The Wiggins Ferry Company v. Adams, Joseph L. & Adams, William A. 1858 St. Louis 391/9

Old Box 591/30

J. L. & W. A. Adams
wants damages for loss of barge (west wind)
hit by ferry-boat & won
$892.80 barge at point in wharf (America) appropriated
to the ferry boats
have to make effort to use care to avoid
injury even if they're at fault passively
O = instructions were correct

March 1858 27
Filed 1857 95
A = B. A Hill
Judge Scott
Judge Richardson dissenting

alley in block number thirty-four, have petitioned the City Council to open an alley in block number thirty-four, from Walnut to Market street, so as to continue the private alley located by Mrs. Chouteau, in the centre of said block, at the cost of the owners of property in said block. Therefore,

Be it ordained by the City Council of the city of Saint Louis, as follows:

Section first. That an alley twenty feet wide be and the same is hereby located in block number thirty-four, running from Walnut to Market street, through the centre of said block, as laid out on plat on file in the office of the City Engineer.

Locating alley through block 34.

Section second. That the Mayor and City Engineer be, and they are hereby authorized and directed to proceed forthwith to cause said alley to be opened in the manner provided by law and ordinances.

Mayor and Engineer to have alley opened.

Section third. All expenses and damages incurred or assessed in opening said alley, shall, before the same be opened, be paid by the owners of property fronting on said alley, according to an apportionment to be made by the City Engineer among the said owners, according to their respective number of front feet, having regard to the benefits, according to each petitioner respectively; and the damages shall be assessed against each petitioner in proportion to the benefits aforesaid, and the number of front feet on said alley owned by him.

Expenses and damages—how apportioned and paid.

Section fourth. The petition referred to in the preamble to this ordinance, shall be filed in the office of the City Register.

Petition filed.

Approved June 15th, 1849.

[No. 2207.]

AN ORDINANCE DIRECTING THE PURCHASE OF MAPS FOR THE USE OF THE CITY OF SAINT LOUIS.

Be it ordained by the City Council of the City of Saint Louis, as follows, viz:

Section first. That the City Engineer be, and he is hereby, directed to purchase from Jules Hutawa two maps of the city of Saint Louis extended so as to embrace all of the improvements made by him to said map within the past year; provided, the City Engineer be satisfied that the said maps are correct, and that the cost of the same shall not exceed the sum of thirty dollars; the cost thereof to be chargeable to the appropriation for contingencies.

Engineer to purchase 2 maps of the city.

Section second. That said Engineer is hereby instructed to cause one of the Maps as aforesaid to be placed on the walls of the Board of Aldermen and the Board of Delegates respectively, and it is hereby made the duty of the Sergeant-at-arms to see that the said Maps are not removed from said walls.

Where to be placed.

Approved June 22d, 1849.

[No. 2208.]

AN ORDINANCE TO CHANGE THE LANDING OF THE FERRY COMPANY COMMONLY CALLED "THE WIGGINS FERRY COMPANY."

Be it ordained by the City Council of the City of St. Louis, as follows:

Section first. The present landing at the foot or termination of Market street of the Ferry Company known and called "The Wiggins Ferry Company,"

Changing landing of the Wiggins Ferry Company.

State of Missouri } I. I. G. Harper
City of St Louis } Register of the City of St Louis do hereby Certify that the aforegoing ordinance No (2208) is a true copy of the Original Ordinance as the same is now on file in my office. Given under my hand and the seal of the City of St Louis this 26th day of Nov 1856
I G Harper Register

shall be, and the same is hereby, changed and transferred to the eastern line or limit of the city at the termination of Spruce street, in the city of Saint Louis.

Section second. This Ordinance shall take effect and be in force at the expiration of the license now held by said Ferry Company from the city of Saint Louis; or sooner, by the consent of said Company; after which said Ferry Company shall be licensed to run a Ferry to and from a landing on the western shore of the Mississippi River at the point designated in the first section hereof; and all ferry rights and privileges which said Ferry Company now has under the Ordinances of the city of Saint Louis shall be reserved to said Company and exercised and enjoyed by it at the said landing hereby designated at the foot of Spruce street instead of Market street, as heretofore.

Ordinance when to take effect.

Section third. All Ordinances or parts of Ordinances repugnant to this Ordinance are hereby repealed; and it shall be the duty of the Harbor Master, under the direction and control of the Mayor, to cause the provisions of this Ordinance to be carried into effect; and the Harbor Master is hereby instructed to keep clear the same space at the landing at Spruce street that they now have at Market street.

Ordinances or parts repealed—Duty of Harbor Master.

Section fourth. Nothing herein contained shall be so construed as to impair the rights of the city to fix and settle the rate of ferriage as heretofore, or to license said Ferry company, as by existing Ordinances she can lawfully do.

Right of City to fix rates of ferriage not to be impaired.

Approved June 22d, 1849.

[No. 2209.]

AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE CONTRACTS WITH THE STATE OF ILLINOIS IN REFERENCE TO THE IMPROVEMENT OF THE HARBOR OF SAINT LOUIS.

Be it ordained by the City Council of the city of Saint Louis, as follows:

Section first. The Mayor is hereby authorized and empowered to execute in the name and behalf of the city of Saint Louis, two certain bonds, one to the State of Illinois (marked number one,) the other to the county of St. Clair (marked number two,) which said bonds are intended to secure the completion of certain works designed for the improvement of the Harbor of St. Louis, as provided for by Ordinances of the city heretofore passed; and also to secure certain rights and privileges to the people of the State of Illinois, and the St. Clair County Ferry Company, and which said bonds are made and executed in pursuance of certain Joint Resolutions adopted by the Legislature of Illinois on the ninth day of February, eighteen hundred and forty-nine, authorizing the said city of Saint Louis, to proceed with said works for said Harbor Improvements within the limits of said State of Illinois.

Mayor to execute certain bonds marked No. one & two.

Section second. Said bonds shall be tested by the Register under the seal of the said city; and when executed under the seal of said city by the Mayor, as provided for in the first section hereof, said bonds and each and every part thereof shall be valid and binding on the said city of Saint Louis.

Bonds to be tested by Register.

Section third. It shall be the duty of the Mayor to cause copies of this Ordinance duly certified and authenticated, to be attached to each of said bonds, and

Duty of the Mayor respecting ordinance and bonds.

State of Missouri }
County of St. Louis } Be it remembered that heretofore to wit; on the 28th day of July A.D. 1854 there was filed in the Office of the Clerk of the St. Louis Court of Common Pleas within and for the County aforesaid a certain petition which is in the words and figures following to wit;

(1)

Petition.

Joseph L. Adams & William A. Adams Plaintiffs } State of Missouri
against } County of St. Louis
The Wiggins Ferry Company Defendant } In St. Louis Court of Common Pleas
September Term 1854

Plaintiffs who are now and were on the 14th day of May 1854 partners doing business under the name and style of J. L. & W. A. Adams by attorney state that on said 14th day of May 1854 at the County of St. Louis they were the owners and in possession of a certain barge or wood boat called the West Wind then lying at the Landing in the City of St. Louis in said County and State properly moored, and worth the sum of eight hundred dollars & said barge or wood boat having on board at said time and place seventy seven & cords of wood also the property of said plaintiffs, The said defendant being an incorporated company, by the laws of the State of Illinois under the name of "The Wiggins Ferry Company" was owner of and had the control & management of a certain Steam Ferry Boat called "the America" at the said time and place, and being the

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owner of & having the management and control of said Ferry Boat as aforesaid by its agents & servants, the said defendant then & there so wrongfully & carelessly managed its said Ferry Boat as to run into & against the said barge or wood boat of said plaintiffs lying at the Landing as aforesaid in said City and County and to break sunk & wholly destroy the said barge or wood boat of plaintiffs worth eight hundred dollars as aforesaid and also forty cords of said Wood of Plaintiffs worth One hundred and Seventy $^{00}/_{100}$ dollars then & there in said barge or wood boat so that said barge or wood boat and said forty cords of wood were totally destroyed and lost to plaintiffs through said wrongful acts of said defendant its agents & servants, And by the said wrongful & careless management of said Steam Ferry Boat by said defendant its agents & servants said plaintiffs were put to great expense to wit Thirty two $^{00}/_{100}$ dollars, in saving from the river 37½ cords of other wood belonging to plaintiffs at said time and place thrown into the river from said barge or woodboat, by said wrongful & careless acts of said defendant its agents & servants

Defendant though requested has not paid to plaintiffs said sum of money losses and damages caused by said wrongful & careless acts as aforesaid which amount to the sum of Ten hundred & two $^{00}/_{100}$ dollars but refuses so to do, and plaintiffs now ask judgment for said sum and interest & such other and further relief as they may be entitled to

W L Gray for Pltffs

State of Missouri }
County of St. Louis } ss William A Adams one of

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said plaintiffs makes oath and says that he believes the above petition & the matters therein as stated are true

Sworn to & Subscribed before me this 28th July AD 1854 } W. A. Adams.

C. W. Hicks clk

Thereupon issued the following Summons to wit;

County of St. Louis ss

The State of Missouri

Summons

To the Sheriff of St. Louis County; Greeting We command you to summon The Wiggins Ferry Company to appear before the Judge of our Court of Common Pleas on the first day of the next term thereof to be held in 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 Joseph L. Adams & William A. Adams as set forth in the annexed petition and have you then and there this writ;

Seal Witness Charles W. Hicks Clerk of our said Court with the seal thereof hereto affixed at Office in the City of St. Louis this 28th day of July in the year of our Lord eighteen hundred and fifty four

C. W. Hicks clerk

Shffs Return.

Thereupon the Sheriff made the following Return Executed August 9th in the County of Saint Louis by delivering a copy of this writ and petition as furnished by the Clerk to Edward C. Wiggins Treasurer of The Wiggins Ferry Company; There being no President or Secretary of said Ferry Company being so informed by said Wiggins.

