St. Louis Marine Railway and Dock Company vs. Lamothe, William P 1852 St. Louis 311/13

/30

Cutting, Albert
Lilly,
Ryland
affirmed

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State of Missouri
County of St. Louis } Sct Be it remembered that heretofore to wit on the 21st day of August 1850 a Petition was filed in the office of the Clerk of the St. Louis Court of Common Pleas within and for the County aforesaid in the words and figures following viz:

Petition

William P Lamoth Plaintiff
vs
"St. Louis Marine Railway & Dock Company" Defendant

St. Louis Court of Common Pleas Sept. Term 1850

Plaintiff states that being the owner of a certain Steam Ferry Boat, containing one Boiler and Engine of the value of three thousand five hundred dollars, he contracted with the "St. Louis Marine Railway & Dock Company" a body corporate & politic in the County of St. Louis & State of Missouri, on the eighth day of July AD 1850, to make certain repairs upon said Boat, to wit, to put said Boat in the Dock of said defendant and cork and otherwise repair the Hull of said Ferry Boat, to make her staunch & tight, for which docking & hauling out of the River the Plaintiff promised to pay said defendant the sum of Forty five dollars & for corking said Boat the usual rates per day. Plaintiff further states that in consideration thereof, defendant agreed to receive said Steam Ferry Boat to wit, at St. Louis aforesaid, on Monday the 15th day of July and put said Boat in the Docks of said Company and make the repairs aforesaid, that on said day to wit, the 15th day of July aforesaid, plaintiff

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Petition

brought down said Ferry Boat from alton Illinois to the Dock of said defendant at St. Louis aforesaid. That on the arrival of said Boat the defendant was not ready or prepared to put said Boat in the Dock as aforesaid. That said Boat was then in a leaky condition and making some water requiring to be pumped out. To keep her afloat. and the force of the current tending to increase the leaking. the plaintiff determined to take said Boat back to alton aforesaid. but at the request of said defendant. and upon his promise and assurance that he would take charge of said Boat and use all necessary care. means and diligence to pump out and keep said Boat afloat till his Dock was ready to receive her. the plaintiff caused said Boat to be dropped down to a safe & convenient place & made fast to the shore. and placed & delivered said Boat into the charge of said defendant. Plaintiff further states that said defendant knowing the leaky condition of said Boat as aforesaid and that she was in great danger of sinking. unless properly attended to. did not keep her pumped out. but carelessly & negligently permitted her to sink. to wit. on the 16th day of July aforesaid at St. Louis aforesaid. by which careless[illegible] and negligence of said defendant. said boat with her Boiler. Engine & Tackle became and was wholly lost to the plaintiff. and he has suffered damages in the sum of three thousand five hundred dollars and for which he asks judgment.

Knox & Kellogg. Plffs. Attys

State of Missouri. County of St. Louis ss. W. P.

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Lamoth Plaintiff makes oath and says he believes the above petition and the matters therein as stated are true W. P. Lamoth
Sworn to & subscribed before me this 21st day of Oct 1858. Simon F Spalsby. Justice of the Peace.

Summons

Upon the foregoing Petition the following Summons was issued viz: "The State of Missouri. To the Sheriff of St. Louis County. Greeting. We command you to summon the St. Louis Marine Railway & Dock Company to appear before the Judge of our St. Louis Court of Common Pleas on the first day of the next Term thereof. To be held at the City of St. Louis within and for the County of St. Louis. on the third monday of September next. Then and there to answer the complaint of William P Lamoth as set forth in the annexed Petition. and have you then there this writ Witness. Philip Tippett. Clerk of our said Court with the Seal thereof hereto affixed at Office in the City of St. Louis this 21st day of August in the year of our Lord one thousand eight hundred and fifty. P Tippett clerk"

I J. B. Carson hereby acknowledge myself bound for all costs that may accrue in the case of Lamoth against St. Louis Marine R. Way Co in the St. Louis Court of Common Pleas. Witness my hand and seal at St. Louis this 24th day of Febry 1857 J. B. Carson

Sheriffs Return

Upon the foregoing Summons the Sheriff made the following return viz: "Executed this writ in the County of St. Louis the 21st August 1858 by delivering a true copy thereof & of the Petition

as furnished by the clerk to Thos. O'Flaherty Prisident of the St. Louis marine Railway & Dock Company the within named Defendant service $1.00 Henry B Bell Shff By W. H. Timberlake Dpty

and afterwards to wit: on the 16th September 1865 the following answer was filed in the clerk's office of said court viz:

Answer

In Court of Common Pleas, For St. Louis County William P Tamoth Plaintiff against St. Louis marine Railway and Dock Company Defendant Thomas O'Flaherty Prisident of the St. Louis marine Railway and Dock Company on behalf of said company. for answer to the said petition states that he has no knowledge of the ownership or value of the boat in the plaintiffs petition mentioned nor has he any knowledge or information upon which to found any belief in relation thereto. The defendant states that the said Prisident has been informed and believes the fact to be so. That said plaintiff did make an agreement as to the price which he would pay said company for docking a Steam Ferry Boat but whether it was such as is described in said petition. This respondent cannot state. The defendant says that said company nor any person or persons on behalf of said company did not at any time agree to take charge of said Boat and to pump her out and keep her afloat until said docks could receive her as stated in the plaintiffs petition. The defendant states that said Boat was not delivered to the defendant as stated in said petition nor was the said boat at any time in the

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answer

possession or under the control of said defendant or any person authorized by said defendant to take possession of said Boat or to control the same. This defendant states that said company did not agree to receive said Boat on the 15th day of July as stated in said plaintiffs petition. The defendant further states that at the time the said plaintiff spoke to those having charge of said dock in relation to docking the said Ferry Boat it was agreed and understood by the parties that the said Boat was not to be brought to ~~said~~ St. Louis aforesaid until the plaintiff should be notified that the said docks were in readiness to receive said Boat. and that those having charge of said dock were to write to the plaintiff and inform him when he should have his said Boat in St. Louis that said plaintiff brought said Boat to St. Louis without being notified to do as above stated and before said Docks were ready to take on said Boat. and that the the sinking of said Boat was without any fault or neglect of the defendant or any person acting on behalf of said company

Hudson atty for defts

James Mugan agent for the defendant on his oath states that he believes the above answer and the matters therein as stated are true

Sworn to & subscribed } James Mugan
This 16th Sept 1850. P. Tippett clk

And afterwards viz: on Monday February 24th 1851 the following proceedings were had in said cause to. wit: " William P Lamothe vs St. Louis marine Railway & Dock Company. Petition. The

plaintiff files a bond for costs herein and the same is approved by the court. Now at this day come the parties by their attorneys and thereupon come also a Jury to wit: Daniel Donahoe, Davis Henley, J. M. Walker, C. Wolverton, Leverett Sherman, Lathrop Sherman, Mosley J. Morrison, W. Murphree, J. Miller, F. A. Pack, W. E. Jackson and John Tuttle, Twelve good and lawful men who being duly elected, tried and sworn well and truly to try the issue joined between the parties aforesaid the trial progressed but not being finished the same is laid over until to-morrow."

