ of an inch when he reached there.
Russell said "Now you must be satisfied you have true
passed on me." McClann replied "if we know me
have not injured you." Russell replied "of that I
shall not permit you to be the judge. Russell told
McClann they had not drawn the water off. There were
many bars and obstructions in the stream, these
obstructions had been very much increased after
the erection of the lower dam so that where the water
before that run off after lower dam was built run
sluggish. When the ~~defts~~ drew their dam
in 1848. the effect was by the action of the water
to clear out and was away these bars but after
defts raised their dam again they filled up.
The water on the line stood 10 inches higher after
lower dam drawn in 1848. than it did before such

dam was built. I have run the Solon Mills from Dec. 1848, up to this time. The plaintiff suffered very great damage from back water in winter of 1848 + 1849 as well as before. Pfff had more grinding than we could do & had to keep double set of hands. We could have ground as much in 18 hours with no back water as we could in 24 with the back water. There was no back water before Defts mill built. The damage to the plaintiff by the back water was more than \$500. per annum. Defts put their slush boards on raised the back water as high as before. Dam down in Sept. 1848 + continued their dam to this time. The slush boards on Defts. dam was from 8. to 14 inches wide. The Defts dam raised the water at plaintiffs wheel 14 inches higher than it was before lower dam built. The Pfff wheel was not clear of water, from December 1847. to February 1849. more than two months altogether. There was back water the whole time with this exception. The damage could not be less than \$500. This estimate is based on the quantity of back water which I myself saw. We could have ground from 7 to 80. bushels the hour more than we did had there been no back water.

James White Sworn. I am a mill wright by trade. Have known the Solon Mills since 1844. worked on them in the winter of 1844 + 1845 as a mill wright walked down by the stream next way to the east line of pffs land. Saw the pfff mill and noticed several ripples in it before Defts dam was built. Defts dam flowed the water back on the Solon Mills wheel in 1845. Dont know of any cause why the water should be higher except it was because Defts mill was running or slow. When Defts mill was erected water rose on the east line of Pfff land 19 inches and at Pfff mill 16.

inches soon after defts dam was erected. drove a spike
in a post of an old bridge. him and Coddin, the water
had fallen 23 inches, run to run of stones at the Solin Mills,
they could do 74 more with the water off than with it on
the wheel. The Solin Mills would be worth from \$100.
to \$500 more per annum if the water did not flow
back on Piff mill wheel than as the water run is. Crooked
stream, as narrow at some places at 10 feet wide & much obstructed.
After Piff mill would stand for 8 hours the whole waste
water would run over ^{plaintiffs} Piff dam & off through the arti-
ficial channel ^{from the dam down to the junction of the artificial channel into} the Creek. Before the Spring Grove mill
was built & after Solin Mill I walked down the stream
nearly to the line and it run clear some ripples no
back water. The Spring Grove dam built in the fall of
1844. when the dam erected, back water immediately rose.
The water would rise & fall 2 or 3 times a day. I know from
of no other cause but the running or stopping of Spring
Grove mill. They drew the lower dam in 1845 & the water
then disappeared from our wheel. I went down and drove
a spike in the bridge this side of lower dam: could see
the water line & it had fallen since drawing the same 22
inches when pond filled again, it rose 22 inches, ^{when pond filled again it rose 22 inches} at bridge
19. at line, & 16 at Plaintiffs wheel. could grind 10 or 12
bushels the hour before lower dam built, not more than
five & since water set back.

C. G. Cotting, sworn, was one of the four men chosen by Plaintiff
& defendants to be present in June 1848. when Defendants
drew their dam and particularly noticed the effect. Found
24 inches head at defts dam, took ^{off} the slash boards. When
the water fell at the time of Piffs land 8 1/2 inches. A stake
had been set at the line and another at the mouth of

Pluffs tail race and sawed off even with the water line before dike dam was drawn. When the Slush boards were afterwards put on dike dam, the water raised on the stake at the line $\frac{3}{4}$ inches. Heard a conversation between Plaintiff & Deft Mann during the trial of the Experiment in drawing Dike dam. Plaintiff said to Mann that he must not raise it over the Stake driven when the water was drawn even with the top of the water by the men who drew it (the water) in future. Noticed two or three rods below the line a ripple over the bar, and the bar wasting or wearing away. A stake was stuck in the mouth of pluff tail race which I noticed, but do not recollect whether the water had fallen on the stake at the mouth of pluff tail race or not. Dont know that I ever saw a gravel bottom stream with a current in it, that formed bar at the turns of the sharp points. Knows water will set back beyond its level line, water was drawn 16 inches at lower dam & fell $8\frac{1}{2}$ inches at line below Plaintiffs mill. I think lower dam would not allow stream to be fully drawn to natural level. I think they did not take down half the obstruction. Mann went down and put in Slush boards when he came back water had risen $\frac{3}{4}$ inch over the stake which was drove even with the top of the water when the lower dam was drawn the obstructions and bars began to disappear the current cut a channel through the bars and I saw the sand running down the stream. The water fell at mouth of Pluffs tail race. The bars and obstructions would not have been there if lower dam had ^{been} built. Russell said to Mann he had not drawn the water down to its natural stage. Notice would have been down 5 or 6 inches lower at line. Heard conversation between Mann and Russell in which Russell said "You must be satisfied you have trespassed on me." & I saw proprietor of Richmond Mill