John M. Wimer Shff

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By Thd Chadbourne Dpty

And afterwards to wit; On 19th February AD 1855 the following Amended answer was filed by leave of Court to wit;

"Amended Answer"

"Defendant for answer to Plaintiffs petition says it has no information sufficient to form a belief whether said plaintiffs were copartners as stated or whether they were the owners of said Barge or Wood Boat called the West Wind as stated, and demand proof thereof. Defendant denies that said Barge was properly moored to the landing at St Louis as stated. Defendant has not sufficient information to form a belief whether said Barge was of the value stated, or what was its value, or whether she had on board seventy seven and One half cords of wood as stated, or what quantity she had on board; or whether said wood was the property of plaintiffs, and upon all these points insists upon strict proof. Defendant denies that its agents or servants so wrongfully or carelessly managed said Ferry Boat as to run into and against said Barge or wood Boat as stated so as to break into and destroy said Boat as stated; Defendant has no knowledge or information sufficient to form a belief whether said Wood was of the value stated or what was the value of the same: Defendant denies that said Barge and Wood or any part thereof were totally lost to plaintiffs by or through the wrongful acts of defendants its agents or servants as stated, and deny that plaintiffs have been damaged in any sum by defendants as alleged; and deny that plaintiffs have been ~~damaged~~ put to any expense whatever by or through any act of defendant, its agents or attorneys wrongfully done

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Defendant avers that said Barge at the time of the alleged damage complained of was moored at the place or point of the wharf where Spruce Street intersects the said Wharf, in the City of St. Louis, at the same place provided by an ordinance of the City Council of the City of St. Louis as the Ferry Landing of Defendant. Said Ordinance is entitled an Ordinance concerning ferries, number 2376, and was approved March 29 1850. So much thereof as relates to said Ferry Landing is in the following words;

"Sec 10. The Higgins Company Ferry Landing shall be at the point where Spruce Street intersects the wharf and the North Ferry Landing at the Eastern termination of North Market Street, at which points the Boats of said Ferries shall respectively land except as hereinafter provided.

"Sec 11 If any Ferry boat on account of the low stage of water in the river or other natural cause, shall be at any time prevented from landing at the point designated as its landing place, the Harbor Master shall designate the nearest point thereto, at which said boat can without obstruction land as its landing place for the time being, and such boat shall be landed at the place so designated until a landing can be effected unobstructedly at its regular landing place".

Defendant avers, that by virtue of ~~the aforesaid~~ said ordinance and the permission of the regularly constituted authorities of the City of St. Louis defendant had a lawful right to use so much of said wharf above described as a ferry landing to the exclusion of all other boats and water crafts so far as the use by such other Boats and

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and crafts might in any wise interfere with the free and proper use of the same by defendants, Defendant at the time having a license in full force from the authorities of the City of St. Louis to run said ferry and to use said place as a landing which was well known to plaintiffs. Defendant further states that said barge at the time aforesaid was wrongfully moored in the said Ferry landing of defendants which plaintiffs well knew and the wrong of plaintiffs in thus mooring said Barge to the Ferry landing of defendant, was the cause of whatever damage plaintiff sustained by reason of the breaking and sinking of said barge, the said Ferry boat being at the time in the act of making its usual & necessary landing in the regular course of the business of said Ferry, under the care and direction of competent and careful officers who were using their best skill to effect a safe landing without damage to said barge, and were in no wise at fault for the damage and loss that ensued.

Hill, Grover & Hill
attys for Defendant

County of St. Louis }

Edward C. Wiggins agent for defendant makes oath and says he believes the foregoing ~~[illegible]~~ answer and the matters therein asserted are true

Sworn to & Subscribed before me this 16th day of Feby 1855. Edwd C. Allen Justice of the Peace

Edward C. Wiggins

And afterwards the following further proceedings were had in this cause to wit:

October Term 1856 Monday November 24th 1856

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Jury & trial progressed.

"Now at this day come the parties by their attorneys and thereupon come a jury to wit; James Longuith A L Hardcastle, George Holsman Philip Nitz J B McKay. H. P Taylor F E Schmeiting James W Francis Walter Ransom Samuel Johnson Wm W Branch and Thomas Lee twelve good and lawful men who being duly elected tried and sworn the issues herein joined well and truly to try, the trial progressed, but not being finished is laid over until to morrow morning."

Tuesday November 25th 1856

"Now again come the parties and jurors as aforesaid, and thereupon the trial progressed, but not being finished is laid over until to morrow morning."

Wednesday November 26th 1856

"Now again come the parties and jurors as aforesaid and thereupon the trial progressed but not being finished is laid over until to morrow morning."

Thursday November 27th 1856

Judgment for Plaintiffs for $892.80

"Now again come the parties and jurors as aforesaid and thereupon the trial progressed and being finished, the jurors aforesaid upon their oaths aforesaid say they find for the plaintiffs and assess their damages at the sum of Eight hundred and ninety two dollars and eighty ~~[illegible]~~ cents; therefore it is considered by the Court that the plaintiffs recover of the defendant the damages aforesaid as assessed, and also their costs herein expended and have execution therefor.

And afterwards the following further pro=

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=ceedings were had in this cause to wit;

Monday January 12th 1857

"The defendants motion for a New trial herein being heard and fully understood by the Court it is ordered that said motion be overruled."

Mo. for New trial Ord.

And afterwards the following further proceedings were had in this cause to wit;

Saturday February 7th 1857

"On motion of the defendant by its attorney it is ordered that an appeal be allowed it to the Supreme Court from the judgment herein; and thereupon said defendant files an appeal bond with Edward C Wiggins as principal and Moses Lamoureaux as security which bond is acknowledged by the obligors and approved by the Court.

"Appeal Granted"

Which bond is in the words and figures following to wit;

Know all Men by these Presents, that we Edward C Wiggins as principal and Moses Lamoureaux as surety are held and firmly bound unto Joseph L Adams & William A. Adams in the sum of Twelve 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 seventh day of February AD 1857.

Appeal Bond

The Condition of the above Obligation is such that whereas The Wiggins Ferry Company has appealed from the judgment rendered against it and in favor of Joseph L Adams & William A Adams in the St. Louis Court of Common Pleas for the sum of Eight hundred & Ninety two

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dollars and eighty 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 shall if the judgment or any part thereof be affirmed comply with and perform the same so far as it may be affirmed; and pay all damages and costs which may be awarded against it by the Supreme Court then this obligation shall be void, otherwise it shall remain in full force and effect.

Acknowledged & } Edward C Wiggins. (Seal)
Approved } W Lamoureux. (Seal)
Attest C. H. McNeill.

And afterward to wit on Feby 24th 1857 the following Bill of Exceptions was filed to wit;

Bill of Exceptions

Bill of Exceptions.

Be it remembered that on the trial of this cause the plaintiffs gave in evidence to the jury tending to prove that they were partners doing business in St. Louis as Wood Merchants That on the 12th May 1854 they were joint owners of a Barge called the West Wind then laden with about eighty cords of wood that on said 12th of May the said barge was landed or moored at the wharf in the City of St. Louis near the north line of a place on said wharf commonly used by defendant as a landing for the steam ferry boats of the defendant; that on the 14th of May 1854 the steam ferry boat America the property of defendant while engaged in the

the ferry on a trip from the Illinois shore to the ferry landing in St. Louis and while round-ing up to the flats of the said ferry landing to make her landing struck the stern post of the barge West Wind with her larboard guard and backing down stream in order to make her landing, ran her against the stern post of said barge again and so broke and injured the barge in making her landing against the flats of the ferry land-ing that the said barge filled with water and sunk. That the plaintiffs immediately procured a number of persons to remove the wood from the said barge and during the evening and night of the 14th. of May and the morning of the 15th. of May the plaintiffs removed about 40 cords of the said wood the barge still remaining sunk to her deck and in the same place where she was first struck, In the forenoon of the 15th. of May the captain of the said Ferry Boat "America" directed the plaintiffs agent to haul the stern of the barge from the flats of the ferry landing towards the stern of a steam boat that was lying a short distance above the ferry lan-ding That the plaintiffs agent caused the stern of the said barge to be hauled away from the flats towards the said steamboat and fastened as directed by the Captain of Ferry Boats ~~[illegible]~~ and shortly afterwards the said steam ferry boat America in rounding out from the said flats to make her usual trip struck the said barge again while the barge was lying in the water in a sunken condition and the said barge sunk her stern in about fifteen feet water and about forty cords of wood remaining in her float-

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-ed away and was lost; and the barge was also lost; and that the barge and wood were of the value of about eight & nine hundred dollars Plaintiffs further offered evidence tending to prove, that the stern of their barge when struck by the steam ferry Boat was from ninety to One hundred feet north of the north line of Spruce street in the City of St. Louis and that it was practicable to have landed the said steam ferry boat without touching or injuring the barge and that the steam ferry boat in making her landing on the 14th of May 1854, at the time of the collision, ran with greater force and speed than was necessary to make the said landing. It was a calm and pleasant day and that the ferry Docks had been moved up once or twice on the 14th of May, The two ferry boats were running all of the 13th and 14th of May and making trips every half hour and they never touched the barge until the afternoon of the 14th and that the stern of the barge was above the curb or grading of the paving of the levee, that the Harbour Master had some times permitted wood boats to land above the ferry landing The defendants read in evidence to the jury the following City Ordinances of the City of St. Louis Ordinance No. 2874 entitled an ordinance concerning ferries approved 29th March 1850 also an ordinance No. 2948 entitled harbor department approved January 4th 1858 published in the revision of ordinances of 1858 by Kemble & Wager City printers. Also ordinance No. 2949 entitled an ordinance establishing and regulating the Engineer department published in the same book between

pages 867 & 871 inclusive; also the ordinances under the same title in the revision of the City ordinances of the City of St. Louis published in 1850 as published by authority of a City ordinance in the revision of 1850; also ordinance No. 2208 entitled an ordinance to change the landing of the ferry Company commonly called the Wiggins Ferry company approved June 22d. 1849; which said ordinances by consent of Counsel of the parties to this suit form a part of the record in this cause; and may be read in the Supreme Court from the printed books of ordinances of 1850 & 1853 as the same are found in the St. Louis Law Library Association or in any private or in the State Library And the said ordinance No. 2208 may be read from the certified copy therefor as made by J. G. Harper City Register on the 26th day of November 1854 in the same manner and with the same effect as if inserted in this record at large.