Jury

and on Tuesday February 25th 1851 the following further proceedings were had in said cause viz: "William P Lamothe vs St Louis Marine Railway & Dock Company. Petition. Now at this day come again the parties by their attorneys and the Jury empannelled and sworn herein also come and the trial of this cause progressed and being finished the Jury retires to consult of their verdict" and afterwards to wit: on Wednesday the 26th February 1851 the following further proceedings were had in said cause viz: "William P Lamothe vs St Louis Marine Railway & Dock Company. Petition. Now at this day come again the parties by their attorneys and the Jury empannelled and sworn herein also come. and being agreed upon their verdict upon their oaths find the issue herein joined in favor of said plaintiff and assess his damages sustained by reason of the premises in his petition mentioned at the sum of Three Thousand dollars. It is therefore con-

Jury retires

Verdict of Jury

sidered by the court that said Plaintiff recover of said defendant the damages aforesaid in form aforesaid as assessed and also his costs and charges herein expended and have therof execution and afterwards viz: on the 28th February 1851 the following motion for a new trial was filed viz:

Motion for new trial

"William P La Mothe Plaintiff against St. Louis marine Railway & Dock Company. The defendant comes and moves the court to set aside the verdict and grant a new trial in the above cause for the following reasons. 1. Because the verdict is against the evidence. 2. Because the verdict is against law and evidence and the instructions of the court 4. Because the court erred in admitting evidence on the part of the plff which should have been excluded. and excluded evidence offered on the part of deft which should have been admitted 5. Because the court erred in the instructions given on the part of the plff. and in excluding those asked by the defendant. 6. Because the court misdirected the jury in the instructions given 7. Because the jury misbehaved in this that during the progress of the trial one of the jurors and the plaintiff were seen talking alone and held a conversation in a tone of voice that could not be heard by any person except themselves 8. For the reasons contained in the annexed affidavits. 9. Because the deft was surprised by the evidence offered by Plff and by reason of a mistake of the witness as to facts as shown in affidavits. 6 Because the damages are excessive"

and afterwards to wit: on Wednesday 7th may 1851. The following further proceedings were had in said cause viz: "William P Sanothe vs St Louis Marine Railway & Dock company. The defendants motion for a new trial herein being heard and the Court being fully advised of and concerning the premises it is considered that said motion be sustained and that a new trial be had herein at the next Term of this Court"

new trial granted

and afterwards to wit: on Wednesday 24th December 1851. The following further proceedings were had in said cause viz:

"William P Sanothe vs St Louis Marine Railway & Dock Company. Petition. Now at this day came the parties by their attorneys and thereupon came also a Jury to wit: W. W. Hobbs John Nash. Joseph Leary. Peter Lindell. E. D. Johnson. M Collins. J. J. Critchard. Thomas Adams M Burch. J. J. Matthews. John Browning and J. Caswell. Twelve good and lawful men being duly elected tried and sworn well and truly to try the issues joined between the parties aforesaid the trial proceeded and being finished the Jury retire to consider of their verdict."

2nd Jury

and afterwards to wit: on Monday the 29th December 1851 the following further proceedings were had in said cause viz:

"William P Sanothe vs St Louis Marine Railway & Dock Company. Petition. Now at this day come again the parties by their attorneys and the Jury empannelled and sworn herein also come and being agained upon a verdict upon their

Verdict of 2nd Jury

oaths aforesaid find for the plaintiff and assess his damages sustained by reason of the premises in his petition mentioned at the sum of one Thousand seven hundred and fifty dollars. It is therefore considered by the court that the plaintiff recover of the defendant the damages aforesaid in form aforesaid assessed and also his costs and charges herein expended and have therefor execution."

Judgment

and afterwards to wit: on Saturday the 24th January 1852 the following further proceedings were had in said cause viz:

"William P Lamothe vs St Louis Marine Railway & Dock Company. The defendants motion for a new trial herein being heard and the court being fully advised of and concerning the premises it is ordered that said motion be overruled."

Motion for new trial overruled

And afterwards viz: on the 31st January 1852 the following Bill of exceptions was filed in said cause

"Wm P Lamothe Plaintiff
vs
Marine Railway & Dock Company. Defendant

In the St Louis Court of Com: Pleas September Term A. D. 1851

Bill of Exceptions

Be it remembered that at the trial of this cause the Plaintiff called as a witness: Mr. Renfrew. who being sworn. Testified. as follows: That the machinery on the Steam Ferry Boat in question was worth about $1500.00. That Cutting built the hull. didnt know the value of the hull. on cross examination he testified that the engine was old and that the value of machinery depreciated annually in proportion to the use. and depending on

Evidence of Mr Renfrew

on the manner it was used. The Plaintiff then read in evidence the depositions of Gilky and Simpson. which said depositions are as follows Towit:

Deposition of E. G. Gilky

Edwin G Gilky. of lawful age. being produced. sworn and examined. deposeth and saith I Know the Plaintiff William P Lamothe. I reside in alton Illinois & am an Engineer. I was in the employ of Plaintiff as an Engineer commencing last February. I was employed by Plaintiff as an Engineer on a steam Ferry Boat that plied between alton & the landing opposite to alton on the Missouri shore. on the 4th march last I took charge of said Steam Ferry Boat as Captain that ferry Boat was built in St Louis. I think a year ago last winter. about the first of July last said ferry Boat commenced leaking very badly & I thought it necessary that she should be docked. Captain Lamothe wrote to me that he wanted the boat brought down to St Louis on the 15th of July last. I brought her down on that day & got her about one oclock. & landed the boat near the upper Ferry. I then came down & saw Mr Cutting who had charge of the Docks of the Marine Railway & Dock Company & asked him how soon he could take her on the Docks. he replied not under six or eight days. (The Counsel for Defendant objected to anything that Mr Cutting said) Question by Plff. Was Mr Cutting at that time acting as agent of the Marine Railway and Dock Company? (Question objected to) answer. Yes. Question. Who had

charge of this Docks at that. (Question objected to) answer. I dont know of any other man than Mr Cutting. Mr Cutting was there. Question. What did you do after that reply of Mr Cutting. (Question objected to.) answer. I told him I should'nt stay there that long. That I would take the boat back to alton & take her out there myself before I would eight days. He laughed at me and said that would be of no use. I told him I was not very well. that I would'nt stay there any way. it was a very sickly time. He told me that didn't make any difference. That he would take charge of her himself. if I did not want to stay. He asked me where she was and I told him she was near the upper ferry. He said he would go up to her then. we went up together. He said I had better drop her down to the Pine mill. I dropped her down as near the mill as I could get her. I didn't get her quite to the mill. I fastened her with two lines. He proposed putting a man on to pump her. I told him that would be too expensive that I had a boy that would do it just as well & work for his board. I told him the boy would have to be watched very close or he would let her sink. That she would sink in four hours if she was not pumped. Mr Cutting said very well. leave him on & I will get him a boarding house. he further said. that if the boy did'nt do the work. he would put a man on that would. while I was dropping the boat down Mr Cutting had gone to the Docks

& when I had got the Boat fast. I started & went to the docks. I saw him & said to him "Mr. Cutting. That is a lazy boy & you will have to watch him mighty close or he will let that Boat sink. Says Mr. Cutting "You can go home & not give yourself any uneasiness what-ever about it" Mr. Cutting said he would take good care of her himself & if the boy didn't do the work. he would put a man on that would. I answered him "very well" & left him. Question. What reason if any did Mr. Cutting give. why he was ready to receive the Boat. (Question objected to) Answer. Because he had a Barge to take out. That he got twice as much for. Question. What else did he say. (objected to) He said he wouldn't look very well taking out the ferry boat. when he could get twice as much for taking on the barge. I asked him then if the contract to take out the ferry boat was not made first. He said it was but that he was to send for me when to bring the boat down from allens. He said he was to have $45. for taking the ferry boat out. he said he didn't get enough for repairing her. but he was going to use her himself after she was repaired or else he wouldn't do it so cheap. Question. Did Mr. Cutting mention any particular time when the boat was to go on the Dock. (Question objected to.) Answer. He said sometime next week. Question. What did he mean by next week (objected to) answer. I supposed he meant the following week after I brought the boat down

