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July 1845 #35

William Waddingham et. al
vs.
The Mayor of the City of St. Louis
St. Louis Co.

} Ordinance violation / damages

Waddington et al sued the Mayor for assessing damages against them for a road in front of their lots.

State of Missouri }
County of St Louis } ss Be it remembered that heretofore, to wit, On the thirteenth day of July eighteen hundred and forty three, Was filed in the office of the Clerk of the Circuit Court within and for the County aforesaid a Petition in the Words and figures following "To the Honorable the Circuit Court of the County of St. Louis the petition of William Waddingham, Stewart McKee and Marshall Brotherton Administrator of Joseph C Lavielle deceased respectfully represents That under an ordinance of the City of St. Louis entitled an ordinance to open Certain parts of North first or Jefferson Street approved June 3d 1841 the Mayor of the said City Caused an assessment to be made of the damages which would be sustained by the opening of the Said Street from Ashley Street to the Northern limits of Central St. Louis by the owners of property thereon which assessment was made on the 16th day of July 1842 and by said assessment the damages were awarded to William Waddingham of five Dollars to Stewart McKee of five Dollars and to Joseph C Lavielle who is since deceased of five Dollars - That afterwards the said William Waddingham & Joseph C Lavielle applied to the Mayor of the City of St. Louis to set aside the said assessment and upon his refusal to do so applied to this Honorable Court for a writ of Mandamus to compel the said Mayor to set aside the said assessment and such proceedings were had upon said application that afterwards On the twenty seventh day of May 1843 a peremptory writ of Mandamus was issued by this Honorable Court requiring the Mayor of the said City to set aside the assessment of damages so made by the said jury. Your petitioners further state that the Mayor of the City of St. Louis having set aside the said assessment in obedience to said writ of Mandamus caused another jury to be empannelled to assess the damages which would be sustained by the owners of prop

1st Petition.

erpty by reasoning of opening and continuing North First or Jefferson Street from Ashley Street to the Northern limits of Central St. Louis which last mentioned jury was empannelled on the 29th day of June 1843 and on that day returned their assessment of damages to the Mayor whereby they assessed the damages that would be sustained by your petitioner Stewart McKee by opening said Street at two Dollars and the damages that would be sustained by your petitioner William Waddingham at one Dollar and the damages that would be sustained by the estate of Joseph C Lavielle at One Dollar. Your petitioners further State that the proposed continuance of said Street would take from Your petitioner William Waddingham a lot of thirty feet front on Prune Street by one hundred and thirty seven and a half feet in depth which was purchased by said Waddingham as a separate lot at about the price of thirteen hundred Dollars - that the proposed continuance of said Street would also take from the estate of said Joseph C Lavielle deceased an entire lot of the same dimensions and situation as that of said Waddingham ~~for his lot - that they purchased~~ and which cost said Lavielle about the ~~same~~ same price as was given by said Waddingham for his Lot - That the proposed continuance of said Street would take from Stewart McKee a lot of sixty feet in front on Payne Street by about the same depth as that of said Waddingham and of equal Value to the two lots of said Waddingham and Lavielle, Your petitioners further State that when the last mentioned jury was empannelled the witnesses produced on the part of your petitioners testified that the present actual Value of the property proposed to be taken for said Street is twenty five Dollars a foot front on Payne Street and there ~~was~~ was no other evidence whatever given of the Value of said property and certainly none to shew the Value to be less - This testimony was given by James Moore and ~~Hudson~~ Theodore Labeaume two respectable Citizens of the

Neighborhood well acquanted with the value of the property these petitioners further state that the said jury did take into their calculation in making their assessment of damages as aforesaid the benefits which they supposed your petitioners would derive from the opening of said street as the owners of adjacent property although the mayor expressly excluded all evidence of such benefits from the consideration of the Jury. Your petitioners also state that on the sixth day of July 1843 Your petitioners applied to the mayor to set aside the assessment so returned by the Jury and shewed cause therefore which said motion of Your petitioners was overruled by the Mayor on the same day and Your petitioners herewith exhibet to Your honorable Court a copy of the proceedings in relation to this last assessment and begleave to refer to a copy of the previous proceedings under the same ordinance seen on file in this Court on the previous application for a writ of Mandamus by which copies the whole proceedings in relation to the opening of said street will be shewn to the Court Wherefore Your petitioners pray that Your honorable Court will issue a writ of Mandamus commanding the mayor of the City of St. Louis to set aside the said last mentioned assessment of damages which was on the 29th day of June 1843. William Waddingham Stewart McKee Marshall Brotherton admr. of Joseph C. Lavielle deceased By H. R. Gamble their attd. — St. Louis Circuit Court, this day William Waddingham being duly sworn upon his oath says that the facts stated in the foregoing petition are true. William Waddingham, Sworn to and subscribed in open Court, July 13th 1843. "And afterwards on the day and year last aforesaid said petitioners filed the following as an exhibit with their

exhibit said petition. "On the twenty seventh day of May 1843 The Circuit Court of Saint Louis County issued a Mandamus

Commanding the Mayor of the City of Saint Louis forth with to set aside the Verdict of the Jury summoned to enquire into and assess the Amount of damages which would accrue to Joseph C Lavielle, William Wadingham and Stewart McKee by reason of opening and extending North first or Jefferson Street from Ashley Street to the Northern limits of Central St Louis on the sixteenth day of July 1842. which said Mandamus is in the words and figures to wit- County of St Louis sct. State of Missouri. To the Mayor of the City of St Louis, Greeting: Whereas Joseph C Lavielle and William Wadingham heretofore ~~[illegible]~~ represented to the Honorable Circuit Court of Saint Louis County That under an ordinance of the City of Saint Louis entitled "an ~~act~~ ordinance to open certain parts of North First or Jefferson Street" approved June 5 1841 On the 16th day of July 1842 a Jury was empannelled and sworn by and before you the said mayor for the purpose of enquiring into the amount of damages which will accrue to the owners of lots within the City of Saint Louis by reason of opening and continuing North First or Jefferson street at its present width from Ashley Street to the Northern limits of Central St Louis, as now enclosed or unopened agreeably to the provisions of an ordinance to open certain parts of North first or Jefferson Street and whereas the said Jury did ascertain, find and determine that the owners of property herein after named will sustain damage by reason of opening and extending said street as aforesaid to the amount of fifteen Dollars, and did assess and apportion the said amount as follows. "We find in favour of William Wadingham five Dollars in favour of Stewart McKee five Dollars, in favor of Joseph C Lavielle five Dollars, Wherefore on the eighteenth day of August 1842 You were commanded to set aside the assessment of damages returned by the jury on the sixteenth day of July (then) last and award to said Lavielle and Wadingham a new trial or that you show cause to said Court on or before the twenty seventh day of August then instant, why you have not done

so, and how you should execute the said command; and whereas on the 27th day of August 1842 you return to the said Court, together with the said writ that having heard all the evidence in said cause and maturely considered the facts and circumstances connected therewith and being satisfied that strict justice has been done to the parties according to law, and no good cause having been shown why said verdict should be set aside you refused to set ~~aside~~ the same aside for the reason aforesaid, and whereas at the April Term of said Court for the Year 1843 to wit, on the 19th day of May of said Year it was considered by the said Court that the return of you the said Mayor shows no sufficient cause for not setting aside the assessment of damages in the said writ of Mandamus mentioned and for not awarding to said petitioners a new trial, it was also then and there considered by said Court that a peremptory writ of Mandamus issue directed to you said Mayor of the City of Saint Louis commanding you forthwith to set aside the assessment of damages returned to you by the jury on the 16th day of August last, in which they assess damages which will accrue to the owners of lots in the City of Saint Louis by reason of opening and continuing North Front or Jefferson Street at its present width from Ashley Street to the Northern limits of Central Saint Louis, and that you award a new trial to Marshall Brotherton whose appearance is entered as administrator of said Lavielle and to William Wadingham and make return of your proceedings under this writ on the first day of June next, Therefore you are hereby commanded forthwith to set aside the assessment of damages returned to you by the jury on the 16th day of August last in which they assess damages which would accrue to the owners of lots in the City of St. Louis by reason of opening and continuing North first or Jefferson Street at its present width from Ashley Street to the Northern limits of Central St. Louis and that you award to the said plaintiff a new trial and make

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return of your proceedings under this writ on the first day of June next. Thereof fail not and have you then there this writ, (Seal) Witness John Ruland Clerk of our said Court, at the City of St Louis this twenty seventh day of May Eighteen hundred and forty three John Ruland Clerk. And afterwards to wit on the first day of June 1843 the Mayor made the following Communication to the said Court Mayors office June 1st 1843 I. John M Wimer Mayor of the City of Saint Louis do hereby state that a writ of Mandamus issued from the Saint Louis Circuit Court at the Suit of Joseph C Lavielle and William Waddingham Came to my hands on the 31st of May 1843 and therefore in accordance with the command of said writ I did on this day as such Mayor as aforesaid set aside the inquisition mentioned in said writ and awarded them a new trial as directed in said writ (Seal) In testimony whereof I have hereunto set my hand and caused the Common Seal of the City of St. Louis to be affixed the day and date aforesaid John M. Wimer Mayor, And on the said 1st day of June It is ordered by the Mayor that in accordance with a writ of Mandamus issued from the Saint Louis Circuit Court at the Suit of Joseph C Lavielle and William Waddingham the inquisition mentioned in said writ be and is hereby set aside and that said defendants be awarded a new trial to be had on the 13th day of June 1843 at 10 Oclock in the forenoon of said day. And on the 9th day of June 1843. a Venire issues commanding the City Marshall to summon a Jury of twelve good and lawful men residents and disinterested free holders of the City of Saint Louis to ascertain the amount of damages which will accrue to the owners of real estate in the City of Saint Louis by reason of opening and continuing North first or Jefferson Street from Ashley Street to the Northern limits of Central Saint Louis agreeably to the provisions of an ordinance entitled "an ordinance to open certain ~~Certain~~ parts of North first or Jefferson Street" approved June 3d 1841. and numbered seven hundred and Sixty Nine (769) to be and appear before the Mayor of said City in the

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Chamber of the board of Delegates in the market and town House on Tuesday the thirteenth day of June 1843 at the hour of ten oclock in the forenoon of said day. And on the 3d of June 1843 they Mayor ordered that subpoenas issue commanding the City Marshall to summon Rene Paul. R, B, Austin Martin Thomas, Thomas J. Payne Joseph C Brown Charles R Anderson Dennis Marks, and William K Mitchel to be and appear before the Mayor at the time and place designated in the foregoing venire, to testify as witness in this cause on the part of Plaintiff. And on the same day to wit - the 3d day of June 1843 notices issue to the owners and legal representatives of property proposed to be taken for the purpose of opening and continuing North First or Jefferson Street as aforesaid, notifying them of these proceedings And afterwards to wit, on the 13th of June 1843 the City Marshall returned the subpoenas aforesaid commanding him to summon Joseph C Brown, Rene Paul R B Austin Martin Thomas Charles R Anderson and William K Mitchel with his written return endorsed thereon stating "Executed this subpoena by reading to the within named Charles R Anderson, William K. Mitchel, Joseph C Brown Rene Paul, R, B, Austin and Martin Thomas, at Saint Louis this tenth day of June 1843 S O Coleman Marshall", and the subpoena to Thomas J. Payne and Dennis Marks stating "not found" June 13th 1843 S O Coleman Ma- And on the said 13th day June 1843 the Marshall returned notices aforesaid, to Solomon P. Ketchum William Waddingham and Marshall Brotherton owners and legal representatives of property proposed to be taken for the purpose aforesaid with his written return endorsed therein stating "Executed this notice by leaving a copy at the place of residence of Solomon P. Ketchum with a white person over the age of fifteen years, and by reading it to William Waddingham and Marshall Brotherton at St. Louis this 10th day of June 1843 S O Coleman Marshall, And afterwards on the said 13th day of June 1843, this.

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Cause Consuming to be heard, the plaintiff by Attorney as well as well as the defendants by their appeared, and the said Thomas I. Payne a Material witness on the part of the plaintiff being returned by the City Marshall "Not found" Therefore it is ordered and decreed by the Mayor that the trial of this Cause be continued until Tuesday the twenty seventh day of June 1843 and that Notices issue to the defendants, Notifying them of the continuance of the trial of this Cause until the day aforesaid And it is also ordered by the Mayor that Subpoenas issue commanding the City Marshall to Summon Thomas I Payne Joseph C. Brown, Rev. Paul R. B. Austin Martin Thomas Charles R. Anderson Dennis Marks, and William R Mitchel to personally be and appear before the said Mayor on the said twenty seventh day of June 1843 to testify as Witness in the trial of a cause of opening and continuing North First or Jefferson Street having been continued as aforesaid, And it is also ordered that a venire issue commanding the City Marshale to summon twelve good and lawfull Men residents and disinterested free holders of the City before the Mayor on the said twenty seventh day of June 1843 in the Chamber of the board of Delegates at the hour of ten Oclock in the forenoon of said day to make a jury of inquisition to enquire into and ascertain the amount of damages which will accrue to the owners of real estate proposed to be taken for the opening and continuing of North First or Jefferson Street as heretofore Mentioned. And on the said 27th day of June 1843 the City Marshall returned the notices to the aforesaid defendants with his written return endorsed thereon Stating "Executed this notice by leaving a copy at the place of residence of Solomon P. Ketchum with a white person over the age of fifteen years and by reading it to William Waddingham and Marshall Brotherton at St. Louis this twenty sixth day of June 1843 S O. Coleman Marshall" And on the said 27th day of June the City Marshall returned the subpoenas aforesaid with his written return

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therein stating "Executed this Subpoena by reading it to the within named persons at the City of Saint Louis this 26th day of June 1843. S. O Coleman Marshall. And on the said day the Marshall returned the venire aforesaid and informs the Mayor that he is utterly unable to summon a Jury. Therefore by and with the consent of all parties concerned it is ordered and decreed by the Mayor that the trial of this cause be con-
2 contin^d tinued until thursday next the 29th day of June 1843 at the hour of ten O'clock in the forenoon of said day, when the defendants and witnesses now present are notified and required to attend in the Chamber of the Board of Delegates in the Market and Town House of the City aforesaid. And on the said 29th day of June 1843 the Marshall returned the venire aforesaid with his written return endorsed thereon stating "Executed this venire by summoning the following named persons twelve good and lawful men residents and disinterested free holders of the City of St. Louis who are here before the Mayor in the Chamber of the Board of Delegates viz Thomas Dennis, Richard Tilden, Abijah R Everest, John B. Bogart, George Collier, John Simmonds, Stephen Ridgely, Thomas C. Fallis, Abijah Ruggles, Hyacinth Renard, Greene Erskine, Robert N Moore, Saint Louis June 29th 1843, S. O. Coleman Marshall. And on the said 29th day of June 1843 comes the plaintiff by her attorney as well as the defendants in their own proper persons and Rene Paul a material Witness on the part of the plaintiff although having been duly summoned failed to appear, when the Mayor issues his writ of attachment commanding the City Marshall to attach Rene Paul and have his body before him immediatly to testify his knowledge in the controversy aforesaid and afterwards on the said 29th day of June 1843 the City Marshall returns the writ of attachment so issued by the Mayor for the Body of Rene Paul, with his written return endorsed thereon stating 'Executed this writ by having the body

of Rene Paul before the Mayor in the Chamber of the Board of Delegates in the City of St. Louis this 29th day of June 1843. S. O. Coleman Marshall, And on the said 29th day of June 1843 this Cause coming to be heard before the aforesaid Mayor thereupon also come a jury of twelve good and lawful Men residents and disinterested free holders of the City of Saint-Louis Viz Thomas Dennis, Richard Gilden, Abijah R Everist John B. Bogart, George Collier, John Simmons, Stephen Ridgely Thomas C Fallis, Abijah Ruggles, Hyacinth Renard, Green Erskine Robert N. Moore who are duly empannelled, tried and sworn to well, and truly enquire into, and ascertain the amount of damages which will accrue to Stewart McKee ~~William~~ William Waddingham and the Estate of Joseph C Laviolle dec. by reason of opening and continuing North First or Jefferson Street at its present width from Ashley Street to the Northern limits of Central Saint Louis, and a true Make of their inquest and findings and said jury so empannelled tried and sworn hear all the testimony and allegations in the Cause, repair to and examine the premises and after having heard all the testimony and allegations adduced in the Cause and repaired to and examined the premises, do upon their Solemn Oath return to the Mayor their written Verdict or finding which is in the following words and figures to wit,- "We the Jury empannelled tried and sworn to enquire into the amount of damages which will accrue to the owners of Real Estate in the City of St. Louis by reason of opening and continuing North First or Jefferson Street at its present width from Ashley Street to the Northern limits of Central St. Louis agreeably to the provisions of "an ordinance to open certain parts of North First or Jefferson Street approved June 3d 1841 and numbered seven hundred and sixty nine (769) after having all the testimony and allegations adduced in the Case repaired to and examined the premises do ascertain find and determine that the owners of property here-