G. W. Truesdell produced & sworn. As plffs father in law was firstly enquired of by Defendants counsel whether he was interested in this suit or the Solon Mills? In answer to which he said he was not and that he worked a wool carding machine and a fulling mill with a portion of the water power of the Solon Mills dam and that he paid the said Nichols a certain per cent for the privilege. Whereupon the defendants by their Counsel objected to his computing, as a witness, but the Court overruled the objection and the witness was interrogated by plaintiffs counsel in chief

Was at the Solon Mills in 1845. There was back water in the plaintiffs race in 1846 and 1847. The wheel of plaintiffs mill was 12 or fourteen inches in the water, when the defendants dam was drawn. The water was just up to the water wheel of the Solon Mills. Thinks the damage to the plaintiff is from \$300, \$400, or \$500, per annum. The present wheel of plaintiffs mill is out of the water but during five or six months it was five or six inches under the water. Plunk was put on Sifts dam in July 1848. and it did back the water on the Plffs wheel. Some of the plunks or Slush boards on defendants dam were six inches high and some of them a foot high and some more. Could not say that the Slush boards he saw on defendants dam then or four weeks after the first part of July 1848. raised the water on plaintiffs wheel or not. Later in the season higher Slush boards were put on and did raise back water I worked on lower mill in 1845 dam was down and the Solon Mill race was clear. In 1846 & 1847, the back water on plffs wheel was 12 to 16 inches all the time. The wheel was in water all the time from 6 to 12 to 14 inches. I did not see water off again until drawn down

in 1848. In about 2. weeks after the trial in June 1848. water was set back again. From the report in the water since.

John Buckner, produced & sworn. Knew the Solon Mills since 1842. worked in them in 1844. was at work about them - deepened the race and cleared it out. There was twelve inches of space between the bottom of Solon Mills wheel and the water in the floor. When the lower or defendants dam was built the water flowed back on the Solon Mills wheel. The water was never quite so high on plaintiffs mill wheel since the summer of 1848. The plaintiff had to clear out the race to make the best wheel run as the old wheel was so low covered the water a foot. There were bars in the race occasionally by the freshets of 1847. Think water has set back since that time. A considerable bar at the mouth of the race crossed the stream between the mills. On Friday & Sunday last thought it was lower than common, did not attribute that fact to any particular cause - noticed the water running rapidly. Before the lower dam there was 16 inches clear between plaintiffs wheel and dam, after lower dam built 12 inches back water on Solon Mills wheel.

Sylvanus Aldrich recalled, stated that he ran the plaintiffs mill from December 1847. till the present time. From Decr 1847. to Feby 1849 there was back water on plaintiffs wheel except about two months. Think the plaintiff was dammed off \$500. per annum or more, with a little over two feet of water on plaintiffs wheel he could grind five bushels per hour but when only 6. inches of water was on plaintiffs wheel he could grind from 7. to 8. or 10 bushels per hour.

The breast wheel of Puff Mill would carry up water
from 2 to 4 feet when there was six inches of water on
the wheel. Without any back water could grind much
more at less expense and do better work.
When the plaintiff rested

After which the Defendants called Jacob C. Bloom, William
Gray, A. W. Gillett, Joseph Shephard, Turnbull Grayson,
Joseph B. Struder, Aaron Bordin, George Carothers, James
Conroy, John Brink.

Jacob C. Bloom a witness produced & sworn on the part of the
defendant. Was one of the four men chosen by Defendants to
state the effect of the drawing of the dam in June
1848, when the plaintiff was also present. Said witness
Bloom stated that when Defendants dam was drawn
in June 1848, he was present. There was one stake stuck
just below the mouth of Puff tail run, and at the
same time another stake was set in the creek at the east
line of the gr. section of land on which the Solon Mills
are situated. He could not perceive that the water
at the stake just below the mouth of Puff run was
affected by the removal of the slush boards from the
Defendants dam. The Defs dam was drawn 16 inches
at Defendants mill and 8 1/2 inches at the line and
nothing at run. This was three days after the defen-
dants dam was drawn down. Russell the plaintiff
said to Bloom one of the Defendants. There was the
stake and that he would expect Bloom would not
raise the water above that stake at the line. Russell
said for the damages already done him he would
not claim provided Defendants would not
raise the water above the stake. When I saw the

Water rising on the stake after man put on flush boards
I said it would not do for Mann to raise the water
on piff or put flush boards on. The water at the mouth
of piff run run with a good current before Deft's
flush boards were removed and after their removal
the same only faster. We saw the Spring Gun (or Deft
Mills) took them, rented them of defendants for a year
in December 1848, but gave them up the April following.
Russell during the experiments of drawing Deft down
stated that he thought the water in Deft dam might
be drawn lower. That it was not drawn down to its
natural state. The water raised $\frac{3}{4}$ of an inch at the
stake at the line after Mann put on the flush boards.
Nitrop looked at the stake at the mouth of the tail
race, or within two rods of it, between half a dozen
times each of the three days we were observing the
effects of the drawing of Deft dam, and could see
no perceptible difference. After defendant dam was
drawn noticed the current was cutting away
a bar below the ^{line} examined the cuts at the time
with John McNichols plaintiff's lepers, in July 1848
the effect of the bar being removed would have lowered
the water at the line.