He said if it was a possible thing he would put her on that same week on Wednesday. I brought the Boat down on Sunday. The ferry boat was sunk & the last time I saw her she was about a mile below St. Louis on a bar upside down. This was on the 17th of July last I saw Mr. Cutting on the following Friday to the best of my recollection. Question. State what then took place. (Question objected to) Answer. I asked him what he let the boat sink for. He said he was there on board of her when she commenced taking water. but that she was in such a good place he thought he would let her sink. That the water was only three feet deep on the outside He said that if the water fell. which it was doing at the time. he knew he could fix her cheaper then. than he could take her on the Docks. The said ferry boat was about 80 feet wide & 80 feet long. she had one Engine & one Boiler. I should think said Boat. with her tackling Engine & every thing on board of her at the time I left her. was worth three thousand dollars. I had no interest in said Boat. Cross Examination I am of the the Plaintiff. was sole owner of said ferry boat as I understood from Samo the himself at that time. I know nothing about a contract between Samo the & the Marine Railway & Dock Company. except what I heard from Samo the & Mr. Cutting. I was not present when it was made. Cutting. I am positive told me that the Boat was not to be brought down

until he (Cutting) sent me word. I never recived any Orders from the Railway & Dock Company to bring that Boat down. nor from any one except Captain Samoths. I do not recollect the name of the boy left on board said boat by me any further than that his name was Alfred. I have conversed with Edward Simpson on my way down here & asked him if he Knew what he was going to swear to. He said he did. and he repeated it over. I told him to swear to nothing except what he heard Mr. Cutting say. Further this Deponent saith not. Edwin G. Gilky

Deposition of Edw. Simpson

Edward Simpson. of lawful age. being produced sworn and examined on the part of the Plaintiff deposeth and saith: I reside in Alton. Ills: I Know the plaintiff & have Known him for about eight or nine years. I have been in his employ on the ferry at Alton. I came from Alton to St. Louis on the ferry Boat in July last. with Captain Gilky. Question. After you arrived at St. Louis was you present at the conversation between Mr. Cutting & Captain Gilky. (objected to) answer I was present and heard a conversation between Captain Gilky & a gentleman at the docks whom I thought was the overseer of the Docks this gentleman told Captain Gilky that he (Capt. G) need give himself no uneasiness about the Boat. that he (said gentleman) would take care of the Boat. Question. what else was said. (objected to) I believe. I dont mind of any thing else. I cant discribe the place

when the Ferry Boat was fastened any more than that it was near one of the Mills. I was present at no time the conversation between said gentleman & Mr. Gilky. I returned to allow the same day we came down. there was no one else present at the conversation of which I have spoken except the said gentleman of whom I have spoken. Capt Gilky & myself Cross Examination. I am not quite Eighteen years of age. I had no conversation with Capt. Gilky about what I was to swear to, on our way down. I believe I dont know the name of the man that I considered the owner of the Docks. Capt. Gilky. I believe told me nothing of what I was to swear to here to day. He said nothing to me of what he wanted me to swear to or of what I ought to swear to. I dont know Mr. Cutting. I dont know that the man I called the owner was in fact the owner of the docks. Further this Deponent saith not. Edward his X mark Simpson

Evidence of Mr. Thomas

The Plaintiff then called as a Witness Mr. Thomas. who being sworn Testified. as follows: am foreman of Fictional Dock Company think Cutting built the boat in question. ~~wood work~~ Lumber was worth $1600.00 or $2000.00 when new. was a year or two old. saw her when sunk in July 1849. saw her coming going by the Docks down River. I suppose this Boat was worth $3000.00 including Machinery and all this depends ~~upon~~ whether it was new or old The foreman of Docks superintends the putting on, and off boats. Perkins was superintendent

at the time this boat sunk. he was absent at that time. cutting was acting for Perkins. cutting was assistant Superintendent. Cr ex examined not certain that Perkins was absent. he might have been here and have had charge of Docks then. the boat was worth $ 600. as if machinery was in good condition. the hull of a boat depriciates about twenty per cent annually. engins about 10 or 12 per cent. this boat had been in use about two years. I returnd from the East about 20th of June. on inquiry at the Docks. on my return cutting was apparently superintending. did inquire of offices of the company. cutting said. was superintending - Re: examined: I didnt call at the Docks immediately on my return.

Evidence of A. Cutting

The Defendant produced alfed cutting as a witness who testified as follows: Early in July between the first and seventh. I saw the plaintiff he wanted his ferry boat repaired. I said we were busy. I was in a hurry. at first I asked him seventy five dollars to dock and repair the boat. and finally agreed to do it for forty dollars. with the understanding that the ferry boat was to come when the docks were unemployed. in the afternoon. told him not to send the boat down until I wrote for her. I didnt write because the ways were busy. on monday the 15th the boat came. I was surprised. this was between nine and twelve o'clock - Gilky came down to the ways. I expressed surprise. because she

came before she was sent for. according to agreement. I went with Gilky up by Mill. Mr Corcoran notified him to take her away from there. I told Gilky it was a bad place. Gilky asked me where to drop her. I said I didnt know but to move her to a better place. In the afternoon of that day Gilky came to me and said he was going home. I asked him what he had done with the boat. he said he had dropped her down and left a watchman on her. I asked him if it was prudent. he said he had left a watchman and he was alarmed at the Cholera. he asked me as an accomodation to him to go up and look at her next morning. I did so and found her in a sinking condition. he was much excited. I told him it was no use to be alarmed at the Cholera. I never took charge of the boat. at any time. I went up to see her. as a matter of accomodation. I was not in charge of the Docks then. I resigned Saturday night the 10th Inst. Perkins took charge Monday morning. I did not tell Gilky that I would take charge of her. I am positive that no such reply was made. there were only a few words passed. I made no proposition to put a man on her. was no conversation of the kind. or about watching the boy. might have said something about boarding house I knew nothing about the boy until evening I did not tell Gilky if boy did not do the work I would put a man on her who would. (The statement of Gilky read from his deposition) I made no such statement as Gilky has thus sworn to:

not a word of The Kind. Gilky didnt come at The Docks at all Then. was on The stret. The boat sank. I Think. on The 15th. I Think I didnt see Gilky afterwards until Thursday or Friday. I Then addressed him first. asked what he left her for. he said it was a serious to Plaintiff. That he (Gilky) would have to bear part. I said it was a good place for her to sink. as it was on a flat rock. and if she had been fast. she could have been repaired Then very well. I had been acting previously as Superintendant I dont Know any general custom governing Docks. (Witness was asked "what were your duties and authority from Perkins" (Objection made by Plaintiffs Counsel. and The objection was overruled by The Court. To which Plaintiff Then and There excepted) - I received no particular instructions. I had been assistant Superintendant before. and he supposed I Knew what duties of Superintendant were. Perkins. as Superintendant. made contracts he didnt take charge of boats until ready to be hauled out. They were in charge of Those who brought Them until hauled out I saw Gilky after The boat sunk. at The ways. he didnt blame me at The time. nor any person. when I approached him. he said he would have to bear The blame. and great part of The loss. when he was here before This. he was sick some and complained of being sick. Cross Ex: I built This boat in Winter or Spring of 1849. The whole boat as she stood in 1850

Owen Rhodes Sp. Lee Mass.

was worth $2500. or $3000. I did not tell Plaintiff when the work on the boat could probably be done. might have said it would be a week or ten days. probably I did. I had then a contract for two barges - dont know that there was any other contract. there were several boats to come out. but I had not made any contract for them Mr. Punmans may have done so. the contract was that I would take her on the ways so soon as I could - when I pleased - I was to take her out as soon as I wrote for her. the Mary Stevens was on the ways when the ferry boat came down and when she sunk. I was examined at the previous trial. my memory is fresher now than on previous trial. about date. before. I was confused. Perkins went east early in May and returned on the 12th or 13th of July when I saw the boat pass the ways. I rode down to see what became of her. when Gilkey brought her down. I was much pressed with business. after Perkins came back I was still in employ of Defendant as day laborer. I was assistant foreman. but had no charge. except to direct workmen. when this Boat was caulked. she would be as good as new - when repaired I was to have her for the St. Charles ferry - I examined the defendant's books at my own instance. to refresh my memory. because I was confounded before about dates. the rule of the Dock is not to take charge of a boat until made fast to be hauled out - I wish to correct my statement about a date. the boat sunk on the 16th I went up