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inafter named will sustain damages by reason of opening and extending said street as aforesaid to the amount of four Dollars, And we do assess and apportion the said amount as follows, we find in favor of Stewart McKee to the amount of two Dollars - We find in favor of William Wadingham to the amount of one Dollar, and we find in favor of the Estate of Joseph C. Lavielle to the amount of one Dollar - and that none others will be damaged in consequence of opening and extending said First or Jefferson Street as provided by the ordinance aforesaid - Given under hands this twenty ninth day of June eighteen hundred and forty three. John Simons George Collier, G Erskin. H. Renard, S Ridgely Robt. W Moore G. C. Fallis, Thomas Dennis, Abijah Ruggles Rich^d. Tilden A.R. Everist Jno. B. Bogart. And on the 30th day of June 1843 Notices issued Notifying the defendants aforesaid of the finding of Jury returned to the Mayor in the Matter of opening and continuing North first or Jefferson Street as before mentioned on the 6th day of July 1843 the following communication was received by the Mayor to wit, In the Matter of the Assessment of damages sustained by the owners of property by the opening and continuing North first or Jefferson Street from Ashley Street to the Northern limits of Central St. Louis. To the Hon: the Mayor of the City of Saint Louis. The undersigned owners of Property on the proposed continuation of North first or Jefferson Street respectfully move you to set aside the inquest of damages returned by the jury in the above Matter for the following reasons 1st That the inquest as returned is against evidence 2d That the jury must have considered in making their assessment What were the supposed benefits resulting to owners from opening the street, 3d That the inquest as returned is against law, 4th That the inquest is against the weight of evidence, William

Waddingham Stewart McKee, Marshall Brotherton adm.s of Jos. C. Lavielle by Gamble and Bates attorneys and agents" And on the said 6th day of July 1843 The Mayor returned the following answer, to wit, "Mayor's office St. Louis July 6th 1843. Messrs Stewart McKee William Waddingham and Marshall Brotherton ~~Sheriff~~ adm.s of Jos. C Lavielle. Gents I have this day received your communication in which for certain reasons therein set forth you move to set aside the inquest of the jury in the matter of opening and continuing ~~North~~ first or Jefferson Street. I have duly considered the same and decline to set aside said verdict. Respectfully John Miner Mayor. State of Missouri City of Saint Louis ss. I, John M Parker Register of the City of Saint Louis do hereby certify that the foregoing is a correct and full copy of the proceedings had (in pursuance of a writ of Mandamus issued by order of the Circuit Court of St. Louis County on the 27th day of May 1843) for the purpose of opening and continuing North first or Jefferson Street according to the ordinance heretofore refered to (Seal) In testimony whereof I the said Register have hereunto set my hand and affixed the common seal of the City aforesaid this tenth day of July A.D. 1843. Jno. M. Parker. Register." And afterwards on the said thirtenth day of July in the ~~xxx xxxx~~ year last aforesaid the following further proceedings were had in said cause, to wit: ~~xxxx xxxx xxxxx~~ William Waddingham, Stewart McKee, and Marshall Brotherton adm.s of Joseph C Lavielle dec.d vs the Mayor of the City of St. Louis Petition for Mandamus — Now at this day come the plaintiffs by their attorney and file their petition herein to which William Waddingham made oath and on motion of said plaintiffs. It is ordered that said defendant appear in this Court on Friday next the Twenty first inst, and shew cause if any he can why a writ of Mandamus should not issue against him commanding him to set aside the assessment of damages returned to

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him on the twenty ninth day of June last in which they assessed damages which would accrue to the owners of lots in the City of Saint Louis by reason of opening and Continuing North first or Jefferson Street at its present width from Ashley Street to the Northern limits of Central St. Louis, as prayed for in said petition, and the Sheriff is ordered to serve a Copy of this order on said defendants. On which order was the following Sheriffs

Shffs return return. "served the above order in the County of St. Louis on the 18th July 1843. by delivering a true Copy of the same to John M. Wimer the Mayor of the City of St. Louis William Milburn Shff By Danl. Murpy Depty. "And afterwards to wit on the eighth day of September in the year last aforesaid the answer of John M Wimer, Mayor as aforesaid, was filed. Which answer is in the words and

Answer from M Wimer figures following, to wit. William Waddingham Stewart McKee & Marshall Brotherton, admr. of Joseph C. Lavielle decd. vs the Mayor of the City of St. Louis, In the Saint Louis Circuit Court. April Term A.D. 1843 And now this day Comes John M Wimer. Mayor of the City of St. Louis, in pursuance of the order of this Court heretofore made on him, to shew Cause why a writ of Mandamus should not issue against him to set aside the assessment of damages returned to him on the 29th day of June last, in which were assessed damages which would accrue to the owners of lots in the City of St. Louis, by reason of the opening and Continuing North First or Jefferson Street at its present width from Ashley Street to the Northern limits of Central St. Louis; for reasons why such Mandamus should not issue, Showeth the following. 1st. The aforesaid assessment of damages is the third one, in order, of a series of assessments or inquests made upon the same subject matter. The first assessment on

the application of said petitioners having been set aside by John D Dagget the incumbent in office at that time and the second one having been set aside by this respondent in accordance with a writ of peremptory Mandamus from this Court. This respondent sees no propriety of setting aside such assessments without limit as long as any one of said petitioners may deem himself aggrieved 2d The first assessment was made on the 25th day of September 1841, by Charles Mansur, David Weston, Titus Hale, Alexander Riddle, George H. Callender, Peter W Johnston, William Risley, William Burd, Thomas Dresser, Elijah Hayden, Jacob True, and Leeds Pritchett, as a jury of inquest, which was set aside on the application of said petitioners, by John D. Daggett, the then Mayor, and by which inquest damages were assessed as follows "To William Waddingham, thirty Dollars, to Stewart McKee sixty Dollars, and Joseph C Laviille thirty Dollars" The second assessment was made on the sixteenth day of July 1842, by Hugh Rose, Robert Kinmere Alexander Buchon, John G. Shelton Henry Maxwell J. R. Stanford, David Shepard, Francis Crealy Francis Lafrance Peter Gurno J. B. D. Belcour, and Wilson Henly. as a jury of inquest, in which damages were assessed as follows To William Waddingham five Dollars, to Stewart McKee five Dollars, and to Joseph C Laviille, five Dollars, This assessment was also set aside by this respondent in accordance with a writ of peremptory Mandamus, issued by this Court, and on the 29th day of June last a third assessment was made by Genge Collier. Greene Erskine, John Simonds H. Renard. S Ridgely, Robt W Moore. J. C Fallis, Thomas Dennies, Abijah Ruggles, Richard S. Felden A R Everist, and John B Bogart, as a jury of inquest in which damages were assessed as follows, to William Waddingham one Dollar, to Stewart McKee, two Dollars and to the estate of Joseph C Laviille, one Dollar" the said petitioners (in all said assessments, so far as this respondent knows) represented by their Counsel, Thus

It appears upon the matter of damages said petetioners have had the opinions under oath, upon testimony produced, of thirty six good and lawful jurors, free holders of the City of Saint Louis, also that the assessment of damages to the petetioners have been less in each succeeding case, it will be seen also from the names of the jurors in the several assessments that they are men not only of the first respectability but also of good judgment in the value of real property. 3d that each of said juries in the several assessments so made as aforesaid, actually went in person on the ground, and examined each individually for himself the premises, and were therefore better able to form a correct opinion of the damages that would be occassioned, than it would be possible for this Court to do without going on the ground, and without having any testimony, but acting only on the exparte statements of the parties interested. Under such circumstances this respondent submits that it would be improper for this Court to issue a second Mandamus. 4th In the opinion of this respondent he has no authority by the Charter of the City of St. Louis, under which said inquest was had, to set aside the finding of the jury, and therefore acting under his official responsibilities he cannot violate his conscience by doing what in his opinion is contrary to common sense, justice and law, unless compelled to do so by the highest tribunal known to our laws. 5th This Court has already one peremptory Mandamus, because the finding of the second jury as to damages was too low in the opinion of this Court, and if it may issue a second for the same cause, then it may issue a third, and fourth, and so on, without limit, until a jury may be found who shall find such a verdict, as this Court may think correct, and thus the opinion of the jury will be resolved into the opinion of this Court, so that the assessment instead of being that of a Jury

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of disinterested freeholders of the City as required by the Charter, will in fact be nothing but the assessment of the judge of this Court. The law properly and justly administered cannot lead to such a result. - 6th In cases of trials of issues by juries in the Circuit Court, only one new trial can be granted by express provision of Statute. except when the jury is guilty of misbehavior, or have erred in a matter of law, and it would seem in this case to this respondent also at least proper that this Court should not proceed to have the verdict of a jury a third time set aside when the only objection is that their finding on the facts adduced before them in testimony was not such as this Court which did not hear that testimony, much less view the premises, may deem improper. 7th This respondent was present at the trial, and heard the testimony upon which said jury formed their inquest, and believes that the testimony fully justifies the finding of said jury for this respondent to set aside that finding therefore would be acting against his convictions of justice and propriety 8th this respondent submits whether by the setting aside of the inquests of juries until one is obtained, allowing a compensation high enough to please the contesting parties, and this Court, a precedent would not be established, whereby property belonging to the judge of the Court might hereafter be subjected, and its value very greatly enhanced, and also submits that the opinions heretofore expressed, and the protest against the City presented by the judge of this Court, do not render the Court somewhat prejudiced against the City authorities. This respondent entertaining these views, deems it a matter of great delicacy to this Court to set aside the verdict after verdict of juries composed of men whose knowledge of the value of the property in dispute, the Court would acknowledge to be at least equal to its own, until a jury shall be found that will place as high an estimate

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should be found that will place as high an estimate upon the value of the land as does the Court This respondent submits to this Court whether it has the power so to do under the act incorporating the City of St Louis, or any other act, or the Constitution of this State or of the United States, - virtually superceding the rightful powers of Juries as such a power does. Mr. M Wimer Mayor. And afterwards, to wit, on the eighth day of September in the Year last aforesaid the following further proceedings were had in said Cause to wit,

14/158 "William Waddingham, Stewart McKee & Marshall Brotherton admr. of Joseph C Lavielle decd. vs the Mayor of the City of St. Louis. Petition for Mandamus - Now at this day Come the parties by their Attornies and the defendants files her answer to the rule herein and thereupon all and singular the premises herein are submitted to the Court, which being seen heard and fully understood It is ordered that a Mandamus issue agreeably to the prayer of said petition Commanding said defendant to set aside the assessment of damages returned to him on the twenty ninth day of June last in which damages were assessed which would accrue to the owners of lots in the City of St. Louis by reason of opening and Continuing North first or Jefferson Street at its present width from Ashley Street to the Northern limits of Central St. Louis, or shew Cause to the Contrary on the Saturday the sixteenth of September Instant. And afterwards on the fifteenth day September in the Year last aforesaid ~~the following further~~ was ~~filed in~~ issued from the office of the Clerk of the St. Louis Circuit Court. A Mandamus in the words and figures

Mandamus following, to wit, "County of St. Louis, Sct. The State of Missouri To the mayor of the City of St. Louis, Greeting - Whereas it has been represented by the petition of William Waddingham Stewart McKee and Marshall Brotherton administrator of Joseph C Lavielle deceased; That under an ordinance of the

City of St. Louis entitled an adinance to open certain parts of North first or Jefferson Street approved June 3d 1841, the Mayor of said City caused an assessment to be made of the damage which would be sustained by opening of the said Street from Ashly Street to the Northern limits of Central St. Louis, by the owners of property thereon which assessment was made on the 16th day of July 1842, by which assessment damages were awarded to William Waddingham of five Dollars and to Stewart McKee five Dollars and to Joseph C. Lavielle who is since deceased of five Dollars - that afterwards the said William Waddingham & Joseph C. Lavielle applied to the Mayor of the City of St Louis to set aside the said assessment, and upon his refusal to do so, applied to this Court for a writ of Mandamus to compel the said Mayor to set aside the said assessment; and on the 27th day of May a peremptory writ of Mandamus was issued by this Court requiring the Mayor of said City of St. Louis to set aside the assessment of damages made by said jury, that said Mayor set aside said assessment in obedience to said Writ of Mandamus & caused another jury to be empannelled to assess the damages which would be sustained by owners of property by reason of opening and continuing North first or Jefferson Street from Ashley Street to the Northern limits of Central St. Louis which last mentioned Jury was empannelled on the 29th day of June 1843. and on that day returned their assessment of damages to the Mayor ~~of the City of St. Louis~~, whereby they assessed the damages that would be sustained by Stewart McKee by opening said Street at two Dollars and the damage that would be sustained by William Waddingham at one Dollar and the damage that would be sustained by the estate of Joseph C. Lavielle at one Dollar that the proposed continuance of said Street would take from Your petitioner Wm Waddingham a lot of thirty feet front on Payne Street

by 137½ feet in depth, which was purchased by said Waddingham as a separate lot at the price of thirteen hundred Dollars - that the proposed continuance of said Street would also take from the estate of said Joseph C Lavielle deceased an entire lot of the same dimensions and situation as that of said Waddingham and which cost said Lavielle about the same price as was given by said Waddingham for his lot - That the proposed continuance of said Street would take from Stewart McKee a lot of sixty feet in front on Payne Street by about the same depth as that of said Waddingham and of equal value to the two lots of said Waddingham & Lavielle; that when the last mentioned jury was empannelled the Witnesses produced on the part of the petitioners testified that the present value of the property proposed to be taken for said Street is twenty five Dollars a foot front on Payne Street and there was no other evidence given of the value of said property - That said jury did take into their calculation in making their assessment of damages as afore said the benifits which they supposed the petitioners would receive from the opening of said Street as the owners of adjacent property although you the said Mayor expressly excluded all evidence of such benefits from the consideration of the jury; that on the sixth day of July 1843. application was made to you said Mayor to set aside the assessment so returned by the jury and shewed cause therefor, which said motion was overruled by you said Mayor on the same day whereof it was prayed that a writ of Mandamus issue commanding you said Mayor of the City of St. Louis to set aside the said last mentioned assessment of damages which was made on the 29th day of June 1843. And whereas it was ordered by our said Court, that a writ of Mandamus

issue commanding you to set aside the assessment of damages returned by the jury on the 29th day of June 1843. and award to said William Waddingham Stewart McKee and Marshall Brotherton administrator of Joseph C. Lavielle deceased a new trial & that you shew cause to this Court on or before the sixteenth day of September instant why you have not obeyed said writ, You are therefore hereby commanded that you do set aside the assessment of damages returned by the jury on the 29th day of June 1843. and award to said William Waddingham Stewart McKee and Marshall Brotherton administrator of Joseph C Lavielle decd. a new trial & that you cause to our said Court on or before the 16th day of September instant why you have not done so, and that you make return of this writ to our said Court on the said 16th day of September instant, and herein fail not at your peril. Witness John Ruland Clerk of our said Court with the seal thereof hereto affixed at office in the City of St. Louis this fifteenth day of September 1843. John Ruland Clerk. On which Mandamus is the following

sheriffs return

sheriffs return. "Executed this writ in the County of St. Louis on the fifteenth day of September 1843 by making known the contents thereof to John W Wimer Mayor of the City of St. Louis, and by offering to read it to the said John W Wimer, which he refused to hear. William Milburn Sheriff By Henry B. Belt Deputy. service $1.00." And afterwards on the seventeenth day of October in the year last aforesaid the following further proceedings were had in said cause to wit, William Waddingham Stewart McKee & Marshall Brotherton adm. of Joseph C. Lavielle decd. vs the Mayor of the City of St. Louis. Petition for Mandamus - Now at this day comes the defendant by his Attorney and files a Bill of exceptions herein and also