A. H. Gibbs, also produced & sworn as a witness on the part
of the Deft. We was present at the raising of the Deft.
when the dam was drawn in June 1848 I saw the stake
at the time before the water was drawn and after. ~~And~~
After the water was drawn the water fell eight and
a half inches on the stake at the line. drawing the water
did not produce any difference in the level of the water
at the stake in the mouth of tail race 100 rods from the mouth
of the tail race to the line, the water runs as current and

between the mouth of the tail race and the line a sharp
current after dam drawn. The day when the slush
boards were taken off they were not put on again to my
knowledge to test the effect till the next day after. Mann
objected in putting on the slush boards in the evening went
next morning and the water on the stake at the line was
 $\frac{3}{4}$ of an inch at the line, slush boards were then eight
inches broad afterwards reduced to five inches broad.
The slush boards were put on once while various other
times at night while testing the experiments.

Willits Gray also present and sworn as a Witness on the
part of the depts. Says that he is a Miller by profession
has milled the Spring Grove Mills 9 months, commenced
in April 1849, saw with the depts Mann to the tail
line before the slush boards were put on and noticed the
level of the water on the stake at the line, the water was
high at the time but falling, Mann pointed out the
stake. The water was seven inches at the stake. The slush
boards were afterwards put on and made no perceptible
difference in the level of the water on the stake at the
line only when the Solen Mills were running or standing
still that when the Solen Mills were running the water
rose on the stake at the line 14 inches that when the
Solen Mills was stopped one run of steam about
15 minutes and the water just below the Solen
Mills in the race fell 7 inches in the time when
McMillen stopped the mill the water from just
below the mill up to the mill was dead or still
the water near the mouth of the race ran off pretty
quick, this was between the middle and last of
April a year ago. When I went to the Solen Mills
it was going, water can't be raised only to a

Certain height before it passes off over the flag, as
defendants claim. Aldrich was there at time I measured
it.

Joseph Shepherd, produced & sworn to testify on part of
Defts. States that he testified on 4 or 5 different days
whether putting on slush boards made any difference
in the water at the line. ^{This} was at same time spoken
of by Gray in April 1849. Measured the water at the
line when the slush boards were on and when
they were off, and could find no difference. The
Solen Mills going or standing still made a difference
in the level of the water at the line of from 10 to 14
inches. Slush boards were 8 inches wide. Measured
several times. The same time Gray speaks of pretty
positive he did not go up with Mann but one, ^{thought}
before that he might have went twice was in depts
employ at the time. The water had been very high
and was falling when we measured. All these tests
were in April 1849.

Amos Bordin, produced & sworn as a witness on the part
of defts. Says he was present at the test of measur-
ing the water at the line 3 or 4 times, sometimes when
they the Solen Mills were grinding & sometimes when
they were not. When slush boards on measured the
water at the line when the Solen Mills were running
from 10 to 14 inches but when the upper or Solen Mills
not running there was no difference in the water at
the line whether the slush boards were on or off.
Measured three days not quite so high the third
day as the first the creek had fallen some measured
again on Sunday. Slush boards up, neither mill
running, water lower by 7 inches than at the previous
measurement. Water had been high and was
falling. These measurements were all in April 1849 and

the same spoken of by Gray & Shepley & some others.

Joseph B. Sturtevant produced and served as a witness on part of Defts. Sturtevant than he is a millwright knows the Solon Mills & knows them before Spring Grove dam was put in, the wheel at Solon Mills was feet, in running high water when putting in buckets had to raise flashboard. The water was seen on the wheel floor sometimes we worked barfoot, had a pump worked by water to keep the water clear from under the wheel a flashboard washed out the underpinning out from under the south side of the mill. After flashboard water always stood on the wheel, I think the best wheel never after the said flashboard before the Spring Grove dam was filled was out of water. The mill did not meet the expectation of the owners. Sturtevant advised a change in the wheel to an overshot & they adopted the plan recommended by him. The race was fixed up by washing below the mill higher than it was at the mill runs when all the water was shut off the old wheel it was from a half an inch to two inches clear runs the dam was drawn down (once a week) the natural level of the stream. In the time of flashboard when the dam would not hold all the water, the water would run into the race below the mill and make a bar in the race and obstructed the free passage of the water in the race. When Solon Mills was going, ^{water} stood ~~on~~ old wheel 16 inches but when water shut in, stood from half an inch on the wheel to two inches below the wheel. After White went out of possession and after Spring Grove dam was built flashboard Sturtevant dug out the bar in Solon Mill race when the water cleared