To the boat in the morning and there was no watchman there. I hunted for the boy. went on the boat and saw that she would sink. I told Gilky she would have been safe there if she had been properly fast. I may have stated that the Docks company couldn't get rid of this. when I had stated all I knew about it. may have said so to the agent of the Victimal Docks. On the day when the boat came down I had only two conversations with Gilky. the boat was scant one fourth a mile above the ways. she was not in sight of the ways. there was an intervening point which concealed her. when Perkins was absent. I gave opinions to Mr. Megan and he contracted. he sanctioned my arangements. the boat in good order ought to have been worth $3000.00. When the boat began to fill she could have been saved easily. if I had had to care of her. I should have shoved her off and let her straighten up and pumped her out. she was aground on the inside. after Gilky left the boy came down to the ways to inquire about boarding place. & Perkins referred to him to boarding place across the street. Gilky or the boy might have spoken about the board. I did say that she could be repaired where she sunk just as well. When the boat came down. the boats on the ways were boats to repair which contracts had been made. after the contract with the Plaintiff. Re-examined. When new. the hull was worth $1600.00

B

OWEN ... So Lee Mass.

she had depreciated some, not much, I never noticed the Engine —

Evidence of Mr. Timmans

Mr. Timmans was produced by the Defendant as a Witness, and testified as follows: I was and am the Clerk of the defendant. Cutting ceased to be superintendant on the 13th of July. I have always understood the general custom to be for Docks not to take charge of a boat until made fast to be hauled out. Cross examined: After July 13th Cutting continued in the employ of Defendant, but as a laborer with 25 cents pay per day more than other workmen. The defendant then produced

Evidence of L Perkins

as a Witness, Luther Perkins, who being sworn testified as follows: I have been foreman and superintendant for defendant since February 1850. I was absent, East, from about the middle of May 1850 to July 11th 1850 - during my absence Cutting acted as superintendant. Cutting ceased to act as such on July 13th Saturday evening. I resumed my place as superintendant on Monday, the 15th. Cutting continued in defendants employ as workmen, superintending workmen and work as I directed him (The witness was here asked as to the custom of the Docks in receiving boats to be repaired. The Plaintiff objected to this testimony as incompetent but the Court overruled the objection and Plaintiff excepted) as superindent I did not take charge of boats until the Company advised the owners

or managers of said boats. That they were ready to receive them. and they were brought to the ways to be hauled out. and had been fastened for that purpose. I saw Gilky at the last trial. on the Friday after the boat sank I talked with Gilky about the boy left in charge of the boat, being a lazy. good for nothing fellow. I saw Gilky and the boy on monday. The boy came down to the ways in the evening to get a boarding place. Tuesday evening boy came down and inquired for cutting. I took no charge of the boat. I never saw the boat until she floated past. I gave no directions about her. I was not in charge of the Dock Co at all. The boy was 18 or 19 years old. at the time. the Mary Stevens and a barge were on the ways. no other could be taken on.

Cross examined. I did not give the boy or any one else any thing for services done on the boat The boy came down at one o'clock and inquired for cutting. said the boat was sinking. That he couldn't pump her out alone. I said he had better get some one to help him. he came afterwards with a man who. he said. had helped him. and asked me for money to pay him. I let him have the money. Mr Hogan is the General Superintendant of the Defendant. I heard of this contract on Thursday when I said this boat was not in charge of the company. I meant she was not in my charge when the boat was brought down I had no conversation with Gilky or the boy. I saw

them and Cutting talking together. The Mary Stevens was on the ways when I returned to the City and remained on at this time. The Laurel was to come on next. Re-examined = If the boat had been properly fastened. she would have been secure – This was all the evidence given in the case. The Plaintiff asked the court to give the following instructions which the court gave. and the Defendant excepted – "1. If the Jury believe from the evidence that Alfred Cutting was the authorized agent of the defendant to take control of Boats brought to the place of business of said defendant to be repaired. and that as such agent said Cutting took charge of the Ferry Boat of Plaintiff. and that through the inattention or carelessness of said Cutting said Ferry Boat was lost. they will find for the plaintiff. 2, The fact that Cutting told the plaintiff not to bring his Boat to St. Louis until such time as he (Cutting) should direct. will not prejudice the plaintiffs right to recover. if the Jury believe from the evidence that when the Boat was in fact brought to St. Louis it was taken possession of by Cutting as said agent of defendant and was lost through inattention. negligence or carelessness of Cutting."

Plffs Instructions given by Court

The Defendant asked the court to give the following instructions which the court gave, "The Jury is instructed. That if they believe from the evidence that the boat of the plaintiff was not in charge of the defendants at the time she sunk. then the defendants are

Defts instructions given by Court

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not liable for her loss. If the jury believe from the evidence that Gilky brought the boat of plaintiffs to St. Louis before he was notified to do so by Cutting. that Cutting on Gilky's informing him of the arrival of the boat. told that the docks were full which statement was correct. that Gilky then left the city. leaving the boat in charge of the boy of whom the witnesses have spoken without any agreement on the part of defendants to take charge of said boat until there was a place for her on the docks and that before there was a place for her on the docks. the boat was lost by the carelessness of Gilky and the boy left in charge of her. without any participation therein by defendants then the plaintiffs cannot recover."

Defts instructions refused to be given by Court

also the following which the court refused to give. and the defendant excepted. "No liability of the defendant to the plaintiff can be made to accrue in consequence of any failure of Cutting as an individual. and not as agent of the defendant to save the vessel of the plaintiff. such neglect if it existed. without any antecedent promise cannot be the foundation of any legal liability against the defendant That if Cutting was not the foreman or superintendant of the defendant on the fifteenth day of July 1850. nor specially authorized to take charge of boats generally. nor of this boat in particular on account of the defendants. then the defendants are not liable for his acts. that

if the jury believe the evidence of Simmons. Cutting & Perkins relative to the time & circumstances when the change of Superintendant took place at the docks. then cutting had no authority to bind the defendants on the 15th July 1850." The Court of its own motion gave the following instructions. and Defendant excepted. "If the Jury believe from the evidence that Cutting was superintendant or foreman for defendant. when the contract was made with Plaintiff for docking and repairing said ferryboat. and that he made on the part of the defendant said contract with the plaintiff. then any agreement or acts of said cutting on the 15th of July within the scope of the powers of said foreman or agent so far as this Plaintiff was concerned. would bind the Defendant. unless the Plaintiff or Plaintiffs agent acting for him at the time was informed or knew that said Cutting had ceased to be foreman or superintendant for Defendant. If the Plaintiff or Plaintiffs agent acting for him on the 15th July knew that Cutting had ceased to be the foreman or superintendant for the Defendant. or if the foreman or superintendant of defendant had no authority to take charge of the ferry boat under the circumstances. then the defendant is not liable therefor. If the custom or general duties of superintendant or foreman included the taking charge of boats under the circumstances named. then the foreman or superintendant had authority as to

Instructions given by Court on own motion

do. so as to bind the defendant: otherwise not. The Defendant is not liable for any neglect of Cutting to save the boat. unless Cutting was at the time an agent of the Defendant and the boat was in charge of the Defendant." There was a verdict for the Plaintiff as follows.

