No. 8645

Supreme Court of Illinois

Laney

vs.

Jasper

71641 7

McMahon

Breese J. This was a bill in chancery in the Washington Circuit Court for an injunction exhibited by Andrew J. Laney against Rudolph Kroper. ~~[illegible]~~

The bill charges, in substance, that complainant was, and had been for several years seized in fee of the north west quarter of the north east quarter and of the south east quarter of the north west quarter of section 27 in township two South in Range five west situate in Washington County, which was enclosed and in cultivation - That Rudolph Kroper, the defendant, was then and had been for several years owner in fee of the north east quarter of the north east quarter of the same section and in possession of it - That at the time the land was purchased by complainant and at the time defendant purchased his land, and up to the ~~time~~ year 1859, a stream of water ran across defendants land from near the south east corner of it, across and near to the north west corner of it in its natural channel, thence out on other land not touching complainants land. That in 1859, the defendant without permission or leave of complainant or notice to him, ploughed and dug a ditch across the south side of his land from east to west, and

[BLNS-17]

turned the stream, and caused it to run from east to west across his land, and thence upon and across complainants land, by which the land was seriously and permanently injured. That he notified the defendant to fill up the ditch and allow the water to run in its natural channel, but that he refused to comply with the notice, and persists in keeping the ditch open and running the water upon complainants land, that the ditch so constructed and flowing the water on to complainants land, is a nuisance to him, and is against equity and justice and has damaged complainant to the amount of two hundred dollars, and so long as it is allowed to exist, it will be a continued cause of mischief and of irreparable injury to complainant and to his land.

The prayer is that defendant be decreed to discontinue the ditch and fill it up, and allow the water to pursue its natural channel and that the defendant be perpetually enjoined by ditching or otherwise, from turning the water upon complainants land, and that complainant be allowed his just damages sustained by reason of the ditch and flowing the water upon his land and for general relief.

[8L45-2]

McRibbin

The answer denies that at the time complainant purchased his land, ~~that~~ there was a stream of water running across the land of defendants, or at any time since, but says there is no such stream of water nor ever has been since he owned the land — he denies that in 1859, or at any other time, ~~xxxx~~ he ploughed or dug a ditch across his own land for the purpose of turning any stream of water from its natural channel, or that by any ploughing or ditching, any water course or stream of water was changed from its natural channel — and charges the fact to be, that whatever water at any time during the year 1859, ran upon, or across complainants' land, now runs upon and across the same land, in the same natural course and channel it did before and at the time complainant purchased the land — denies that complainants land has been injured by changing any water course since complainant became owner, or that any water course or stream has been in any way changed by ditches or ploughing from the natural channel — denies that any ditching he has made since they respectively purchased their lands does or will flow the water

[8145-3]

on the complainants land to his injury and to its impairment in value.

No application was filed to the answer, but much testimony was taken by depositions, and the cause fully heard on its merits, and a decree entered dismissing the bill.

To reverse that decree, the complainant prosecutes this writ of error assigning as error, the refusal of the Court to have his damages assessed - refusing to grant the relief prayed, and in dismissing the bill.

On this assignment of error the ~~[illegible]~~ ~~[illegible]~~ question arises, does the bill present a case demanding the interposition of a Court of equity?

~~[illegible]~~ The bill claims that the act of the defendant in making the dike, by which the accustomed flow of the water was changed, and on to his land, works him a permanent and irreparable injury - that it is a nuisance and its erection and continuance has damaged him to the extent of two hundred dollars at the least.

The defendant in error contends that the injury complained of, by cutting the dike, has ceased before complainant was the owner of the land, and while the United States

[Plus-H]

here the owner, and when he purchased it from the United States, he found no water with this ~~this~~ nuisance, if it be one, upon it. He further insists that it is now and has been at the locality of the alleged offence, a running stream of water, the natural channel and flow of which cannot be diverted as he further insists, that the ditch he has ~~[illegible]~~ constructed, is of great benefit to complainants land.

Mannis

The proofs show, that Reuben Lively owned one of the "forties", and what has been the other forty, the defendant, he purchased of New Jersey ~~[illegible]~~ or the other forty being known as Gough land. These are the facts now urged by complainants, he having, subsequently to the dictating by defendant, become the owner.