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an affidavit And on his Motion an appeal is granted him from the decision herein to the Supreme Court, Whereupon said defendant as principal and trusten Polk and Robert Simpson as securities acknowledge themselves indebted to said plaintiffs in the sum of one hundred and fifty Dollars to be levied of their respective goods and Chattels lands and tenements, to be void upon Condition that said defendant shall prosecute his appeal Now taken with due diligence to a decision in the Supreme Court and that if the decision appealed from is affirmed or his appeal dismissed that he will pay whatever of damages and Costs have been recovered against him by the decision of the Circuit Court, or that he will otherwise perform the judgment of the Circuit Court And that he will pay the Costs and damages that may be adjudged against him in the Supreme Court upon his appeal otherwise this recognizance to be and remain in full force and virtue. ~~And afterwards on the day and Year last aforesaid~~ which said Bill of Exceptions was filed in the words and figures following to wit. William Waddingham et al vs John M Wimer the Mayor of the City of St Louis, In the St Louis Circuit Court April Term 1843, SS. Be it remembered that this Case came on to be heard at the April of this Court for the Year Eighteen hundred and forty three and on the eighth day of September of said Year upon the answer of the said John M Wimer Mayor of the City of St Louis aforesaid unexcepted to, undemurred to And undenied and thereupon it was submitted to the Court by the parties aforesaid as a question of law, to say and adjudge whether by the law of the land a Peremptory Mandamus ought or ought be awarded in this Case against the said Wimer Mayor of the City of St Louis aforesaid, and the Court decided and adjudged that a peremptory Mandamus might & ought to be awarded in this Cause against said Wimer Mayor as aforesaid and accordingly did award a peremptory

Bill of Exc.

Mandamus in this Case against said Wimer such Mayor as aforesaid to which ruling & Judgment of said Court said Wimer by his Counsel excepted at the time & Now here tenders this his bill of exceptions & prays that the same may be signed & sealed and made a part of the record in this cause which is done, Bryan Mullanphy Seal Judge 8th Jud. Cir. of Mo. And which said affidavit was filed ~~afterwards to wit on the day and the last aforesaid an affidavit was filed, which is~~ in the words and figures following to wit:— William Waddingham et al vs John M Wimer Mayor of the City of St Louis, St Louis Circuit Court April Term 1843. John M Wimer the above named defendant & respondent being duly sworn on his oath saith that the appeal by him prayed & taken in this case is not made of vexation or delay, but because the affiant believes that the said appellant is aggrieved by the judgment & decision of the said Court. Jno M Wimer Mayor — Sworn to and subscribed in open Court this 17th day of October A.D. 1843. Jno Ruland Clk.c

affidavit for appeal

State of Missouri }
County of St Louis } ss. I. John Ruland Clerk of the Circuit Court within and for the County aforesaid Certify the foregoing to be a full true and Complete transcript of the record and proceedings in the case of William Waddingham et al vs the Mayor of the City of St Louis as the same Now remains in my office.

In testimony whereof I hereto set my hand and affix the seal of said Court at office in the City of St Louis this ~~twenty~~ second day of July ..... Eighteen hundred and forty five.

J N. Ruland Clerk

~~22~~ (35)
~~23~~

William Waddingham, Stewart McKee & Marshall Brotherton, admr of Joseph C Laveille

vs

The Mayor of the City of St Louis

Filed by appellees.
H. L. Boon clk

11 to 22.

Transcript $8.25/100

William Waddingham
Stewart McKee &
Marshall Brotherton admrs
of Joseph le Laveille decd Appellees

vs

The Mayor of the City of St Louis Appellant

The appellees move the Supreme Court to affirm the judgment in this case for the reason that the appellant has not filed the transcript of the record as required by law

Gamble & Bates
for appellees

William Waddingham
others
vs
The Mayor of St Louis

Motion to affirm judgt

Filed July 30. 1845
H. L. Bruce Clk

State of Missouri } ss.
County of St Louis }

Be it remembered that on this Eighth day of January Eighteen hundred and fifty, there was filed in the office of the Clerk of the Circuit Court, within and for the County of St Louis, a Petition which is in the words and figures following to wit:

To the Hon. the Judge of the St Louis Court of Common Pleas for St Louis County.

Petition

William Waddingham, William G. Ewing, George W. Ewing, Charles Chambers, Jane Chambers, William S. Harney, Mary Harney, John Aydoe, John Biddle, Henry M. Shreve, Henry Von Phul, John Finney, William Finney, James Clement Jr. Henry Boyce, Octavia Boyce, Richard Graham, Catherine Graham, Louis G. Picot & Walker R. Carter, Plaintiffs

Against

The City of St Louis.

The plaintiffs State, that they are the owners in fee in severalty of the land East of the land laid down and designated on the City plat as front Street, and extending to the river Mississippi at low water. Situated between Cherry and Biddle streets in the City and County of St Louis State of Missouri, that they have owned and possessed said land for many years and at all times have suffered persons to use the same as a Wharf, retaining however their rights of property in said ground that the public have been permitted to deposite merchandize and property thereon and Vessels to receive and discharge their Cargoes on said land, that the same was permitted as a matter of ease and favor without any charge and without parting with their rights as proprietors. The plaintiffs State that the

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owners of said land have long designed improving on said land said Wharf for the accommodation of the public, and on the second day of November 1849. the proprietors entered into an agreement and obligation to proceed without delay to grade said land and complete said Wharf therein for the accommodation and convenience of the public, as will appear by the said agreement, a true copy of which is hereto attached marked "A." and made part of this petition.

The plaintiffs state that under said instrument, contracts have been made considerable sums of money expended and a large number of operatives have been and now are ingaged in grading said land and preparing the same for a convenient Wharf which will be completed as soon as possible and free to be used by the public as a Wharf a public landing upon the payment of such wharfage as the City Council of the City of St Louis may fix or prescribe to be charged thereat, and in default of such regulation on reasonable terms. The plaintiffs state until they shall complete the improvement of said Wharf, they are willing the public should use and enjoy said land free of charge. The plaintiffs state that the committee appointed by the proprietors to superintend the improvement of said Wharf a few days after being appointed employed persons and had them at work in grading and improving said Wharf. that shortly after the said work was commenced the Mayor of the City aforesaid threatened to enter into and upon said land and with force and violence caused those who had been employed by said committee to grade said land to be expelled therefrom and take forcible possession of the same for and in the name of the City of St Louis.

The plaintiffs state that said committee on behalf of the plaintiffs deemed it advisable if possible to avoid any conflict with the City authorities and by all means to keep out of litigation if it were in their power to do so. The committee felt confident that an Ordinance could be passed which would obviate the difficulties anticipated, and in view of the adjustment of the dispute, memorialized the City Council praying that body to allow the proprietors to improve their own private property without molestation and stated the object

they had in view and also declared their willingness to allow the city authorities to fix the grade and superintend the completion of said Wharf, all of which will more fully appear reference being had to said Memorial a copy of which when the same can be procured will be hereto attached marked "B" and made part of this petition. The plaintiffs state that on the 3d day of November 1849. a Bill passed the Board of Delegates in accordance with the prayer of the Memorialists, which bill with the said Memorial was referred by the Board of Aldermen to the Committee on Harbor, a copy of which bill is hereto annexed marked "C" and made part of this petition. The plaintiffs state that the Committee to which was referred said Memorial and bill made a report recommending the rejection of said bill and instructed the Mayor to proceed to condemn &c all of which will more fully appear reference being had to said report, a copy of which is hereto annexed marked "D." and made part of this petition. The plaintiffs state that the Mayor of said city under the instructions of the City Council and under color of Ordinance No 2263. a copy of which is hereto attached marked "E" and made part of this petition, and under colour of the authority in him vested by the general ordinances of the City, claims the right to condemn to the use of the public the said land. The plaintiffs state that the Mayor has notified the proprietors of his intention to proceed on the 9th day of January 1850. to condemn to public use the land aforesaid. The plaintiffs state that they had no notice of the intention of the Mayor to take any steps to condemn said land until the 29th day of December 1849 that since said notice was published there has been no meeting of the City Council and will be none until the 10th day of the present month January 1850.

The plaintiffs state that on the 3d day of January A.D. 1850. they caused a notice to be served on the Mayor of said city protesting against said proceeding, a copy of which said notice is hereto attached marked "F." and made part of this petition. The plaintiffs state that after the service of said notice the Mayor of said city declared his determination to disregard said notice and to condemn the

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the land aforesaid of the plaintiffs to public use on the 9th day of January 1850. The plaintiffs state that they are willing that their said land as also the land designated as Front Street between Cherry & Biddle Streets should be used and enjoyed by the public as a wharf or public landing as fully and completely as if the same were owned by the City and upon the same terms that the owned by the City is used or upon any reasonable terms which the City may prescribe. The plaintiffs state that they are willing to construct and complete said wharf in such manner as the City authorities may direct at their own proper cost and keep the same in good repair. The plaintiffs state that they are ready and willing and hereby offer to execute any proper instrument or obligation which may be deemed requisite to secure to the public for all time to come the use and enjoyment of said wharf upon the terms hereinbefore stated, and at all times keep the same in good repair, and in all things to conform to such regulations as may be lawfully made by the said City authorities on the subject.

The plaintiffs state that before they commenced grading their said land they called on the City Engineer of said City and requested him to furnish to them the proper grade in order that the wharf should be completed according to the wishes of the corporate authorities of said City, the said engineer declined giving the grade as requested in his official capacity, but consented that a copy might be taken from his books in which the grade as established was recorded. The plaintiffs state that a copy was taken and that they are now and have been and intend to grade their said land, complete their said wharf in conformity to the grade as established by the proper city authority, unless the City Council or some City officer duly authorized should alter or change said grade. The plaintiffs state that under existing ordinances of said city wharfage to the amount of nearly forty thousand dollars is annually collected from boats and vessels and for landing and placing lumber and other property on that portion of the wharf owned by the City. The plaintiffs state that

their said land is well calculated for a wharf, that there is deep water along the banks where boats and vessels can at all times land with safety, that it affords many facilities for the transaction of business and when the wharf shall be completed it will be the best and most convenient landing in the City, that it extends along the bank of the river over thirteen hundred feet. The plaintiffs state that in the grading and construction of said wharf they have indeavoured to and have thus far complied with ordinances of said City, and are determined to do so, and to conform to all lawful and proper regulations in relation to the same which may be required by the corporate authorities of said City. The plaintiffs state that the proprietors of the land between Cherry and Biddle streets have agreed to set back their buildings a distance sufficient to give ample room for the transaction of business and to afford greater facilities to trade and commerce than are enjoyed at any other part of the wharf, that in extreme low water the larger class boats cannot land below Cherry street and are forced to land between Cherry & Biddle streets or above those streets. The plaintiffs state that their said land is of great value to them as a wharf, that the same is rapidly increasing in value and as soon as the wharf should be completed will yield a large income to the proprietors, of all which the City authorities of said City are well informed.

The plaintiffs state that the corporate authorities in various official acts and proceedings endeavoured to prejudice the rights of the plaintiffs and to create the impression that the plaintiffs had no title to said land, all of which illegal oppression and fraudulent conduct actings and doings were for the mere purpose of depreciating the value of the plaintiffs property and fraudulently depriving them of the same without without a just compensation therefor. That the City Council after having resolved that the plaintiffs had no title to said land and that the City owned the same adopted the report hereinbefore referred to marked "D" The plaintiffs state that they verily believe that the whole of the proceedings of the City officers and corporate authorities of said City were concocted, contrived and designated

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to cheat and defraud the proprietors of said land and fraudulently deprive them of the income and revenue of the same. The plaintiffs state that they are advised and believe that the Ordinance number No 22263. under color of which the Mayor claims to act is in violation of the Constitution and laws of this State. The plaintiffs are advised and believe that the Corporate authorities of said City cannot legally take their private property and condemn it to public use in order to realize therefrom a revenue for the benefit of the Corporation or to take as a mere matter of speculation, so long as the owners are willing to allow it to be used and enjoyed by the public for precisely the same purposes it will be used if condemned, and upon terms equally or even more favorable that if the same were owned and possessed by the Corporation. The plaintiffs state that upon the completion of said wharf they are willing that the City should exercise all the powers over the same which delegated by the Charter and warranted by law, and to make all legal & necessary regulations for the government of the same so as to secure the enjoyment and use thereof to the public. Plaintiffs state that said land for a considerable time has been, and now is, open to public use as a wharf as fully in all respects as the same would or could become by any formal condemnation thereof, and that the effect of condemning or seizing the said land by the City would be to divert the income & revenue derived from said land from the plaintiffs the lawful proprietors thereof & applying the same to the benefit of the Corporation of the City of St Louis, without in the slightest degree changing the use of said land: And plaintiffs believe that without the interposition of this Court by injunction, the officers of said City of St Louis will proceed to the formal condemnation of said property, and under colour of such condemnation will deprive the plaintiffs of all the income, profit and advantage of said land so applied by them as aforesaid as a wharf for public use. The plaintiffs state that under the provisions of the Charter of said City it is made the duty of the City Council to expend all the money collected for wharfage (after

deducting expenses for Collection &c) to the improvement of the wharf in front of said City. That the City Council in violation of the City Charter have expended over twenty thousand Dollars of the wharf fund for other purposes. The plaintiffs state that during the past year many Steam Boats were in port consumed by fire and the wrecks of which were sunk near the bank of the river along the portion of the wharf owned by the City and caused such obstructions as to render the same useless to the public, that an ordinance has been adopted by said City to widen and improve the wharf which will to complete the same absorb for several years to come the entire wharf fund. The plaintiffs state that owing to the situation of the wharf owned by the City it becomes absolutely necessary for the accommodation of the public that they should complete the improvement on their land of said wharf for the accommodation of the public as soon as possible which they determined to do. The plaintiffs state that if the said City were permitted to condemn their land and take possession of their said wharf & the income thereof, that great injury would result therefrom not only to the plaintiffs but to the public interests.

The plaintiffs state that the City is governed by men who have local and sectional interest to subserve that they prejudiced against the growth and prosperity of the northern part of the City and will use all means in their power in violation of law and justice to owners and oppress the plaintiffs and the inhabitants of the northern portion of St Louis, that said City ~~of St Louis~~ authorities well knowing that the land of the plaintiffs must from necessity whether improved or unimproved be used by the public as a landing. And the plaintiffs verily believe and they are justified in the opinion from the proceedings of the City Council, that the object of the City is to obtain the land of the plaintiffs, use it as a wharf or landing to receive a revenue therefrom and permit the same to remain in such condition as to depreciate property and drive business from that portion of the City.