Verdict of Jury

"Wm P Lamothe vs St Louis Marine Railway Dock Company. St Louis Court of Common Pleas Sept Term 1868. We the Jury find for the Plaintiff. and ass[ess] the damages at Seven-Ten hundred & fifty dollars ($1750:00)

Mackey Collins Foreman"

within four days thereafter the Defendant filed the motion and reasons for a new trial which said motion is as follows. "In the St Louis Court of Common Pleas For St Louis County

Motion for new trial

Wm P Lamothe Plaintiff against St Louis Marine Railway & Dock Company. and now comes the defendant and moves the Court to set aside the verdict and grant a new trial for the following reasons. 1. Because the verdict is against the evidence. 2. Because said verdict is against the weight of evidence 3. Because the verdict is against law and evidence. 4. Because the Court erred in the instructions given to the jury. 5. Because the Court erred in refusing instructions asked by defendant. 6. Because the Court admitted evidence which should have been excluded 7. Because the Court excluded evidence on behalf of the deft which should have been admitted. Houser & Gantt attys for deft"

which motion the Court overruled and Defendant excepted and presented this bill of exceptions and prayed that it be signed and made a part of the record. which is done.

Samuel Treat. Judge &c

and afterwards to wit: on Monday the 26th April 1852. the following further proceedings were had in said Cause viz:

appeal granted

"William P Lamothe vs St Louis Marine Railway & Dock Co. on motion of the defendant by attorney an appeal is granted to the Supreme Court and thereupon said defendant files a bond which is acknowledged by the obligors therein and approved by the Court." Which said Bond is in the words and figures following viz:

appeal Bond

"Know all men by these presents. That we James Duggan as principal and Thomas O'Flaherty as surety are held and firmly bound unto William P Lamothe in the sum of three thousand five hundred dollars. for the payment of which. well and truly to be made we bind ourselves. our heirs. executors and administrators. jointly and severally. firmly by these presents. sealed with our seals and dated at St Louis this 26th day of April. A.D. 1852. The condition of the above obligation is such that whereas the St Louis Marine Railway & Dock Company has appealed from the judgment rendered against it and in favor of said Lamothe in the St Louis Court of Commons Pleas for the sum of seventeen hundred & fifty dollars and cents together

with costs. Now if the said appellant will pay all costs and damages that may be awarded against it occasioned by such appeal. and shall prosecute its appeal and shall perform such judgment as shall be given by the Supreme Court and such as the Supreme Court may direct the St. Louis Court of Common Pleas to give. and if the judgment or any part thereof be affirmed, that it will comply with and perform the same so far as it may be affirmed. and will pay all damages and costs which may be awarded against it by the Supreme Court then this obligation to be void. otherwise to remain in full force and effect James Morgan (Seal)

Approved in open Court Thos. O'Flaherty (Seal)
26th April 1852 (Seal)
Attest P. Tippett clk (Seal)

State of Missouri }
County of St. Louis } ss

I Philip Tippett Clerk of the St. Louis Court of Common Pleas within and for said County. do certify that the foregoing is a full and complete transcript of the Record and proceedings in the case of Wm. P Lamothe against St. Louis Marine Railway and Dock Company.

In Testimony whereof I have hereunto set my name and affixed the seal of said Court at office in St. Louis This 24th September 1852

Philip Tippett Clerk

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(30) 75

Oct. T. 1852

Wm. P. Lamothe

vs Transcript of Record

St. Louis Marine Rail-Way & Dock Company

Filed 7th October 1852
Wm. S. Glanville
Clerk

$10 Fee paid by James Meegan ~~Hudson~~

(30)

In the Supreme Court
October Term 1852

Wm P Lowrie Respondt

vs

St Louis Marine Rail Way and
Dock Company Appellants

by

~~William Lowrie the Appellee~~

And now comes the appellant and assigns the following as Errors Committed by the Court below

1. The Court admitted evidence on behalf of plff which should have been excluded, and excluded Evidence offered by defts below which ought to have been admitted

2. The Court below erred in giving the instructions asked by plff below and in excluding those asked by defts

3. The Court below Committed error in refusing to grant the motion of defts below for a new trial, and in giving judgment for plff.

4. The Court erred in giving judgment for the plff below

Thos B. Hudson atty for
appellants

75

Wm P La Mothe Resp^dt

v

St Louis Marine Rail-
way & Dock Co

Assignment of
Errors Rudrm for
appellant

Filed 22 Oct. 1852
Wm G Clanville
Clerk

William P. Sarnoth
vs
The St Louis Marine Railway and Dock Company

In the Supreme Court
October Term 1852

The said plaintiff comes and says that there is no error in the Record in this cause

Krum & Kelly
Attys for Plff.

No 75

In the Supreme Court
October Term 1882

William P. Lomelter
vs
St Louis Morning Railway
and Dock Company

Joinder in Error

Kerr & Kelly
for Deffs

Filed 26th October 1882
Wm L Glanville, Clerk

Wm P. Lamothe, appellee
v
Marine Railway & Dock Company, appellant

Appeal from St Louis Court of Com. Pleas
This was an action brought by Lamothe against the appellant to recover damages for the loss of a steam Ferry Boat, alleged to have been caused by the negligence of defendants agent, while the boat was in her charge. The petition set forth that by virtue of a previous contract to that effect the plaintiff caused his boat to be brought to St Louis on the 15th July 1850, and delivered to the defendant to be docked & repaired: but that owing to the carelessness of defendants agents in that behalf she was utterly lost.

Defendant replied that the boat was brought to St Louis in violation & not in pursuance of a previous understanding. That she was not put into the charge of defendant. That plffs held no communication with the agent of the defendant, but with one who had formerly been ~~agent~~ but then had ceased to be, ~~then~~ her agent: and that neither directly nor indirectly did the defendant take charge of the Ferry boat. That she was left by plaintiff in charge of one of his own employées, and lost by his own carelessness.

At the trial the following evidence was given -
Messrs Thomas & Renfrew stated their opinion of the value of the boat. and Mr Thomas stated that he was foreman of the St Louis Dry dock Company and that it is the duty of foreman to superintend the getting on & off the docks of boats brought thither for repairs. That Perkins was the foreman of defendant at the time the boat sunk: but that he was absent & Cutting was the acting foreman.

On Cross examination he stated that Perkins might have returned before the boat sunk - he was not certain - and might then have had charge of defendants work in proper person. He knows Cutting was acting foreman on the 20 June 1850.

The plaintiff read the ~~testimony~~ deposition of Gil Key

who testified that he had an understanding with Cutting for the repair of the ferry boat while Cutting was foreman of the docks. That Cutting was to write Hetherington when to bring the boat down from Alton where she was. That Cutting did not write & he brought down the boat on the ~~fourteenth~~ fifteenth day of July 1850. That Cutting said that the docks were full & he could not receive her. Cutting finally consented to take charge of her where she lay at some distance above the docks and repair her as soon as there was room for her on the docks. That the boat was left in charge of Simpson & Cutting, Cutting being specially warned that Simpson was lazy & inadequate, and that the boat would sink unless she was regularly pumped out as she was leaking badly. and that Cutting agreed to see that Simpson did what was needful and if he did not, then to put a reliable man on board Gilkey then left town, and by reason of Cuttings negligence the boat was lost. The spot where she was when Cutting saw her, was out of sight of the docks of defendant where Cutting was employed.

Simpson corroborates what Gilkey said and added the particulars of the loss, all of which he ascribed to the negligence of Cutting whom he declared to be the foreman of the defendant.

This was all the evidence given by plaintiff.

The defendant examined Cutting who testifies that during the absence of Perkins in 1850 he acted as foreman of the defendant. That Perkins went away in May and returned about the 12th July, 1850. Witness ceased to act as foreman on the 13th July 1850, and from that day Perkins was the foreman, and witness merely a hand employed at the docks.