There is ~~[illegible]~~ no conflict in the testimony as to the nature of this water-flow which is alleged to be diverted. It appears to be a mere wash-ways the branch, carrying off, the rains as they fall with scarcely a perceptible depression in the ground over which it runs, though when building in channel has applied, there is found to be a trifling depression. F

There is some conflict in the testimony as to the question of injury to complainant. ~~[illegible]~~

[R45-5]

If digging the ditch by defendants to improve his own land, be an injury to the complainants it is certain from the proof it is not irreparable, and it is evident he could be compensated in damages if he has sustained any, for those witnesses who are of opinion he has sustained damages have no hesitation in estimating them at about two hundred dollars.

On these facts, the question is is a case made for the interposition of a Court of Equity to exercise its ~~[illegible]~~ powers? There can be no doubt of the general power of this Court, in cases of private nuisances. It can prevent a threatened, or remove an existing ~~[illegible]~~ one - it may grant ~~[illegible]~~ remedial as well as preventive relief. ~~But the question is does the [illegible] of a nuisance?~~ The people ex rel. the City of St Louis et al. 5 Gilm. 351 ~~On this point there is [illegible] a [illegible] in a [illegible] [illegible] the action of a Court of Equity~~ The general ground of its interference is understood to be that kind of nuisance injurious to property or health requiring the application to prevent, as well as remedy an evil, for which damages, more or less, should be given in an action at law. Attorney Genl. ex rel. Nichol 15 Vesey 343. Story in his treatise on Equity jurisprudence says, it is understood

[9045-6]

formed, on the ground among others, of restraining irreparable mischief. But he says, it is not every case which will justify right of action against a party for a nuisance, which will justify the interposition of the Court, to stop the injury, or to remove the annoyance. 2 Eq. 238 § 925

Nor must the kind of injury, as from its nature is not susceptible of being adequately compensated by damages at law, or not so, from its continuance or permanent mischief, must occasion a constantly recurring grievance which cannot be otherwise prevented but by an injunction. Ibid.

Therefore, a mere diminution of the value of property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. 2 Eq. 239 § ib.

One of the most usual cases for the interposition of a court of equity, is, the obstruction of water courses — and another is the diversion of the course of water from mills. Neither of these is charged by this bill. Taking the charge in the bill in connexion with the evidence, the gist of complaint would seem to be that by leading the surface water by the ditch to the premises of complainants made when lawfully owned it, the complainants

~~[illegible]~~ a gully has been formed ~~[illegible]~~ through complainant's land ~~[illegible]~~ where there is already a natural outlet for it, and he owes thereby be incommoded by two ditches greatly retarding his ploughing, drilling and farming operations to be carried on in the fields, upon both ditches or drains ~~[illegible]~~ are.

Rowe

Now that this additional ditch so made ~~which the complainant may have under the impression acting upon the notes through the land~~ by reason of the ~~[illegible]~~ ditch, is a grievance to the complainant there can be no doubt ~~[illegible]~~ ~~[illegible]~~ and it is constantly recurring, if the land through which it should pass, be arable land which the proof shows it is, but it is not of a trifling character, one which ~~[illegible]~~ a court of equity should not be expected to interfere. ~~[illegible]~~ Besides, ~~the [illegible]~~ the damage to the complainant so far from being inappreciable, is adjusted by the witnesses at two hundred or two hundred and fifty dollars at the utmost. Not is the extent of the injury done to the ~~[illegible]~~ complainant, though all time to come is be incident and the testimony. This being so an adequate remedy exists at law to recover in a proper action the damages, or more if more should be proved. Adams Equity 210 and notes, 2 Story's Eq. Jur. 244

The fact, that defendant did the act of which complaint is made, ~~and~~ before complainant became the owner of the land and with the consent of the then proprietor of one of the parts, ~~and~~ the other being "Congress land" ought to have its weight in deciding this case.

Complainant, when he purchased the land, knew this ditch had been made and, knew the furrows got on the land he was about to buy. their purpose ~~and~~ and design ~~[illegible]~~ and knew the effect. They owned, and had, upon his intended purchase, ~~[illegible]~~ did acquiring the land with this ditch and furrows made, constructed, he took it with all its drawbacks and inconveniences. The defendant had an unquestionable right to improve his own land by ditching through it, and if, in the operation, water was thrown on to the land of an adjoining proprietor with his consent or on to Congress land, we do not well see, on what ground the complainant can complain, or with what propriety a Court of Equity can interfere to abate the nuisance, if it be one, or award damages, the latter especially, since the proofs show the injury can be repaired by a recovery in an action at law.

There is another objection to this action. The proofs do not establish to

6 Debate
2 Tiffany
3 Lucinda
1 Muster Rolls

on this position, the existence of any natural water course the flow of which the defendant has diverted. It is a mere bare-bottomed branch of no value except as a drain for the adjacent lands so that the cases cited for diverting a water course have no application.