The plaintiffs objected to the introduction of each of these ordinances in evidence for the reason that they were irrelevant incompetent & immaterial to the issue in this cause; and because not properly certified or proved: all except No. 2208 being offered and read from the printed revisions of 1850 & 1853 in the Law Library without and further proof or authentication than appear in said printed books. But the Court admitted the said ordinances to be read in evidence to the jury and the plaintiffs then and there excepted: defendant further gave evidence to the jury, tending to prove that the plaintiffs barge West Wind was landed at the wharf at St. Louis on the 12th. of May so near to the ferry flats used for receiving

and discharging freight and passengers by the steam ferry boats of the defendant ~~as~~ to be unsafe and in danger of being struck by the said steam ferry boats in their ordinary use of the said steam ferry flats in landing at and departing from the said ferry flats; that the said barge was so moored that a portion of her hull was within that portion of the wharf of the City of St. Louis which had been paved and marked on the said wharf for the use of the defendants as a ferry landing that on the 13th day of May 1864 the River Mississippi began to rise and continued to rise for three days quite rapidly; That on the said 18th of May at the request of the defendant the Harbor Master caused the plaintiffs to be notified that the said barge was moored at an improper place for a wood boat that the proper landing for a wood boat was below the ferry landing at Almond street, that the barge was in an ~~improper~~ improper place from the continual landing and departing of the steam ferry boats; and that the plaintiffs promised the harbor Master to drop their wood barge down below the ferry flats among the other wood boats as soon as the steam ferry boat then lying at the ferry flats would go out to make her trip across the river. That the plaintiffs failed to do so, that they suffered their barge to remain where it had been moored: that the barge was fastened in such manner to the shore that the rising of the river caused it gradually to drop down nearer to the flats of the ferry landing until the stern post of the said barge was abreast of the North line of the ferry flats

of the defendants, when the collision that sunk the barge in the first instance took place That the pilot and engineers of the Steam ferry boat America used every precaution in their power to avoid injuring or sinking the said barge in making the landing with the said ferry boat at the time of the collision which first sunk the barge; and in rounding out from the landing when the ferry boat struck the barge the last time; That during the year 1849 the space upon the wharf of the City of St. Louis used for a ferry Landing by the defendants was from 250 to 300 feet at the foot of Market street, one half of said space being above & the other half below said street, that the ferry landing at the foot of Spruce Street was paved in 1852 by the City of St. Louis North of Spruce street 124 feet 8 inches, the part of the space for the ferry landing south of Spruce street was not paved at the time of the collision, the Spruce Street sewer was the termination of the paving of the ferry landing towards the South, The Spruce street sewer extended into the River Mississippi beyond the line of the paving of the ferry landing & it was impracticable to moore the flats of the ferry landing below the Spruce street sewer; and it was impracticable to use the space below the Spruce street sewer for a ferry Landing; there were rocks there & the landing was not graded and paved so as to be capable of being used for that purpose; That the harbor master was frequently present, when the City Engineer of the City of St. Louis, was laying out and establishing the grade & directing the paving of the wharf for the ferry landing at the

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foot of & above Spruce street; that the City engineer laid out said wharf & directed the grading & paving thereof under the orders of the Mayor of the City of St. Louis. That the City of St. Louis had exercise jurisdiction over the wharf or levee of the said City between Almond & Cherry streets embracing the ferry landings at the foot of Spruce and Walnut streets for more than twenty five years before the said collision. That the paving of the space on the landing or wharf for the use of the ferry landing North of Spruce street was different from the other paving of the wharf, the slope of the ferry landing was more uniform and considerably greater from the centre of the wharf to the river, than the other portions of the wharf, whereby the North line of the paving of the ferry landing was very distinctly marked, the paving of the general wharf being several feet higher than the paving of the ferry landing near the river. That the ferry landing was changed in the year 1852 from the foot of Walnut street to the foot of Spruce Street that since the said change of the said landing the said defendant has used the space at the foot of Spruce Street and above Spruce street to the extent of the paving of the ferry landing as a ferry landing for the ferry boats of defendant engaged in crossing the river from the City of St. Louis to the Village of Brooklin in the State of Illinois. Defendant here offered to prove to the jury That the defendant has used the wharf of the City of St. Louis as a landing for their Ferry Boats, at such places on the Public Landing as were designated by ordinances & by the Harbor

Master, and such other officers of the City as had control of the wharf of said City for more than thirty years next before the commencement of this suit & that the said City exercised during all such time the control of said wharf & of the place designated as a ferry Landing of said defendant; but the Court excluded all of said evidence so offered & every part thereof from the jury & the defendant then & there excepted. Defendant further gave in evidence to the jury, that the flats of the ferry landing were 70 feet long, that Spruce Street was 32 feet wide; that the ferry boat was 150 feet long, that the fore & aft gangways were respectively 30 or 40 feet from the bow & stern of the ferry boat America; & the lading & landing to & from the ferry boat upon the ferry flats were made through said gangways; That the said ferry boat arrived at & left the said ferry flats in the transaction of the ferry business every half hour during the day; That during the afternoon on Sunday before the collision that sunk the barge, the said barge had drifted some distance down stream as the river rose until it came so near the ferry flats, that it was impracticable to land the ferry boat America in the usual way without touching the barge and pushing it out of the way or removing said barge or straightening its lines; that from noon of Sunday until four O'Clock afternoon when the barge was sunk, the said Steamer generally touched the said barge when a landing was made & pushed the barge out of the way to make the landing; that this was necessary in order to effect a landing of the ferry boat

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in the usual way unless said barge had been removed or its lines straightened, that at the time the barge was first sunk, the ferry boat in making the landing ran against the barge without breaking it & then backed down thirty or forty feet & run against the said barge to make the landing of the ferry boat at the ferry flats & the ferry boat ran with such force against the barge to make such landings, as to break the barge & sink it; that there was no watchman or person in charge of the barge on board of it on Sunday when the collision took place.

The foregoing was all the evidence on the trial & the plaintiff asked & the Court gave for them & upon its own motion to the jury the following instructions.

Instructions Given for plaintiffs

Instruction on part of plaintiff.

If the jury shall believe, that the barge or Wood Boat in question was moored in a place not permitted by the City authorities at the time of the collision referred to in the petition and that notwithstanding this the Ferry Boat of defendant could have reached the landing by the exercise of ordinary care & skill on the part of those who had charge of the said Ferry Boat, without inflicting the injury complained of then the fact of her being so out of place constitutes itself no defence to this action.

Court's Own Instructions

If the jury believe from the evidence that the plaintiffs were copartners at the time of the injury complained of and that the barge and wood in question were their property and that the injury to said property was caused by the negligence or unskillfulness of the officers or crew of the Ferry Boat belonging to the defendant,

without any fault on the part of the owners officers or crew of the barge contributing substantially thereto the jury should find for the plaintiffs and assess the damages sustained thereby

2 If the injury was caused by the negligence or unskillfulness of the plaintiffs or of the Officers or crew of said barge; Or if such negligence or unskillfulness contributed substantially to produce said injury; Or if the injury was not caused by negligence or unskillfulness on the part of the officers or crew of the Ferry Boat or agents of the defendant, then the jury should find for the defendant.

3 If both parties were in fault and the fault of each contributed substantially to produce said injury, or if neither was in fault, the jury could find for the defendant.

4 If the barge was moored and left by her owners in a hazardous position and the Officers and crew of the Ferry Boat used ordinary care and skill to avoid injuring the barge and the injury complained of occurred notwithstanding said care diligence and skill on the part of said Ferry Boat the jury should find for the Defendant.

5 If the barge was in a dangerous position at the time and the injury complained of would not have occurred if ordinary care diligence and skill had been used on the part of the Ferry Boat then the jury should find for the plaintiffs unless the plaintiffs by their negligence or unskillfulness at the time contributed substantially to the said injury

And to the giving of each of said instructions the Defendants at the time then & there objected

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& excepted to.

The Court also gave to the jury on the part of the defendants the following instructions

Given for Defendant

If the jury believe from the evidence that the injury done to the barge was occasioned by the negligence of both the plaintiffs & the defendants & their mutual negligence caused or produced the injury then the plaintiffs cannot recover & the jury will find for the defendant.

The defendant asked the Court to give to the jury the following instructions which were refused, to wit;

Defendants Instructions Refused.

1 If the jury believe from the evidence that the plaintiffs were guilty of negligence in mooring their barge at the landing in St. Louis and were also guilty of negligence in taking care of said barge after she was moored; & that she was moored in an improper place & that such negligence & mooring in an improper place in any way concurred in causing the damage or injury done to said barge the plaintiff cannot recover & the jury will find for the defendant.

If the jury believe from the evidence that the barge West Wind was moored or landed at an improper place at the wharf of St. Louis that the plaintiffs were notified by the Harbor Master or by his agent in that behalf to remove her; and that she was injured by reason of the neglect of plaintiffs to remove her to a proper place & in consequence of her being improperly moored & that plaintiffs were guilty of negligence therein then the jury will find for the

defendant.

The Defendants had a lawful right to make her landing at her proper place, assigned to her by the Harbor Master & to force away the barge of plaintiffs therefrom, by using prudently sufficient force for that purpose; & if the plaintiffs by their own negligence left their Barge in an improper place, in violation of the order of the Harbor Master & she became injured by the causes stated above, in the prudent exercise of the right to make the landing, then plaintiffs cannot recover & they must bear their own loss.

If the jury find from the evidence that the Barge West Wind was moored in such manner that any part of said Barge was within the space on the wharf of the City of St. Louis paved and commonly known and used as the ferry Landing for the steam ferry Boats of the defendants; that such place was unsafe and an improper place for the mooring of said Barge, that plaintiffs were notified to remove said Barge therefrom and failed to do so, & that the mooring of said Barge at said place & the failure of plaintiffs to remove her therefrom, contributed directly and substantially to produce the collision or collisions which followed & sunk the barge, then the jury will find for the Defendants.