That the boat of plaintiff was brought down too soon before the docks were ready to receive her. That he had ceased to be foreman before the boat came down &

that he only spoke with Gilkey as an individual & not as agent or foreman of the company. That he told Gilkey the docks were full. That Gilkey was very much afraid of the cholera which was then prevailing in Saint Louis, & that he would go home leaving the boat there in charge of Simpson - and that as Simpson was not very trustworthy, he would be obliged to him Cutting to have an eye to the boat now & then until the docks were ready for her reception. which Cutting promised to do. and also promised to find a boarding house for Simpson. but nothing of all this was done by him as the agent of the Company, he Cutting not being at that time an agent, or foreman. That the custom of the Company is to take charge of boats only when they are brought to the ways to be hauled up out on the marine railway. & that the foreman would have had no authority to take charge of a boat for the Company in any other situation. This is the rule of the dock Company, & their uniform practice. That the boat of plaintiff was lost by reason of the negligence of Simpson & the failure of Gilkey to make her properly fast to the shore. If she had been made properly fast to the shore, she might have sunk without being lost; and indeed where she was tied up the bottom was of such a nature (rocky) as would have caused her to careen in sinking and enabled the workmen of the Company to repair her as she lay, provided she had been made fast to the shore. Her fastenings were seen to by Gilkey & no other person; Cutting afterwards discovered that they were very insufficient. He learned this when they gave way on the sinking of the boat. The strain on the fastenings produced by the sinking of the boat was trifling - any good Cable, rope or chain would have stood it. No other person in the employment of the defendant had any communication with Gilkey on the 15th July 1850, except Cutting. The boat sunk on the 16th July 1850. & was a total loss. She floated down the river & went to pieces. Cutting then denied having used the ex=

pressions attributed to him by Gilkey — and further testified that when

Timmons also proved that the Custom of the docks was ~~for~~ to take charge of boats only when they came, by concert with the foreman alongside of the ways to be hauled out

Perkins proved that he & no one beside was foreman & agent of the Company on the 15 July 1850. And that the custom of the company in respect of taking boats in charge was, not to take them in charge until they were brought to the ways to be hauled out, the owners being notified by the foreman that the docks were ready to receive them. That he had no communication with Gilkey on the 15 July 1850. Afterwards he saw Gilkey. The only time he saw the boat was when he saw her ~~gon~~ floating down the river on the 16 July. 1850.

The Court at the instance of the plaintiff gave the following instructions

1°. If the jury believe from the evidence that Alfred Cutting was the authorised agent of the defendant to take control of boats brought to the place of business of said defendant to be repaired and that as such agent said Cutting took charge of the Ferry boat of plaintiff & that through the inattention or carelessness of said Cutting said Ferry boat was lost they will find for the plaintiff.

2°. The fact that Cutting told the plaintiff not to bring his Boat to St Louis until such time as he (Cutting) should direct, will not prejudice the plaintiff's right to recover if the jury believe from the evidence that when the boat was in fact brought to St Louis it was taken possession of by Cutting as said agent, of defendant & was lost through inattention negligence or carelessness of Cutting

To the giving of which instructions defendant duly excepted ~~And~~ the Court gave the following instructions of its own motion.

1° If the jury believe from the evidence that Cutting was superintendant or foreman for defendant when the contract

Gilkey came to the city after the loss of the boat, & conversed with him about it, he, Gilkey blamed himself & Himpton — said that he supposed the loss would fall on him, and did not at that time blame Cutting or the Company or talk of making either of them liable for the boat.

when the Contract was made with plaintiff for docking & repairing said Ferry boat, and that he made on the part of the defendant said Contract with the plaintiff. then any agreement or acts of said Cutting on the 15th of July within the scope of the powers of said foreman or agent so far as this plaintiff was concerned would bind the defendant unless the plaintiff or plaintiffs agent acting for him at the time was informed or knew, that said Cutting had ceased to be foreman or superintendant for defendant.

2d. If the plaintiff or plaintiffs agent acting for him on the 15 July knew that Cutting had ceased to be foreman or superintendant for defendant, or if the foreman or superintendant of defendant had no authority to take charge of the Ferry boat under the circumstances, then the defendant is not liable therefor. 3d. If the custom or general duties of superintendant or foreman includes the taking charge of boat, under the circumstances named, then the foreman or superintendant had authority so to do, so as to bind the defendant, otherwise not.

To the giving of which instructions defendant duly excepted.

The Court refused the following instructions prayed for by appellant. viz.

1st No liability of the defendant to the plaintiff can be made to accrue in consequence of any failure of Cutting as an individual and not as agent of the defendant, to save the vessel of the plaintiff. Such neglect, if it existed without any antecedent promise cannot be the foundation of any legal liability against the defendant.

2d. That if Cutting was not the foreman or superintendant of the defendant on the 15 July 1850, nor specially authorized to take charge of boats generally nor of this one in particular on account of the defendant then the defendant is not liable for his acts.

3d. That if the jury believe the evidence of Simmons Cutting & Perkins relative to the time & circumstances when the change of ~~circumstances~~ superintendants took place at the docks, then Cutting had no authority to bind the defendants on the 15th July 1850

And to said refusal defendant duly excepted
There was a verdict for plaintiff which defendant duly moved to set aside, and the court overruled the motion to which defendant excepts and appeals to this Court.

Lamothe
vs
St Louis Marine Railway & Dock Company
Statement of Case.

Filed Nov. 8th 1852
Wm. F. Blanchard
Clerk

Lamothe vs St. Louis Marine Railway & Dock Co –
Copy Statement marked by me –

From the facts in this case, it will be seen that the only points necessary for the consideration of this Court arose upon the instructions given and refused to be given by the Court below –

The evidence being conflicting and contradictory, the facts involved were for the determination of the jury; and of the law of the case has been so given as to present the whole case in a proper light before the jury, that must end the controversy –

Whether Cutting or Perkins was on the 15 July the day the Boat was brought down to the Company for repairs the agent of the Company at the time the Boat was received – cannot alone determine the rights of these parties –

Cutting had been the agent, or communications or correspondence about the repairing of the Boat had taken place before that day between Cutting as the agent and superintendent of the Company's Dock and Gilkey the agent of the plaintiff. – Gilkey brought the boat down – Cutting was there at the Company's Dock; Gilkey says Cutting took charge of his Boat and promised to take care of her and repair as soon as the docks became empty – The Company contends that on Saturday the 13th July, Perkins came home from his visit to the East and commenced his business for the Company on Monday 15th July – the day the Boat was brought.

as the Superintendent or agent of the Company and that Cutting was on that day no longer such agent or Superintendent. He ceased to act as such on Saturday night previous— It is evident that Cutting had been the agent had as agent conversed about the repairing of this very Boat. had promised to make to let Ilsley know when to bring the Boat down. That when the boat was first brought, he Cutting was not willing to receive her— There is testimony to these facts; Now in order to exonerate the Company from the promises and acts of Cutting on the 15 July, [redacted] persons, such persons must have knowledge of the fact, that Cutting was no longer the agent of the Company. Between the Company and Cutting the relation of Principal and agent might have ceased. But if third persons not knowing that the relation had ceased, had bargained with Cutting as the agent of the Company in good faith such persons would hold the Company responsible—

In looking into the instructions given by the Court, we think that the whole transaction was properly laid before the minds of the jury. That the merits of the case was fairly under the law put before them—

That the instructions requested, could not have had a tendency to make the case more plainly understood by them.

