CITY OF ST. LOUIS, TO THE USE OF SULLIVAN, ALICE, ADM'X | V | CLEMENS, JAMES JR. | OCTOBER 1867 | COUNTY OF ST. LOUIS 5861/2

FOLDER 2 OF 2

OLD 662/2 AFFIRMED

INVOLVED:
CONTRACT - ASSIGNMENT

City of St Louis & use of Alice Sullivan, Respondent

vs.

James Clemens Jr, Appellant

IN SUPREME COURT,
Oct TERM, 1867

AND now come I the said defendant and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said he assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by plaintiff
2. That said Court rejected proper and legal testimony offered by defendant
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by defendant
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the plaintiff when it should have been rendered for the defendant
10. That said Court overruled the motion for a new trial, made by defendant

A. M Gardner
atty for defft
& Appellant

And now come the Respondent and for joinder in error say, that there is no error in the record and proceedings of said Court in said cause, as assigned by said Appellants

Tucker Glover
for Defts

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Oct Term 1867

The City of St Louis
to use of
Alice Sullivan
Respondent
vs
James Clemens Jr
Appellant

Assignment of Errors

A. M. Gardner
atty for
Appellant

Filed Octo 23. 1867
O T Fishback Clk
Per E. P. McCarty Dp

In the Supreme Court of Mo
October Term 1867

The City of St Louis which sues to
and at the relation of Joseph Davis Admr
the use of Alice Sullivan. Plaintiff — Respondent

vs

James Clemens Jr. Defendant — Appellant.

Statement of Case by Respondent.

This was a suit originally instituted by Alice Sullivan who pending the suit died, and her administrator Joseph Davis was substituted as plaintiff in her stead.

The petition contained eight counts or causes of action, being upon eight special tax bills under this ordinance of the City of St Louis

members of said Board having voted for its passage, the objections of the Mayor thereto to the contrary notwithstanding.

JOS. BAKER,
Clerk Board Common Council.

[No. 4,638.]

An Ordinance providing for the improvement of certain streets in the Extended New Limits.

Be it ordained by the Common Council of the city of Saint Louis:

Section 1. The City Engineer is hereby directed to cause the following street improvements in the Extended New Limits, to be executed, to-wit:

First—Grading and macadamizing carriage-way on Natural Bridge Road, from its intersection with Salisbury street to Grand avenue.

Second—Grading, curbing, guttering and macadamizing, and constructing cross-walks on Fourteenth street, from North Market street to Dodier street.

Third—Macadamizing Fifteenth street, from Salisbury street to Bremen avenue.

Fourth—Grading Warren street, from Thirteenth to Sixteenth street.

Fifth—Grading, curbing, guttering and macadamizing, and constructing cross-walks and side-walks on Twenty-Fourth street, from Carr street to O'Fallon street.

Sixth—Grading, curbing, guttering and macadamizing, and constructing side and cross-walks on O'Fallon street, from Twenty Fourth street to Pratt avenue.

Seventh—Grading, curbing, guttering and macadamizing, and constructing side and cross-walks on Locust street, from Seventh street to Nineteenth street.

Eighth—Grading, curbing, guttering and macad and constructing cross-walks on Eugenie street, from Adolph street to Pratt avenue.

Ninth—Grading, curbing, guttering and macadamizing, and constructing side and cross-walks on Nineteenth, Twentieth and Twenty-First streets, from Christy avenue to Biddle street.

Tenth—Grading, curbing, guttering and macadamizing, and constructing side and cross-walks on Twenty-Fourth street, from Christy avenue to Franklin avenue.

Eleventh—Grading, curbing, guttering and macadamizing and constructing side and cross-walks on Lafayette avenue, from Second Carondelet avenue to Jefferson avenue.

Twelfth—Grading, curbing, guttering and macadamizing and constructing side and cross-walks on Lucas avenue, from Leffingwell avenue to Ewing avenue.

Thirteenth—Grading, curbing, guttering and macadamizing and constructing side and cross-walks on Cozzens street, from Coote street to Pratt avenue.

And the City Engineer is also directed to grade and macadamize a carriage way twenty-five feet wide on Devolsey street, from McNair street to Gravois road; and also to grade, curb, gutter, macadamize and construct the sidewalks on Wall street, from Carondelet avenue to Eighth street, and on Utah street, from Eighth street, to Lemp avenue, to the width as opened; and also to grade and macadamize Haren street, from the Iron Mountain railroad westwardly; and also to grade Rappahannock street, from the Gravois road to Grand avenue, with the view of making the same passible; and the sum of three hundred dollars is hereby appropriated for the grading of Devolsey street, and the sum of six hundred dollars for the grading on Wall street and Utah street, and the sum of one thousand dollars for the grading on Haren street, and the sum of one thousand dollars for the grading on Rappahannock street, all chargeable to appropriations for streets and alleys. The cost of macadamizing curbing, guttering, and construction of sidewalk and crosswalks, shall be apportioned and charged to the owners of lots fronting on said streets respectively, according to the provisions of charter and ordinance.

Sec. 2. The cost of grading authorized by the foregoing section, shall be paid out of the general treasury, and be charged to appropriation for streets and alleys, and the following sums are her by set aside out of said fund, to-wit:—For the grading on Natural Bridge road, twenty-two hundred dollars; on Fourteenth street, fourteen hundred dollars; on Warren street, nine hundred and sixty dollars; on Twenty-fourth street, from Carr street to O'Fallon street, four hundred and twenty-five dollars; on O'Fallon street, nine hundred and sixty dollars; on Lucas street, fifteen hundred and twenty-six dollars; on Eugenie street, twenty-one hundred dollars; on Nineteeth, Twentieth, and Twenty-first streets, thirty six hundred dollars; on Twenty-fourth street, from Christy avenue to Franklin avenue, four hundred and twenty-five dollars; on Lafayette avenue to Jefferson avenue, one thousand dollars; on Lucas avenue, three hundred and fifty-two dollars; on Cozzens street, five hundred dollars.