If the jury find from the evidence that the Barge West Wind was moored so near the flats used for the ferry Landing, as to be in danger of collision with the ferry boats in their ordinary landing at such flats; that said

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place where said Barge was moored was an unsafe and improper place for the mooring of said Barge; that Plaintiffs were notified to remove the Barge away from said place before the collision and failed to do so, and failed to use any necessary or proper precautions to avoid or prevent the collision; and that the mooring of said Barge at such place and the failure of plaintiffs to remove her or to use proper precautions to prevent a collision, contributed directly or substantially to produce the collision or collisions which followed & sunk the Barge, then the plaintiffs cannot recover & the jury will find for the Defendants.

If the jury find from the evidence that the ferry landing for the boats of defendants for more than a year before and at the time of the collision was at the place north of the centre of Spruce street marked by the paving for such landing on the levee and that it was during said periods daily used for such purpose and known by the plaintiffs to be so used and that plaintiffs barge West Wind was moored so as to place any part of said Barge within the limits of said ferry landing & that such place was an improper place for the mooring of said Barge & that plaintiffs were notified to remove the Barge before the collision & failed to do so & that the mooring of said Barge at said place and their omission to remove her therefrom contributed directly or substantially to produce the collision or collisions which sunk the Barge the plaintiff cannot recover & the jury will find for the defendant.

If the jury find from the evidence that the

the barge West Wind was moored or landed at an improper place, at the landing or wharf of St. Louis that the plaintiffs or either of them were notified to remove her before the collision & failed to do so and that the mooring of said Barge at said place in the wharf & the omission to remove her therefrom contributed directly or substantially to produce the the collision, then the jury will find for the defendants.

If the jury find from the evidence that the Barge West Wind was moored so as to place a portion of said Barge within the limits of the place reserved ~~[illegible]~~ and used as a ferry landing for the Steam Ferry Boats of the defendants; and that such place was an improper place for the mooring of said Barge; and that Plaintiffs were notified to remove her before the collision & failed to do so; and that the mooring of said Barge at said place and the omission of Plaintiffs to remove her therefrom, contributed directly or substantially to produce the collision, then the jury will find for the defendants.

If the jury find from the evidence that the Barge West West was so moored at the wharf as to be exposed to the danger of collision from the ordinary & skilful management of the ferry boats that the plaintiffs were notified to remove her a reasonable time before the collision & failed to do so & that the mooring of said barge at said place & the failure of Plaintiffs to remove her therefrom, contributed directly or indirectly to produce the collision, then the jury will find for the defendants.

If the jury find from the evidence that

the plaintiffs or those in charge of the Barge West Wind were guilty of carelessness, negligence or mismanagement in mooring the said Barge at it was moored or in suffering said Barge to remain there after it was moored while the river was rising & that the said place where the said Barge was moored, was a dangerous place for the said Barge & under all the circumstances of the case, the said mooring of said Barge there & the suffering it to remain there while the river was rising contributed directly or substantially to produce the injury done to the barge by the landing or departure of the ferry boats of defendants then the jury will find for the defendants

If the jury find from the evidence that the plaintiffs or those in charge of the Barge West Wind, were guilty of carelessness negligence or mismanagement, in mooring the said Barge as it was moored, or in suffering said Barge to remain there after it was moored; that the river between the time of the landing of the barge & the collision was rising & that the plaintiffs or either of them were notified to remove the barge & that it was an unsafe place for it to remain & that the place where the barge was moored was a dangerous place for the barge to remain & that under all the circumstances of the case the said mooring of the Barge & the suffering it to remain there contributed directly or substantially to produce the injury done to the Barge in the ordinary & skilful use of the ferry boats of Defendants in making their landing at the ferry landing or in

departing therefrom; then the plaintiffs cannot recover & the jury will find for the defendants

If the jury find from the evidence that the Barge West Wind was moored within the limits of the Ferry landing of Defendants ferry boats as the said ferry landing was established by ordinance of the City of St. Louis; and that the said Barge was moored so near the flats of the Ferry Landing of Defendants steam boats, that the rising of the river caused the Barge to float down so near the flats of said ferry Landing as to impede and obstruct the landing of the said ferry boats of defendants; and that said ferry boats had no other place on the wharf of St. Louis to land freight and ~~passengers~~ passengers but at the ferry flats aforesaid that said flats could not be removed further down the river, that the plaintiffs or either of them were notified to remove their barge from said place where it was moored, by order of the Harbor Master of St. Louis, that plaintiff failed & neglected to do so; that at the time of collision said barge was lying within the limits of said ferry landing, that the proper place for said Barge was south of Spruce Street; that plaintiffs well knew that it was against the ordinances of the City to moor said Barge within the limits of the ferry landing; and the plaintiffs well knew that they exposed their barge to imminent danger of collision with the steam Boat by mooring it there; and the mooring of the barge there & the suffering the Barge to remain in the condition it was in, if the jury find the river was rising during

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Saturday & ~~Wednesday~~ Sunday, was unskilful management on the part of plaintiffs or the persons in charge of the Barge & that such unskilful management contributed directly or substantially to produce the injury complained of then the jury will find for the defendants.

If the jury believe from the evidence that the barge West Wind was moored at the wharf of St. Louis at an improper place in violation of the order of the Harbor Master; that the ordinary action of the elements caused it to drift or drop down the river so as to obstruct the landing of the defendants ferry boat at the landing of the ferry assigned to the said ferry by order of the Harbor Master aforesaid & that the injury to the plaintiffs Barge was in any manner attributable to the negligent mooring of said Barge, then plaintiffs cannot recover.

If the plaintiffs moored their barge at an improper place in violation of the rules & ordinances relating to the wharf of St. Louis & in such manner as to obstruct the wharf at the place assigned to the Defendant to be used as a ferry landing & that the defendant's boat was unable to make her landing without running against said barge & that the servants of defendants used proper care in landing then the plaintiffs cannot recover.

If the jury believe from the evidence that the Barge West Wind was moored & landed at the wharf of St. Louis so near the flats of the ferry landing of the defendant that the rising of the river caused the barge of plaintiffs to go down so near the flats as to obstruct the landing of the defendants ferry boat, that the place

assigned for the ferry landing by the Harbor Master of St. Louis under the ordinances of the City was at the place where the flats of the defendant were moored that this was the only place of landing in St. Louis for the said ferry boat of Defendant at the time of the accident or injury that the plaintiffs were notified by the Harbor Master or his agent in that behalf to remove said Barge before the accident, from the wharf where it was moored, to the proper landing place for wood boats, that plaintiffs refused so to do & neglected to put their barge in a place of safety that they were also notified that the said place where the barge was moored was an unsafe place on account of the same being too near the ferry landing, that the plaintiffs neglected to take proper care of their Barge; that the river was rising prior to the accident, that the barge dropped down so as to obstruct the landing of the defendants ferry boat at ~~their~~ her proper place, and that the plaintiffs were guilty of neglecting & failing to take proper care of their said barge in said particulars & that the defendants exercised proper care in landing their boat, then the plaintiffs cannot recover,

And the Court refused to give to the jury each of said last preceding instructions asked by the defendant and to said refusal of the Court to give each & every of said instructions so asked by the defendant refused by the Court, the defendant then & there objected & excepted.

The foregoing was all the evidence & all the proceedings upon the trial of the cause & the jury having found a verdict for the plaintiffs & the

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Motion for New Trial

Court having entered judgment thereon the Defendant within due time filed its motion for a New Trial as follows

"The Defendant by Hill Grover & Hill its attorneys comes and moves the Court for a New trial & to set aside the verdict in this cause for the following reasons

Because the verdict is against law and against evidence

Because the Court erred in admitting illegal & incompetent evidence on the part of the plaintiff.

Because the Court erred in refusing to admit to the jury legal & competent evidence offered on the part of the Defendant

Because the Court erred in giving the instructions that were given to the jury

Because the Court erred in refusing to give the instructions asked by the defendant to the jury

Hill Grover & Hill
attys for Deft.

The Court refused to grant said motion for a new trial & the Defendant then and there objected & excepted. All of which the defendant prays by its Counsel be made a part of the record in this cause & the same is done accordingly as witness the hand & seal of the Judge of this Court in this same term of the trial of this cause

Samuel Treat Judge (Seal)

State of Missouri }
County of St. Louis } I, Charles W. Hicks
Clerk of the St. Louis
Court of Common Pleas within and for the
County of St. Louis certify the above and fore-
going to be a full true and complete tran-
-script of the Record and proceedings in the
above entitled cause as fully as the same
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 Sixth
day of February A.D. 1857

C. W. Hicks clerk

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48 ~~[illegible]~~

(30)

March. T. 1858

Joseph L. Adams
& William A. Adams
resp't.

vs Transcript

The "Wiggins Ferry
Company" apt.

Appeal from St. Louis
Court of Common Pleas

Filed 28 Febry 1857
Wm S Glanville
Hill Grover & Hill

$12 50/100 paid by Hill
Examined Grover & Hill

48 ~~[illegible]~~

Cy instrum for res. alg 2.25 / do for apts. alg 2.25 /
second tr. for apts. alg 80
a pigt & f. / stat. & brief for each / Affirmed June 24 58 – B p. 451

Joseph L. Adams &
Wm. A. Adams pltffs
respondents
vs
The Wiggins Ferry Company
Defts Appellants

In the Supreme Court
of October term 1857

The Defendants Appellants come and assign for error the following —

1st The court erred in giving judgment for the plaintiffs, instead of the Defendants

2d The Court erred in admitting as evidence to the jury illegal & incompetent evidence on the part of the plaintiffs.

3d The Court erred in excluding legal & competent evidence from the jury offered by the Defendants.

4th The Court erred in giving the instructions given by the Court to the jury & asked by the plaintiffs & the Court also erred in refusing to give to the jury the instructions asked by the Defendants

5th The Court erred in refusing to grant to the ~~plaintiffs~~ Defendants a new trial —

And the Defendants ask the judgment be reversed & the cause remanded

B. A & D. M. Hall
Attys for Defts

No ~~134~~ 48
Oct. 7, 1857
Supreme Court

I. L. & W. A. Adams
respdts plffs
v
The Wiggins Ferry Co.
Defts appltts

Assignment of
errors

B. A. & D. W. Hill
for Defts

Filed 3d Novr. 1857
Wm. S. Glanville
Ck.