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The plaintiffs State that they will Complete the entire wharf between Cherry & Biddle Streets sooner than the City can do it, that they will make it a better wharf and keep it in better repair than if owned by the City, and allow the same to be freely used and enjoyed by the public upon terms equally or more favorable than if it were owned by the City. The plaintiffs State that the Condemnation to public use of their said land would be illegal unjust and oppressive and prove highly injurious to the public.

In Consideration of the premises the plaintiffs, ask that your honor may make an order for an injunction to issue against said City its officers agents and servants enjoining and restraining them from Condemning seizing or taking possession of said land to be used as a public wharf for the benefit of the City aforesaid, or otherwise disturbing or interfering with the possession and use of said land as a private wharf by the proprietors.

R. M. Field Thos. B. Hudson
Attorneys for proprietors.

William Waddingham one of the plaintiffs makes Oath and says, he believes the above petition and the matters therein as stated are true.

William Waddingham

Subscribed and Sworn
before me on this the eighth
day of January AD 1850.

Saml Treat, Judge
of the Court of Common Pleas

Exhibit A

The undersigned owners of property on the Mississippi between Biddle & Cherry Streets in the City of St Louis hereby agree and bind ourselves our & each of our heirs Executors Administrators and assigns jointly & firmly by these presents, well & truly to pay our respective portions or shares of all expences Costs & charges in and about the grading & paving the Levee between Cherry & Biddle Streets in the City & County of St Louis, and also our due proportions of all expenses for attorneys agents & others who may be Consulted or employed in & about grading & paving said Levee or the proportion of the right of those owning land between said Streets. And we further agree & bind ourselves to pay our due proportions of all such expenses as above specified according to the quantity of land which we may own between said Cherry & Biddle Streets. And it is further agreed that the Committee this day appointed at a meeting of the property holders between said Streets shall have full power and authority to take all necessary steps for the grading & paving said Levee and to make Contracts for the same and assess the amount to be paid by each of the property holders aforesaid — And such assessment when made by said Committee we bind ourselves to pay when called on by the chairman thereof or by any person duly authorized by him to collect the same — And it is further understood that William Waddingham, James Clemens Jr, John Finney and Thomas B. Hudson shall compose said Committee & fully authorized to carry out the objects of this agreement. And the said Committee shall also have power to make such regulations as they may deem expedient for the collection of wharfage between Cherry & Biddle streets, and to distribute any wharfage that may be collected among the owners of property according to their respective

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rights. It is further understood & agreed that so soon as the Levee between said Streets shall be graded & paved the powers of said Committee shall cease & determine. And it is further understood and agreed that the West line of Front Street shall be a line running Northwardly from Cherry Street to correspond with the line as established by the East front of the two Stone Warehouses erected by James Clemens Jr & Charles Chambers except so far as relates to lots now under lease & in possession of tenants. And it is understood that if the tenants on leased lots will not consent to said line, that the proprietors so soon as the present leases shall expire, that they will then conform to the above line. And it is further understood that said West line of Front Street shall be so established as to leave a space of at least ninety feet between the West line of Front Street and the East line of Commercial Street between Cherry & Biddle Streets.

Witness our hands & Seals this second day of November 1849.

Henry M. Shreve (Seal)
John Biddle (Seal)
Charles Chambers (Seal)
By Jno B. Hudson his atty
H. Von Phul (Seal)
James Clemens (Seal)
W. Waddingham (Seal)
Patrick Riden attorney (Seal)
for Mary Warney
Octavia Boyce (Seal)
By John Ryan Jr agt
John Finney (Seal)
R. Graham (Seal)
Bryan Mullanphy (Seal)

Acting as trustee for whom it may concern I agree to all the foregoing provisions excepting the one respecting the line of Front Street protesting that I do not intend to alienate or abandon any part of the land.

Louis G. Picot (Seal)
Edward Walsh atty
for John Andoe (Seal)

I agree to & become a party to the foregoing agreement so far as the grading, paving & making the Levee, but do not now consent to throwing back or changing our front line on the present Levee or Eastern front not knowing W. G. Ewings views on the subject.
Nov 2nd 1849.

Geo W Ewing firm of
W. G. & G. W. Ewing

Exhibit "C"

An Ordinance providing for grading and paving a portion of the Wharf.

Be it ordained by the City Council of the City of St Louis.

1. That the claimants of land abuting on Front Street in the City of St Louis between Cherry & Biddle streets and who claim title to the line of the river are hereby authorised to proceed to grade and pave the landing between the streets mentioned at their own proper cost.

2. That it shall be the duty of the City Engineer to establish the grade of said landing and to supervise the grading and paving of the same.

3. That when the said grading and paving shall have been completed the said Engineer shall file in the Office of the City Register a statement founded upon such vouchers as may be satisfactory to him, of the cost of the same; and if at any time hereafter the authorities of the City shall

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take possession of said landing as the property of the corporation of said city the amount so certified to have been expended shall be refunded to the claimants of the land before mentioned, or their legal representatives, according to their respective contributions to said amount.

4. That nothing contained in this ordinance shall be so construed as an admission or denial of any right or title in or to the Levee between said streets, and that this ordinance shall not be taken or construed as affecting any right now existing either on the part of the city or individuals.

5. This ordinance to take effect and be in force from and after its passage.

Resolutions

Resolved by the Board of Aldermen the Board of Delegates Concurring.

Exhibit D.

That the city engineer be, and he is hereby instructed and required to commence forthwith and carry out the provisions of the first section of ordinance No 2188. authorizing the engineer to grade a certain portion of the wharf, and push said work to completion as early as possible.

"

Resolved by the Board of Aldermen the Board of Delegates Concurring.

That the Mayor be, and is hereby requested to carry out the provisions of ordinance No 2263. approved August 10. 1849. as soon as practicable, so that the entire landing front of the city shall be in the peaceable possession of the same, that the improvement of the landing or wharf can be progressed in by the city as fast as the wharf fund accumulates.

Exhibit "D"

The Committee on Harbor to whom was referred the Communication of the Mayor, with reports from the City engineer and City Counselor, and also a bill passed by the Board of Delegates for grading and paving a part of the wharf, all on the subject of the landing between Cherry and Biddle Streets, on examination of the subject matter referred to them find from the records in the Clerk's Office of the Circuit Court of St Louis County and old plats of the City in the engineer's Office, that the Landing between Cherry and Biddle Streets, or, from Antoine Roy's old Mill three or four hundred feet North of Biddle Street down the river to a point on the shore due East of the southern end of a bridge across Mill Creek on Second Street has been used for a public landing for the Town of St Louis since the year 1809. when the Court of Common Pleas of St Louis County in the Territory of Missouri incorporated said Town and also since said Town was incorporated as a City by an Act of the General Assembly of the State of Missouri Approved December 9th 1822. up to the present time. Therefore your Committee have come to the Conclusion that the landing between Cherry and Biddle Streets is as much a public landing or wharf of the City as it is below or South of Cherry Street, and that the City has as much right to Collect port tax or wharfage from Boats landing at and fastening to, and delivering goods upon the one part of their landing as the other part, and your Committee are strengthened in their Conclusions by the fact that the Town and City of St Louis have been in possession of and exercised ownership over said landing or wharf for the last forty years according to said incorporated boundaries and that the City authorities have been and are expending large sums of Money in improving its landing, and it is known to your Committee that an Ordinance No 2188. was passed by the City Council last March directing the City engineer

to grade and improve that portion of the City's landing betw-
-een Cherry and Biddle Streets his report to this Board
No 651. referred to us gives his reasons for not having com-
-menced the work before this time, and Your Committee would
respectfully recommand that the engineer be instructed to
Commence said work forthwith and push it to Completion
as provided by said ordinance. that the paving of said lan-
-ding can be Commenced next Summer, Your Committee
would further recommend that the Mayor be requested to
Carry out the provisions of ordinance Number 2263. approved
Augt 10th 1849. as soon as practicable, so that the entire
landing front of the City shall be in peaceable possession of
the same, that the improvement of the landing or wharf
Can be progressed in by the City as fast as the wharf fund
accumulates, that the Commerce of the City can be better
accommodated than it is at present. Your Committee
respectfully recommands that the Ordinance pass by the
Board of Delegates providing for the grading and paving
a portion of the wharf be indefinitely postponed and for the
resons that sufficient ordinances are already passed and
in for for the improvement of the City landing between
Cherry and Biddle Streets, and believing that the City should
have the work done and paid for out of the wharf fund
and not to be done by private individuals. All of which with
the resolutions herewith reported, Your Committee recom-
-mand to be adopted by this Board, Newspaper Subscribers
Scurrilous Opinions of the Members of the Board of Aldermen
to the Contrary notwithstanding

A. L. Mills, Chairman

Ex-E.

Ordinance No. 2263.

An Ordinance to secure to the City of Saint Louis
the occupancy and possion of the entire landing in front there-
-of, and to adjust and settle between the City and individuals,

the question of ownership to such portions of the public landing as established by ordinance and known as Front Street, and the Wharf as may not be admitted already to belong to the City.

Be it Ordained by the City Council of the city of St Louis — Section 1st That as soon as may be after the passage of this ordinance, the Mayor shall cause to be condemned for public use by a Jury properly summoned for the purpose so much of the ground set apart and established by ordinance for a public landing along the entire front of the City, and known and designated on the plat of said City as Front Street and the Wharf as may be claimed by individuals and over which the City does not at present exercise control and ownership.

Exhibit "F"

To The Honorable James G. Barry Mayor of the City of St Louis State of Missouri

Sir

You are hereby notified that the owners of the land East of the Eastern line of the land laid down on the city plat and claimed by the City as Front Street situated between Cherry & Biddle streets of said city, and extending to the waters edge at low water, are now grading and preparing the same for a wharf; the owners have always, designed and ever been willing that said land should be used as a wharf for the accomodation of the public upon the same terms that the residue of the wharf in the City of St Louis is and has been used, the owners are willing and hereby offer to continue the improvement of said land under the direction of the Corporate authorities, of said City at their own cost so that the same shall conform to the wharf above and below, and keep the same in good repair and permit it to be used and enjoyed by the public as fully as if the same were, owned by the City. The proper officers of the Corporation or the City Council to regulate

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16 the erection and repair of the said Wharf between Cherry and Biddle Streets and to fix the rate of wharfage to be charged thereat, the owners have been and are now expending large sums of money in and about improving said Wharf and they are determined to complete the same as soon as practicable so that it may be used by the public, The undersigned have read with astonishment the following notice, printed in the St Louis New Era of this date ~~to wit Wednesday the~~

Notice,

Notice In pursuance of the provisions of ordinance No. 2263. and the General ordinances of the City of St Louis, the Mayor, assisted by the City Counsellor, will proceed on Wednesday the 9th of January next, at the Mayor's Office in the Town Hall of said City, to Condemn to the use of the public, Blocks No 17. 18. and 19. of the wharf, Commencing at Cherry Street, running north. Said proceeding to be continued from day to day until completed: When and Where, all persons interested, are notified to attend.

D 29. James G Barry, Mayor.

Protest of Comttee The undersigned for themselves and on behalf of those owning and are in possession of said land (being duly authorized to act in the premises) protest against the Condemnation to public use of the land in question as proposed in the above Notice. They also notify you that the owners of said land have ever been willing and are now ready. Willing and hereby offer to Continue to improve the same, and have it Completed as a wharf at the earliest possible moment and to erect, the said wharf and keep the same in good repair under the proper authorities of the City of St Louis, at their own Cost and expenses and when completed the owners are willing that the same should be used and

enjoyed by the public as a wharf or landing upon the same terms that the portion of the wharf owned by the City is used and enjoyed. The owners of the land in question protest against the Condemnation of the same and deny the right of the Corporation to take private property for public use and Convert the same for the purpose of revenue when the owners are willing and hereby Offer the same to the public upon precisely the same terms that the City would allow it to be used and enjoyed if owned by the Corporation.
The owners are willing and hereby offer to execute any instrument or obligation that may be deemed requisite to secure to the public the enjoyment of said land as a wharf or landing for all time to Come and to give proper & Satisfactory Security to keep the same in good repair, They also protest against the Condemnation of Blocks 17. 18 & 19. as proposed in the foregoing notice.

St Louis January 2nd 1850 Very respectfully Your Obedient Servants
William Waddingham
John Finney
James Clemens Jr
Thos B. Hudson
Committee

Service Notice

Served the within Notice in the City and County of St Louis State of Missouri on the 3d day of January 1850 by delivering to James S Barry Esqr. Mayor of said City a true Copy of the within Notice
. . . . . Thos B Hudson

Notice

To the City of St Louis.

Take notice that on the 8th day of January inst at 10. O'clock forenoon at the room of the Law Library Association in the Court House in the City of Saint Louis application will be made on behalf of William Waddingham & Others proprietors of the land in front of Blocks 17. 18. & 19. as laid down on the Map of the City and laid out and used as a private wharf, for an injunction to be issued

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18

to said City its officers, Agents and Servants against Condemning seizing or taken possession of said land to be used as a wharf for the benefit of said City or otherwise disturbing or interfering with the possession and use of said land as a private wharf by the said proprietors, said Application will be made to the Hon Samuel Treat Judge of the St Louis Court of Common Pleas.

Jan 5. 1850.

Hudson & R. M. Field
Attorneys for said proprietors

Served the above notice in the City and County of St Louis State of Missouri on the 5th day of January 1850. by delivering a true copy thereof to James G. Barry, Mayor of the City of St Louis.

Thos B. Hudson

6th this no will be changed

William Waddingham and others
vs
The City of St Louis

Injunction by Order

Inject by order

The motion for an injunction by order in the above entitled Cause having been made before me on the Eighth day of January Eighteen hundred and fifty, on the annexed petition and affidavit, and the parties plaintiff and defendant having been fully heard by Counsel on the Subject Matter set forth in said petition, and said Matter having fully Considered by me and said plaintiffs having stipulated to accept Short answer to said petition. It is ordered that said defendants its Officers, agents, and Servants be enjoined and restrained, until the St Louis Circuit Court shall make further order in the premises, from Condemning, Seizing and taking possession of the land in said petition described to be use as a public Wharf for the benefit of the City aforesaid and from otherwise disturbing or interfering with the possession and use of said land as a private Wharf by the proprietors thereof, And it is ordered that this Order be returned to the St Louis Circuit Court forthwith, And it is further ordered that said plaintiffs execute a bond according to law, in the sum of Twenty Thousand Dollars with Edward Walsh as Surity.

Given under my hand this 8th day of January A.D. 1850.
Samuel Treat
Judge of the St Louis Court of Common Pleas.

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Sheriffs Return

Served this order in the County of St Louis on the 9th day of January 1850. by delivering a true Copy thereof to James J. Barry, Mayor of the City of St Louis.

Louis J. LaBeaume Shff
by Franklin Wise Dept

Bond

A Know all men by these presents that we William Waddingham as principal and Edward Walsh as Security, are held and firmly bound unto the City of St Louis in the Sum of Twenty Thousand Dollars, for which payment we bind ourselves firmly by these presents, Sealed with our Seals this Eighth day of January A.D. Eighteen hundred and fifty

The Condition of the foregoing Obligation is that whereas the St Louis Circuit Court has this day granted an order enjoining and restraining said City of St Louis.

Now if the said William Waddingham shall abide the decision that be made in the Matter of said Injunction, and pay all Sums of Money, damages and costs that shall be adjudged against him, if said Injunction shall be dissolved, then the foregoing Obligation to be void otherwise in force.

William Waddingham (Seal)

Edward Walsh (Seal)

County of St Louis, SS.