Sec. 3. The cost of all macadamizing and paving of carriage-way, gutters, curbing, sidewalks or crosswalks, done under this ordinance, shall be apportioned and charged on the adjoining lots, and be collected of and paid by the owners of such lots respectively, all according to and under the provisions of charter and ordinance.

Sec. 4. The contracts for the work herein authorized, shall be submitted to the Common Council for approval at the commencement of the next session.

Approved March 24th, 1860.

Under this ordinance the City made a contract on the 11th June 1860 with contractors to wit Lewis McGrath and William Cahill and which contract is numbered 1131 for the grading curbing and guttering and macadamising of Twenty fourth street from Carr street to O'Fallon street and for the construction of cross walks and side walks therein.

This contract being between the City and the Contractors was of a character precisely similar to that which came under the consideration of this Court in the case of The City of St Louis to use of McGrath & Cahill v James Clemens Jr reported in the 36th Mo p 467

This contract was regularly and duly entered into according to law and ordinances and contained inter alia these clauses.

"And the City of St Louis hereby distinctly
"reserves to her City Engineer the right
"of refusing or rejecting any workmanship
"done or materials furnished which in his
"opinion may not be in strict compliance
"with the intentions of this agreement and
"moreover to procure any materials or have
"any workmanship done at the expense
"of the said McGrath and Cahill should
"he (they) fail or refuse to furnish or do
"the same at the proper time, or in the proper
"manner.

And also

"It is hereby distinctly understood and that
"agreed to by both parties to this agreement
"the City Engineer shall have the right
"to suspend this contract whenever the
"appropriations made therefor by ordinance
"are either exhausted or unavailable. The
"City Engineer may also extend the time
"for the completion of this contract should
"he deem it necessary" The cost of grading was to
be paid by the City, of the other work by the property owners
The petition alleges that under said Contract
the said Contractors McGrath and Cahill
proceeded and did a portion of said work
and on the twenty second day of Decem=
=ber in the year 1863 the said Louis Mc
Grath and William Cahill for value
received transferred all their right
title and interest to that part of Con=
tract No 1131 which authorised the
grading curbing guttering macadam=
izing and laying of crop walks on
Twenty fourth Street from Liddle to
O'Fallon Street to Alice Sullivan and
requested the City Engineer to issue
all certificates for so much of the said
work in her favor, and plaintiff further
states that thereby Alice Sullivan became
the assignee of said contractors McGrath
and Cahill, and substituted as contractors
for the doing and completing of the work
aforesaid to wit the grading curbing
guttering macadamising and laying
of crop walks on Twenty fourth Street

from Biddle to O Fallon Street and that the City of St Louis acting by and through her officer the City Engineer opened Streets. And the plaintiff further states that all the work contracted to be done by said contract was fully completed in part by said McGrath and Cahill and by this relator Alice Sullivan fully in a skillful and workmanlike manner under the authority of the Ordinance and Contract as aforesaid

The petition makes the other allegations proper to be made to charge the Defendant

The work was done chargeable to the property of the defendant on Twenty fourth Street between Biddle and O. Fallon.

The Answer and Counter claim on page 36 of the Record among other matters of general denial or want of knowledge of the truth of the matters alleged in the petition denies that the said McGrath & Cahill could or did assign said alleged Contract or any part of it to the said Alice Sullivan, or that the said Alice Sullivan was or could become the assignee of the said McGrath and Cahill or was or could be substituted for the said McGrath & Cahill as contractor for

doing and completing said work or any part thereof or that the City of St Louis acting by and through the City Engineer did or could assent to said alleged assignment or that all the work Specified in said alleged ordinance and contract was fully completed, either by the said McGrath and Cahill or the said Alice Sullivan in manner and form as by said plaintiff alleged.

And the defendant made a counter claim as follows.

Defendant states a counter claim for damages to the amount of $2500, growing out of the same subject matter and the contract alleged to have been made by the City with the said McGrath and Cahill and the said Alice Sullivan.

States in attempting to curb, gutter, macadamize and improve said 24th Street under said alleged ordinance and contract the plaintiff negligently carelessly and improperly performed said work left the same in such an unfinished and incomplete condition so that the property of the defendant was greatly injured and damaged thereby. That the servants agents or employees of the plaintiff so excavated dug up and embanked the said street and adjoining property as to obstruct the natural drainage of the water to, and from the premises of said

defendant. and negligently carelessly and improperly failed to leave or to construct proper and necessary outlets for the surface water so that the same was overflowed, and defendant was thereby deprived of the use and enjoyment of the same whereby he has sustained great injury and damage and has been put to great expense and loss in constructing sewers and drains to carry off said water and prevent the constant overflow of his said premises

The plaintiff replied to the Counter claim Pa. 75 of Record in a general and particular negation of the matters set forth in the Counter claim.

It appeared in evidence as follows.

Pa. 108 of Record That the Contractors Mcgrath and Cahill did not finish the work. (which they had undertaken to do).
did a part of the grading (only)
The City Engineer authorised (under the contract) one Walter Sullivan (the husband of Alice the plaintiff) to go on with the work, he finished the grading between Carr and Biddle Street, and between Biddle and O'Hallen in part and died. The Court will here observe that the expense of grading the streets mentioned in Ordinance Lpo 4638.

was to be borne wholly by the City payable out of the City Treasury and by the 2nd section of the Ordinance there was an appropriation out of the City Treasury for grading Twenty fourth Street from Carr Street to O'Fallon Street of Four hundred and twenty five Dollars.-

Alice Sullivan was administratrix of Walter Sullivan. She came to see me about the work I authorised her to go on, and finish the work. She brought an assignment to me as administratrix from McGrath and Cahill. The bills - (sued upon) were made out in her name as Administratrix. I said to Mrs Sullivan when she came I did not want to be mixed up with an administration. that I authorised her individually to do the work under the power contained in the Contract authorising me to get some one to do the work if the Contractor did not do the work - After the work was completed she was fearful that some difficulty might arise with the Contractor and to obviate that procured an assignment from them to her describing her as the admrx. I told her that I would not have the matter mixed up with any administration inasmuch as I had authorised her individually to do the work. I required the assignment to be made to her individually and the term administratrix was stricken out in the presence

Pa. 109 of Record of both parties to the assignment. They having informed my Clerk of the form of the assignment before I had given him any instructions on the subject he had made out the bills to Mrs Sullivan as Administratrix and upon reflection believing that to be only a description of the person I did not apprehend any necessity for changing the bill to correspond with the modified assignment.