the wheel. The new wheel was so constructed as to operate in back water. In 1844 the water was higher than its ordinary stage all the season. If the Solon Mills wheel was hung below there would be water on the wheel if high enough to clear it there would not. Saw the stake at the line, below the line there was a rapid, think probable before the Spring Grove dam was drawn the back water was not so high at the line, but whether it would affect the Mill not able to say. Stack Stake under the willows 4 or 5 was below the line in 1845 to satisfy my curiosity about back water, noticed the water on them 3 or 4 inches lower in common water, never was to them when the water was higher than the mark, he put on them when he stuck them, done this to satisfy himself but did not satisfy himself whether the water was higher or lower after the lower dam was built, than it was before. Albrick was wading in the creek below the line and measured with a stick in June 1848 at the same time there was a rapid, below in the cove. Thinks the water was lower than he had seen it where Stokes stuck 16 inches. Since dam was drawn thinks the water was lower 10 inches at the line when the water was drawn in 1848 than it was in Whites time. I cannot say but before lower dam built there was full enough in Peff run to clear the wheel but do not know. In June 1848 when lower dam drawn there were rapids. I think it probable Spring Grove mill did run back the water & high. I found the water full on the Stokes. I had stuck when lower dam drawn some 16 inches. The water fell 10 inches on line. Not drawn ^{at low} as in its natural condition.

Dumbell Granger produced and sworn in behalf of Defts.

Knew the Solon Mills 7 years and before the Spring Gove
Mills were built. The first wheel of the Solon Mills
never saw it clear of water. Saw it soon after it started
and frequently afterwards. Spring Gove dam built in
1844 or in the Spring of 1845 the wheel of the Solon
mill was a logg wheel. Wheels of both mills alike
till Goodell altered the Spring Gove mill wheel.

^{above the line that does not change it backed water}
Always thought that lower dam backed water on to
the Solon mill wheel, that dirt was deposited into the
race by the water which obstructed and made a
bar in the race and made left a pool in the race above
the bar saw the water running down in plff race when
lower dam drained. There is a channel in high water
through the flats into plff race. In high water at
lower dam the water discharged over the flats, the waste
weir is about 30 or 35 feet wide. Jus the dam of depth
every day, and at this stage of the water it was over
the flats in a stream. There was an embankment
which broke away before Mr Blivin did in 1846.

Could not tell the exact point to which water backed
above line. Mr McCann's hire differed. Riv said thought
dam did not back over line, would not be afraid
to draw down. I thought and knew it did, was
drawn soon after found it did.

George Clowthorne produced a worm. Is a Miller by trade
has known the Spring Gove Mill since 1845. The Shush
boards have remained at the same height since the water
was drawn in 1848. have worked in mill since that time.
The Shush boards on the dam are 1 1/4 inches high when
the water runs over. The mill was run night and day
during three months from the middle of November 1847
except perhaps an night in a week.

Col James Young, produced and sworn. I am a practical Engineer and have been in practice since 1827 have Engineered on several canals for repairing canals, took a level of the water in Defendants Creek a few days ago from Spring Grove mill to Solon Mills. This level (which was exhibited) I know to be correct from actual survey made by me with proper instruments. Mr Binns surveyed the stream up and I down, each taking notes as the other surveyed. The fall from a point in the Solon mill race 3 or 4 rods below the race to the line spoken of by other witnesses is a little less than nine inches - thence to the next point observed about 80 rods down stream $13\frac{5}{8}$ inches thence to Spring Grove mill dam $2\frac{1}{2}$ inches. The distance from said line to defendants mill is $1\frac{1}{2}$ miles. The whole fall from plaintiffs mill race to defendants dam is 25 inches. There is a bar found in the Creek 5 or 6 rods below the line. A level line drawn from the surface of the water at defendants dam strikes the bed of the Creek on the bar below the line 30 rods of a foot below the top of said bar. The waste weir at Defendants dam is 35 feet wide. The slush boards on defendants dam I think on an average are 8 or 9 inches wide. Where there was great a capacity for water to escape as to run in a level line from the top of the dam, up the stream to where such level line strikes the bed of the stream will show the fall. There was 23 inches of water on the bar below the line. There is several narrow places in the Creek one was no more than six feet wide. I have levelled I suppose 20 different mill streams showed their bar might back the water above the line. We made water marks with stakes on Friday last. On Sunday following went and looked at them and found the water had fallen 3 inches at the dam, at the next point up stream 3 inches at line 9 inches at mouth of artificial channel 7 inches at mouth of plaintiffs tail race b.