54 Ewing v Jasper Rowe
opinion of the C.

The injury complained of here is of an entirely different character, as we have already stated. The real complaint is, by the proof, that during the water by this ditch made by the defendant makes an additional flood on complainants land and so inconvenences him in his farming operations. For such an injury, the remedy is complete at law.

We admit a court of Chancery will sometimes relieve by injunction, though a tort at law may be maintained for the injury but this is not one of those cases. It is a mere case for damages at law if any action at all can be maintained on the facts as proved.

Perceiving no error in the decree, it must be affirmed.

Decree affirmed.

6 — 17

Caney
vs
Hasper

opinion by
Reese J.

Dec

Nov T. 1865

~~4067~~
8645

6 — 17

Laney
vs
Hopper

opinion by
Reese J.

Nov T. 1865

~~4067~~
8645

No 16

Andrew J Laney Plff in Error
vs
Rudolph Jasper Deffdt in Error

In Supreme Court
1st Grand Division
Nov Term 1865

This Cause is Submitted on Abstract Brief and Additional abstract to be furnished by Defdt by agreement

Amos Watts Atty for Plff in Error

L Compton & Stokes
Deffts Attys

No 16

Andrew J Lacey Plff in Error
vs
Rudolph Jasper Defdt
in Error

Submission

Filed Nov. 10. 1865.
N. Johnston Clk

Nashville Ill Aug 28th 1865

N Johnson

Dear Sir

Please file the inclosed papers and I will send abstracts soon, I send $09. Docket fee. I paid you $5 in this case which you will find marked on the Record in your hand writing

Respectfully Yours.

Amos Watts

[BL45-12]

16

Lancy
vs
Jasper

Praecipe

Filed August 30.
1865.
A. Johnston Clk

Lancy vs.

Nashville Ills. Septr 28th 1865

N. Johnson Esqr

Dear Sir

In the Case of Dancy vs Jasper the Case is taken up on Error. You will please issue the writ and forward it to me. We do not ask that it be made a supercedeas, therefore issue the writ in the usual form and send it to me. This matter should have been attended to some time ago, but a press of other matters has taken up my attention. I send you $10 50 to pay stamp duty &c

Your Friend
Amos Watts

(91402-13)

16

Andrew J. Laney

by

Rudolph Jasper

Pauper

Filed Oct. 3 – 1865.

N. Johnston Clk

November term - Supreme Court. A.D. 1865

Andrew J. Lacey - Plaintiff in Error. vs Rudolph Jasper. Defendant in Error. } Error to Washington — Decree Affirmed — at Cost of Plaintiff in error

Costs made by Plaintiff in Error & collected of him upon fee bill.

1865.	To filing Record & C. 20 - Docketing Cause 12 -	"	32.
	" issuing & filing Mot of Error - with Stamps	1	25.
	" " " " Scire facias	1	00.
	" filing Papers	"	87
	" Abstracts (1700 words Each)	23	80.
	" Entering Orders		50
	" " Opinion of Court.	5	67
	" Making Cost bill & Entering Same	"	37.
	" fee Bill & C & C. 62 - Stamps 5 - Postage 30	"	97
		34	65
Circuit Clerk -	Jno. A. Vernon's fee for Copy of Record	35	75
		$70.	40

Credit Deposit by Matter $5.50 - do by Allen $9.00 - - $14.50 -
" Abstracts furnished 3.40
$17.90

Defendants Costs

	To Abstracts (1200 words Each)	16	80 -
	" filing Papers		42.
	" Making Cost bill & Entering Same		37.
	" Execution & C & C 62 - Postage 6 —		68
		$18.	27

Enter this part of the bill in Record on the first page —

(8445-14)

16 ——— 17

Lancy
my
Jasper

Born to Washington

Corbell

X

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Washington Greeting:

Because, *In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of* Washington *county, before the Judge thereof between*

Andrew J. Lacey *plaintiff and*

Rudolph Jesper *defendant it is said manifest error hath intervened to the injury of the aforesaid* ~~Defendants~~ Plaintiff *as we are informed by his complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given; you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid; with all things touching the same; under your seal, so that we may have the same before our Justices aforesaid at* **Mount Vernon**, *in the County of Jefferson, on the* first Tuesday in November *next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.*

WITNESS, *the Hon.* P. H. Walker *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* thirteenth *day of* August *in the year of our Lord one thousand eight hundred and* Sixty five.

Noah Davis
Clerk of the Supreme Court.

[8245-15]

16

SUPREME COURT.

First Grand Division.

Andrew J. Lancy

Plaintiff in Error,

VS.