The only contract under which all the work was done was that heretofore referred to made by the City with McGrath and Cahill. Neither Walter nor Alice Sullivan had any contract with the City to do the work, nor did they give any bond for the performance of the work.

Pa 110 of Record Under the contract the work was to have been
" 111. " " completed in 1860, but was not completed until 1863. The work was all done in a good sufficient and skilful manner to the satisfaction of the City and in the manner required by the ordinance and the terms of the contract. After the completion of the work I examined the same, and finding it to be done according to the contract I accepted the same on behalf of the City and issued to Mrs Sullivan the tax bills given in evidence as being the party who had completed the contract.

Walter Sullivan had an assignment of the McGrath & Cahill contract dated Feb'y 23d 1861. which is produced and read in evidence

February 23d 1861. For value received I hereby transfer all my right title and interest to that part of Contract No 1131 which authorises the curbing guttering macadamising and laying of crosswalks on 24th Street from Biddle to Carr Street to Walter Sullivan and re= =quest the City Engineer to issue all special tax bills for the above work in his favor

McGrath & Cahill
by Lewis McGrath

Alice Sullivan also had an assignment from McGrath & Cahill also read in Evidence

December 22d 1863. For value received I hereby transfer all my right title and interest to that part of the above contract No 1131 which authorises the grading curbing guttering. macadamising and laying of crosswalks on Twenty fourth Street from Biddle to O. Fallon Street to Mrs Alice Sullivan ~~administratrix of Walter Sullivan deed~~ and request the City En= =gineer to issue all certificates for the above work in her favor and her receipt for the same will be good

Lewis McGrath and
William Cahill
by Lewis McGrath

On the question of damages arising
Pa 181. of Record from the performance of the work, on
the counter claim of the defendant
the defendant introduced Philip Klein
whose testimony was substantially as
follows.
the ground between 24th & 25th & O' Fallon and
Biddle was firm hard & dry ground before
24th st was made, the descent was from
25th to 24th st, there was a good surface
drainage, there was descent enough to carry
off the water. The street was filled up solid
3 or 4 ft deep from Biddle to O'Fallon street
above the natural surface. After the street
was built the water stood on the lots west of
24th st from 6 in. to 3 or 4 feet in depth.
There was some 18 vacant lots and 8 or 10 houses
in the block west of 24th street occupied
by tenants of defts. Some of the Tenants were
driven off by the water. he estimated the
Dam at $3000. After the street was made the
water could not run off. There were no sewers
culverts gutters or openings left in the
street through which the water could escape
If culverts or openings had been left in the
embankment, the water would have flowed
off eastward over the private property to
the Eastward as it had done before but in
greater volume. A culvert or opening at
O'Fallon street would have allowed the water
to run off to the East. The work was delayed
two years or more, and during that time
the street was almost impassable in wet weather

There was no sewer adjoining this block into which the water could be drained. The nearest sewer was in the alley between 24th & 25th streets and Division and Biddle Streets. This was too high up to drain the pond on defendants premises. I took the level myself & found it would not drain the water off of those lots. it would take a few inches from the top nothing more..

The plaintiff objected to all evidence upon the part of this witness, and all evidence whatever going to show any damage resulting to the property arising from the mere fact of the making of 24th street, however done if the same was the necessary result of the making of the street, however it might be made, but the Court overruled the objection and permitted the Evidence de bene esse

Pa 183 of Record John Flood testified that he had lived in the vicinity of the property in question. knew its condition before 24th st was built The water ran off very well. The building of the street blocked it up & there was no way left for it to run off. The water since the street was built stands in the lots and fills the cellars of the houses all the time. It is three or four feet deep in some places and higher after a rain. The parties had been notified by the City Authority that the water on the premises constitute a nuisance.

Pa 183 of Record John Murphy testified

Knew when the work was done on 24th St that the street was filled with dirt and left in a very bad condition for two years.

It prevented the water from running off the block on the West and about one half of the block was covered with water. Before the street was built the ground in that block was hard and level sloping eastwardly so that the water ran off.

There was no opening of any kind left in the street. There had been a slough gutter across 24th St at Division and another at O'Fallon street but these were filled up and no way left for the water to run off. There was a sewer built on 24th to Division street and through Division street last fall, but dont know that water from this lot could be drained into it. It could not without cropping the lot fronting south on Division street, or along the street on 24th St.

Pa 184 of Record Cross Examination.