J L & W A Adams
Respondents
vs
The Wiggins Ferry Co
appellants

In Sup Court
Oct Term 1857

And now come said Respondents and allege that there is no error in the record & proceedings aforesaid as is alleged by the said appellants & they pray that said judgment may be in all things affirmed

M. L. Gray for
Respondents

~~134~~ 48

In Sup Court
Oct T. 1857

J L & W A Adams
Resp t

v

The Wiggins Ferry Co
appellants

Joinder in errors

M L Gray for
Respondents

Filed 5 Nov. 1857
Wm S Glanville
Clk.

Supreme Court in Error from the St. Louis Court of Common Pleas. — March T. 1858 —

Joseph L. Adams & William A. Adams pltfs Respondents

vs

The Wiggins Ferry Co. Deft Appltts —

Statement of case.

The record contains a condensed statement of facts with the instructions, upon which there could be no honest improvement. I adopt the statement there. In addition to the facts there succinctly stated, the ordinances referred to & not copied, contain the following provisions.

Ord. No 2208, of 22d June 1849, provides that

Ordinance 2376, pp. 387 to 390. of 1853, requiring the Wiggins ferry Co. landing to be at the foot of Spruce street; & that the boats shall pursue the nearest practicable route, across the Mississippi river, & shall not remain at their landing in this City longer than ten minutes &c; and shall transport persons & property with the greatest possible safety & despatch &c under penalties.

Ordinance 2948 - pp. 419, 420, &c; gives the Harbor Master, the power to direct the landing & stationing of all water craft, arriving at any point on the river bank within the City &c; & to exercise complete supervision & control over the wharf, river bank, landing & front street &c.

He shall at all times & forthwith cause to be removed all obstructions which may be found at any landing set apart at the wharf for ferry boats packet boats &c & he may notify any person having charge of such obstruction to remove the same forthwith.

§14 p 422. All other boats to be moored when Harbor Master directs

p 427. Shows duties of wood master —

p 367. Duties of City Engineer, to see to the protection of the harbor & the improvement thereof.

By the Charter p 142 §2 subd. 17th the City Council has power, to regulate the stationing, anchoring & mooring of vessels within the City &c Subdn 40th "to regulate &c all ferries within the City".

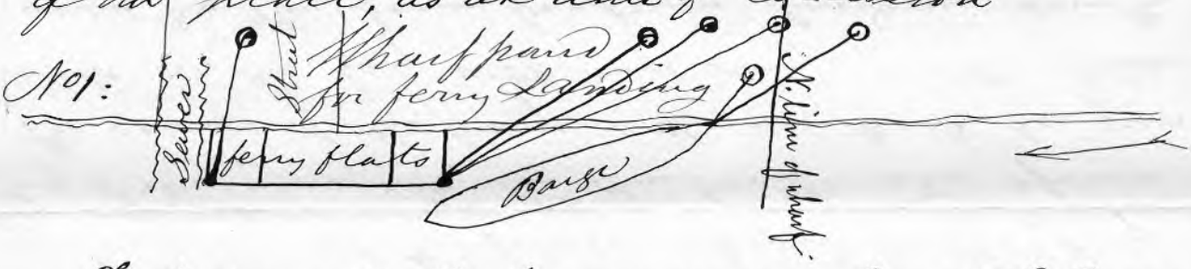
By ordinance page 427, §5. All fire wood hereafter brought by water to this City, shall be landed north of Cherry Street & south of Almond Street, at such points & places, as shall be directed by the Harbor Master.

General Summary of facts.

On the 14th of May 1854 (friday) the pltffs landed their wood boat in violation of the ordinances of the City of St Louis, within the paved limits of the ferry landing as Defts. claim it, and as it is paved & laid out for the use of the ferry. The pltffs were immediately notified to remove it to the place assigned to it by Ordinance, a short distance below - & they agreed to remove it forthwith as the Harbor Master directed. They failed to do so, & began to unload; the river being high & rising rapidly, the barge of wood gradually approached the ferry flats & encroached still more upon the landing of the ferry boats, until Sunday, when it came so close to the ferry flats that the ferry boats struck against the barge, nearly every time it landed, and at length, the repeated blows of the ferry boat, necessarily given in effecting a landing at the place assigned for that purpose by Ordinance & by the Harbor Master, opened the seams of the barge & she sunk to her gunwale as she lay & the next day, another blow given by the ferry boat in landing, sunk the barge entirely & she was lost with about fifty cords of wood. The ferry boat had no other place for landing & it was not practicable to effect the landing without striking the

barge & every precaution was used to make the landing of the ferry boat without injuring the Barge, but her position was such that a collision was unavoidable. I annex a plat of the place, as at time of Collision

No 1:



The injury to the barge was undoubtedly occasioned by the improper mooring of her at a point so near the ferry landing, that she was in the way of the ferry boats, when they rounded to land their passengers & freight.

The Court below refused to instruct the jury, that if they believed the injury was occasioned to the barge, by reason of her being improperly moored, the pltffs could not recover; and the issue was put to them, that if the exercise of any precaution & skill could have avoided the collision, the pltffs are entitled to recover.

Brief—

1. The Court erred in the instructions given & in the refusal of those asked by Dfts.

If the pltffs barge was moored in an improper place, according to the ordinances of the port, the pltffs cannot recover unless the Dfts wilfully run into her, without any necessity for so doing, and sunk her.

The dfts were not required to use any other than ordinary precautions, and if the jury found that pltffs were in fault in mooring their barge there, under the ordinances, the pltffs could not recover

2nd As the ordinances stood at the time, the plffs were in fault in mooring their barge there & this bars them from recovering; unless the Defts wilfully ran into her without occasion.

If the party was in fault he cannot recover, provided his fault tended to produce the collision - Of this there can be no doubt. The improper mooring near the ferry flats tended directly to produce the collision. It could not have occurred, without the negligent & unlawful mooring. This bars the plaintiffs -

A vessel injured by negligent mooring cannot recover for the damage.

Stront vs Foster 1 How U. S. 89 -

Angell on Carriers, §643 - 646 - 633 @ 638 -
§635 -

Valentine vs Clough 29 Eng. L & E. 49 -

B. A. Hill
for Applts, Dfts.

48. Mar T/58

Supreme Court

Adams & Bro. pltfs
Respdts
v
The Wiggins ferry Co.
Defts
Appellants.

Statement & Brief
for appellants
B. A. Hill
for Defts.
Applts.

Filed 25 March 1858
Wm S Glanville
Cl

1st Instruction—

If the wood boat was improperly moored, in a place not permitted by the City authorities, at the time of collission; & the Drift could have reached the landing by the exercise of ordinary care & skill, without inflicting the injury complained of; the fact of the barge being out of place constitutes itself no defence to this action.

2nd Authorizes jury to find damage, if there be no fault, on the part of the owners of the Barge, at the time of the injury.

3d A general instruction as to negligence—
4th As to both parties being in fault.
5. As to mooring in a hazardous position.
6th

If the Barge was in a dangerous position at the time & the injury complained of, would not have occurred if ordinary care diligence & skill had been used on the part of the ferry boat, then the jury should find for the plaintiffs, unless their negligence or unskilfulness at the time, contributed substantially to the injury—

By these instructions, the improper mooring of the wood boat, the notice to Plffs to remove her, their failure to do so, the obstruction of the ferry landing & the neglect of Plffs, in leaving their boat, when the river was rising, are all ignored & the case put upon the question of

ordinary care or mutual negligence
This construction bars the Dft of the true defence —

B. A. Hill
for Dfts

48
Supreme Court

Adams & Bro Plfs
Respdts
v
The Wiggins Ferry
Co. Appellants

Notes upon the
instructions

B. A. Hill
for Dfts

Since 25 March 1888
W. L. Glamieer
Cp

J L Adams et al appellees
vs
Wiggins Ferry Co Applt

In Sup Court
Oct T. 1857

Statement of the case by Appellees

Plffs below appellees here. sued Deft an incorporated Co & alleged that on 14th May 1854. they were partners & owners of a barge or wood boat called the "West wind" then lying at the wharf of St Louis properly moored & worth $800 & having on board 77½ cords of wood belonging to Plffs

Deft was owner & had control of the Steam Ferry boat "America" & that Deft. then & there by its agents & servants so wrongfully & carelessly managed the said Ferry boat as to run into & break & sink Plffs barge & also 40 cords of wood of Plffs worth $170 80/100 so that said barge & wood were totally lost through the carelessness of Deft. its agents & servants. Plffs were also put to an expense of $32 15/100 in endeavors to save 37½ cords of other wood, on said barge & thrown into the river by said by the said careless acts of Deft its agents & servants. for which losses & damages Plffs ask judgment with interest for their damages. in all $1002 95/100

Deft by amended answer denied that Plffs were partners & owners of said barge

& denied that said barge was properly moored, denied knowledge of the value of barge & of the wood thereon, & whether any wood was on said barge

Denied the wrongful & careless acts alleged & that barge & wood were totally lost as alleged, & denied that Plffs had sustained any damage by Deft or put to any expense

Alleged that the barge was moored at the place on the wharf where Spruce Street intersects the wharf at the same place where, by ordinance No 2376. approved March 24 1850, a landing was provided for said Deft. & Deft cited into its answer Sect 10 & 11 of said Ordinance as follows

Sect 10 The Wiggins Ferry Co. landing shall be at the point where Spruce Street intersects the wharf & the North Ferry Landing at the Eastern termination of North Market Street, at which points the Boats of said Ferries shall respectively land except as hereinafter provided.

Sec 11. If any Ferry Boat on account of the low stage of water in the river or other natural cause, shall be, at any time, prevented from landing at the point designated as its landing place, the Harbor Master shall designate the nearest point thereto at which said boat can, without obstruction land, as its landing place for the time being, and such boat shall be landed, at the place so designated, until a landing

can be effected, unobstructedly, at its usual landing place.