In the conflict of evidence, the jury must determine - and we have no disposition to interfere with them in matters so peculiarly within their province - -

We consider the main point the one about the character of bantling on the 15th July - and this we think ~~[illegible]~~ a very plain one - Story on Agency Sec. 470. Speaking of the revocation of the powers of agents - says - "In the next place, let us consider at what time and under what circumstances, the revocation by the act of the principal takes ~~place~~ effect. And here the rule of our law is equally clear and and comprehensive and just. As to the agent himself subject to what has been already stated, it takes effect from the time, when the revocation is made known to him; and as to third persons when it is made known to them, and not before - Until, therefore, the revocation is so made known, it is inoperative. - If known to the agent, as against his principal his rights are gone; but as to third persons, who are ignorant of the revocation, his acts bind both himself and his principal" - -

Upon the whole case, then as it was submitted to the jury by the Court below, in the opinion of this Court there is no error and the judgment must consequently be affirmed - The other Judges concurring, it is affirmed

John J. Ryland

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Lamothe
v
St Louis Marine Railway & Dock Co

Filed 10th December 1852
Wm. S. Glanville
Clerk

(25)

William P. Lamothe

vs

The Marine Railway and Dock Company

In the Supreme Court
October Term 1865

The only question properly presented to the Court is whether the St Louis Court of Common Pleas erred in giving or refusing instructions.

That the Court committed no error appears by reference to Story on Agency page 611. Sec 480 12 Modern 346. Salte v Field 5 Term Rep. 215. Hozend vs Treadwell 1. Str. R 506. 2 Kent Comm Lect. 41. p 644 (4th Ed.)

Knox & Kellogg
for Pltf

In the Supreme Court
October Term 1852

William P. Smythe

The St Louis Marine
Railway & Dock Company

Statement of Points and
authorities

Knox Kelly &
for Neff

William P. Lamothe, appellee
v
St Louis Marine Railway and Dock Company, appellant.

Upon the aforegoing State ment the appellant Submits the following propositions & relies on them to reverse the judgment of the Court below. viz

The point chiefly at issue was whether the defendant, by any authorised agent, took Charge & was the Keeper of the Ferry boat of plaintiff. and this involved two minor points. which were, 1° Whether under the circumstances detailed it was necessary in order to exonerate defendant, to inform plaintiff that Cutting was no longer foreman of the Docks. 2° Whether it was Competent for any foreman to bind the Company to depart from her usual & accustomed mode of taking Charge of boats, without express authority.

The Court below held the affirmative & the appellant the negative of these propositions.

I will therefore be insisted. that

1° Under the circumstances detailed by the witnesses for defendant and uncontradicted by any evidence, Cutting having ceased to be agent for the defendant had no longer power to bind her. on the 15 July 1850

2° The custom & fixed usage of the defendant being only to take Charge of boats when they were brought alongside of the ways by direction of the Company. in order to be taken on the Docks. express authority from the Company was necessary in order to enable an agent to bind her by a contract different from the usage & custom so shown.

And the following authorities are relied on viz.

Schimmelpennick & al v Bayard & al 1 Peters S. Ct. 265.
Pickering v Burk 15 East. 43.
Stubbing v Heintz Peake's Reps. 47
Pearce v Rogers 3 Espin. 214.

(32)

Andrews v Kneeland 6 Cow. 354
Beals v Allen 18 Johns 363
Parsons v Armor 3 Peters (U.S.S.C.) Rep. 428
Snow v Perry 9 Pickering 542
Wiltshire v Sims 1 Camp. 258
Brown v Staton 2 Chitt. 353

Wm T. Gantt
for appellant

Wm. P. Lamothe
v
St Louis Marine Railway
& Dock Company. appt.
Points & authorities for ap-
pellant. Gantt for appt.

In support of the first point, it must be remarked that the only presumption of authority from the Defendant to Cutting arose from Cuttings position de facto as foreman. Properly speaking it was the foreman not Cutting, who was presumptively authorised to represent the Company Now, Gilkey came here on 15th July '50 when Cutting was no longer acting as foreman, but Perkins was. Gilkey was on the ground and could see for himself who was then filling the office to the incumbent of which the presumption of agency attached. If he was so careless or heedless or so preoccupied with the notion that Cutting being agent for certain special purposes in June was also agent for these purposes in July & always afterwards, that's the misfortune of his principal. The enquiry is whether the defendant was guilty of negligence in not advising the world of the change of agency, and so bound by the acts of the agent whose authority had ceased. They were guilty of no negligence. They put one person after another in a certain position. The authority a presumption of authority, attached to this position, and to the person filling it de facto. This can deceive no one. There is certainly a rule & a very salutary one too, that in case any one Constitutes an agent, and accredits him so to the world and afterwards revokes the agency but fails to give notice of such revocation, any person dealing in good faith with this ex-agent will be entitled to charge his principal. But this good faith requires not only actual ignorance of revocation but it includes also that degree of common vigilance & discernment which will take notice of circumstances which announce the close of the agency. And if there be any such circumstances the party dealing with the agent must at his peril take notice of them. There must be some excuse for Gilkey not taking notice of the change of foremen, if he had been any where but at St Louis. But there he was, so alarmed

about the cholera that he could attend to nothing but his anxiety to get away, and he never even enquired for the foreman at the Docks. It is not even said that he visited them, that is, went into them. He saw an old acquaintance of Cutting and meeting him he talked about securing the boat so as to allow him Gilkey to leave St Louis: and as soon as possible he does leave St Louis.

What proclamation of the fact was necessary? The defendant put another man in the physical place of Cutting. This was notice to the world.

The Court laid stress on the fact that Cutting, while agent, agreed with Gilkey for the repair of this boat, and treats his action on the 15 July '50 (taking Gilkey's version of it & rejecting Cutting's) as a mere continuance, in pursuance of the original agreement. But this evidently proceeds on a curious misconception. It is agreed on all hands that Gilkey did not come down from Alton on the 15 July in pursuance of his arrangement with Cutting. He was to have received word from Cutting when the docks would be ready. He did not wait for this word but came down without it. He cannot then claim the benefit of any previous understanding with Cutting - for he did not act according to it: And as for any new agreement, Cutting was no longer agent, and the most satisfactory information on that head was furnished by the actual presence and action of another person as foreman and agent at the Docks (in place of Cutting) themselves. Every one having business with the defendant was bound to take notice of the existing arrangements at the place which the Company used to carry on business.

Suppose that the Company had put up in a conspicuous manner at their docks a notice that Perkins (e.g.) was discharged from all employment by them. Could any one having business with the Company evade the force

of his notice by a failure to go to the docks themselves & make a bargain with Perkins in another County for the taking out of a boat & repairing her on the docks?

It was error then for the Court to instruct the jury as was done by the instructions given at the ~~the~~ its own motion by the Court.

On the second point, the error of the court was manifest The powers of the foreman of the docks were not express They were implied from the nature of his business. He was to superintend the getting of vessels on, & the putting of them off, the ways. This is necessary. There must be then a time when the foreman must take charge of the vessel & discharge the owners from all further care of her for a space. Reason & usage fix this time to be when the boat is ready to be hauled out on the ways and the ways are ready to receive her. She is then brought alongside. made fast, and given in charge of the foreman: and then the foreman, acting for the company, becomes answerable for her, and makes the company answerable. See the testimony of Meegan, Perkins & Timmons

But upon such powers as these must be grafted an enormous increase before the foreman can bind the Company to take charge of vessels thrown along shore out of sight and reach of the docks. The unreasonableness and unusualness of the pretence that the foreman could so depart from customary rules, are enough to condemn it. Authority speaks the same language

But the Court held that 1st plaintiff must recover if the boat was lost by fault of defendant's agent (which may be safely conceded as a correct legal principle) 2d that although the boat was not done against the will of the agent, yet defendant is liable if he received her as agent. 3d and even though he had then ceased to be agent yet such act as he might while agent have done, might be done then would bind the company unless

plaintiff had notice of the revocation of his powers:

And refused to tell the jury that no neglect of Cutting could make defendant liable, unless prior to such nonfeasance (i.e. no nonfeasance) some obligation rested on the defendant: And that though all which Cutting & Perkins had said should be believed by them, yet there was no authority on the part of Cutting to bind the defendant on the 15th July 1859

Now the second instruction was certain to mislead the jury. It told them in effect that any one representing himself as agent bound his supposed principal, without more: And that it was enough for any one dealing with a fur company to deal with a former agent of that company, (tho' no longer acting in that capacity) provided he did not actually know of his displacement.