That he only difficulty he experienced from the street being left for the time stated in an unfinished condition arose from the circumstance that the street was muddy and difficult to pass in wet weather, and as he had went down 24th St he had to pick his way thro the mud when the weather was bad

Ca. 184. of Recd John Hynes. testified

work was commenced on 24th St about 1860, and was left in an impassible condition for about 2 years. The filling of the Street was made solid no gutter or other way left for the water to run off. If a gutter or opening had been left the water would have run off eastwardly as it did before. About 10 tenants were driven off by the water. I am lessee of the lots and the ground rents of the lots was $32 and taxes

On Cross Examination

The lots might have been filled up to the grade as it had been established by the City ordinance which would have prevented any water from standing on the lots. he witness would not do it don't know why Mr Clemens did not do it. All the lots in the block affected in the manner I have testified to, were below the grade of the streets. O'Fallon and Biddle as established by Ordinance and when the Street was made it of course prevented the flow of the water eastwardly as the inclination of the ground was decidedly from West to East. if openings had been left on 24th Street it would have thrown a flow of water on the private property to the East and have injured it. The houses in the block affected by the making of 24th St were built several years before the establishing & making of 24th St by the City & were built on the natural surface without regard to the established grade of Streets there

Pg. 185 of Record

The defendant here rested and the plaintiff recalled Truman J. Homer who further testified

A part of the ground in the block west of 24th St. sloped eastward, and a part slightly towards 25th St. There was a natural pond near the corner of 25th and Division street. The filling up of 24th St. effectually cut off the surface drainage. Before the street was filled there were 2 or 3 channels apparently worn out by the flow of the water, and through which the surface water of a part of the block run off. There was no other result followed from the making of the street in the manner in which it was done than necessarily resulted from the fact that the public sewerage system of the City of St Louis did not extend so as far west as that part of the city and that the lots were below the established grade. The public sewer system extended within reach of this property however by connection with the district system, and it depended upon the application of property owners as to the extension of the district sewer system to it, if they had desired to have the benefit of a district sewer to be made at their proper cost.

The work on 24th street was left for about 2 years in a rugged and incomplete condition. The curbing was left lying promiscuously on the street. The work was suspended on account of the hard times growing out of the late war. Most of the city work was

suspended on that account. Among others the dept called on me and suggested that the work should be suspended. It was authorised by the Ordinance and by the terms of the contract to suspend the Execution of the work. In improving 24th Street no provision was made for draining off the water. The water could now be drained into the Biddle Street Sewer by constructing a district sewer on 24th St at the Expense of the property owners

This was all the evidence in the Cause

And the Defendant asked the Court to instruct the Jury as follows and which the Court refused but gave in: Instructions fits and motion as will appear

The cause was tried without the assistance of Jurors.

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Defendants Instructions Refused

1. If it appears from the evidence that the contract No 1131 referred to in the certificates, upon which this suit is brought, was made by the City of St Louis with other party or parties than the said Alice Sullivan, then the plaintiff cannot recover in this action.

2. Although it may appear from the evidence that the work specified in the several certificates upon which this action is brought was done by the plaintiff Alice Sullivan, yet if it further appear that the contract No 1131 under which said certificates were issued was not made with the said Alice Sullivan, then plaintiff cannot recover the Verdict should be for the defendant.

3. As the right of the plaintiff to recover in this action is founded upon the statute and the certificates of the city Engineer, if it appears from the evidence that the certificates were improperly or illegally issued under the statute or were issued to the assignee or subcontractor, instead of the original contractor as provided by the statute, then the defendant is not liable & the plaintiff cannot recover.

4 If it appears from the pleadings or the proof that the contract for the work in question was assigned by McGrath & Cahill to Alice Sullivan after the completion of the work or any portion of it, then the certificate issued to the wrong party & the plaintiff cannot recover in this action

6th The plaintiff cannot recover in this action for the full amount of the certificates sued upon if it appears from the evidence that a portion of the work was done by McGrath & Cahill, the original contractors with the city under contract 1131 a portion by Walter Sullivan in his life time and the balance by the said Alice Sullivan after the death of the said Walter Sullivan.

8th The plaintiff is not entitled to recover in this action for so much of said work as was done by Walter Sullivan in his life time or by McGrath & Cahill, the original contractors before the assignment of said contract.

9th The defendant is entitled to recover of the plaintiff in this action any amount of damage it may appear from the evidence he has sustained not to exceed the Sum of $2500.00, by reason of the manner in which said work was done, or by the want of proper care & caution on the part of the plaintiff in the execution of said work, or which might have been avoided by the use of proper care diligence and precaution on the part of said plaintiff. Although the work itself may have been done in a skilful & workmanlike manner.

The Court of its own motion gave the following instructions.

No 5. To entitle the plaintiff to recover in this action it must appear that the work sued for was done under contract No 1131 and completed according to the terms and conditions of said contract And the certificates of the City Engineer upon which this action is brought are only prima facie evidence of those facts, and of the liability of said defendant

No 7 If it appear from the evidence that the whole of the work contracted to be done by McGrath & Cahill under Contract No 1131 with the City was not fully completed according to the terms of said contract when the certificates were issued, then the plaintiff ought not to recover although the amount of work may have been done as certified to by the Engineer

In lieu of the 9th instruction asked by defendant the Court declares the law to be that if the work performed by plaintiff and her assignor under contract No 1131 was performed in a skillful and workmanlike manner according to the terms of said contract and the directions of the City Engineer then the defendant cannot recover of the plaintiff any damages which he may have suffered on account of the making of said street unless such damages were caused by some act of omission or negligence in performance of the work, for which the City of St Louis would have been responsible in damages to defendant.

The Court found for the plaintiff and Judgment was rendered in favor of the plaintiff, and against the defendant.

The defendant in due time moved for a new trial, which being overruled, he appealed to the General Term of the Circuit Court, and the Circuit Court in banco, affirmed the Judgment of the Circuit Court at Special Term, and the defendant has now appealed therefrom to this Court.

Jacko & Clover for
Alice Sullivan Respondent

In the Supreme Court of Mo

October Term 1867

The City of St Louis to the use of Joseph Davis adm of Alice Sullivan deceased. Respondent

James Clemens Jr. Appellant

Statement of the case by Respondent.