Deft avers that by virtue of said ordinance & the permission of the regularly constituted authorities of the city of St Louis Deft had a lawful right to use so much of said Wharf above described as a Ferry Landing to the exclusion of all other boats so far as the use by other boats might interfere with the free use of the same by Deft.

Deft had a license from the City of St Louis in force to run said Ferry & use said place as a landing, which was known to Plffs. Deft says that said barge was wrongfully moored in the said Ferry Landing which Plffs knew & the wrong of Plffs in thus mooring said barge was the cause of whatever damage Plffs sustained by reason of the breaking & sinking said barge - said Ferry boat being at the time, in the act of landing, in the usual way & in course of its regular business, under the care of competent & careful officers, who were using their best skill to effect a safe landing without damage to said barge & were in no fault for the damage & loss that occurred.

Plffs had judgt. once & new trial granted & on 2nd trial, judgment again & appeal from the last judgment by Deft.

By bill of exceptions it appears that Plffs gave proof tending to ~~show that~~ establish, that they were partners & owners of said barge & wood & their value, & that on 12th May 1854 said barge was landed at the wharf near the North line of a place on said wharf commonly used by Deft as a landing - that on 14th May 1854 the Steam Ferry boat "America" property of Deft, while rounding in to the flats of Deft, struck the stern post of the Plffs barge with her larboard guard, & backing down stream, then run up again against the stern post of the barge, & so broke and injured the barge that it filled with water & sunk - that Plffs immediately procured persons to remove the wood & during the evening, night & morning of May 15, removed about 40 cords of wood, the barge still remaining sunk to her deck, & on the forenoon of May 15th the Captain of the Ferry boat "America" directed Plffs agent to haul the stern of the barge from the flats of the Ferry landing, to the stern of a steam-boat lying a short distance above, that Plffs agent caused the stern of the barge to be hauled out & fastened as directed, by the Captain of the Ferry boat, & shortly afterward, the said Ferry boat in rounding out to make her trip, struck the said barge again, while lying in the water in a sunken condition, & the barge then totally sunk & about 40 cords of wood floated off & was lost, & the barge

was lost & that the barge & wood were of the value of $800 or $900

Plffs further offered proof tending to show that the stern of the barge, when struck was from 90 to 100 feet North of the North line of Spruce Street, & that it was practicable to have landed said Ferry boat without ~~touching~~ touching or injuring the barge, & that the Ferry boat in landing on 14 May at the time of the Collision, ran with greater force & speed than was necessary to make a landing. It was a calm & pleasant day & the Ferry Docks had been moved up once or twice, on 14th May. Two Ferry boats were running all of the 13th & 14 May & making trips every half hour, & that they never touched the barge till the afternoon of the 14th & that the stern of the barge was above the curb or grading of the paving of the levee. & that the Harbor Master had sometimes permitted wood boats to land above the Ferry Landing.

Deft offered city ordinances Nos 2376, approved 29 Mch 1850, also No 2948, approved 4 Jany 1853, also No 2949 published between pages 367 & 371 inclusive, published by Krumb & Hagar in Revision of 1853; also Ordinance entitled Engineers Department, in Revision of 1850 also No 2208 approved June 22 1849, which ordinances, by agreement may be read in Supreme Court in printed books of Ordinances from 1850 & 1853, as a part of the record, & Ordinance No 2208, may be

read from certified copy thereof certified by J. G. Harper City Register, on 26 Nov 1856, all with same effect as if copied in the record.

Plffs objected to the introduction of these Ordinances, on the ground that they were irrelevant, incompetent & immaterial to the issue in the case, & because they were not properly certified or proved, except No 2208, all being read from the printed revisions of 1850 & 1853, in the law Library without any further proof or authentication, than appear on said printed books.

The Court permitted them to be read & Plffs excepted.

Defts further gave evidence tending to show that Plffs barge was loaded on 12th May 1854 so near to the Ferry flats used for receiving & discharging freight, as to be unsafe & in danger of being struck by the Ferry boats in their ordinary use of said flats in landing & departing – that the said barge was so moored within that ~~a part~~ portion of the Wharf, that had been paved & marked on the Wharf for the use of the Defts as a Ferry Landing – that on the 13th May, the river began to rise & continued to rise for 3 days quite rapidly, that on said 13th May the Harbor Master, at request of Deft, caused Plffs to be notified that the barge was moored in an improper place for a wood boat – that the landing for Wood-boats was below the Ferry Landing at Almond Street, – that the barge was in safe place from the landing & departing of the

Ferry boats & that Pliffs promised the Harbor Master to drop their wood boat down as soon as the Ferry boat then lying at the wharf left & that they failed to do so, but suffered it to remain where it had been moored, - that the barge was fastened in such manner to the shore that the rising of the river caused it gradually to drop down nearer the flats until the stern post of the barge was abreast of the North line of the Ferry flats when the collision took place, in the first instance; that the pilot & Engineer of the Ferry boat used every precaution in their power to avoid ~~a collision~~ injury or sinking said barge at the time of the collision that first sunk the barge; & in rounding out from the landing when the Ferry boat struck the barge the last time - that during 1849 the space on the wharf used for a Ferry Landing was 250 & 300 feet at the foot of Market Street; one half of said space being above & one half below said Street, that the Ferry landing at Spruce Street was paved in 1852 by the city 124 feet 8 inches ~~South~~ the part of the space for the Ferry Landing South of Spruce Street was not paved at the time of the collision. the Spruce Street Sewer was the termination of the landing South & extended into the river & it was impossible to move the flats below the Spruce Street Sewer, & it was impracticable to use the space below Spruce Street, - that the Harbor Master was frequently present when the city Engineer was laying out & establishing the grade of the Ferry Landing at foot of Spruce Street.

that the city Engineer laid out & graduated the Wharf by order of the Mayor - that the city of St Louis had exercised jurisdiction over the Wharf from Almond to Cherry Stret. embracing the said Ferry Landings for more than 25 years before said collision - that the paving of the wharf for use of Ferry Landing ~~was different~~ North of Spruce Stret was different from the other paving of the wharf - the slope of the Ferry landing was more uniform & greater from the centre of the wharf to the river, whereby the North line of the paving of the Ferry landing was very plainly marked - the paving of the general landing being several feet higher than the Ferry landing near the river, - that in 1852 Ferry landing was changed from Market to Spruce Stret & that since said change, Deft had used the space at Spruce Stret & above it to the extent of the paving of the landing as a Ferry landing.

Deft offered to prove "That the Deft had used "the wharf of the city of St Louis as a landing for "their Ferry boats at such places on the public "landing as were designated by ordinances by "the Harbor Master & such other officers of the "city as had control of the wharf for more than "30 years before this suit brought & that said city "exercised during all said time control of the "wharf & of the place designated as a Ferry landing "by Deft" The Court excluded it & Deft duly excepted.

Deft further gave evidence tending to show that the Ferry flats were 75 feet long & Spruce Stret 32 feet wide - that the Ferry boat was 150 feet long & that fore & aft gangway were 30 or 40

fast from the bow & stern of the Ferry boat America & that landing to & from the boat was through said gangways. – that the Ferry boat arrived & left the wharf every half hour during the day, that during the afternoon of Sunday, previous to the collision that sunk the barge, it had drifted down some distance, as the river rose, till it came so near, that it was impracticable to land the Ferry boat, in the usual way without touching the barge & pushing it out of the way, or removing it, or straightening its lines, that from noon of Sunday until 4 o'clock P.M. when the barge was sunk, the Steamer generally touched the barge, when a landing was made & pushed it out of the way – that this was necessary in order to land the Ferry boat in the usual way, unless the barge had been removed or its lines straightened – that at the time the barge was first sunk, the Ferry boat run against it without breaking it & then backed down 30 or 40 feet & run against the barge to make a landing, at the flats & the boat run with such force, as to break the barge & sink it. – that there was no person in charge of the barge, on board, on Sunday when the collision first occurred.

The above was all the evidence on the trial.

Plffs instructions given

If the jury shall believe that the barge or wood boat in question was moored in a place not permitted by the City authorities, at the time of the collision referred to in the Petition, & that notwithstanding this

the Ferry boat of Dft could have reached the landing by the exercise of ordinary care & skill on the part of those who had charge of the said Ferry boat, without inflicting the injury complained of, then the fact of her being so out of place constitutes of itself no defence to this action.

The Court of its own motion gave the following instruction.

If the jury believe from the evidence that the Plffs were co-partners at the time of the injury complained of, and that the barge & wood in question were their property & that the injury to said property was caused by the negligence or unskillfulness of the officers or crew of the Ferry boat belonging to the Dft, without any fault on the part of the owners, officers or crew of the barge contributing substantially thereto, the jury should find for the Plffs & assess the damages sustained thereby.

2 If the injury was caused by the negligence or unskilfulness of the Plffs or of the officers or crew of said barge; or if such negligence or unskilfulness contributed substantially to produce said injury. Or if the injury was not caused by negligence or unskilfulness on the part of the ~~Ferry boat~~ officers or crew of the Ferry boat or agents of the Dft, then the jury should find for the Dft

3 If both parties were in fault & the fault of each contributed substantially

to produce said injury, or if neither ~~was~~ was in fault, the jury should find for the Deft

4 If the barge was moored & left by her owners in a hazardous position & the officers & crew of the Ferry boat used ordinary care & skill to avoid injuring the barge & the injury complained of accurred notwithstanding said care, diligence & skill, on the part of said Ferry boat, the jury should find for the Deft.

5. If the barge was in a dangerous ~~and~~ position, at the time & the injury complained of, would not have accurred if ordinary care, diligence & skill had been used, on the part of the ferry Boat, then the jury should find for the Plffs, unless the Plffs, by their negligence or unskilfulness, at the time contributed substantially to the said injury.

Deft excepted to the above instructions

The following was given for Deft.