Rudolph Jasper

Defendant in Error.

WRIT OF ERROR.

Issued & FILED - 30th of August. 1865.

N. Johnston Clk

IN THE SUPREME COURT,

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

ANDREW J. LANEY, *Plaintiff in Error*,
vs.
RUDOLPH JASPER, *Def't in Error*.
} Error from Washington Co.

DEFENDANT'S BRIEF.

The act charged in compl'ts bill to have been done by def't on compl'ts land was not done on compl'ts land, but whatever was done by def't was done on his own land and on land belonging to the United States, to Reuben Lively and long before the compl't owned the same, and with the express consent of Reuben Lively, the then owner of a part of the land, as shown by the evidence. The act of def'ts, if anything, was a tort to the then owners and not transferable to the subsequent purchaser, the present compl't.

The injury must be irreparable, not susceptible of computation in damages at law, or an injunction will not lie, in this case damages are fixed by the evidence at $200 by several witnesses. Adams Equity, page 210, note 1st, and authorities there cited.

For a private nuisance the remedy is by action at law. Adams Equity page 211, note 1st. 2 Hilliard on Torts, page 92–93.

Until it is discovered by action at law that the injury is continuing and irreparable, and not susceptible of compensation. An injunction to abate a private nuisance or injury will not lie. Adams Equity, page 211 and note 1st. Simpson vs. Justice, 8th Ired 29, 115.

The evidence in this case clearly shows that compl't has not been injured by def't from the weight of testimony as it is believed, and therefore the decision should be affirmed in the absence of evidence to show that def't by his acts of digging or ploughing ditches since compl't became the owner injured his soil; but the weight of testimony is that it was a great benefit to complt's land.

The material allegations in complt's bill are not sustained by the proofs in any substantial point. There is no water course. 2d Story, Eq. 238, secs. 925–927.

LECOMPTE & STOKER,
Att'ys for Def't in Error.

16

A. J. Laney
vs
Rudolph Jasper
Defts Brief

Filed Nov. 9. 1865
N. Johnston Cl

IN THE SUPREME COURT,

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

ANDREW J. LANEY, *Pl'ff in Error*,
vs.
RUDOLPH JASPER, *Def't in Error*.
} Error to Washington.

Page

ADDITION ABSTRACT BY DEF'T.

8 Wm. Kingston testifies obstruction about one foot above bottom of natural channel. Water would overflow complt's land in time of flood running in natural channel. Channel not deep, and land very level. Can't state where natural channel leaves deft's land, it scatters so, is hard to tell.

15 J. Lively: Water only runs in wet time. Is not continual water
16 course. Was little drain on one 40 acres for 25 or 30 years. R. M. Laney
18 says natural channel lost itself by spreading out on deft's and complt's lands.
19 Is now large ditch dug in the larger natural channel on deft's land. Ditch is from 6 to 10 inches deep, and made by ploughing and washing.

21 Compl't owned the land 5 or 6 years. Def't and Doeling in 1850 ploughed furrows from deft's field to gullies. There was before ploughing a pond on complt's land.

34 R. M. Kennedy: Known land 15 years. There is no natural channel on deft's land at west side, nor on east side of complt's land. Water spreads
35 all over, and there was considerable duck pond there. The most of water run out at southwest corner of complt's land, NW ¼ NE ¼ sec 27, and continues southwest through complt's other land, and at SW corner of SE ¼
36 NW; is considerable gully; has been there ever since I recollect. Think compl't has been benefited by deft's ditching on deft's land. The gully was stopped in several places on complt's land. There is a branch north of
37 complt's land; no banks to it. Cannot perceive a dip in land. There is no channel. The most of water runs southwest through complt's land.

38 L. W. Crain: Known land 25 years. There was large pond on deft's and complt's land at northwest corner. Most of pond on complt's. When pond was overflowed in wet time water ran out soathwest through complt's
39 land. That was natural channel water would not flow north. The deft's
40 ditching his benefited complt's land. Ditch made 9 years ago. Complt's lands are now drained and dry where they were not before the ditching.

41
42 David Kenedy states Crain's testimony is correct. Known land 25 years. Compl't sowed wheat in what was once pond. Deft's ditch has benefited complt's land. Did not turn any more water on complt's land. This ditch was there 10 or 11 years and long before compl't owned land, and when it was Congress land. Water has ran there ever since.

45 Wm. Given: Known the lands 15 years. The water course on deft's land running west on complt's land. It has been there as it now is 8 or 10 years. The water has run in same channel through both 40 acres of complt's land for 10 or 12 years. The natural branch was filled up on complt's land and turned north about a year ago. Did not see any one do it, but compl't as working in the field about that time.