Jecks & Clover for Respondent

Filed November 6 1867
O T Fishbackelk
Per E P McCarty Dp

City of St Louis
to use of Alice Sullivan
Respondent

vs

James Clemens Jr
Appellant

In the
Supreme Court

Oct. Term
1867

Appellant's Statement

This suit was brought on eight special tax bills for grading, curbing, macadamizing & 24th Street in the city of St Louis — under contract No 1131 made by the City with Lewis McGrath & Wm Cahill June 11th 1860 — The contract was to make 24th Street from Carr to Biddle & O'Fallon St —

The petition alleges that McGrath & Cahill did a portion of the work & on the 22d of Dec 1863 assigned the part from Biddle & O'Fallon to Alice Sullivan & requested the city engineer to give all certificates for that portion of the work to her

That thereby she became the assignee of the contractors & substituted as contractor for doing & completing the work

That all the work was done by the original contractors & Alice Sullivan

That on the 23d day of Decr 1863 the city Engineer made the assessments & delivered the bills to the said Alice Sullivan —

Defendant denies all the material allegations in the petition & sets up a counter claim for $2500 damages, growing out of the careless, negligent & improper manner in which said work was done — and the unfinished & incomplete condition in which the work was left adjoining defendants property — That no provision was made for the natural surface drainage from defendants premises — that no outlets were left whereby defendants premises were overflowed & he was deprived of the use of the same

Death of Alice Sullivan suggested & Joseph Davis administrator made party

Plaintiff's reply to counter claim — general denial —

Case tried at the June Term of the St Louis Circuit Court 1867 without a jury verdict for pltff —

Motion for new trial overruled and appeal to general term — judgment affirmed —

Appeal granted —

On the trial the pltff read in evidence 1st the letters of administration to Davis —

J. I. Homer — sworn — testified that he was city engineer — Shown the several tax bills & testified they were signed by him as city engineer

Pltff then offered the tax bills in evidence —

Objected to by deft's counsel on the ground that they were not admissible as legal competent or proper evidence under the pleadings & issues in the case

Objection overruled & tax bills read in evidence —

These tax bills are all made to Alice Sullivan administratrix of Walter Sullivan decd & certify that the amount therein stated is due to Alice Sullivan admx of Walter Sullivan contractor in accordance with city charter —

Contract No 1131 between the City & McGrath & Cahill — then read by plf — By contract the whole work was to be completed by Nov 1st 1860

The only power given to the City Engineer in the contract was the right to annul or suspend — for a failure to fulfill on the part of the Contractors

The contract was made subject to the approval of the City Council — Also to sections 1. 2 & 3 of City Ordinance No 4084 approved Jany 13/58

The contract included a Bond for faithful performance —

Form of contract approved by City Counsellor as required by law

Bond approved by the Mayor & the whole contract by City Comptroller & City Council —

City Ordinance No 463 & read in evidence -

Jn Homer then testified further that the contractors McGrath & Cahill did not finish the work - did only a part that he then authorized Walter Sullivan to go on with the work that he finished the grading in part & died & then he authorized Alice Sullivan to go on with the work

She brought to him an assignment of the contract to herself as administratrix & the Bills were made out to her as administratrix

Says he authorized her to do the work individually & told her I would not have the matter mixed up with an administration - I did not think it necessary to change the Bills as I thought it was only descriptive of her person

The contract gave me power to get the work done - and all the work was done under the contract with McGrath & Cahill - neither Walter nor Alice Sullivan had any contract to do the work - nor did they give any bond

I examined the work & found the Bills to Alice Sullivan as being the part who had completed the work contract

There was an Assignment of the contract to Walter Sullivan dated Feby 23/61

This was all by plffs. proof

Defts then offered & read in evidence the record in seven suits brought by the said Alice Sullivan as administratrix of Walter Sullivan against the defts to the Feby Term 1864 of this Court - upon the identical Bills now sued upon

The petitions in these cases are all sworn to by Alice Sullivan & allege that the work was done by Walter Sullivan as contractor & that the Bills issued to her as administratrix -

In these suits there was a trial & plff took a nonsuit

Philip Kline - testified that he was well

a equantity on the ground - There was a good surface drainage - the street was filled up 3 or 4 feet above the natural surface - 8 or 10 houses on the Block occupied by tenants of the deft - after the street was built the water stood on these lots from 6 inches to 3 feet in depth - Some of the tenants were driven off - estimated the damage to deft to be more than $3000

After the street was made the water could not run off - no sewers, gutters culverts or openings were left in the street through which the water could escape

If culverts or openings of any kind had been left the water would have run off

The work was delayed for more than two years - during which time the street was almost unpassable in wet weather -

There was no sewer adjoining this block into which the water could be drained - The nearest sewer was too high to drain the water from deft's premises - I took the level myself it might have taken a few inches from the top of the pond ——

John Flood
John Murphy &
John Hynes } witnesses for deft testified substantially to the same facts

That before the street (24th Street) was built - the surface drainage from defts premises was good that the failure on the part of the City contractors to make culverts or leave openings in the street caused the water to overflow defts premises by which his tenants were driven off

Pl'ff objected to all this evidence if it showed the damage to be the necessary result of making 24th Street - however it might be done -

This was all defts testimony

The pl'ff then recalled Mr Homer who testified that the filling of 24th Street actually cut off the surface drainage - there were before two or three channels apparently worn by the flow of the water - through which the surface water of a part of the block ran off -

The public sewerage of the city did not extend to the defts lots — The flooding of the lots was the necessary result of making the street
The public sewerage could have been extended to these lots upon application of the property owners & at their cost
In making this street no provision whatever was made for draining off the water —
The water could now be drained into the Bellville Street sewer at the cost of the property owners —

This was all the testimony in the case —

Deft — then asked the following instructions which were refused by the court —

1st If it appears from the evidence that the contract No 1131 referred to in the certificate upon which the suit is brought was made by the city of St Louis with other party or parties than the said Alice Sullivan then the plaintiff cannot recover in this action —

2d Although it may appear from the evidence that the work specified in the several certificates upon which this action is brought was done by the plff Alice Sullivan — yet it further appears that the contract No 1131 under which said certificates were issued was not made with the said Alice Sullivan then the plff cannot recover & the verdict should be for the deft ——