If the jury believe from the evidence that the injury done to the barge was occasioned by the negligence of both Plffs & the Deft & their mutual negligence caused or produced the injury, that the Plffs cannot recover & the jury will find for the Deft.

The following asked by Deft were refused

If the jury believe from the evidence that the plaintiffs were guilty of negligence in mooring their barge at the landing in St. Louis & were also guilty of negligence in taking care of said ~~barge~~ barge after she was moored; & that she was moored in an improper place & that such

negligence & mooring in an improper place in any way concurring in causing the damage done to said barge the plaintiff cannot recover & the jury will find for the defendant.

If the jury believe from the evidence that the barge West Wind was moored or landed at an improper place at the wharf of St Louis that the plaintiffs were notified by the Harbor Master or by his agent in that behalf to remove her; and that she was injured by reason of the neglect of the plaintiffs to remove her to a proper place & in consequence of her being improperly moored & that plaintiffs were guilty of negligence therein then the jury will find for the defendants.

The defendants had a lawful right to make her landing at her proper place assigned to her by the Harbor Master & to ~~place~~ force away the barge of plaintiffs therefrom by using prudently sufficient power for that purpose; & if the plaintiffs by their own negligence left their barge in an improper place, in violation of the order of the Harbor Master & she became injured by the cause stated above in the prudent exercise of the right to make the landing then plaintiffs cannot recover & they must bear their own loss.

If the jury find from the evidence that the Barge West Wind was moored in such manner that any part of said Barge was within the space on the wharf of the City of St. Louis paved & commonly known & used as the ferry landing for the steam ferry boats of the defendants that such place was unsafe & an improper place for the mooring of said Barge, that plaintiffs were notified to remove said Barge therefrom & failed to do so & that the mooring of said Barge at said place & the failure of plaintiffs to remove her therefrom, contributed directly and substantially to produce the collision or collisions which followed & sank the barge, then the jury will find for the defendants.

If the jury find from the evidence that the Barge West Wind was moored so near the flats used for

the ferry Landing, as to be in danger of collision with the ferry boats in their ordinary landing at such flats; that said place where said barge was moored was an unlawful & improper place for the moorings of said Barge; that plaintiffs were notified to remove the Barge away from said place before the collision & failed to do so, & failed to use any ~~unnecessary~~ necessary or proper precautions to avoid or prevent the collision; & that the moorings of said Barge at such place & the failure of plaintiffs to remove her or to use proper precautions to prevent a collision constitute directly or substantially to produce the collision or collisions which followed & sunk the Barge then the plaintiffs cannot recover & the jury will find for the defendants.

If the jury find from the evidence that the ferry landing for the boats of defendants for more than a year before and at the time of the collision was at the place north of the center of Spruce Street marked by the paving for such landing on the levee & that it was during said periods daily used for such purpose & known by the plaintiffs to be so used & that plaintiffs barge West Wind was moored so far as to place any part of said Barge within the limits of said ferry ~~Com~~ Landing & that such place was an improper place for the mooring of said Barge & that plaintiffs were notified to remove the barge before the collision & failed to do so & that the mooring of said Barge at said place & their omission to remove her therefrom contributed directly or substantially to produce the collision or collisions which sunk the Barge the plaintiff cannot recover and the jury will find for the defendant.

If the jury find from the evidence that the barge West Wind was moored or landed at an improper

place at the landing or wharf of St. Louis that the pltffs. or either of them were notified to remove her before the collision & failed to do so & that the mooring of said ~~boat~~ Barge at said place in the wharf & the omission to remove her therefrom contributed directly or substantially to produce the collision then the jury will find for the defendant.

If the jury find from the evidence that the Barge West Wind was moored so as to place a portion of said Barge within the limits of the place reserved & used as a ferry landing for the Steam ferry Boats of the defendants; & that such place was an improper place for the mooring of said Barge; and that plaintiffs were notified to remove her before the collision & failed to do so; and that the mooring of said ~~Boat~~ Barge at said place & the omission of plaintiffs to remove her therefrom, contributed directly or substantially to produce the collision, then the jury will find for the defts.

~~And~~ If the jury find from the evidence that the Barge West Wind was so moored at the wharf to be exposed to the danger of collision from the ordinary & skilful management of the ferry boats that the plaintiffs were notified to remove her a reasonable time before the collision & failed to do so, & that the mooring of said Barge at said place & the failure of plaintiffs to remove her therefrom contributed directly or indirectly to produce the collision, then the jury will find for the defendants.

If the jury find from the evidence that the plaintiffs or those in charge of the barge West Wind were guilty of carelessness negligence or mismanagement in mooring the said Barge at it was moored or in suffering said Barge to remain there after it was moored while the river was

rising & that the ~~pt.~~ said place where the said Barge was moored was a dangerous place for the said Barge & under all the circumstances of the case the said mooring of the said Barge there and the suffering it to remain there while the river was rising contributed directly or substantially to produce the injury done to the barge by the landing or departure of the ferry boats of defendants then the jury will find for defendants.

If the jury find from the evidence that the plaintiffs or those in charge of the Barge West Wind, were guilty of carelessness negligence or mismanagement in mooring the said Barge as it was moored, or in suffering said Barge to remain there after it was moored; that the river between the time of the landing of the barge & the collision was ~~rising~~ rising & that the plaintiffs or either of them were notified to remove the barge & that it was an unsafe place for it to remain & that the place where the barge was moored was a dangerous place for the barge to remain & that under all the circumstances of the case the said mooring of the Barge & the suffering it to remain there contributed directly or substantially to produce the injury done to the Barge in the ordinary & skilful use of the ferry boats of defendants in making their landing at the ferry landing or in departing therefrom, then the plaintiffs cannot recover & the jury will find for the defendants.

If the jury find from the evidence that the Barge West Wind was moored within the limits of the Ferry landing of defendants ferry boats as the said Ferry landing was established by ordinance of the City of St. Louis; & that the said Barge was moored

so near the flats of the ferry landing of defendants steamboats that the rising of the river caused the Barge to float down so near the flats of said ferry Landing as to impede & obstruct the landing of the said ferry boats of defendants; & that said ferry boats had no other place on the wharf of St. Louis to land freight and passengers but at the ferry flats aforesaid that said flats could not be removed further down the river, that the plaintiffs or either of them were notified to remove their barge from said place where it was moored, by order of the Harbor Master of St. Louis, that plaintiffs failed & neglected to do so; that at the time of collision said Barge was lying within the limits of said ferry landing that the proper place for said Barge was south of Spruce Street; that plaintiffs well knew that it was against the ordinances of the city to moor said Barge within the limits of the ferry landing; and that plaintiffs well knew that they exposed their barge to imminent danger of collision with the steamboat by mooring it there; and the mooring of the barge there & the suffering the Barge to remain in the condition it was in, if the ~~jury~~ jury find the river was rising during Saturday & Sunday, was unskilful management on the part of plaintiffs or the persons in charge of the ~~Boat~~ Barge & that such unskilful management contributed directly or substantially to produce the injury complained of then the jury will find for the defendants.

If the jury believe from the evidence that the barge West Wind was moored at the wharf of St. Louis at an improper place in violation of the order of the Harbor Master; that the ordinary action

of the elements caused it to drift or drop down the river so as to obstruct the landing of the defendants ferry boat at the landing of the ferry assigned to the said ferry by order of the Harbor Master aforesaid & that the injury to the plaintiffs barge was in any manner attributable to the negligent mooring of said Barge, the plaintiff cannot recover.

If the plaintiffs moored their barge at an improper place in violation of the rules & ordinances relating to the wharf of St. Louis & in such a manner as to obstruct the wharf at the place assigned to the defendant to be used as a ferry landing & that the defendants boat was unable to make her landing without running against said Barge & that the servants of defendants used proper care in landing then the plaintiffs cannot recover.

If the jury believe from the evidence that the Barge West Wind was moored & landed at the wharf of St. Louis so near the flats of the ferry landing of the defendant that the rising of the river caused the barge of plaintiffs to go down so near the flats as to obstruct the landing of the defendants ferry boat, that the place assigned for the ferry landing by the Harbor Master of St. Louis under the ordinances of the city was at the place where the flats of the defendants were moored that this was the only place of landing in St. Louis for the said ferry boat of defendant at the time of the accident or injury that the plaintiffs were notified by the Harbor Master or his agent in that behalf to remove said Barge before the

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accident from the wharf where it was moored to the proper landing place for wood boats that pltffs. refused so to do & neglected to put their barge in a place of safety; that they were also notified that the said place where the barge was moored was an unsafe place ~~or were~~ on account of the same being too near the ferry landing, that the plaintiffs neglected to take proper care of their Barge; that the river was rising prior to the accident, that the barge dropped down so as to obstruct the landing of the defendant's ferry boat at her proper place, and that the plaintiffs were guilty of neglecting & failing to take proper care of their said barge in said particulars & that the defendant exercised proper care in landing their boat, there the plaintiffs cannot recover.

Deft moved for a new trial on the grounds that the verdict was against law & evidence & that the Court admitted illegal evidence for Plffs & refused legal evidence for Deft. & that the Court erred in giving the instructions that were given & in refusing those asked by Deft.

The motion was over-ruled & Deft excepted & appeals to this Court.

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Sup Court
Mch Term 1858

J. L. Adams et al

vs

Wiggins Ferry Co

appellees statement

M. L. Gray
for appellee

Filed 25 March 1858
Wm S Glanville
Cl.

J L & W A Adams, Res
vs
The Wiggins Ferry Co Appl

In the Sup Court
March 7, 1838

Appeal from the St Louis Com Pleas

Respondents brief.

The errors assigned are
1st The Court erred in giving judgment for Plffs instead of Deft
2. The Court admitted illegal evidence for Plffs
3 The Court excluded legal evidence offered by Deft.
4 The Court erred in giving instructions for Plffs & in refusing those asked by Deft.
5 The Court erred in refusing a new trial to Deft.

I. The first assignment of Error is general and amounts to nothing unless specific error is alleged & shown. The jury having found for Plffs, it was right & proper for the Court to give judgment on such finding for Plffs, & the Court could not do otherwise. Therefore this assignment of error, requires no further remark.