[8145-12]

46 J. C. Jackson: Known land 11 years; the water has run as it now runs ever since 1850; def't then made the ditch and it has been there ever since; runs west 200 yards then southwest; the ditch was made before compl't owned land; compl'ts land is lower than deft's, and is low wet land; is a pond on it and extends to deft's land; from pond is a branch to Mud Creek
47 through compl'ts land; compl't filled up the one on his land last fall; I seen him do it; compl't is benefited by deft's ditch, because it runs water straight through instead of around as before; I own the 40 acres immediately north of complt's land; there are no abrupt banks to natural channel, is a flat hollow.

48 P. Atchison: Known land 16 years; known the gully on complt's said
49 land 16 years; has grown larger since first knew it; most of water from
50 pond run southwest.

J. M. Scott: Knows land and pond water; run southwest through
51 complt's land; never knew it run any other way; deft't cut the ditch over three years ago; the largest hollow runs southwest; don't know that ditch diverts water from naturnl channel.

R. Lively: Def't made a ditch south side of his land about 11 or 12 years ago; complt's land west of deft's was then vacant land; I owned 40 south of north 40 at that time; def't ran furrows across corner of vacant 40 and on to mine at that time; I gave him permission to do so; owned land two years after and then sold it to compl't; the north was not entered.

53 A. Lassley: Northwest corner of def'ts and northeast corner of complt's land has wet marsh or pond; the only outlet from it for wnter is southwest through complt's land into a hollow; never heard of a northwest outlet.

LECOMPTE & STOKER,
Atty's for Defendant.

16

A. J. Laney
vs
Rudolph Jusfer
additional Abstract
By
Deft

Filed Nov 11/65
Mont Johnston
Clerk

IN THE SUPREME COURT,

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

ANDREW J. LANEY, *Plaintiff in Error*,
vs.
RANDOLPH JASPER, *Def't in Error*.
} Error from Washington Co.

Page

Bill in Chancery to abate Nuisance, and for Relief.

ABSTRACT OF RECORD.

1 Copy of bill, in which it is averred that complainant owns a tract of land containing 40 acres, inclosed and in cultivation; that defendant owns another 40 acre tract, east of and adjoining complainant's land; that defendant, by damming the original channel and by ploughing and digging a ditch, has changed the course of a stream of water which originally ran, or passed through defendant's land from near the south-east corner, leaving defendant's land a little east of the north-west corner thereof, originally passing off in a north-west direction, without any of the water from said stream, flowing into or upon complainant's land; that the ploughing, digging and damning of said defendant on his land, has turned the channel of said
2 stream so as to run the water of said stream and cause it to flow in a west direction, across defendant's land, and on complainant's, about 100 yards north of the south-east corner thereof, greatly and permanently injuring complainant's land; that complainant has requested defendant to fill up said ditch, but defendant refuses; that complainant is damaged the sum of $200; prays that dam and ditch be abated as a nuisance, and that defendant be perpetually enjoined from ploughing, ditching, &c., and for general relief.

3 Summons in usual form.

Defendant's Demurrer to Bill. 1st, Because bill does not show that
4 the water is turned upon complainant's land different from where it originally entered it. 2d, Because it don't show the damages irreparable. 3d, Because the injury is already committed, for which an action at law lay. Order of court. Demurrer sustained. Leave to amend instanter. Answer filed and cause set down for trial at next term. Answer of defendant, ad-
5 mitting the ownership of land as stated in the bill, and that it is in cultivation. Denies that there is any stream of water passing through compl'ts
6 or defendant's land. Denies that defendant ploughed, dug, &c., any ditch, made any dam, or turned any stream of water from its natural channel. Denies that complainant's land is permanently injured, and avers that whatever water course is upon the land of either complainant or defendant, is now
7 upon its original channel, and where it ran long before either of the parties
to owned their respective tracts of land.

13 Deposition of William Kingston—Who knows land and stream mentioned in bill—that the original channel has been turned from a north-west
14 direction to a direct west direction, by which complainant is, has been, and
16 is permanently damaged and injured in the sum of $200.

Jesse Lively says in substance same as Kingston, except as to amount of damage, which he puts at $250 already.

[5145-17]

17 Daniel Anderson gives as his opinion, after examination of the land, that the natural channel of the stream has been changed by ditching and putting straw in the natural channel.