3d As the right of the plff to recover in this action is founded upon the statute & the certificates of the city engineer — if it appears from the evidence that the certificates were improperly or illegally issued under the statute or were issued to the assignee or sub contractor instead of the original contractor as provided by the statute then the deft is not liable & the plff cannot recover

4th If it appears from the pleadings or the proof that the contract for the work in question was assigned by Mc Geo McCahill to Alice Sullivan after the completion of the work or any portion

5th Then the certificates issued to the wrong party & the plff cannot recover in this action ——

6th The plff cannot recover in this action for the full amount of the certificates issued upon it appears from the evidence that a portion of the work was done by M. & Groth & Cahill the original contractors under contract No 1131, a part by Walter Sullivan in his life time & the balance by the said Alice Sullivan after the death of the said Walter Sullivan ——

8th The plff is not entitled to recover in this action for so much of said work as was done by Walter Sullivan in his life time or by M. Groth & Cahill the original contractors before the assignment of said contract —

9th The defts is entitled to recover of the plff in this action any amount of damage it may appear from the evidence he has sustained not to exceed the sum of $2500 by reason of the manner in which said work was done or by the want of proper care & caution on the part of the plff in the execution of said work or which might have been prevented —

by the use of proper care diligence & precaution on the part of said Plaintiff although the work itself may have been done in a skilful & workmanlike manner —

The Court gave the following instructions

5th To entitle the Plff to recover in this action it must appear that the work sued for was done under Contract 1131 & completed according to the terms & conditions of said contract — And the certificates of the City Engineer upon which the action is brought are only prima facie evidence of these facts & of the liability of said defendant —

7th If it appears from the evidence that the whole of the work contracted to be done by Mc Gratto & Cahill under contract 1131 with the City was not fully completed according to the terms of said Contract when the certificates were issued — then the Plff ought not to recover although the amount of work may have been done as certified to by the engineer —

In lieu of the 9th instruction asked by deft

The court declared the law to be that if the work performed by plff & her assignee under the contract No 1131 was performed in a skilful & workmanlike manner according to the terms of said contract & the directions of the City Engineer - then the deft cannot recover of the plff any damage which he may have suffered on account of the making of said street - unless such damages were caused by some act omission or negligence in performance of the work for which the city of St Louis would have been responsible in damages to deft

Verdict for plff

Motion to set aside verdict & for new trial for following reasons

Because the court erred in permitting the plff to introduce illegal & incompetent testimony

Because the court excluded legal & competent evidence offered by deft

Because the court refused to give legal & competent instructions asked by dft

Because the court erred in declaring the law of the case as presented on the evidence

Because the court erred in declaring the law as asked by dft

Because the verdict is against the evidence & the weight of evidence

Because it is against the law of the case

Motion overruled
Dft excepted &c

A M Gardner
Atty for Appellant

No 60

Supreme Court
Oct Term 1867

City to use &c
Alice Sullivan
Respondt

vs

James Clemens Jr
appt Jr

Appellants
Statement

Gardner
for appellant

Filed November 7. 1867
O T Fishback Clerk
Per E. P. McCarty Dep

The City of St Louis
to use of Alice Sullivan
Respondent
vs
James Clemens Jr
Appellant

In the Supreme
Court
Oct. Term
1867

Appellant's Brief

The appellant insists first that the court erred in admitting the City Tax Bills as evidence on the part of the plaintiff —

These were only admissible under the provisions of the 2d sec. of the Act supplementary to the acts incorporating the City of St Louis — Appd. Jany 10/60 See Session Laws 1859 & 60 pg 383 —

The allegations in the petition show that Alice Sullivan was not the contractor — The act referred to only authorizes the issuing of these Bills to the contractor — and the suit must be brought for his use alone — —

It was contended that the plaintiff Alice Sullivan was a substituted contractor — sub-contractor or assignee — neither of which are known to or recognized by the Statute under which suit is brought

Besides these Bills do not accord with-
but unequivocally on their face contradict
all of these hypotheses —

They purport to have been issued to Alice
Sullivan administratrix of Walter Sullivan
Contractor — so that they neither proved
or tended to prove any allegation in the
plaintiff's petition — on the contrary
contradicted & disproved the very allegation
on which alone plaintiff could seek to
recover — to wit — that Alice Sullivan was
the contractor or as styled in the petition
substituted contractor — & hence should
have been rejected —

The petition shows just that Lewis Mc
Grath & Wm Cahill were the contractors in
the contract (No 1131) under which the work
is alleged to have been done —

Second — That an alleged assignment was made
to Alice Sullivan Dec 22d 1863 & the
certified Bills issued to her on the 23d the
following day — showing beyond a contingency
that she could not have done the work either
as contractor — sub-contractor. assignee or
otherwise —

Thirdly — The Bills do not even purport to have been issued to Alice Sullivan as contractor sub-contractor or assignee and therefore should have been excluded as not proving or tending to prove any allegation in plaintiffs petition ——

It may be contended however that subsequent proof justified the admission of this evidence on the part of the plaintiff & cured the previous erroneous ruling of the court —

11 Sergt & Rawle 134 Weidler v Farmers Bk of Lancaster

It is true the Counsel for the plff. attempted by subsequent proof to explain the contradiction between the allegations in his petition & his evidence as contained in the tax bills —

This explanation was that the word admitx in the Bills read in evidence meant nothing, was merely descriptive of plffs person & was a clerical error — This explanation was attempted to be made by the city engineer (Mr Hamer) in his testimony after the tax bills had been read in evidence & the court had overruled the defts objection ——

But if true it does not reflect or do away with the other part of the statement in the Bills

as evidence is a statutory privilege in derogation of the common law rules of evidence (& I may add of common justice) so that no presumption can or ought to be allowed in their favor —

They should be strictly construed & when offered in evidence should never be admitted except in exact conformity with the statute under which the privilege is granted & with the pleadings in the case —