Surely this qualification was necessary: that such displacement should have been so secret that a person might be ignorant of it without gross negligence.

The court further told the jury that if the thing contracted for between Cutting for the defendant & Gilkey for Lamothe were within the scope of the authority of a foreman, then if Cutting so contracted, Deft was bound by his contract.

And refused to tell them that such a contract was not within his powers as foreman, if what Timmons, Perkins & Cutting said about the powers of foremen was true.

The clear inference was that the onus of disproving authority rested on us, and that we had failed to disprove it. I mean, authority to make the extraordinary bargain respecting the custody of the boat of which Gilkey speaks.

I have throughout avoided to touch on the discrepancies between Gilkey's & Cutting's testimony, and have argued as if the jury believed Gilkey and discredited Cutting. It is impossible to say whether they

Lamothe

vs

Marine Railway & Dock

Company

Argument.

did this or not. The error and confusion which the instructions were calculated to induce deprived us of a fair trial before the jury on the facts: and so we pray a reversal of the judgment with a correct laying down of the law in order that we may have such a trial.

(42)

Lamothe
Railway Co.
argument

In the Supreme Court
October Term 1852

William P Lamothe Respondent

vs

St Louis Mississ Railway and
Dock Co appellants.

To reverse the judgment of the Court below the Counsel for appellant relies upon the following.

1- The Court below erred in giving the instructions at the instance of plaintiff, as also in those given upon its own motion, said instructions did not place fairly before the jury the law which should have governed in the decision of the cause as will be seen by reference to them.

2. The instructions given by the Court on behalf of the plaintiff below were calculated to mislead the jury, as they enunciated principles clearly repugnant to the well established rules of law, and to Each other

3 The instructions prayed by appellant, were strictly in accordance with the law and the evidence given on the trial of said cause and the refusal of the Court to give them was error.

4 The evidence preserved in the bill of Exceptions clearly establishes the fact, that Cutting, was not the Agent of the appellant, at the date of the alleged agreement, his acts therefore could not legally bind said Company, and the Court should have ~~to~~ declared the law, as prayed

5. When the principal is charged for the acts of another as his agent, it is incumbent on the part of the person attempting to establish the liability; to show that the individual with whom he contracted was in fact such agent and acted within the scope of his authority. The instruction asking the declaration of this proposition as law was refused by the Court below

6. When a person deals with another knowing him to be a mere agent, it is the former's duty to ascertain the exact extent of the agency; he deals with him at his own risk; the law presumes him to know the limit of the agent's power; and if the agent exceed his power, the principal will not be bound. 12 Smedes & M. 398

7. It is insisted that Alfred Cutting even if he were the agent of the appellant (which is denied) he had no authority to make a contract as the one alleged to have been entered into.

Wm P. Lamothe Respt
vs
St Louis Marine Rail-
way & Dock Co. Appellant

Appellants Brief

Thos B Hudson atty
for Appellant

(46)

William P. Lemutho Plff
vs
The St. Louis Marine Railway and Dock Company Deft

In the Supreme Court
October Term 1852

This action was instituted to recover of the defendant the value of a Ferry Boat charged to have been lost by the negligence or carelessness of the defendants Agents. There was much conflicting testimony in the case. All of the evidence of the plaintiff tended to prove that Alfred Cutting, at the time the Boat was brought to St Louis for repairs, was the superintendent and foreman of the defendant, and that he was so when the contract was made by him, Cutting as the Agent of said defendant with plaintiff for the repair of his Boat

Defendants offered evidence tending to show that though Alfred Cutting was Agent for said Defendant and was foreman & superintendent of the Docks of said defendant when the ~~plaintiffs~~ contract was made with plaintiff for the repairs of his Boat was made, he ceased to be such foreman and superintendent on Saturday the 13th of July being the Saturday night previous to the Monday morning when said Boat was brought to St Louis. The evidence of defendant further tended to prove that said Cutting continued in the employment of said defendant from the time said contract was entered into till some weeks after the plaintiffs Boat was lost though the actual superintendent of the Docks after July 15th was Luther Perkins

In regard to all the material points in the case the testimony of the plaintiff was in direct conflict with the testimony of the defendant. Two verdicts have been rendered for plaintiff

On motion of plaintiff the Court instructed the Jury as follows viz:

If the Jury believe from the evidence that Alfred Cutting was the authorized Agent of the Defendant to take control of Boats brought to the place of business of the defendant to be repaired, and that as such Agent said Cutting took charge of said Ferry Boat of plaintiff and that through the inattention or carelessness of said Cutting said Ferry Boat was lost they will find for the plaintiff

The fact that Cutting told plaintiff not to bring his Boat to St Louis until such time as he, Cutting should direct will not prejudice the plaintiffs right to recover if the Jury believe from the evidence that when the Boat was in fact brought to St Louis, it was taken possession of by said Cutting as Agent of defendants and was lost through the inattention negligence or carelessness of said Cutting

On motion of defendant the Court instructed the Jury as follows viz:

The Jury are instructed that if they believe from the evidence that the Boat of the plaintiff was not in charge of the defendants at the time she sunk, then the defendants are not liable for her loss

If the Jury believe from the evidence

that Gilky bought the Boat of Plaintiff to St Louis before he was entitled to do so by Cutting, that Cutting on Gilkys telling him of the arrival of the Boat at St Louis told Gilky that the Docks were full which statement was correct, that Gilky then left the City leaving the Boat in charge of the boy of whom the witness have spoken, without any agreement on the part of Defendants to take charge of said Boat until there was a place for her in the Docks, and that before there was a place for her in the Docks the Boat was lost by the carelessness of Gilky in the boy left in charge of her without any participation therein by Defendants, then the Plaintiff cannot recover

The Court refused the following instructions asked by Defendant Dy:

No liability of Defendant can be made to accrue in consequence of any failure of Cutting as an individual and not as agent of Defendant to save the vessel of plaintiff such neglect if it occured without any antecedent promise cannot be the foundation of any legal liability against the Defendant. That of Cutting was not the foreman a superintendent of the Defendants until the 15th of July 1850 nor especially entrusted to the charge of Boats generally nor of this Boat in particular on account of Defendants, then Defendants are not liable for his acts

That if the Jury believe the evidence of Simmons, Cutting & Perkins relative to the time and circumstances when the charge of superintendent

of the Docks took place then Cutting had no authority to bind defendants on the 15th day of July 1850

The Court of its own motion instructed the Jury as follows Viz:

If the Jury believe from the evidence that Cutting was superintendent or foreman for defendants when the contract was made with plaintiff for the docking & repairing ~~of his Boat~~ and repairing his Boat and that he made on the part of Defendant said contract with plaintiff then any agreement or acts of said Cutting on the 15th of July within the scope of the power of said foreman or ~~superintendent~~ agent so far as this plaintiff was concerned would bind the defendant unless the plaintiff or his agent acting for him at the time was informed and knew that said Cutting had ceased to be foreman or superintendent for defendant

If plaintiff or plaintiffs agent acting for him on the 15th of July knew that Cutting had ceased to be the foreman or superintendent of defendants and had no authority to take possession of the Boat under the circumstances then defendant is not liable therefor

If the custom & general duties of foreman or superintendent included the taking charge of Boats under the circumstances proved then the foreman or superintendent had authority so to do & so to bind the defendant otherwise not.

The defendant is not liable for any neglect of Cutting to see the Boat unless Cutting was at the time agent for defendants & the Boat was under charge of Defts

Knowe & Kellogg
for Pltff

In the Supreme Court
October Term 1852

Wm P. Lamothe

The St Louis Marine
Railway & Dock Company

Statement of Case

Kerr & Kelly
for Pfff

(To be fixed at the head
of the opinion -
Ryland)

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