18 to 22 Robert Laney makes about same statement as Kingston and Lively—natural channel of drain runs north-west, passing out of defendant's land near north-west corner—saw pile of straw in natural channel, and ditch running west from pile of straw, turning the water on complainant's land—knows complainant requested defendant to remove the straw and logs from natural channel in August, 1859—the water is turned by a ditch and logs and straw on defendant's land, upon complainant's land.

23 & 24 Alexander Lessley—Knows the natural channel is obstructed—a ditch on defendant's land turns water from its natural course on complainant's land.

26 Silas Gaskill—Says the natural channel is obstructed by pile of straw and logs; that thereby, and by a ditch cut on def'ts land, the water is turned from its natural channel running northwest, to a west direction upon complaidant's land.

28 B. G. Roots—Says by actual survey the lowest point on deft's land is 365 feet east of northwest corner, on the north line, which would be the natural outlet or channel for the water, and also presents notes of his survey.

30 Exhibits showing natural course of stream, drawn by R. M. Laney.

31 Report of B. G. Roots, mentioned in his deposition.

32 Robert M. Kennedy, deft's witness—Says natural channel of drain in dispute runs northwest until near northwest corner, then turns west upon complainant's land and runs southwest; that defendant has run a ditch near south side of his land, and runs the water nearly due west upon complainant's land; thinks complainant's land has not been damaged by it so far, but would not like to say he would not be; think it has been a benefit so far.

34 36 37 38 Lewis W. Crain—Says natural channel runs from southeast to northwest, and empties into a pond near northwest corner of defendant's land, which pond is about equally upon complainant's and defendant's land; that the ditch turns the water west, and benefits lands of both parties.

39 40 42 & 43 David Kennedy—Says in substance same as Lewis W. Crain; says that the furrows from which gulley is formed, running from near northeast corner in southwest direction on complainant's land were run before said land was entered.

44 45 H. P. Farrar—Says he surveyed the land of defendant and found lowest point 480 feet south of northwest corner—that defendant's ditching has turned part of the water from its natural channel.

William Given—Says the water now runs where it has run for last 8 or 9 years, but is diverted from its natural channel by the ditch on defendant's land.

46 47 John C. Jackson—Says the water runs now where it did in 1850, at which time defendant made a ditch for it to run in; complainant has not been injured by it.

48 Peter Atchison—Says pond on northwest corner of defendant's land had an outlet in a southwest direction; saw straw in natural channel of drain in dispute, on defendant's land.

49 James M. Scott—Knows the pond on complainant's land has had an outlet in a southwest direction, the ditch on defendant's land has been cut for three years or more; there was the appearance of an outlet from the pond in a northwest direction.

50 51 Reuben Lively—Knows defendant run furrows across the 40 acre tract of complainant, and the "40" south of it; I owned the latter "40," and the one north of it was vacant; I gave defendant permission to run furrows on

mine; the furrows from which gulley was formed running from near northeast corner in southwest direction on complainant's land, were run before said land was entered; knows the water formerly run through defendant's land in a northwest direction to the pond, and out northwest and southwest, mostly northwest.

52 Alexander Lassley—Says the only outlet to pond known to him is in a
53 southwest direction, through complainant's land.
54 H. P. Farrar's Map of Survey and Report—Ex. A. and B.
55 Decree dismissing bill, and costs against complainant.
55 Motion for new trial. Motion overruled.

ASSIGNMENT OF ERRORS.

57

1st. The court erred in refusing to grant the Plaintiff in Error the relief prayed for in the bill in this cause.

2d. The court erred in refusing to assess complainant's damages stated in the bill.

3d. The court erred in dismissing the bill in this cause, and entering a decree against Plaintiff in Error for costs.

4th. The court erred in overruling Plaintiff in Error's motion for a new trial.

AMOS WATTS, *Att'y for Pl'ff in Error.*

PLAINTIFF'S BRIEF.

Plaintiff's bill charges that the injury by defendant is such that from its continuance the mischief is permanent, constantly recurring, and cannot be otherwise prevented than by injunction. In such cases relief will be granted. 2d Story's Equity, 238, sec. 925, 926 and 927. 2d Hilliard on Torts, 94, Note a. City of New York vs. Mapes, *et al.*, 6 Johnson's Ch. Rep., 46. The Mohawk & H. R. R. Co., vs. Artcher *et al.*, 6 Paige Ch. Rep., 83.

Obstructing and diverting a water course is such a permanent and constantly recurring injury. 2d Story's Equity, 328, secs. 925, 926 and 927. 2d Hilliard on Torts, 94, Note a, last clause. Ang on water Cs 2d Ed 4th

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The fact that this was partly, or all, done ten or twelve years ago, even while complainant's land belonged to the United States, if *wrongfully* done, cannot preclude complainant from claiming damages, and asking relief for the nuisance and injuries done him when owning and in possession of the land.