Under our present system of pleading the plff must state the facts constituting his cause of action & is not allowed to prove other facts not alleged in his petition —

{ 9 Barb. Sup. Ct. 158
Bristol vs Rensselaer & S. R. R. Co —

The position of the appellant in this case is such that he can consistently ask the Court to hold the contracting parties (The City & her contractors) to strict proof — He was no party to the contract — nor could he in any way control or direct the performance of it — he is made liable without his knowledge, consent or approval of the work done — & it is now sought

Alvin Sullivan
by the present pltff to make him pay for work done by at least two other parties & which has resulted for more to his injury than benefit

Secondly The appellant insists that the Court erred in refusing to declare the law to be as contained in the defendants 1st 2d 3d & 4th instructions

The propositions contained in these instructions are that these certificates can issue only to the contractors themselves — that the contracts themselves are not assignable & that no one except the contractors have the right or can recover in this peculiar statutory action

Session Laws 1859 & 60 page 383 (sec 2)

The proof shows that the party for whose use this suit is brought had no contract with the city either verbal or written —

See contract as contained in the Bill of Exceptions & testimony of the City Engineer on Cross Examination

To sustain these propositions reliance is placed upon the terms of the act under which this suit is brought from which it will be seen that this extraordinary privilege of suing an outside party in no way connected with the contract itself – is granted only to the contractor with the city for the work to whom the bills shall be delivered & who shall proceed to collect in his own name by the city to use &c

No allusion or provision whatsoever is made in the act for a sub-contractor agent or any other person except the original Contractor himself

If the Legislature intended to give sub-contractors – material men – or other parties other than the original contractors the rights & privileges of this extraordinary act why did they not name & provide for them in the law itself as has been done in the Mechanic's Lien Law so called & all others of that character where special rights or liens are created! —

There was an attempt made to show that some part of the work was done by Alice Sullivan pltff as though that would overcome some of the obstacles to pltffs recovery —

It is submitted that if one or the larger portion even of the work had been done by Alice Sullivan - still the City engineer had no authority or right to issue the certificates to her - nor did she ever claim them - nor were the ever issued to her as contractor -

The act prescribes to whom the certificates shall (not may) issue & the engineer had no discretion & could not assume to do what the law gave him no authority to do -

The pretence was that the contract had been assigned to Jeff & that she was substituted for McGrath & Cahill

By what authority, or how a contract of this peculiar character could be assigned we are not informed - except that it had the sanction of the omnipotent City engineer

It was an executory Contract & therefore not assignable
By Mo R 437 Leahy v Dugdale

The money after it was earned, or the certificates after they were issued might

be assigned – but not the contract itself

Aside from its being an executory contract it contained other matters that prevented it from being assigned – There was a bond attached for its faithful performance by the original Contractors – The form of the contract by city ordinance had to be approved by the City Counsellor – The bond by the Mayor – the contract itself by the City Council to make it a valid – all these requisites had been complied with – All the city engineer had to do or could do was to fix the terms of the contract & see that the contractors performed them – His consent to, or approval of an assignment of the contract gave it no more force or validity than if it had been the consent or approval of any private citizen – It was a matter about which officially he had nothing to say & over which he had no control

Laws & Ordinances St Louis 1856 – Ordinance No 3578 Engineer Dept – pg 408 &c

It will be observed further that this pretended assignment is assumed to have been made without any of the formalities or the approval of any of the city officers attached to & required by ordinance to the original contract –

In other words this mere overseer of the work to be done, assumes the right to permit an assignment of the contract — to allow the work to be done by assignee or anybody without a contract without a bond or without the approval of the city officers designated by ordinance — and then to issue his certificates for the whole work to any one of any number who may have been engaged on the work — With such undefined & unlimited powers in the hands of this petty officer the court will readily perceive that no examination for the liens of special taxes in the transfer of real estate could be made with any accuracy as the records in the engineers & city register's office (where these contracts & the liens accruing under them are supposed to be filed) would not show with any certainty in whose favor the liens would stand —

If it be true as was assumed by the Court below (in the refusal of these instructions asked by the dft —) & contended for by the Counsel here — that this contract could be assigned & that it was legally

& properly assigned to Alice Sullivan — and that the City Engineer could legally & properly issue his certified Bills to contractor sub-contractor or assignee —

Still where does the engineer get the right or authority to give certificates to the widow for work done by the husband in his lifetime & to authorize her to collect for her own use the money which properly & legally belongs to his estate —

The pretence is that the pltff Alice Sullivan completed the contract & was

The proof shows that the contract was assigned to her (if at all) on the 22d of Dec 1863 & the certified Bills ~~were~~ delivered to her on the 23d the following day —

Further that Walter Sullivan her deceased husband did some portion of the very work for which these Bills issued

So that we have this absurd proposition that if the pltff put on the last load of MacAdamized Rock (and only one at that) she would in the wisdom of the City engineer be entitled to the certificates & to collect

for her own use the whole contract price of the work & the entire exclusion of her husbands estate & creditors ——

If A should be held that the assignment of the contract (or of the work done under the contract) by Mr Goath & Cahill to Alice Sullivan was valid — what right — or how could they assign & her the contract or the part previously assigned to her husband (then deceased) or the work that had been done by him — or what right has a city Engineer more than any body else to say who shall collect the claims of a deceased city contractor except upon the monstrous assumption that the individual who may happen to do the last days work on the contract under his permission or direction is entitled to his certificate for the whole work & may collect the whole amount to the exclusion of all others including the legal representatives of the deceased contractor who had done all the balance of the work ——

The 9th instruction asked by (defts) appellants & refused by the Court was based upon the ruling of this court in the case of The City & the use of McGrath et al vs Clemens 36 Ind R 467 —

The counter claim set up in this suit is identical with that in the case referred to — and which the court therein declared & established would have been a complete rebuttal of the plff's prima facie case