inches at Mill ^{24/100} of a foot, think the difference is accounted for by the obstructions which I saw in the Creek noticed quite a dam below the line of floodwood-grap - dead bogwood. The bottom of the Creek is very uneven the water varies in depth from 18 inches to 4 or 5 feet. The defendants dam could not back the water above the base of stream clear from all obstructions. I dont know the depth of water on dam at time I levelled. I levelled from surface. My Engineering in Canals has consisted both in acting as rodman & carrying chain & sometimes level. I am now a lawyer. The experience in Canals was from 20 or 30 years ago. I cannot name the authors I have studied on Civil Engineering. I have a theory, that water will not set back beyond the level from top of dam to place where it strikes surface of water but never saw such a principle laid down in any book on hydraulics or Civil engineering. If I should see slash bounds put on the water set back beyond the point of level should think my theory not a good one. I dont know height of lower dam. Water may have set back beyond line, never saw the stream outlet last week. Had been having rains when I examined creek. When water meets obstruction it reacts cannot tell how far reaction extends. It might may be it extends to the other of column of the fluid cannot say it does not.

John Brink Iron. was present with Col Gony. and took the level of the perpendicular between Spring Grove Mills and Solon Mills am a Surveyor by profession & have surveyed for the General Government. am now County Surveyor of McHenry County and have been for 25 years. We both took levels which different

a little at the bend of the Creek the difference in our surveys was $\frac{5}{16}$ of a foot (between $74\frac{1}{2}$ inches) at the line about $\frac{1}{16}$ of an inch. The map produced is correct a level line from Defendants dam top of flush board strikes the bed of the Creek on a bar situated a few rods below the line $89\frac{1}{1000}$ of a foot below the top of said bar. I should Col Young the line spoken of by the other witnesses it is the E. line of the N. W. quarter of Section 26. T. 46. R. 8. East, I think the water running down the artificial channel from plaintiffs dam at high water, would cause high water on plaintiffs wheel.

Defendants Counsel then offered in evidence a letter from the plaintiff Seymou Charles H. Russell agent to the defendants McClure dated June 14th 1848 (which letter is made part of the record of this cause). To the reading of which in evidence the plaintiff by his Counsel objected which objection was overruled by the Court and the said letter read in evidence to the Jury.

" John C. McClure Esqr. Solon Mills June 14 1848.

" Dr Sir I am directed by the
" proprietor of the Solon Mills to say to you and others
" interested, if you choose to settle the question of water
" flowing upon his premises without a resort to law you
" can do so if you will draw your pond and raise
" by actual experiments the facts in the case, and if it
" should prove that you have trespassed upon his premises
" he will bring no suit for damages already sustained
" but will expect you to not trespass again. If you
" see fit to settle the question in this manner please notify
" me by Thursday noon.

Yours truly

Charles H. Russell
agent

The defendants Counsel then offered to read in evidence an advertisement in the South West Telegraph in which the p[er]ff objected, which objection was sustained by the Court to which decision rejecting said testimony the defendants Counsel then & then excepted, which said advertisement is in the words & figures following.

Solon Mills

The subscriber takes pleasure in informing the inhabitants of Wisconsin that his mill is now in full rate grinding order, and he is prepared to flour in a manner unsurpassed by any mill in the West. To Customers he would say bring your grain and you shall not in any case be detained longer than one night. I have plenty of water and if necessary can run three runs of stone upon custom work. In all cases when good wheat is brought he will warrant good flour and good yields. The flour is kept constantly on hand for sale at McCall, Merrill & Kellogg, and at the different flour dealers in South West which is always warranted and sold at the lowest price for the quantity. In case the flour does not suit it can be always returned and the money refunded.

Solon Mills McHenry Co. Ill., Chas. H. Russell
October 2^d 1849.

x The defendants Counsel then said he would offer to prove that John W. Nichols purchased, and the plaintiff obtained the occupation of said mill at a greatly reduced price on account of the back water on plaintiffs mill which which was objected to by plaintiffs Counsel, and the said objection was sustained by the Court. But depts

called no witness & propounded no questions on this point. To which said decision of the Court in sustaining said objection, the said defendants then and there excepted. And here the Defendants rested their case.

The Plaintiff Counsel then called Daniel Strain and interrogated him with regard to the Condition of the water in said Reservoirs Creek to which the Defts. objected on the ground that the said Plaintiff had rested his case and that said testimony was cumulative, which objection was overruled by the Court and said witness then testified as follows. I have known Solon Mills since 1844. in 1845 in the winter or Spring after Spring Snow dam constructed I made some marks, marked in Plaintiff race, - water was over 17 inches higher in the race when I measured than it was the previous fall before said dam built. The Solon Mills were grinding when I measured.

Sylvanus Aldrich recalled Gray & myself looked at a stake set by Mann & Rice; the stake was a foot above the water. The ~~water~~^{stake} set by Mr. Coddery was 12 feet further up the stream & 10 inches under water at that time. I could grind pretty well in Solon Mills with 4 inches water on the overshoot wheel but of course much better without back water. The stake set by Mr. Coddery was 10 or 12 inches under water in April 1849. when Gray & others were there.

George W. Prudden recalled. Saw the stakes set by defendants witnesses Gray, Shepard, & Borden, Smith, measured them with his rule.