II The record does not show that any evidence admitted for Plffs, was objected to, by Deft; consequently there exists no such error as appellant has secondly assigned.

III. The Court excluded no legal evidence offered by Deft.

The only evidence offered & excluded, was that Deft offered to prove "that the Deft had used
" the wharf of St Louis as a landing for their
" Ferry Boats, at such places on the public
" landing as were designated by ordinances &
" by the Harbor Master & such other officers of the
" city, as had control of the wharf for more than
" 30 years before this suit brought & that said city
" Exercised, during all said time control of the
" wharf & of the place designated as a Ferry landing of Deft"

This was properly excluded

First. Defendant had already shown by ordinance & by witnesses the then actual landing of Deft, as fixed by city ordinance.

2nd Because the length of time Deft may have used any other landing designated by the city, was wholly immaterial & irrelevant & could throw no light on the question of care or carelessness involved in this case.

& 3rd Because the same facts had been already substantially proved & the evidence offered, if material, was only cumulative of what had been already given. The Court properly excluded it as immaterial & a repetition

IV 1. The instructions given were legal & proper & covered the whole law of the case fully and fairly & were expressed in almost the exact language of the Courts as given in adjudged cases.

Angel on Com Carriers Sects 638-9. Sedw on Dam 469-70
11 East p 60
Sills vs Brown 9 Car & Payne 601
Raisin vs Mitchell 9 Car & Payne 613
3 Meeson & Welsby 244.
1 Scott. New cases p 392
~~[illegible]~~

New Haven S1 B1 & T. Co vs Vanderbilt 16 Conn 420
Beers vs Housatonic RR Co 19 Conn 566.
Cook vs Champlain Tr Co 1 Denio 91
3 Ohio State Repts p 172

Where both parties are in fault - Plff remotely & Dept proximately, the Plff may be entitled to recover
10 Meeson & Welsby 545
Trow vs Vt Cent R.R. 24 Vt R 488
Kerwhacker vs C.C. & C. R.R. Co. 3 Ohio State R 172
C.C. & C. R.R. Co. vs Elliott 4 Ohio State R 474

2. The instructions asked by Dfpt & refused, were properly refused.

Because the case had been fairly submitted to the jury, under the instructions given.

Even if any one or more of the 150 or more instructions asked by Dfpt & refused, were in themselves free from objection, they were nevertheless properly refused, in accordance with the practice of this Court, not to reverse for refusing instructions, when those given present the case fairly to the jury.
19 Mo p 102.

I shall not comment seriatim on the mass of instructions, overwhelming in number, that were asked & refused, on the part of Dfpt. It would be tedious & unprofitable to do so.

They seem to have been asked merely for the purpose & with the hope, that possibly, some one of them might furnish a pretext for a reversal of the case.

The course of the Dfpt. in this case, of literally loading & weighing down the case, with innumerable instructions, is a reprehensible one & will not, I am sure, meet with any encouragement from this Court.

The best practice & the one recommended by this Court is to present all the main points ~~to the~~ to the jury in as few, clear & lucid instructions as possible

By so doing a case is ~~best~~ most likely to be passed upon by the jury on its merits.

Multiplicity of instructions tends to confuse perplex & embarrass the minds of a jury & thus prevents rather than facilitates a just decision.

On the question of whether or not the instructions fairly presented the law to the court, I remark that they clearly tell the jury that if Plffs negligence substantially contributed to the injury - or if Deft used ordinary care to avoid the injury, then Plffs cannot recover.

Under the instructions given the jury could not find for Plffs, without finding the facts to be that Plffs were guilty of no negligence substantially contributing to the injury & that Deft was guilty of negligence or want of ordinary care in the premises.

Notwithstanding the barge may have been at a landing not usual for wood boats, yet that did not absolve from the obligation Deft, to use her own so as not to injure Plffs property. Deft was still responsible for ordinary care & diligence.

~~The facts of the case are to be assumed.~~

The questions of the alleged improper mooring of the barge, & the notice to Plffs to move the same, & their not doing so, & the effect of the river's rising. & in fact all the questions of fact in the case, bearing on Plffs neglect or want of due care, together with Defts rights & privileges, &c were all questions the effect of which the jury were bound to consider & pass upon, in determining whose fault caused the injury.

All these questions the instructions given put directly before the jury in determining the question of negligence - which was a question of fact & not of law - & consequently Deft was not deprived in any way, of the benefits of these facts. These were the very facts that the jury are left by the instructions to consider & say whose fault was it?

The question of negligence in either party was a question of fact only, & not of law.

The complaint of Deft is, that the Court did not take from the jury the question of negligence, & decide it as a question of law. Such is the purport of some of Defts instructions refused - as I understand them.

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Sup court
Mch T. 1858

J. L. Adams et al
v
Wiggins Ferry co

appellees brief

M. L. Gray

Filed 25 March 1858
Wm S Gummer
Clk

J. L & W. A. Adams Respdts } Appeal from the St
vs } Louis Court of
The Higgins Ferry Company } Common Pleas

The rule that there can be no recovery, when both plaintiff & defendant are in fault, and each by his negligence or otherwise has contributed proximately & directly to the injury has its most frequent application in cases of collisions of vessels, carriages and like vehicles, when they are in motion and on the public thoroughfare. But in such collisions, if one party finds the other in fault, he cannot wantonly or intentionaly inflict an injury upon him. The principle above stated does not apply to cases in which the fault or neglect of the plaintiff has contributed remotely to the injury. Because one has committed a fault or been guilty of negligence, he does not thereby place himself at the mercy of every one, who may encounter or come in the way of the object in relation ~~an relation~~ to which the fault or negligence has been committed or imputed. If a person discovers that a fault has been committed by another he is not thereby released from the obligation of conducting himself with the ordinary care & prudence ~~necessary~~ in order to avoid doing an injury in relation to him.

In the case of Butterfield vs Forrester 11 East, 60. the defendant for the purpose of making some repairs to his house, which was close to the road side at one end of the town, had put up a pole across the part of the road, a free passage being left by another branch or street in the same direction. The plaintiff at an hour in the evening when there was light enough to discover the obstruction at the distance of one hundred

yards ~~distance~~, riding very violently & not observing the obstruction, his horse ran against it & fell with his rider who was much hurt in consequence of the accident. In answer to the plaintiffs action Lord Ellenborough said a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use ordinary and common caution to be in the right. In cases of persons riding upon what is considered, the wrong side of a road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action an obstruction in the road by the fault of the defendant & no want of ordinary care to avoid it on the part of the plaintiff. In the case of Davies vs Mann 10 Mees. & Wels. 545, the plaintiff having fettered the forefoot of an ass, turned it into a public highway & as the ass was grazing on the side of the road about eight yards wide, the defendants wagon with 3 horses, the driver being behind coming down a descent at a smart pace, ran against the ass, knocked it down, & the wheels running over it, it soon after died. The plaintiff recovered. The court said, that although the ass was wrongfully on the road, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were not this so, a man might justify driving over goods left on a public highway or even over a man lying asleep there or the purposely running against a carriage

going on the wrong side of the road. In the case of Kerwhacker vs The Cleaveland, Columbus & Cincinnati R.R. Company 3 Ohio State Rep. 189 it is said, that the mere fact however, that one person is in the wrong does not of itself discharge another from the observance of due & proper care toward him or the duty of so exercising his own rights as not to injure him unnecessarily. There have been numerous adjudications both in England & in this country, where parties have been held responsible for their negligence although the party injured was at the time of the occurrence culpable & in some of the cases in the actual commission of a trespass. In the case of Trow vs The Vermont Central Rail Road Company 24 Ver 488 it was held, that when the negligence of the defendant is proximate & that of the plaintiff remote, the action can then, well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England & in this country. Therefore if there be negligence on the part of the plaintiff, yet if at the time the injury is committed it might have been avoided by the defendant in the exercise of reasonable care and prudence an action will lie for the injury. The case of the N. Haven Steam Boat company vs. Vanderbilt 16 Conn. 428 was one for an injury to a Steam Boat. The defendant claimed and offered evidence that at the time of the injury, the lights of the boat were not up according to the statute law of the State & prayed the court to instruct if this was so the plaintiff could not recover: The court said, that while on the one hand, a party shall not recov-

or damages for an injury which he has brought on himself, neither shall he be allowed to protect himself from an injury which he has committed, because the party injured was in the wrong, unless such wrong contributed to produce the injury, & even then it would seem a party is bound to use, common and ordinary caution to be in the right. Sedgwick in his work on the law of damages 470 approves the principle of the case of Davis vs Mann 10 Mees & Wels to which reference has been ~~already~~ made So does Angel in his treatise on the law of carriers 532 as also Judge Redfield in his book on Railways 394.

We have stated the facts of most of the cases to which we have referred, because it seemed necessary to do so in order fully to understand their bearing upon the matter before us. The ~~understanding~~ caveat the law ~~to be~~ as deduced from them to be, that although when both parties are in fault & where there is negligence on both sides, and both actively contributing to the injury at the time of its commission there can be no recovery yet, where there is a mere passive fault or negligence on the part of the plaintiff, ~~that~~ the defendant is bound to the observance of ordinary care & prudence in order to avoid doing him a wrong. In this case before us the boat received the injury complained of when she was moored, and although she was in a prohibited place, from which she had been lawfully ordered to be removed the defendants was not released from the obligation imposed both by law & sound morality of using ordinary care and diligence in order to avoid injuring her. If by the fault of

the plaintiffs, in leaving their boat at the place where she was found, the defendant could not avoid injuring her, by the observance of ordinary care & prudence, they would be without redress.

We are of the opinion that the instructions given, put the law of the case correctly to the jury, and although some of the refused instructions may have contained correct legal ~~propositions~~ propositions, yet as the instructions given embodied the law of the case, the defendant was not prejudiced by their refusal

J. Napton concurring judgment affirmed

Wm Scott

J. Richardson dissents

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Adams & Adams
vs
Steam Ferry Company

Opinion

Affmd. Scott.

Filed 24 June 1858.
Wm S. Garnett
Cl.