Summons

The State of Missouri
To the Sheriff of St Louis County Greeting:

We Command you, to Summon the City of St Louis, that it be and appear before the Judge of our Circuit Court, on the first day of the next Term thereof, to be held in the City of St Louis, on the third Monday of April next, then

and there to answer unto William Waddingham, William G. Erwing, George W. Erwing, Charles Chambers, Jane Chambers, William S. Harney, Mary Harney, John Andoe, John Biddle, Henry M. Shreve, Henry Von Phul, John Finney, Wm Finney, James Clemens Jr. Henry Boyce Octavia Boyce, Richard Graham, Catharine Graham, Louis G. Picot and Walker R. Carter of their petition hereto annexed, And have you then there this writ.

Witness. Michael S. Cerré, clerk of said Court, with the seal thereof hereto affixed, at office, in the City of St Louis, this 9th day of January in the year of our Lord Eighteen hundred and fifty.

M. S. Cerré clerk

Shff's return

Executed this writ in the County of St Louis on the 9th day of January 1850, by delivering a certified copy of the petition and reading this writ to James G. Barry Mayor of the City of St Louis.

Louis T. LaBeaume Shff
By Franklin Wise Dept

Judgmt

And afterwards to wit; on 30th April 1850, the following proceedings were had in the words and figures following to wit.

William Waddingham, William G. Ewing, George W. Ewing, Charles Chambers, Jane Chambers, William S. Harney, Mary Harney, John Andoe, John Biddle, Henry M. Shreve, Henry Von Phul, John Finney, William Finney, James Clemens Jr, Henry Boyce, Octavia Boyce, Richard Graham, Catharine Graham, Louis G. Picot &

21.

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Walker R. Carter
vs
The City of St Louis } Petition.

Now at this day comes the said plaintiffs by their attorney and it appearing to the satisfaction of the Court, that process in the above entitled cause has been duly served according to law, and the said defendant having wholly failed to answer, demur to, or otherwise deny the allegations, matters and things stated in the petition of the said plaintiffs, It is ordered adjudged and decreed by the Court that the relief prayed for by the plaintiffs be granted, that the said City of St Louis its officers, agents and servants be perpetually enjoined and restrained from condemning, seizing or taking possession of that piece parcel or portion of land mentioned in the plaintiffs petition situated between Cherry and Biddle streets in the City of St Louis, bounded on the south by Cherry street, on the north by Biddle street, on the East by the Mississippi River, on the west by the Eastern line of Front street as laid down on the map of the City of St Louis, and that said city its officers, agents and servants be and they are hereby perpetually enjoined and restrained from condemning seizing taking possession of, or using the said land for the purposes of a public wharf or landing, and it is further considered that said plaintiffs recover of said defendant their costs and charges herein expended and have thereof execution.

Motion ~~And afterwards to wit on the 24th day of May 1850, the following motion was filed in the Clerk's Office in the words and figures following to wit:~~

"Motion & affd filed

May 24th 1850 "The said defendant files a motion to set aside the Judgment by default and two affidavits in support thereof

And afterwards to wit on the 15th day of June 1850. the following proceeding was had in the words and figures following to wit:

William Waddingham &c
vs
The City of St Louis

Motion overruled

appeal Bill except filed

The motion of said defendant to set aside the judgment by default being heard and the Court fully advised of and concerning the premises it is ordered that said motion be overruled, thereupon on said motion of said defendant an appeal is granted it from the decision herein to the Supreme Court, and the Court doth order that said defendant enter into bond according to law in the sum of fifty Dollars, and said defendant files a bond which is executed and acknowledged in Open Court by the obligors therein, and which is approved by the Court, said defendant also files a bill of exceptions, And thereupon said plaintiffs file an affidavit and a motion for an attachment, which motion being heard it is ordered that the same be overruled, and said plaintiffs file a bill of exceptions.

Bond to Waddingham et al

Know all men by these presents that we H. R. Gamble as principal and Sinclair Kirtley as security are held & firmly bound, to William Waddingham, William G. Ewing, George W. Ewing, Charles Chambers, Jane Chambers, William S. Harny, Mary Harny, John Andoe, John Biddle, Henry M. Shreve, Henry Von Phul, John Finney, James Clemens Jr, Henry Boyce, Octavia Boyce, Richard Graham, Catharine Graham, Lewis G. Picot & Walter P. Carter in the sum of fifty Dollars, for the payment whereof well & truly to be made we hereby bind ourselves

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our Executors and administrators firmly by these presents. Signed and sealed by us and dated this 15th day of June Eighteen hundred and fifty. The Condition of this obligation is such that whereas the said plaintiffs at the April Term in the year Eighteen hundred and fifty of the St Louis Circuit Court, received against the said City of St Louis a Judgment, the Record whereof still remains in said Court and whereas the said City of Saint Louis appeals to the Supreme Court, from the Judgment of said Circuit Court. Now if the said H. R. Gamble shall pay all costs and damages which may accrue & be awarded against the said City of Saint Louis occasioned by said appeal and shall prosecute this appeal, and perform such Judgment as shall be given by the Supreme Court and such as the Supreme Court may direct the Circuit Court to give and if the Judgment of said Circuit Court, or any part thereof be affirmed, if said City of Saint Louis shall comply with and perform the same so far as it may be affirmed & shall pay all damages which may be awarded against said City of St Louis by the Supreme Court, then this obligation shall be void, otherwise it shall remain in full force and virtue.

Signed and acknowledged by the obligors & approved by me.

A Hamilton
Judge

H R. Gamble (Seal)
Sinclair Kirtley (Seal)

Bill of excepts

Filed the date last aforesaid -

Waddingham & others
against
The City of St Louis

In the Saint Louis Circuit Court
Apl Term 1850.

Be it remembered that on the

24th day of May 1850. the defendant by her Counsellor filed herein a Motion to set aside the order & Judgment in this Cause & for leave that said defendant be permitted to file an answer herein in the words & figures following.

Mo to set aside the ord & judgt

Waddingham & others against The City of Saint Louis	In the Saint Louis Circuit Court

Said defendant by her Counsellor moves the Court to set aside the order & Judgment herein & to allow said defendant to file an answer to the petition herein for the reasons;

1st There was no sufficient Service of the process in this Cause served on defendant according to the Statute in such Case made and provided.

2nd The Service of process in this Cause was irregular & insufficient to authorize the final Judgment rendered herein.

3rd For the reasons set forth in the affidavit filed with this Motion

Kirtley, City Counsellor

Also

& also filed in support of said Motion, the affidavits of Sinclair Kirtley & Luther Mc. Kennet in the words & figures following.

Waddingham & others against The City of Saint Louis	In the Saint Louis Circuit Court

State of Missouri County of Saint Louis } ss

Sinclair Kirtley

aff of Kirtly

Being duly sworn saith, that the election for City officers was held on the first Monday of April 1850. and that during the first week of April after said election

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R. S. Blennerhasset Esqr. the former City Counsellor resigned that office. That this affiant was appointed by the present Mayor City Counsellor & on the 22nd day of April gave the bond required by law & entered on the duties of that Office, when he found the City involved in a large amount of litigations in the several Courts of the City, with non of which had this affiant any previous Connection or acquaintance. That on apply to Mr Blennerhasset for information & the papers pertaining to the City business in his possession, this affiant received as he supposed all the papers in his hands relating thereto & immediately endeavoured to inform himself of the condition of the business & its necessary preparation. There were Sixteen Causes on the Dockets of the Circuit Court & Court of Common Pleas, requiring the attention of the City Counsellor. That he received from Mr Blennerhasset the Copies of the petitions left by the Sheriff at the time of the service in the Cases recently Commenced, but that no such copy in the case of Waddingham & others against the City of Saint Louis was delivered to him nor did this affiant ascertain that such a case was pending in the Circuit Court until the Evening of the 16th of this Month when he casually learned that final Judgment had been taken for want of an answer on the 30th day of April. Affiant has since ascertained that process in this Case had been served but as this affiant believes not in a regular or legal Manner as by law is required on the former Mayor of the City who had not as far as this affiant can learn handed the Copy of the petition in said Case to Mr. Blennerhasset or to his Successor in the Office of Mayor, Nor had he left it among the papers of the Office, as it cannot be found upon Searching for it as has been done. And so this affiant states that it has been in Consequence of the recent Change in the officers of the City, the number & importance of the cases to be examined & attended to, that the Case of Waddingham & others against

the City has been overlooked as it was, and that no answer has been filed, that the case involves very great interest to the City of Saint Louis & rights which she has long claimed & insisted upon & which she is very desirous to have the opportunity of asserting before the Courts of the Country, but this affiant has no suffiant knowledge of the facts to express any opinion in the legal merits of the claims of the parties

Sworn to & Subscribed
this 24th May 1850.
M. S. Cerré clk

Sinclair Kirtley

Waddingham & others
against
The City of Saint Louis

In the Circuit Court
of Saint Louis

State of Missouri
County of Saint Louis } Sct.

Kennett's affdt

Luther M. Kennett Mayor of the City of Saint Louis being sworn saith, that the rights & interest of the City of Saint Louis involved in the above cause is large & of great importance to its future growth & prosperity, that they have long & strenuously insisted upon & as this affiant is informed & believes are founded in legal right & justice, That the City is desirous of having an opportunity of making her defence to the petition in the above cause before the Courts of the Country & is in the course of preperation for that purpose & this affiant if so allowed to defend expects & believes, from the advice & opinion of legal counsel, that said City will be able to make & maintain a good & meritorious defence herein upon the merits of the case.

Sworn to & Subscribed
this 22d May 1850.
M. S. Cerré clk

L. M. Kennett

& on the hearing of the motion upon the return of the Sheriff of the service of process in the cause & the said affidavits

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28

which was all the proof offered on the motion the Court overruled said motion, to which opinion & decision of said Court in overruling said motion the defenant by her a Counsellor excepts & prays this his exception to be signed & made a part of the record in this Cause, which is done.

A. Hamilton,
Jurs. Pr.

Bill Except for plff

Bill of Exceptions filed by plaintiffs on 15th day of June 1850. in the words and figures following to wit:

William Waddingham &
Others plaintiffs
against
The City of St Louis.

Be it remembered that on this 14th day of June 1850. the plaintiffs filed the following affidavit.

Hudson's affdt

In St Louis Circuit Court April Term 1850. Thomas B. Hudson makes oath and says, that since the granting of the injunction in case of William Waddingham and others against the City of Saint Louis, and since the said injunction was made pertual in said Cause by the Order and decree of this Court on the 30th day of April A.D 1850. the agents and Offers of said City of St Louis, have in violation of said injunction instituted suits and proceedings at law against several Masters of Steam Boats for resorting to and using the premises mentioned in said Order and decree as the private wharf

of the Complainants in said case, and have prosecuted such suits before the Recorder of said City and threaten to collect of said Masters of Steam Boats the penalties that may be awarded by the Judgment of said Recorder: and who threaten to institute from time to time further suits and proceedings against such Masters of Steam Boats as may resort to and use the said private Wharf of said Complainants; And deponent further states that said suits and proceedings have been commenced and prosecuted by Kirk Anderson attorney of said City, under the express command and direction of Luther M Kennett the Mayor of said City; they said Anderson & Kennett having then notice of said injunction and of the order and decree of this Court making said injunction perpetual.

Affdvt

Sworn to & Subscribed in
Open Court June 14th 1850.
M. S. Cerré clk

Tho. B. Hudson

And thereupon by attorney moved the Court for an attachment against Kirk Anderson City attorney and Luther M. Kennett Mayor of the City of St Louis, which motion is in the words and figures following—

William Wadding ham & others
against
The City of St Louis

And now come the said plffs and move the Court for an attachment against Kirk Anderson City atty & Luther M. Kennett Mayor of said City, for the following reasons to wit: for the reasons contained in the annexed affidavit

Mo over rule

T Hudson
atty for plffs

29

30

which Motion the Court overruled, and to which opinion of the Court the plff by their Counsel excepts and prays this their Bill of Exceptions to be signed Sealed and made part of the Record in this Case which is done.

A Hamilton
Jr. Jr.

The above is Correctly Stated as I believe
S. Kirtley

29/03

And afterwards to wit on the 15th day of June 1850 the following proceedings were had in the words and figures following to wit.

Entry set aside, & new one entered therefor

William Wadding ham, William G. Ewing George W. Ewing, Charles Chambers, Jane Chambers, William S. Harney, Mary Harney, John Andoe, John Biddle, Henry M. Shreve, Henry von Phul, John Finney, William Finney, James Clemens Jr. Henry Boyce, Octavia Boyce, Richard Graham, Catharine Graham, Louis G. Picot, Walker R. Carter

vs

The City of St Louis

} It appearing to the satisfaction of the Court that the entry of the final Judgment in this Cause made on the 30th day of April 1850. does not sufficiently set forth the actual judgment rendered, it is ordered that said Entry be set aside and the following entry therefor as of that day Nunc pro tunc –

Now at this day come the said plaintiffs by their their attorney and it appearing to the satisfaction of the Court that process in this Cause has been duly served according to law, and that said defendant has wholly failed to answer, demur or otherwise

deny the allegations, matters and things stated in the petition of the said plaintiffs, it is ordered adjudged and decreed by the Court that the relief prayed for by the plaintiffs, be granted, that the said City of St Louis its Officers Agents and Servants be perpetually enjoined from Condemning Seizing or taking possession of that piece parcel or portion of land mentioned in the plaintiffs petition, Situated between Cherry and Biddle Streets in the City of St Louis, bounded on the South by Cherry Street on the North by Biddle Street on the East by the Mississippi river, on the West by the Eastern line of Front Street as laid down on the Map of the City of St Louis, and that said City its Officers, Agents and Servants be and they are hereby perpetually enjoined and restrained from Condemning Seizing taking possession of or using the said land for the purposes of a public Wharf or landing for the benefit of the City aforesaid and from otherwise disturbing or interfering with the possession and use of said land as a private Wharf by said proprietors thereof and that the plaintiffs recover their costs of Suit and may have therefor Execution

State of Missouri } ss
County of St Louis }

I, Michael J. Cerré, clerk of the Circuit Court within and for the County aforesaid, Certify the foregoing to be a true and Correct Transcript of Record and proceedings in the Case of William Waddingham and others against the City of St Louis, as fully as the same remain in my office.

In Testimony Whereof I hereto set my hand and affix the Seal of said Court, at office in the City of St Louis, this 2nd day September AD. 1850 } M. J. Cerré Clk

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(41) 18 ~~60~~

March T. 1851

William Waddingham et al

vs Transcript

The City of St. Louis
appellant

Filed Oct. 8th 1850
W. B. Starke Clerk

$10.

William Waddingham & others Plaintiffs and Appeal & appellees
The City of St Louis Defendants & Appellant

In the Supreme Court. October term 1850, from the St Louis Circuit Court.

And now at this day comes the said ~~defendant~~ appellant by her Counselor and says that there is manifest error in the record & proceedings in said circuit court in said cause as also in the rendition of the judgment therein in this to wit;

1st That it appears by the record & proceedings aforsaid that said Circuit Court rendered judgment on the petition filed therein in favour of said petitioners when by law no such judgment ought to have been rendered therein.

2nd There was no sufficient or legal service of process on the defendant in said cause to authorize said Circuit Court to render the judgment in favour of plaintiffs given in said cause.

3rd The circuit court erred in overruling defendants motion to set aside the judgment by default against defendant & for leave to file an answer to the plaintiffs petition

4th The circuit court erred in refusing to sustain defendants motion to set aside the default taken in said cause & for leave to defendant to file an answer therein.

5th. The circuit court committed manifest error in said cause in rendering a judgment nunc pro tunc for plaintiffs against defendant after an appeal had been prayed & granted by said court to this court & after said appeal had been fully perfected & without any notice to said defendant & its counselor or attorney.

6th. The circuit court erred in entering & rendering a judgment in said cause nunc pro tunc for plaintiffs against defendant after an appeal had been consummated & granted by said court therein.