Samuel P. Shepard called by plaintiffs counsel and sworn. Am a millwright by trade & have run mills as a miller. Know the Solon Mills and Spring Grove Mills. 1st of August 1848 noticed slash boards on Spring Grove dam about 4 inches above the body of the dam. There must be one foot fall to the mill before water will discharge itself think the damage to plaintiffs mill from my knowledge of back water, what I saw and from the testimony of other witnesses as to ^{the} back water to be not less than 500 or 1000 dollars per annum. Have built two mills in Jefferson County State of New York & helped build about half a dozen more, have drafted machinery for mills and ground saws as a miller perhaps a year or two in all my life. I never levelled the Westsinks Creek but can tell pretty near what the level of a stream is by my eye. Water will find its level when there is no supply coming from above - the water in a pond is highest when it runs in. Saw obstructions in the Creek below plaintiffs mill consisting of trees, stumps &c. If the obstructions were removed from the Creek there would be less difficulty with back water. (When Plffs.

Counsel asked witness to state his opinion of the amount of damage sustained by plaintiff predicted on his knowledge & on the testimony of the other witness of plaintiff. Defts counsel objected to the question as calculated to elicit from witness accumulative testimony but the Court overruled the objection.

This was the substance of all the testimony adduced on the trial of said cause drawn out on direct & cross examination.

It appeared from the evidence that Defts. Mills and Premises were over a mile & a half below Plffs. mill. Defts offered to read records of McHenry County for the purpose of showing they had acquired

right to show up to lefts. Am, but the names were excluded as incompetent.

The defendants counsel prays the Court to sign and seal this bill of exceptions & make it a part of the record in said cause which is accordingly done this 22nd day of May 1850.

Rough Henderson Seal

Judge of 11th Judicial Circuit

It is hereby stipulated and agreed by and between the respective counsel in the above entitled cause that this bill of exceptions contains a true history of the testimony given on the trial of said cause and that the Judge of said Court may sign & seal the same after this date.

May 8th 1850.

Stodd & Bush

Defendants attorneys.

We agree that the foregoing may be used as the bill of exceptions in this cause provided this cause is argued and disposed of finally at the ensuing June term of the Supreme Court. If not then argued or finally disposed of it is to be treated as a nullity and as if it never had been signed.

May 10th 1850.

Arnold & Platt

Which bill of exceptions has endorsed thereon.

Filed May 24, 1850.

J. H. Johnson

clerk

And thereafter to wit on the 29th day of April A.D. 1850 the said defendants filed in the office of the Clerk of the Circuit Court their certain appeal bond in the words and figures following to wit.

Know all men by these presents that the above

John Mann Joseph Rice and Richard Blinn principals
 Abel W. Fuller Erns W. Smith Jno C. Frowbair and
 Laurence S. Church securities of the County of McHenry
 and State of Illinois are held and firmly bound unto
 Charles H. Russell of the same County and State in the penal sum
 of fifteen hundred dollars current money which payment well and
 truly to be made we and each of us bind ourselves our heirs Executors
 Administrators and assigns jointly jointly and severally by these pres-
 ents. Witness our hands and seals at Woodstock this 29th day of
 April A.D. 1850.

The condition of this obligation is such that whereas
 the said Charles H. Russell did on the 18th day of April inst. (1850) in a
 certain action in the case for forwage, recover in the Circuit Court of
 said County and State aforesaid, a judgement against the above bounden
 John C. Mann Joseph Rice and Richard Blinn for the sum of Eight hun-
 dred and thirty five dollars and twenty cents damages and costs of suit pay-
 which said judgement of the said Circuit Court the said John C. Mann Joseph
 Rice and Richard Blinn has taken an appeal to the Supreme Court of the
 State of Illinois Now if the said John C. Mann Joseph Rice and Richard Blinn
 shall prosecute their said appeal to effect and in case said judgement shall
 be affirmed in the said Supreme Court shall pay and satisfy whatever judgement
 costs interest and damages that shall in said Supreme Court be awarded
 against them then ~~the above obligation~~ to be verily deemed in
 full paid and written.

Approved by us in presence of the
 order of Court this 29th day of April
 A.D. 1850.

Jno. Logan
 Joel H. Johnson
 Clerk Circuit Court.

Witness as to Richard Blinn
 Joseph Shephard

John Mann
 May 2^d 1850
 W. Johnson et al

John C. Mann Seal
 Joseph Rice Seal
 Richard Blinn Seal
 A. W. Fuller Seal
 Erns W. Smith Seal
 Jno C. Frowbair Seal
 L. S. Church Seal

State of Illinois }
McHenry County } S.S.

I the undersigned Clerk of
the Circuit Court in and for
the said County and State aforesaid do hereby certify
that the foregoing is a true perfect and complete copy
of the record, pleadings, and papers on file and
of record in this office in said above intitled cause
so far as it pertains to have been copied from the files
and records aforesaid.

Witness Joel W. Johnson Clerk
of our said Court and the seal thereof
at Woodstock in said County this 2nd
day of May A.D. 1859.