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Rec.d from Mr Lesker Jan. 21 – the papers the clerk gave me, had no Pltff's abstract or brief among them. J. B.

Andrew J. Laney Pltff. in Error
vs
Rudolph Jasper Defdt. in Error
Plaintiffs Abstract And Brief

IN THE SUPREME COURT,

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

ANDREW J. LANEY, *Plaintiff in Error*, *vs.* RUDOLPH JASPER, *Def't in Error.*	Error from Washington Co.

DEFENDANT'S BRIEF.

The act charged in compl'ts bill to have been done by def't on compl'ts land was not done on compl'ts land, but whatever was done by def't was done on his own land and on land belonging to the United States, to Reuben Lively and long before the compl't owned the same, and with the express consent of Reuben Lively, the then owner of a part of the land, as shown by the evidence. The act of def'ts, if anything, was a tort to the then owners and not transferable to the subsequent purchaser, the present compl't.

The injury must be irreparable, not susceptible of computation in damages at law, or an injunction will not lie, in this case damages are fixed by the evidence at $200 by several witnesses. Adams Equity, page 210, note 1st, and authorities there cited.

For a private nuisance the remedy is by action at law. Adams Equity page 211, note 1st. 2 Hilliard on Torts, page 92–93.

Until it is discovered by action at law that the injury is continuing and irreparable, and not susceptible of compensation. An injunction to abate a private nuisance or injury will not lie. Adams Equity, page 211 and note 1st. Simpson vs. Justice, 8th Ired 29, 115.

The evidence in this case clearly shows that compl't has not been injured by def't from the weight of testimony as it is believed, and therefore the decision should be affirmed in the absence of evidence to show that def't by his acts of digging or ploughing ditches since compl't became the owner injured his soil; but the weight of testimony is that it was a great benefit to complt's land.

The material allegations in complt's bill are not sustained by the proofs in any substantial point. There is no water course. 2d Story, Eq. 238, secs. 925–927.

LECOMPTE & STOKER,
Att'ys for Def't in Error.

16

A. J. Laney
vs
Rudolph Jasper

Defts Brief

Filed Nov. 9. 1865.
N. Johnston Cl

IN THE SUPREME COURT.

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

ANDREW J. LANEY, *Plf in Error*,
vs.
RUDOLPH JASPER, *Def't in Error.*
} Error to Washington.

Page

ADDITION ABSTRACT BY DEF'T.

8 Wm. Kingston testifies obstruction about one foot above bottom of natural channel. Water would overflow complt's land in time of flood running in natural channel. Channel not deep, and land very level. Can't state where natural channel leaves deft's land, it scatters so, is hard to tell.

15 J. Lively: Water only runs in wet time. Is not continual water
16 course. Was little drain on one 40 acres for 25 or 30 years. R. M. Laney
18 says natural channel lost itself by spreading out on deft's and complt's lands.
19 Is now large ditch dug in the larger natural channel on deft's land. Ditch is from 6 to 10 inches deep, and made by ploughing and washing.

21 Compl't owned the land 5 or 6 years. Def't and Doeling in 1850 ploughed furrows from deft's field to gullies. There was before ploughing a pond on complt's land.

34 R. M. Kennedy: Known land 15 years. There is no natural channel on deft's land at west side, nor on east side of complt's land. Water spreads
35 all over, and there was considerable duck pond there. The most of water run out at southwest corner of complt's land, NW ¼ NE ¼ sec 27, and continues southwest through complt's other land, and at SW corner of SE ¼
36 NW; is considerable gully; has been there ever since I recollect. Think compl't has been benefited by deft's ditching on deft's land. The gully was stopped in several places on complt's land. There is a branch north of
37 complt's land; no banks to it. Cannot perceive a dip in land. There is no channel. The most of water runs southwest through complt's land.

38 L. W. Crain: Known land 25 years. There was large pond on deft's and complt's land at northwest corner. Most of pond on complt's. When pond was overflowed in wet time water ran out soathwest through complt's
39 land. That was natural channel water would not flow north. The deft's
40 ditching his benefited complt's land. Ditch made 9 years ago. Complt's lands are now drained and dry where they were not before the ditching.

41
42 David Kenedy states Crain's testimony is correct. Known land 25 years. Compl't sowed wheat in what was once pond. Deft's ditch has benefited complt's land. Did not turn any more water on complt's land. This ditch was there 10 or 11 years and long before compl't owned land, and when it was Congress land. Water has ran there ever since.