Wherefore for the errors aforesaid as also other manifest errors in said record & proceedings as also in the judgment aforesaid said appellant ~~defendant~~ prays the court here to set aside reverse & annul the judgment aforesaid & that the same be held for nought & that defendant be restored to all things which it hath lost by reason thereof.

Kirtley & Gamble
Att'ys for ~~deft~~
Appellant

7th And the said appellant further says that in the record and proceedings aforesaid and in giving the judgment aforesaid there is error in this

that the said Circuit Court had no jurisdiction of the said suit and had no lawful power to render a judgment therein and the said judgment so rendered ought to have been set aside

8th. There is also error in this that by the record aforesaid it appears that the said Circuit Court rendered a judgment by default in favor of persons as plaintiffs who are not plaintiffs in the writ pretended to have been served upon the defendants and are not by any order of the Court made plaintiffs.

Wherefore for the errors aforesaid as well as for other errors in the record aforesaid appearing the said Appellant prays that the judgment aforesaid in form aforesaid be considered be reversed annulled and for nought held and estimed &c

Kelley & Gamble
for Appellant

The City of St Louis
appellant
ads } Assignment
of Errors.
William Wadding-
ton & others appel-
lees.

Filed 26. Oct 1880
W. B. Stark clk

City of Mobile v. Waddingham & others

Waddingham & others presented a petition to the Court of Common Pleas, asking an injunction to restrain the City authorities of Mobile from condemning certain portions of their lands lying on the river & within the corporate limits of the city as a public wharf. The injunction was granted until the Circuit Court, to which tribunal the order was made returnable, should make further order on the subject. A writ was issued from the Circuit Court, returnable to the April Term 1850, which was executed by "delivering a certified copy of the petition, & reading the writ to James G. Bury Mayor of the City of Mobile." At the return term, the defendant failed to answer, & a judgment by default was entered, making the injunction perpetual on the bill. On the 24th May a motion was made to set aside this judgment & permit the defendant to answer — but the motion was overruled — & the case brought here by appeal.

The propriety of the judgment by default depends upon the sufficiency of the service of the writ. It is conceded, that this

return does not show a service literally conforming to either of the modes of service directed by the 4th section of the 3rd act. of the Practice Act. It is however contended, that it is a substantial compliance, & therefore should be upheld. Since the first mode of service specified in the law is by reading the writ & the petition, it is thought that leaving a copy of the petition, which is a more formal service than reading it, will not ~~constitute~~ make the service less beneficial to the defendant than it would have been if the petition had been merely read.

There are only two modes of personal service pointed out by the act – one is by reading the petition & writ – & the other is by delivering copies of them. The officer may pursue either mode – but the act does not seem to contemplate the propriety of separating the process, by ~~one~~ reading one portion & delivering a copy of the other. It is probably designed, that the entire process, writ & petition, shall be served in the same way. It might have been provided, that it would be sufficient to serve the entire process in either of the two modes specified – so that if the petition

were served, either by sending or delivery, and the writ were served, either by sending or delivery, the service should be deemed good - & it may be admitted, that no very good reason occurs, why the provision was not so framed. But we are inclined to adopt the more obvious construction of the provision as it now stands. There may be inconveniences attending ~~see~~ the service of the same process in two different modes, not suggested by the circumstances of this case

We do not consider it necessary to determine upon the sufficiency of the affidavits filed, ~~th~~ which were designed to present reasons for opening the judgment by default. Had the service of the writ been sufficient, the history of the case would certainly present some difficulties ~~not easily solved. &~~ growing out of the recent statute for "reforming the pleadings & Practice in Courts of Justice." This proceeding, by whatever name it may be called, is substantially an ~~exercise~~ interposition of judicial power to protect the citizen against what is deemed unconstitutional encroachments of the body politic. The Practice Act declares that the distinction heretofore existing between suits at law & in equity is abolished, & proceeds to give a new name by which every form of action

shall be hereafter distinguished. Incidental to the old forms had sprung up a variety of rules & precedents, by which the courts were governed, but in relation to which the new code is silent. To which system shall we look for guidance when such questions arise? Shall we go to Chancery or Common law, according as the proceeding now termed a civil action belongs in its character & nature, if not in its name, to the one or the other of these ancient systems? The judgment by default in a common law action stood upon a very different footing from that in which a decree nisi did in a court of Chancery. There can be no question but that the present proceeding would have fallen within the province of the Chancellor, & certainly there would have been no hesitation in setting aside a decree nisi taken under the circumstances which marked the judgment by default in this case.

The most important question discussed in this case is, whether the petition made out a case authorizing the interference of the Court. This question might be passed by, since the judgment by

Default must be set aside; but as the point is made & arises on the record, we will state our impressions of the law arising from the facts stated in the petition.

We readily assent to the proposition, that it is but a semblance of exercising the eminent domain, for a state or a municipal corporation created by it, to appropriate the revenues of an existing franchise, already dedicated to the same public uses for which it is ostensibly seized. If a bridge, or wharf or road, already devoted to public uses & regulated by the public authorities, is sought to be made tributary to the public revenue, under color of taking private property for public uses, it will be the duty of the courts to ~~interfere~~ interpose. But the facts disclosed in this petition do not call for the application of such principles. There was no private wharf in existence. The river bank owned by the complainants had been used as a place of landing, & without objections on their part — but this circumstance constituted no better objection to its being converted into a public wharf, with all the erections appropriate to such a purpose, than the owner of a

tract of land would have to the building of a macadamized road over that portion of it which was unenclosed & already open to public travel.

The complainants, it is true, avow that ~~their~~ a design had been & yet was entertained by them, to erect a wharf for the accommodation of the public; — that they had in fact, on the 2nd of November 1849 gone so far as to enter into an agreement among themselves, & reduced that agreement to writing, to cause the ~~two~~ river banks to be graded & otherwise suitably prepared for a public wharf; — that in ~~consequence~~ pursuance of this agreement they had made contracts for the necessary works & expended money under said contracts. They further declare their entire readiness to submit to any regulations respecting the construction of such wharf & the rates of wharfage as the City authorities may dictate.

But it will be seen that the ordinance of the City (No. 2263) for condemning this land, with a view to make

it a public wharf, was passed on the 10th of August 1849, before the agreement recited in the petition was executed & so far as appears, before any design was entertained on the part of the proprietors to appropriate their land & money in this way. At the date of the ordinance the land of the petitioners seems to have been in a state of nature — no wharf had been erected or even commenced — nor had a single step been taken to put this land in a condition to be used in the mode & for the purposes for which it was desired.

This is not therefore an attempt on on the part of the public authorities to assume, under pretext of public necessity, the management of a wharf already in existence, owned by private citizens, & dedicated to the same purposes for which the public authorities ~~design~~ desire it.

The petition however assumes other grounds upon which the interposition of the Court is asked. The petitioners declare they are willing to devote this land, at their own expense, to the same public use for which the City authorities have seized it — & on such terms, as these authorities

may direct – & to this end, they propose to give such security as the Court may direct to secure the fulfilment of their undertaking.

This presents a different question. Is a municipal Corporation, authorized by its Charter to ~~erect~~ construct wharves & other similar public ~~[illegible]~~ conveniences, upon the lands of private citizens, bound to select as agents for the accomplishment of the work the owners of the land upon which the erections are proposed? Is the power of the City or the State (where the State acts directly) asserted by an offer on the part of the citizen to do himself what the city or the State proposes to do with his private property? This would appear to be a matter of legislative discretion. Such a mode of procuring public conveniences may be often very desirable, but its adoption or rejection is addressed to the discretion of the political body through

whom the corporation or state acts. The power of eminent domain is not affected by such propositions. Our Constitution allows private property to be taken for public uses, upon making just compensation to the owner - but to say, that this shall not be done, when the owner proffers to appropriate his property to the same use for which the public desire it, is to impose an additional restriction not provided for in the Constitution. If the petitioners could fully secure to the City the erection of this wharf, & as they propose, would further submit the rates of wharfage to be regulated by the City authorities; & in their discretion to be entirely abolished, it would certainly seem strange that so liberal a proposition should be declined. But we have no power of reversing the legislative discretion of the municipal authorities of St Louis. Their power to ~~carry~~ conduct this work, at their own expense, upon paying a just compensation to the owners of the land, has been delegated to them by the state, & no sufficient objection to the exercise of this power has been suggested by the facts of the petition.

We shall reverse the judgment & dismiss the petition.

W. B. Napton

Concurred in:
James H. Birch.
J. F. Ryland

53

Waddingham
& others
v.
City of St Louis

Opinion
of the Court

W. B. Napton

Filed Apl 3d 1857.
W. B. Starke clk

In Supreme Court

William Waddingham, et al. Respondents,

vs

The City of St Louis, Appellant.

The Respondents respectfully ask of this Court a rehearing in the above entitled cause upon a point of great importance to their interests, and in respect to which it is conceived that this Court has misapprehended the language of the petition.

This Court in its delivered opinion, after distinctly denying the power of the City to condemn to publick use a private wharf already existing as such, proceeds as follows;— "But the facts disclosed in this petition do not "call for the application of such principles. There was "no private wharf in existence." The respondents think that this petition has here been misconstrued. They appeal to its plain language. The petition sets out with a statement in terms that the petitioners "have owned and possessed "the land for many years and at all times have suffered persons to "use the same as a wharf, retaining however their rights of property "in said ground; that the publick have been permitted to deposit "merchandize and property thereon, and vessells to receive and discharge "their cargoes on said land." It is added that "the owners of "said land have long designed improving on said land said wharf" that they entered into an agreement among themselves to complete said wharf; and that they were actually engaged in the grading of said land and preparing the same for a convenient wharf. In a subsequent part of the petition it is stated in clear and unequivocal terms that "said "land for a considerable time has been and now is open to publick "use as a wharf as fully in all respects as the same would or "could become by any formal condemnation thereof." The petition containing the statements before mentioned closes with a prayer that the City may be restrained "from disturbing

"or interfering with the possession and use of said land as a "private wharf by the proprietors." The respondents, in view of the explicit language of their petition as above recited, conceive that they ought to ask from this Court a review of its opinion; and particularly as the proceeding was instituted under a code of practice dispensing with all technical rules of pleading and requiring from the complainants nothing but a simple statement of their grievances in plain and intelligible terms.

There are other views presented by this Court in which the respondents can not acquiesce. The opinion as delivered by this Court contains the following passage:

> The river bank owned by complainants, had been used as a place of landing, and without objection on their part; but this circumstance constituted no better objection to its being converted into a public wharf, with all the erections appropriate to such a purpose, than the owner of a tract of land would have to the building of a McAdamized road over that portion of it which was unenclosed and already open to public travel.
>
> The complainants, it is true, aver that a design had been and yet was entertained by them, to erect a wharf for the accommodation of the public; that they had, in fact, on the 2d of Nov. 1849, gone so far as to enter into an agreement among themselves, and reduced that agreement to writing, to cause the river bank to be graded and otherwise suitably prepared for a public wharf; that in pursuance of this agreement they had made contracts for the necessary works and expended money under said contracts. They further declare their entire readiness to submit to any regulations respecting the construction of such wharf and such rates of wharfage as the city authorities may dictate.
>
> But it will be seen that the ordinance of the city, No. 2263, for condemning this land, with a view to make it a public wharf, was passed on the 10th of August, 1849, before the agreement recited in the petition was executed, and, so far as appears, before any design was entertained on the part of the proprietors to appropriate their land and money in this way. At the date of the ordinance the land of the petitioners seems to have been in a state of nature; no wharf has been erected, or even commenced; nor had a single step been taken to put this land in a condition to be used in the mode and for the purposes for which it was desired.

The respondents [illegible] for the consideration of the Court [illegible] upon the views expressed in the [illegible]

1. It is [illegible] to suppose that artificial works are [illegible] a wharf. The banks of navigable [illegible] set apart by the proprietors and used [illegible] of landing are whenever. This is amply proved by the authorities cited on the brief of the respondents. This Court however seems to regard the circumstance that the land in question was in its natural state not graded, paved or otherwise improved by and as decisive to show that it was not a wharf. With difference to the Court, it is submitted that the question whether a particular tract on the river bank be or be not a wharf is to be determined, not by the amount of labour that has been expended upon it in the way of improvement, but simply by the publick use to which it has been dedicated.

2. Land set apart by the proprietor to be used as a publick landing or wharf can not be applied by the proprietor to other purposes. In the language of Lord Chief Justice Hale "it is affected with a publick interest & ceases to be jus privati only." The argument therefore, derived from the acknowledged right to condemn for publick use as a highway, unenclosed land over which the publick have been permitted to travel, seems to be wholly inapplicable. In the latter case, the proprietor may enclose his land & prevent the publick travel over it, whenever he pleases. This point has been so adjudged by this Court at the present term. But in respect to land set apart to be used as a publick wharf no such power in the proprietor exists. He is irrevocably bound by his dedication

3. But there is another important particular in which the analogy between a wharf and a road fails. No citizen has the right, without a grant from the sovereign, to exact from the traveller a toll for the use of a publick road which he has opened through his land. But the right of a proprietor to take a reasonable toll for the use of a wharf within a port is unquestionable. In fact the taking away of this toll from the proprietor & vesting it in the City is the very grievance of which the respondents complain in their petition. The argument, then, from the case of a road or highway where there can be no private proprietorship without legislative grant, obviously amounts to nothing.

4. This Court has certainly through inadvertence misapprehended the language of the petition when it says that "the petitioners were that the design had been and was yet entertained by them to erect a wharf for the accomodation of the publick." The respondents have carefully examined the petition and they do not find that that significant word "erect" once occurs in any of its moods

or times. Nor do they find any language of equivalent import. On the contrary, the words set down in the petition are that the petitioners "have long designed improving said wharf for the accomodation of the publick." Now, there is a fundamental difference, in reference to the questions before the Court, between the erection of a new wharf and the improvement of one already in existence. The respondents confidently appeal to their petition on this point and they invite a most careful and rigid scrutiny of it. They have utterly mistaken their own language & their own meaning, if it is not clearly expressed that a private wharf did in fact exist on the premises in question for many years before the attempt on the part of the City to make the condemnation to publick use. The history of this wharf is briefly told. As long ago as the year 1823 the City authorities of St Louis directed a general survey of the City to be made and a map to be prepared conformably to the survey. The work was done and the map was published. According to this survey, the space between the river and the first warehouses was called Front Street and was designed, and has in fact been used, for a publick landing or wharf. The western line of this wharf was continued northwardly from Cherry Street to the Northern line of the City. The land above Cherry Street was owned by private individuals, but the action of the City in designating the wharf was assented to and acquiesced in, by them; and accordingly by the act of the City & of the landowners a wharf was established over the premises in question as early as 1823. The landowners above Cherry Street were careful however to retain their proprietary rights. Those rights were successfully asserted in this Court in 1836, as may be seen in the report of the case O'Fallon v Price & Daggett 4. Missouri Reports page 343.

From the foregoing statement, drawn from the publick history of the City & notorious to all the old citizens, it will be apparent that the land in question became a wharf more than 25 years ago, by the action and consent of the City and the private proprietors. It is true there is no detail of this particular evidence in the petition, but the respondents submit that the statement in their petition that the premises had been a wharf for many years is sufficient according to the established rules of pleading that prevailed before the introduction of the more liberal provisions of the new Practice act. Those liberal provisions will be seen in article VII particularly at Section 5.

5. The court is understood to express the opinion that the ordinance of the City Council passed in August 1849, directing the Mayor to proceed to the condemnation of all the ground holden by private individuals within the bounds of Front street, had the effect of withdrawing the land from the control of the proprietors from the date of the ordinance, so far as such control might interfere with any subsequent execution of the ordinance by the Mayor. This opinion is calculated to strike the property holders of St Louis with surprise; for it is notorious that ordinances like the one in question are of frequent occurrence, and in many instances no proceedings are instituted under them for a series of years. Can it be, that the City Council may, by mere ordinance, set a mark on the private property of a citizen, and deprive him of its use and control until it may suit the pleasure of the executive officers to proceed to its formal condemnation? The answer to this question is perhaps not material to the present controversy, but it is obviously so important in its bearings, that the respondents feel justified in respectfully asking of the Court that it may be re-considered.