Joel W. Johnson
Clerk

⁴¹
Murray

Russell } Appeal
vs } Record
Mann } &
et al } Bill Exors



Look + Huntly
for appellants

Filed June 10. 1850.
L. Deland Clk.

Stunell
at
Mann et al } McHenry Co Circuit
Court

On the trial of this cause
a number of Instructions were given
& a number refused on the part of P[er] [et] D[ef] [et]
^{also on part of}
& exceptions were taken respectively
by each party to those given & to those refused
Hugh Henderson

John E. Mann et al
vs
Charles H. Russell

appeal from McHenry

In the Supreme Court Illinois
Third Grand Division
June Term A.D. 1858

James L. Loop Counsel for said appellants being duly sworn, on his oath deposes and says, that immediately after the trial of this cause in the Court below, and after the jury had rendered their verdict, the said appellants moved the Circuit Court to set aside said verdict and grant a new trial to the said appellant in said cause; that as the basis of said motion the said appellants filed their motion in writing and also the affidavits of Enoch W. Smith & David Barker establishing misconduct of the said jury in the making of their said verdict, and that the said appelle upon the said motion & in exculpation of the said jury read the affidavits of David Barker and John C. Dixon, and also the affidavit of S. J. David juror, that upon the hearing of said motion the said Circuit Court overruling of the said overruled the said appellants motion refused him a new trial of this cause to which opinion & decision of the said Court in overruling the said motion the said appellants excepted at the time the said decision was pronounced, but these facts do not appear in the bill of

exceptions sealed by the judge who tried this cause
owing to the non appearance of the counsel
who prepared said bill, who doubtless supposed
that said affidavits, reasons, and exceptions
would appear upon the records of the said Circuit
Court. And said affidavits further depose &
say that the said motion, affidavits, reasons
and exceptions appear upon the records
& files of the said Circuit Court, and form
a proper foundation for the amendment of
the bill of exceptions taken herein by the said
appellants. And this affidavits further depose
and say that said ~~record~~ decision upon said
motion for a new trial was made at the
April Term 1850 of the Court below, and
that the judge who tried said cause &
pronounced said decision, and sealed said
bill of exceptions is said judge of said Circuit
Court. For which reasons this affidavits sug-
gests dimi-
-nution of the record in this cause in the
particulars aforesaid, and prays that a Certiorari
may be awarded in this cause to the said
Circuit Court returnable to the next term
of this Court, to the end that the said
appellants may take such steps to supply the
deficiencies in the record filed herein, as
may be warranted by the laws of the land.
And further this affidavits saith not.

Subscribed and sworn to before me
June 14, 1850.
C. H. and Clerk.

James L. Loop

Supplemental affidavits

And the said James S. Loop further deposes & says that upon the trial of this cause in the court below, and after the hearing of the evidence and arguments of counsel, the appellee prayed the said circuit court to give to the said jury certain instructions which are numbered 1 2 3 4 5 & Co. and copied into the records aforesaid & now appear upon the files of the court below, & which said instructions were given by the said court as prayed to which opinion of the said court in giving said instructions the said appellants at the time excepted but by mistake of counsel who prepared said bill of exceptions the said instructions decision & exception do not appear upon the records of this cause; and the said appellant further deposes and says that the said appellants also prayed certain instructions of the said court numbered 1 3 & 4, that no one was refused by said court & no 3 & 4 modified & given as modified to which opinion of the said circuit court in refusing said instructions No. 1. and in modifying these no 3 & 4. appellants at the time excepted, that said last named instructions are now upon the files of the court below & have been copied into the

record sent upon to this court, and
 said instructions, decisions & exceptions
 taken during the same are not embraced
 in the bill of exceptions taken by
 appellant herein, owing to a mistake
 in the counsel who ~~took~~ ^{conducted} said
 cause upon said bill: And this
 appellant annexes hereto a certificate
 of the judge who tried said cause
 by which it appears that said exception
 was in fact taken by said
 appellants upon the trial of this cause
 And appellant therefore suggests damages
 of ten thousand dollars and prays a continuance
 of the record herein and prays a continuance
 of the cause in his original appellants

Subscribed and sworn to before
 me June 14. 1850.
 L. Ireland Ck

James L. Cook

James E. Mann et al
 vs
 Appellants
 Chas. A. Russell

Filed June 14. 1850.
 L. Ireland Ck.

John E. Man et al Appellants

vs
Charles H. Russell Appellee

And now comes the said appellee
by J. N. Arnold his Atty. ^{2 sep} That
there is no error in the record,
nor in the credits of the judgment
in this case, & he therefore
says that the same may
be in all things affirmed,
with damages & costs &c.

1st & 2^d Error, assigned, questions the decision
in giving & refusing instructions. as there
are not embodied in the Bill of Exceptions,
& as no exception was taken at the time,
their correctness of instructions will not be
considered by the Court.

2 4d. R. 292.