45 Wm. Given: Known the lands 15 years. The water course on deft's land running west on complt's land. It has been there as it now is 8 or 10 years. The water has run in same channel through both 40 acres of complt's land for 10 or 12 years. The natural branch was filled up on complt's land and turned north about a year ago. Did not see any one do it, but compl't was working in the field about that time.

46 J. C. Jackson: Known land 11 years, the water has run as it now runs ever since 1850; def't then made the ditch and it has been there ever since; runs west 200 yards then southwest; the ditch was made before compl't owned land; compl'ts land is lower than deft's, and is low wet land; is a pond on it and extends to deft's land; from pond is a branch to Mud Creek
47 through compl'ts land; compl't filled up the one on his land last fall; I seen him do it; compl't is benefited by deft's ditch, because it runs water straight through instead of around as before; I own the 40 acres immediately north of complt's land; there are no abrupt banks to natural channel, is a flat hollow.

48 P. Atchison: Known land 16 years; known the gully on complt's said
49 land 16 years; has grown larger since first knew it; most of water from
50 pond run southwest.

J. M. Scott: Knows land and pond water; run southwest through
51 complt's land; never knew it run any other way; deft't cut the ditch over three years ago; the largest hollow runs southwest; don't know that ditch diverts water from naturnl channel.

R. Lively: Def't made a ditch south side of his land about 11 or 12 years ago; complt's land west of deft's was then vacant land; I owned 40 south of north 40 at that time; def't ran furrows across corner of vacant 40 and on to mine at that time; I gave him permission to do so; owned land two years after and then sold it to compl't; the north was not entered.

53 A. Lassley: Northwest corner of def'ts and northeast corner of complt's land has wet marsh or pond; the only outlet from it for water is southwest through complt's land into a hollow; never heard of a northwest outlet.

LECOMPTE & STOKER,
Atty's for Defendant.

[BL45-34]

16

A. J. Laney
vs
Rudolph Jasper

additional abstract
By
Deft

Filed Nov 11/65
N Johnston
Clk

IN THE SUPREME COURT,

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ABSTRACT OF RECORD.

1 Copy of bill, in which it is averred that complainant owns a tract of land containing 40 acres, inclosed and in cultivation; that defendant owns another 40 acre tract, east of and adjoining complainant's land; that defendant, by damming the original channel and by ploughing and digging a ditch, has changed the course of a stream of water which originally ran, or passed through defendant's land from near the south-east corner, leaving defendant's land a little east of the north-west corner thereof, originally passing off in a north-west direction, without any of the water from said stream, flowing into or upon complainant's land; that the ploughing, digging and damning of said defendant on his land, has turned the channel of said
2 stream so as to run the water of said stream and cause it to flow in a west direction, across defendant's land, and on complainant's, about 100 yards north of the south-east corner thereof, greatly and permanently injuring complainant's land; that complainant has requested defendant to fill up said ditch, but defendant refuses; that complainant is damaged the sum of $200; prays that dam and ditch be abated as a nuisance, and that defendant be perpetually enjoined from ploughing, ditching, &c., and for general relief.

3 Summons in usual form.

Defendant's Demurrer to Bill. 1st, Because bill does not show that
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to owned their respective tracts of land.
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Deposition of William Kingston—Who knows land and stream mentioned in bill—that the original channel has been turned from a north-west
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Jesse Lively says in substance same as Kingston, except as to amount of damage, which he puts at $250 already.

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17 Daniel Anderson gives as his opinion, after examination of the land; that the natural channel of the stream has been changed by ditching and putting straw in the natural channel.

18 to 22 Robert Laney makes about same statement as Kingston and Lively—natural channel of drain runs north-west, passing out of defendant's land near north west corner—saw pile of straw in natural channel, and ditch running west from pile of straw, turning the water on complainant's land—knows complainant requested defendant to remove the straw and logs from natural channel in August, 1859—the water is turned by a ditch and logs and straw on defendant's land, upon complainant's land.

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16

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vs
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Plaintiffs Abstract and Brief

Filed Nov. 9. 1865
N. Johnston Cl

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16–17

8645

Henry Pepper et al.

vs

Rudolph Pepper et al.

Plaintiff's Abstract

Year 1865

16 - 17

A. J. Laney

vs 8645

R. Jasper

Abstract of Brief of Deft. in error — Dec. 15 —

Opinion — Reversed — Abs. & Brf. of Deft. and Brf. of Deft. sent to Reporter Sept. 2, 1866

Nov. 7. 1865