6. The respondents have just remarked that they consider the ordinance as not material to the merits of the present case. They regard it so; for they insist that according to the express language of their petition their private wharf had existed as such for many years prior to the passage of the ordinance; and according to the publick well known history of the City its existence dates as far back as 1823.

In conclusion the respondents ask the attention of the Court to the particular judgement rendered in this case. The judgement below is reversed and the petition is peremptorily dismissed. The grounds of this judgement are two; — 1st that the Sheriff informally or irregularly served the original process — in short that by the default of the officer there was no legal service of the summons: 2d — That it was not sufficiently averred in the petition that the premises in question were a private wharf. The respondents respectfully suggest that it appears to them that conceding both grounds, the proper course under the law would be to remand the case to the lower Court to the end that the defects might be supplied. It is provided by statute that "when any writ shall not be executed the clerk shall issue other like process." Rev. Stat. 1845. Writs & Process sec 4. So too the faults of the petition, if any, are proper subjects of amendments, and under the new practice act it would seem that the party may well insist on such amendments as matter of right. See practice Act 1849 art. XI sec. 5. But under the judgement of this Court as it now stands, all opportunity of supplying any defects in the service or [redacted] in the pleadings is absolutely cut off.

For these reasons the respondents ask for a re-hearing.

Hudson & Field

Waddingham & al.
vs
City of St Louis

Motion for Rehearing

Filed apl 21st 1857.
N. B. Starke clk

Waddingham & al.
vs.
City of St. Louis

abstract of Bill

Plffs allege they have at all times allowed same land to be used as a wharf & permitted the public to deposite merchandise & property thereon and vessels to receive and discharge cargoes thereon, & without charge, but without parting with their rights in the land: that owners have agreed to improve it as a wharf as per agreement made part of petition: that they have proceeded to grade the land & prepaing same as a wharf & will be completed as such as soon as possible & free to be used by the public as a wharf & public landing upon payment of wharfage as City council should fix same: till such improvements made, are willing public should use it free of charge: that Mayor threatened to enter into & upon said land & with force & violence, cause than employed to be expelled &c, & to take forcible possession in name of City: The plffs informed City of all this & of their object as their memorial to City shows hereto annexed as part of petition, The Mayor under instructions of City Council & under ordinance No 2263, a copy of which is annexed, claims right to condemn said land to use of public. The Mayor gave notice he would condemn same on 9 Jany 1850 Plaintiffs applied to City officers for grade &c, that in the work done and to be done, they have complied & will comply with ordinances, City has fraudulently endeavored to depreciate value of the land, by circulating reports that the plaintiffs have no title. The Council resolved that plffs had no title,

The whole of City proceedings were concocted & intended to to cheat & defraud pl'ffs, & deprive them of income from said land. The taking the property by the City, will not alter use of it in slightest degree, ~~and all~~ The City is trying to get the property & will let it be unimproved, & thus the adjacent property will be injured: they have prejudices against northern peat &c.

Wm Waddinghamsal
vs
City of St. Louis

Petition filed 8th January 1850

Alleges pltfs are owners in severalty of the space between what is called Front Street & River, between Cherry & Biddle Streets,

9 Jany 1850 writ issued; and on same day executed by delivering a certified copy of petition to the mayor & reading the writ to him in said County of St. Louis

30th Apl. 1850 Decree by default entd of perpetual Injunction against the City its officers agents & servants, condemning seizing or taking possession of said land or using it for purposes of a public wharf or landing

1850 May 24. Motion made & affdvts filed to set aside decree

1850 June 15th Motion overruled and appeal taken

Reasons for setting aside decree assigned were

1. no sufficient service of process on deft,

2. service was irregular & insufficient

3 The matters set forth in the affidavits,

Affidavit of Nutley states that Blumenhasset was Counsellor of deft, & that during the first week of April after the City election which was on 1st Monday, he

resigned; that deponent was appointed & that on 22 April, he entered on duties of office; that he applied to Blumenhorst & got as he supposed all the documents of suits, but this was not among them; nor did he know of this suit till 16th. May;

Hunt swears to merits as he is advised,

15 June 1850 Entry of decree nunc pro tunc, restraining Lutz &c, as aforesaid, & also from otherwise disturbing or interfering with the possession & use of said land as a public wharf by the proprietors

The process was correctly served on the Lutz by delivering a copy of the petition to him and reading the writ.

Acts of 1848-9 page 78 Section 4.

Rev. Code of 1845 p. 237. Sec. 2.

III The plaintiffs have not, in their affidavits on which the motion to set aside the judgment was based, made out a case of due diligence, and the Court below therefore rightly refused to open the judgment.

11 Mis. Rep. 192 mistake of attorney no excuse for default.

10 Mis. Rep. 392. negligence of attorney under strong circumstances, like the present.

8 Mis. Rep. 686. negligence of attorney no excuse.

7 Mis. Rep. 6 & 25 deft. relied on maker of note to defend as he promised, & did not; no excuse.

6 Mis. Rep. 254 attorney surprised by cause coming on soon not enough.

4 Mis. Rep. 557 neglect of party apparently, who had forgot whether he had applied to counsel.

These cases show that diligence and merits are both necessary here.

The affidavits allegements perhaps, but are utterly defective as to the other point. The process was served months before the election. It does not appear that any attorney was applied to, or even advised of the existence of the suit till after the decree had been entered; and no information was given to the lady Counsellor till three or four weeks after the commencement of the ~~[illegible]~~ of Court.

IIII. Acts of assembly of 1846-7 p. 185 act authorizing taking wharves & paying therefor.

Acts of 1848-9 p. 502. as to purchasing & compromising so as to quiet title to wharf.

Constitution of Missouri Article XIII. clause 7 prohibits taking private property for public use without just compensation.

IIII There is equity in the petition, as the City has no right to appropriate the bank of the River for the purpose of revenue, when its appropriation for public use as a wharf, is not necessary, the proprietors in fact, devoting it to that purpose, under the control of the City.

The case is to be considered on the allegations of the petition alone; and they make out a case of an attempt of the City to condemn the land for purposes of revenue alone —

12 Pick 480 private property cannot be taken for public use, merely for ornamental purposes, The purpose must be both necessary & useful,

6 Howard 507 at page 597

The Lean Judge says that if the use of the bridge after it was taken, was the same as before, he should consider the taking a bad act, at p. 543-4 Justice Woodbury gives the limitation of the right of eminent domain, p. 545 last paragraph, also 548,

7 Pick. 457. "It is only in cases of public exigency that private property can be taken, & then "only for public use, and upon making a just & "full compensation".

2 Kent's Com. 276 If property be taken
① for purposes not of public nature
such law would be void.

3 Paige 45, Rail Roads are for public use &c
canals, ferries, bridges &c, p. 73-74.
3 Fairfield 222 illustrates the subject as to
what is public use.

3 Yerger 41 Land for a grist mill is for
a public use.

2 Porter 296 &c land taken for roads is for
public use.

It appears from these an innumerable other authorities that might be cited, that land can be taken for the purpose of being used by the public, as a road, or a canal, for a bridge or mill, for a basin or a wharf, where the necessity exists, that the public should have such use of it. But it is not such use of it as is intended by the constitution when land is taken for purposes of revenue; nor is it taken for public use, nor does the exigency exist for taking it, when it is already applied exactly in the way it is proposed to use it when taken —.

The word use in the constitution does not mean benefit. The State cannot replenish its treasury, by taking & condemning private property. But it can, under the

right of eminent domain, take specific articles or pieces of property, to be used as such when public necessity requires it.

Taking property for purpose of revenue, is in nature of tax.

The Constitution prohibits the taking of private property for public uses as a matter of revenue, or pecuniary gain. In 19th. Section of article XIII. it is declared that "all property subject "to taxation in this State shall be taxed in pro-"portion to its value". This is the annunciation of a great fundamental principle. It is that in levying taxes on property, they shall be apportioned to the value. In other words, in raising revenue, — i.e. money for the exigencies of Government, contributions shall be made in proportion to the value of property.

Besides, the necessity of doing it can never exist; as the State has power to provide for its wants in this respect, by compelling all its citizens to pay in proportion to their estates, such taxes or contributions, as may be needed at any time. To take the property of individuals ~~ad libitum~~ for, the ordinary purposes of revenue is tyranny: and to possess that power ad libitum, constitutes the Government a tyrannical one.

2 Sand. Superior Ct. Reports 98, Too much land was taken for widening Street in New York. & held void.

This clause in the Constitution providing

for the means of carrying on the Government, is in its character, a negation of any other mode of doing it. It embraces all the power conferred upon the Legislature on that subject,

IV The Court has power to interfere in this stage of the Proceedings by injunction, and prevent the condemnation of the property for the use of the City.

4 John. Chy. Rep. 53 City of New York enjoined from proceeding to take possession & dig down the ground possessed by complainant for 25 years till they should show their title at law.

2 Story's Eq. Sec. 886. The injunction to restrain proceedings at law, are not confined to any point of the proceedings, but may be granted in any stage of the suit

Ibid. Sec. 927 It lies against corporations and others, to prevent abuse of powers given them or to secure rights & privileges: if the right be doubtful, the Court will direct it to be tried by Law, & in the meantime restrain all injurious proceedings,

Ibid Sec. 926 It will be granted in case of trespass. "if the acts done or threatened to the "property would be ruinous or irreparable "or impair the just enjoyment of the "property in future".

2 Barb. Sup Court Rep. 577 Injunction vs. City of

Supreme Court

Wm. Waddingham & al
vs.
City of St. Louis

Brief for appellees

Spalding & Shepley
for appellees

7 Pick. 451
12 do. 480
6 How. 537, 545, 548
2 Hunt's Com. 276

acts of 1848-9 p. 78 Sec. 4

4 Mis. Rep. 557
6 " " 254
7 " " 6 & 25
8 " " 686
10 " " 392
11 " " 192
12 Mis. Rep. 617

New York, to restrain from appropriating portion of Street.
3 Barb. Sup. Ct. Rep. 254
16 Ohio 574 Court can restrain by injunction City from collecting a special tax levied in property.
3 Paige 573 Champlin vs. Mayor &c. of New York, Injunction to prevent opening Street must show that pending is void, or fraud or corruption &c.
2 Barb. Sup. Ct. Rep. 9 Court day injunction is not the proper remedy in case of irregular taxation.

4 Barb. Sup. Ct. Rep 17 Injunction not the remedy where taxes irregularly assessed. "If the pro-
"ceedings are void, there is a perfect remedy at law,
"and the defect appearing on the face of the pro-
"ceedings, there is not such a cloud upon the
"plaintiff's title to lands — as can authorize
"a court of equity to set aside or stay the
"proceedings". "If the proceedings are not void,
"but merely voidable or irregular the rem-
"edy of the plff. is not in this court" &c.

4 Page 384, Injunction vs. Collector of Albany to restrain him from collecting tax.

9 Paige 388, Vandoren rel. vs. Mayor &c of City of New York; "Where a valid legal objection appears upon the face of the proceedings through which the adverse party can alone claim title to the complainant's land, there is not in law such a cloud upon the complainant's title as to authorize him to apply to Chancery; but where claim of adverse party is valid on face there is jurisdiction.

8 Paige 197, Messerole rel. vs. Mayor &c. of Brooklin. That it was proper to interpose by injunction to restrain from an illegal act which would cast a cloud on plffs. title, 26 Wend, 132 at p 136 as to cloud on title, 137
5 Paige 501 recognizes same doctrine } that Chancery will
6 Paige 262 do, do, }
interpose by injunction to prevent cloud being

cast on pltff's title to real estate, and not really diminishing its value,

3 Barb, Sup, Ct. Rep, 254 Brown vs Mayor &c, of New York, Injunction granted to restrain City from building barns, &c, appropriating a public square for emigrants recently landed from Europe &c. As language, municipal corporation is irresponsible; it is then in the exercise of a purely governmental function; but is responsible in acts of different kind,

Parsons Rep, 501, Hill &al, vs. Commissioners &c,. Injunction issued to restrain municipal corporation.
7 Watts & Serg, 107,

9 Howard 32-33 as to dedication to public use; and that as to wharf property presumption does not arise of dedication, it being of its nature to keep it open

12 Mis, Rep, 617 Gamble vs. City, When a valid legal objection appears on face of proceeding, then there
(1) is not such a cloud upon the title as authorizes the court of equity to interfere; but when the claim is valid on its face, that is, of proceedings or instrument and extrinsic facts are necessary to show the invalidity, a case is made out for the interference of equity —
(1) 5 Paige 501. 6 Paige 262, as to interfering when the proceeding would cast cloud on title &c.

The Legislature contemplated the existence of private wharves, as is manifested by the provisions on the subject in every charter of the City,

acts of 1821-2 p. 41 Sec. 12 authorizes Mayor and Board of Aldermen to "erect, repair and "regulate public wharves & docks, to regulate "the erecting and the rates of wharfage at pri-"vate wharves" &c. This act was approved 9 Dec. 1822

Rev. Code 1825 p. 201 Sec. 6, City authorized or empowered to do the same thing and in the same words,

Private acts of 1834-5 p. 28, passed Feby 26, 1835 at page 32-3 Sec. 32 is same power in same words with slight variation.

acts of 1838-9 p. 156. passed Feby 8, 1839 another charter, at p. 159. Article 3, clause 17, same power in same words,

acts of 1840-1 p 129 at p. 132 clause 16 same power in same words,

acts of 1842-3. p 113. at p. 117 clause 16. same power in substantially same words.

4 Mis. Rep. 343 Mullanphys Exrs vs. Daggett & Price Bank of river is private property subject to use of navigators in the exigencies of navigation

on subject of taxation. Drake has cited as to general principles

6 J. C. R. 28

26 Wend. 132

9 Paige 388

4 Barb. Sup. Ct. 9 & 17

10 Paige 539.

8 Ohio 370

1 A. K. Marshall 554.

9 Paige 16,

4 Sam. Chy. 357.

Drake cites to prove purchaser for taxes must have taxes legal & legally assessed

8 Blackford 335. 681.

Blackf. 98

9 Ohio 170 that purchaser had authority to make deed

4 Scam. 69

1 Scam. 385

4 Hill 76

4 Barb. Sup. Ct. 113.

13 Mass 272 to show that it part of the

Supreme Court

Waddingham & others

vs.

City of St. Louis.