3 366-

4 448-

3 Error. Receipt of Ino. H. Nichols, admitted -
No exception was taken to the decision
of Court admitting it.

4. Error .. There is no such decision, of the Court
Rec'd. states .. Dept's Counsel said he would
offer the same ~~at~~ certain parts .. But
says .. Bill of exceptions .. he called no witness
& proposed no questions on the point.

a statement by Counsel. "that he would offer to prove, without making the offer, calling a witness or asking a question, a decision on such a statement is not assignable for error."

5. error. assigned, questions the decision in excluding the party from reading a newspaper as evidence to the jury!! No preliminary proof.

Exclusion of records.

6. = The court excluded certain "Records" we know not what they were -

7th error. in admitting testimony of Danl. Strain, Sylvanus Aldrich & S. F. Shepherd. The objection was that their evidence was Cumulative. No exception was taken. And if there had been this was a matter of discretion. the exercise of which cannot be assigned for error -

8. overruling motion for new trial - No exception.

9. overruling motion to set aside verdict on account Misconduct of jury - The ^{papers of Col. Cook} affidavits show no

Sup. Court

Jno. E. Mearns

Chas. H. Pupella

joined in Eva
& answer - truck

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John E. Mann et al., Appellants }
vs }
Charles H. Russell, Appellees } Appeal from
McHenry.

And now come the said Appellants by
their Attorneys, and say that in the Record
& proceedings and in the rendition of the
judgment in this Cause, there is manifest
error, in this, to-wit:

First, The Court erred in giving the instructions
^{asked} on the part of the plaintiff in the Court below.

Second, The Court erred in refusing the first ~~in~~
instruction asked by the depts in the Court below;
And also erred, in modifying instructions ~~asked~~
numbered 3 & 4, asked by them.

Third - The Court erred in admitting the Receipt
of John H. Nichols to be read in evidence on
the part of the plff. in the Court below -

Fourth - The Court erred in refusing to allow the
defendants in the Court below to prove that the
premises, upon which damages for flowage were claimed,
were leased by the plff. below at a reduced price by reason
of the flowage or backwater.

Fifth - The Court erred in excluding from the Jury,
as evidence on the part of the defendants below, the

~~the~~ advertisement in the "Southport Telegraph".

Sixth - The Court erred in excluding the Records from being read in evidence on the part of the defendants below -

Seventh - The Court erred in admitting the testimony of David Strawn, Sylvanus Aldrich, Geo. W. Insdell & Samuel J. Shepard, on the part of the plff. below -

Eighth, The Court erred in overruling motion for new trial.

Ninth - The Court erred in overruling ~~the~~ motion to set aside the verdict on account of the misconduct of the jury.

Tenth, The Court erred in overruling motion in arrest of judgment.

Eleventh - The Court erred in rendering judgment in said cause in favor of the plff.

Twelfth - That said judgment of said Court, and the proceedings in said Court are in other respects informal and erroneous.

Wherefore the said Appellants pray that the said judgment of the McHenry

Circuit Court may be reversed, annulled,
set aside, and wholly for nothing returned.

Strode & Bush
Attys for Appellants.

⁴⁸
Sup. Court.

John E Mann et al.

vs } Appeal.

Charles H. Russell

Assignment of Errors.

Filed June 15. 1850.
L. Leland Clk.

John E. Mann et al
vs
Chas. H. Russell

{ Appeal from Michigan
}

Supreme Court
June Term 1850

And now comes the said appellants
by their counsel & upon affidavits
filed ~~with~~ suggest demurrers
of the record herein and move
the court for a certiorari to the ^{court}
below returnable next term of this
Court.

Loop & Humboldt
counsel for
appellants.

J. E. Plummer et al

in } motion

Chas. Russell

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Main body of vertical handwritten notes, organized into several columns, possibly representing a ledger or account book.

Vertical handwritten notes on the right side of the page.

Man & other }
} Pro. for Curator -
Burrill

A Bill of exceptions can only be signed
at the term of the trial. unless party
consents to extend the time. or judge by an order
so directs

5 Gil. R. 456 & cases cited
10 Miss. R. 156-

In this case, the party did not present
his Bill to be signed, until expiration
of time. The Bill signed is then
a nullity, except. per stipulation -

That stipulation is a consent that
"that Bill of exceptions, should
be signed, & was only given, because
the Counsel, was confident of an
affirmance of the judgment.

Had a Bill of exceptions been
presented containing other questions
he would not have felt at
liberty to have waived the legal
rights of his client, resulting from
negligence or omission of the
Counsel for the appellus.

SEE order praying appeal - &
Stipulations.

The Bill of exceptions being signed out
of term is a nullity -

2

But parties have by agreement of
Council, consented to treat the
paper signed as the Bill of
Exceptions.

Can the Court, Antiquary,
& will it to change the
agreement, so as to make the
party a part of a Bill which
the name is intended to do?

= Arrived for Russell

Sup. Court

John E. Mann
269

Chas. B. Russell

Wm. J. J. Appleton
agot. Mo. J.
Cotton