Bar Dad

Appellee

Plaintiff

Appellee

William Wadingham & others, plaintiffs & appellees
vs } Appeal.
The City of Saint Louis
defendant & appellant

In the supreme Court October term 1850

This was a petition by the appellees presented to the judge of the common pleas of Saint Louis in vacation asking the judge to issue his order restraining the corporation from condemning as a wharf certain lots claimed to be owned by the petitioners in the city of Saint Louis on front street extending down to the low water mark on the Mississippi river situated between Cherry & Biddle streets. In the petition there are nineteen plaintiffs who alledge that they are owners in fee in severally & that they have owned & possessed the land for many years & at all times had suffered persons to use the same as a wharf retaining however the rights of property therein, that they had long designed improving on said ground a private wharf for the accommodation of the public & on the 2nd day of November 1849 the proprietors had entered into an agreement to make said wharf, that with a large number of labourers they were proceeding to complete said wharf to be used by the public upon the payment of such wharfage as the City Council might fix upon & in default of the action of the Council on reasonable terms, that while said work was progressing the then Mayor of the City threatened with force & arms to enter on said land & expel said labourers & take possession for & in the name of the City, that a committee appoin-

ted by the proprietors to make contracts & carry on the work to avoid collision & disputes memorialized the council that the proprietors might be allowed to improve their property without molestation declaring their willingness to allow the city authorities to fix the grade & superintend the completion of said wharf, that said memorial & an accompanying bill were referred to a committee of the board of aldermen who recommended that the same be rejected & the council instructed the mayor to proceed to condemn to the use of the public the said land, that the mayor notified the plaintiffs that he would on the 9th of January 1850 proceed to condemn said land & that they on the 3rd day of January caused the mayor to be notified that they protested against said proceeding, which after receiving the same the mayor threatened to disregard & to proceed to said condemnation. Plaintiffs state that they are ready & willing to construct such wharf & keep the same in repair & to execute any proper legal obligation to secure the public for all time to come in the use of said wharf & to conform to such regulations as the city may lawfully make in relation thereto. That they applied to the city engineer for the proper grade for this work, which he declined to give officially, but permitted them to take the grade from his books & that plaintiffs intend to complete said work in conformity to the grade established by the proper city authority. Plaintiffs also state that their said land is well calculated for a wharf, offers great facilities for the transaction of commercial business & is of great & increasing value to them, of which the city

authorities have had full notice & that these authorities by various official acts have endeavored, designed & intended to depreciate the value of said property, have denied the plaintiffs title thereto & claimed it themselves & have concocted & designed said official proceedings to cheat & defraud plaintiffs out of said property & the income therefrom. Plaintiffs say they are advised that the ordinance No. 226 is unconstitutional & against law & that the city authorities cannot legally take private property in order to realize revenue therefrom for the benefit of the corporation, or to take it in speculation when the owners are willing to allow the public to use it for the same purpose, that the land is & has been as fully opened to the public as if the same was condemned for a wharf & that the effect of such condemnation would be only to divert the revenue therefrom from the proprietors to the city & that unless prevented by the intervention of the court the authorities will proceed to the formal condemnation of said wharf, that the city authorities have misapplied the wharf fund in violation of the charter, that by the fires of the past year there have been wrecks of burnt steam boats sunk along the bank of the river in that part owned by the city, that improvements of the wharf will consume the wharf funds of the city for a long time to come & that it will be therefore absolutely necessary for the accommodation of the public that plaintiffs should complete their wharf. That the condemnation of this land for a public wharf would produce great injury both to them & the public generally. That the city is

governed by men who have local & sectional interests to subserve, who are prejudiced against the growth of the northern part of the city. Plaintiffs pray that the judge of the Court of Common pleas may make an order restraining the city, its officers, agents & servants from condemning, seizing or otherwise taking possession of said land to be used as a public wharf for the benefit of the city, or otherwise retarding or interfering with the possession and use of said land as a private wharf by the proprietors

On this petition process was issued by the clerk of the circuit court of Saint Louis County ~~omitting the names of three of the petitioners William S Harney, Mary Harney & John Andoo &~~ an attempted service was had by delivering a certified copy of the petition, & reading the writ to James G. Barry the then Mayor of the City on the 9th of January 1850 & on the 30th day of April judgment by default was taken by plaintiffs against the defendant & the court ordered, adjudged & decreed that the plaintiffs have the relief prayed for by them, & that the city of St. Louis its officers, agents & servants be perpetually enjoyned & restrained from condemning seizing & taking said land or using same for a public wharf or landing.

At the same term the defendant by its counsel moved the court to set aside the order & judgment aforesaid & to allow the defendant to file an answer to the petition, for the reasons,

1st That there was no sufficient service according to the statute served on the defendant.
2nd The service of the process was irregular, illegal & insufficient to authorize the judgment entered up
3rd For the reasons set out in the affidavits filed with the motion, For their contents see page of the record.
This motion on the hearing was overruled & the defendant by its counsel prayed an appeal which was regularly granted by the court.
By way of appeal to the above I respectfully state that after the appeal was so prayed for & granted & without the knowledge or notice to the defendants counsel, the court set aside the former judgment & ordered another & more extended judgment to be entered up on the last day & hour of the term & which was written out some days after the adjournment of the court.

The errors assigned are,
1st That judgment was rendered on the petition for plaintiff, when by law no such judgment could or should have been given.
2nd There was no sufficient service of process to authorize the judgment given.
3rd There was error in overruling defendants motion to set aside the judgment by default & for leave to answer
4th The same error in another form.
5th & 6th Errors question the correctness of the decission entered up after the appeal taken & perfected in the case & entering up a

new judgment nunc pro tunc

7th That the circuit court had no jurisdiction or lawful power to render a judgment therein

~~8th That there was error in rendering judgment for persons who are not plaintiffs in the writ pretended to have been served~~

1st The first point insisted on for appellant is the irregularity & insufficiency of the service of the process. The suit was brought under the new code

By the 4th Sectn Article V (page 78) it is provided that the service of a summons shall be

1st By reading the petition & writ to the defendant.

2nd By delivering a copy of the petition & writ &c or

3rdly By by leaving a copy of the petition & writ at the usual place of abode of the defendant with some white person of the family above the age of fifteen years.

The service in this case was neither the one nor the other, but was a selection of a portion of the 1st method pointed out by the Statute, & tacking thereto a part of the 2nd mode.

If this can be done, it is capable of demonstration that instead of there being but three modes by which a writ may be served as pointed out by the statuted thereon at least twelve different & distinct methods by which a legal service may be had according to the whim or fancy of the sheriff.

See Acts of 1848-9, §4 (page 78)
1 Mo. Rep. p. 158. Hickman vs Barnes
1 do do p. 336 Cabeen vs Douglass
1 Pikes (Ark) R. p. 50

2nd The 2nd point insisted on is that the motion to set aside the default & permit the defendants answer to come in should have been sustained, first for the reason so much of the insufficiency of the service & also for the reasons set out in the affidavits filed with the motion. The city election & general change of offices occurred on the 1st Monday in April, the former Mayor left the city for the East. The City Counsellor resigned his office in the first week after that election. His successor gave bond on the 22nd of the month, in receiving the papers pertaining to the litigation of the City the usual copy of the petition was not among them, nor was his attention called to this case until after default taken, the new Mayor & City Counsellor was necessarily pressed for a time greatly with business with which they were yet unfamiliar, & in the great amount of legal business in which the City was then involved this case accidentally was overlooked. When its situation was discovered the motion to set aside was made at the return term of the case, which if granted would have produced no delay whatever, a good meritorious defence was shown to, & full & ample justice could have been administered according to the rights of the parties, without injustice to others. It was not a case of neglect or want of due diligence

3rd. The third point upon which the appellant relies is the insufficiency of the petition.
The city charter either authorizes the City to condemn private property for public use as a public wharf, or it does not If it does not then there was no jurisdiction to grant the injunction in this case or to make it perpetual by the final decree. Gamble vs the City of Saint Louis 17th Mo Repts page 617

If it does confer the power, then unless there are facts stated in the Bill which would withdraw the property in question from the exercise of the power there is no ground for the injunction There is no fact connected with the property in question which would prevent the City from condemning it, except that the owners intended some time in the future to use it as a private wharf. This will not prevent its being condemned. Here this fact stated so that the court could properly act upon it.

4th. It is finally insisted on, that after the appeal was granted & perfected in this case the Circuit Court had no power to set the first judgment aside & order a new judgment more comprehensive in its terms to be entered up nunc pro tunc.

Coxe Rep. 93 White vs McCall
do do 1 160-1 Thompson vs Thompson

Wm Waddingham
& others appellees
vs Appellants Brief
The City of Saint Louis
Appellant.

Authorities.
Acts 1848, 9 & 4 p 787 Rev. Rt
1st Mo. Repts. 158.
1 do do 336
1 Pike 250 (Ark.)
Coxe 159 Thompson vs Thompson
do 93. White vs Calle
12 Mo. R 617

Waddingham & others appellees } In the supreme
vs } court at St Louis.
The City of St Louis appellants }

This was a petition to the judge of the Saint Louis court of common pleas in vacation praying him to grant petitioners an order for an injunction to issue injoining the City of St Louis its officers agents & servants from condemning seizing or taking possession of certain lots & land on front street & the Mississippi river claimed by petitioners, to be used as a public wharf for the benefit of the City or otherwise disturbing or interfering with the possession & use of said land as a private wharf by the proprietors without setting out their title, or showing how they claim Petitioners claim to be the owners of the land & say the public have been permitted at all times to use the same as a wharf, they retaining their rights of property therein, that they designed to improve this wharf for the accommodation of the public & by an agreement among themselves, were proceeding to do so, to be used by the public on the payment to them of such wharfage as the City Council might prescribe & in default thereof, on reasonable terms. That shortly after their commencing this work the then Mayor of the City threatened to cause the plaintiffs workmen to be expelled from said land & to take possession of the same for & in the name of the City, that then plaintiffs memorialized the City Council to be permitted to improve their private property without molestation, declaring the object they had in view & their willingness that the city authorities should fix the grade & superintend the completion of this work, that the prayer of memorialists was rejected by the City Council & the Mayor instructed to condemn this land, which he claimed the

right to do under color of the City ordinance No. 2263 & other ordinances & had given plaintiffs notice of his intention to proceed on the 9th day of January 1850 so to condemn this land to public use, which plaintiffs had protested against & caused the Mayor to be served with notice thereof on the 3rd day of January 1850, which the Mayor also threatened to disregard, Plaintiffs offer to make the wharf, keep the same in repair for the public use on the same terms as the City wharf is used, or such legal & reasonable terms as the City may prescribe, & to execute a proper obligation to secure the public in the use of their wharf upon the terms above specified. That this land is well calculated for a wharf, of great & increasing value &c. that the City authorities design to defraud them out of the income of this wharf, to divert it to the

petition further states that said land is now open to publick use as a wharf as fully in all respects as the same would or could become by any formal condemnation thereof & that the effect of condemning or seizing the said land by the City would be to divert the income and revenue of said land from the plaintiffs the proprietors & applying the same to the benefit of the City without in the slightest degree changing the use of said land.

clerk of the St Louis Circuit Court ~~awaiting the~~ ~~manner of those of the petitioners~~, which was attempted to be served by delivering a copy of the petition to the Mayor of the city & reading the writ to him. At the return term of the Court a judgment was entered up for plffs against defendant by default restraining the city of

This is the error of the transcript

of St Louis its officers agents, & servants from condemning, seizing & taking said land or using same for a public wharf or landing.

At the same term a motion by defendants attorneys to set aside said judgment & for leave to answer the petition, assigning as reasons therefor.

1st That there was no sufficient service of process on defendant according to the statute in such case made & provided.

2nd The service of process in the case was irregular & insufficient to authorize the final judgment rendered herein.

3rd For the reasons set forth in the affidavits filed with the motion.

The affidavits are made by the City Counsellor & the Mayor. The first in substance is that the election for city officers was held on the first Monday of April 1850 & that during the week after s. election R. S. Blennerhasset Esq. the former city Counsellor resigned his office as such. That affiant was appointed by the present Mayor on the 22nd of April 1850 gave bond & entered on the duties of that office. when he found the city engaged in a large amount of litigation in the several courts of the City, with none of which had the affiant any previous connection or ~~acquaint~~ knowledge. That on applying to his predecessor for information & the papers pertaining to the City business in his possession affiant

received as he supposed all the
papers in his hands relating thereto
immediately endeavored to inform
himself of the condition of the business
& its necessary preparation. That there
were sixteen cases on the dockets of the
Circuit Court & Court of Common Pleas
requiring the attention of the City Coun-
sellor. That he rec'd from Mr Blennerhas-
set the copies of the petitions left by the
sheriff at the time of the service in the ca-
ses recently commenced, but that no
such copy in the case of Wadding ham
& others against the City of St Louis was de
livered to him. Affiant this affiant as-
certain that such a case was pending
in the Circuit Court until the evening
of the 16th of the month of May when he
casually learned that final judgment
had been taken for want of an answer
on the 30th day of April, that affiant had
afterward ascertained that process in
the case had been served but as affiant
believed in an irregular & illegal manner
on the former Mayor of the City who had
as far as affiant could learn handed the
copy of the petition to his predecessor
Mr Blennerhasset or to said Mayor's suc-
cessor the present Mayor, nor had the
former Mayor left it among the papers
of the office, as it could not be found
upon searching for it, and so affiant
states that if it had been in consequence of
the then recent change in the officers of the City

& the number & importance of the cases to be examined & attended to, that the this case had been overlooked as it was & that no answer had been filed, that the case involves very great interest to the City of Saint Louis & rights which had been long claimed & insisted upon & which defendant was very desirous to have the opportunity of asserting before the Courts of the County.

The affidavit of Mr. Kennet in substance that the rights & interests of the City involved in the case was large & of great importance to the future growth & prosperity of the City, that these rights & interests have been long & strenuously insisted upon & as he was informed & believed founded in legal right & justice, that the City was desirous of making its defence to the petition & was in the course of preparation for that purpose & that from the advice & opinion of legal counsel that the City had & would be able to make & maintain a good & meritorious defence.

The motion to set aside & for leave to answer was overruled, a bill of exception taken & an appeal prayed by defendant, allowed by the court regularly taken to this court in the last day of the term of the circuit court. After the appeal was so taken and allowed & without the defendants counsel having any knowledge or notice thereof the circuit court as we believe about the

time of its final adjournment order-
ed a minute to be made by the clerk
setting aside the entry of the judgment so rendered
as above & a new & more extended entry ~~judg-~~
~~ment~~ to be ~~entered up for plaintiffs a-~~
~~gainst the defendant~~ nunc pro tunc
which was entered on the record some
days after the adjournment by the clerk

Kirtley & Gamble Attos
for Appellants

R. M. Field & Hudson
for Respondents

No. 60.

Wadding ham & others
appeals Statement of
the case
Coty of St Louis appel-
lant

Gamble & Kirtley
Attos appellant

Waddingham ral. Respondents,
vs
The City of St Louis, Appellant.

Supreme Court Act Term 1850.

Field, for Respondents: —

I. The default in the Court below was regularly taken and no sufficient cause for setting it aside was shown.

1. The service tho' not a literal compliance with the new Practice Act was in substantial conformity with its provisions and justified a judgement for want of an answer.

See Practice Act of 1849 art. V sec 4.

By reference to sec. 6 of the same article it will be seen that the manner of service adopted by the officer was regarded by the legislature as of a higher grade than would have been necessary to hold the defendant to answer at the first term.

2. The reasons appearing in the affidavits for setting aside the judgement are in the main the same and certainly no better than those decided to be insufficient by this Court at its present term

Allen's Exr vs Carondelet

II. The case made by the plaintiffs below in their petition entitled them to the relief sought in their petition and granted by the Court.

1. The plaintiffs show a title to land on the river bank which they had made a private wharf conformably to all existing regulations of the City. Their right to the property and revenues of this wharf can not be questioned.

(Harg Law Tracts 77) Hale's Tractus de portibus maris cap 6.
The Wharf case, 3 Bland's Rep.
St Louis City Charter of 1843 art III, sec 2, subdivn 16.

2. The City of St Louis was not authorised to seize the private wharf of the plaintiffs & condemn it to publick use, under the act of 1847 (See acts of 1847 page 185); for that act evidently contemplated a case where the property was used by the private proprietor for some different purpose. In the present case the "necessity" for taking the property does not exist, and of that necessity the courts of justice must judge.

2 Kent's Com. 340

[redacted]

3. The case is made stronger by the statements of the petition that the whole object of the proceedings of the City was to confiscate the revenue of the plaintiffs property under the pretext of a condemnation to publick use.

4. If the act of 1847 is to be construed as authorising the proceedings of the City to condemn the plaintiffs property under the circumstances stated in the petition; then it is insisted that the act is unconstitutional and void.

Westkiver Bridge Co vs Dix C Howards Rep.

Waddingham & al.
vs
The City