That the city being the substantial plaintiff was liable if the defendant was injured by negligence or unskillfulness in the performance of the work —

The evidence on the part of the defts uncontradicted & in a measure supported by the plff's witness — the city engineer showed the grossest negligence & want of skill & care in the performance of the work in question —

The city engineer & the contractors in making this street deliberately dammed up the natural water courses — by which nearly a whole block of grounded was flooded — the defts tenants drowned out & compelled to remove — the water allowed to remain for years until it becomes a nuisance & as shown by one of the witnesses declared such

by the city authorities & the dept. notified to abate it — Yet not a single effort was made by the engineer having the work in charge or the contractor doing it, to prevent the damage or to remove the cause after it occurred although the testimony shows that a gutter, sewer or common culvert across the street where the natural water courses were would have prevented the flooding of defts premises & saved the heavy loss proven to have been by him sustained & probably would not have added a single dollar to the cost of the work —

The appellant contends that the evidence shows beyond a cavil that it required no unusual skill to prevent the damage complained of — there was no necessity whatsoever for it — nor it would it have required any extra or additional expense on the part of the City or its employees to have prevented it — that it was the natural & unavoidable result of a careless act the commonest understanding could have foreseen — hence it was there inexcusable negligence & for which under the previous rulings of this court the City ought to be held liable —

It is not intended to dispute the doctrine laid down in the case of Kavanaugh vs The City of Brooklyn — 38 Barb. Sup Ct - 232 - 237 —

It is not claimed that the city is liable for establishing a grade to the street higher or lower than defts premises - or that it would be liable for the accumulation of the water thereon if that was the unavoidable & natural result

In the case at bar the result could easily have been avoided — it was the careless and unnecessary stoppage of a water course known & established that caused the injury

As well might it be said that the city could construct a street across the present channel of "Mill creek" a well known stream flowing through the city & without leaving any egress for the water — flood the whole original surface of the old Chouteau Pond & the adjoining low lands & then contend they were not liable for damage because it resulted from establishing the grade of a street — A doctrine too absurd for serious argument —

4 Greene (Iowa) 373 Wallace vs City of Muscatine
2 Denio 433 Mayor of N.Y. vs Bailey et al

It is insisted that the 9th instruction declared the law on this branch of the case & should have been given —

On the trial the Plff's counsel contended that if the work itself was done in a skilful & workmanlike manner according to the terms of the contract & under the directions of the city engineer then the Plff could not be made liable for damages —

In other words that a compliance with the terms of the contract would relieve both contractor & city from all claim for damages by other parties —

On the other hand the appellant contended then & insists now that no matter how skillfully & completely the work itself may have been done — Yet if either the City engineer in charge of the work — or the Contractor under him omitted to do any thing which common & ordinary care & skill or attention would indicate ought to have been done to prevent injury to third parties — or were so careless or negligent in performing the work, that damage resulted therefrom unnecessarily to other parties — then the

& failed to take a single precaution to prevent the damage which he knew must inevitably result from his acts & yet we are told there is no remedy—

The appellant asks for a reversal of the judgment against him —

1st Because the court admitted illegal & incompetent evidence —

2d Because the court failed to declare the law of the case,

3d Because the verdict was against the evidence —

A M Gardner
Atty for appellant

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A M Gardner
Atty for appellant

No 60

Supreme Court
O N Term 1867

City to use of
Alice Sullivan
Respondent

vs

James Clemens Jr
Appellant

Appellant's
Brief

Gardner
for Appt

Filed November 7. 1867
O T Fishback Clk
Per E. P. McCarty Dp

In the Supreme Court of Mo.
October Term 1867

The City of St Louis to the use
of Joseph Davis admr of Alice Sullivan deceased. Respondent.

vs

James Clemens Jr Plaintiff

On appeal from the St Louis Circuit Court
and argument
Brief on behalf of Respondent.

The main proposition it is conceived which is presented for the consideration of this Court arises upon an instruction offered by the defendant and refused by the Court, but and which is numbered the 9th, but for which the Court substituted one of its own framing.

The defendant asserts the proposition that though the work ordered by the City to be done was done in a skilful and workmanlike manner, yet if necessary or unavoidable damage resulted to the defendant from the doing of the work, however skilfully and properly done, or which might have been avoided by the use of any means whatever, that then the defendant might recoup these damages against the bill of work for which the Engineers certificates issued.

The plaintiff aperts the contrary as the law and submits under the authority of City of St Louis v Gurno 12 Mo p 415 which has withstood many and repea= =ted attacks

That the Corporation is not liable to an action for damages consequential upon the paving and grading of a street directed by the corporate au= =thority in pursuance of an ordinance authorized by its charter, when the agents of the Corporation have exceeded the powers entrusted to them in a skilful and workmanlike manner.

Damages occurring to owners of lots on streets by reason of the establishing or changing the grades of the streets in improving the same or by reason that the streets are not improved to a level with the established grades by the mu= =nicipal authorities are damnum abs= =que injuria.

Taylor v The City 14 Mo p 20.
Radcliff v Brooklyn 4 Comstock 195
Hatch v Vt. Con. R.R. Co. 25 Vermont 49
Tate v Ohio & Mi. R. R. Co. 7 Ind 479. 482.
Commonwealth v Erie R. R. Co 27 Pa. 354. 357.
Porter v North Mo R R Co 33 Mo 128.
Lambar v The City 15 Mo p 611.
Hoffman v The City 15 Mo p 651.

Unless Clemens therefore had a right of action against the City, he could not recoup against the work done under the authority of the ordinance by the plaintiff, and which was the principle declared by the Court in the instruction which it substituted for the erroneous instruction asked by the defendant. and so the Court declares that if the work performed by the plaintiff was performed in a skilful and workmanlike manner according to the terms of the contract and the directions of the City Engineer then the defendant cannot recover of the plaintiff any damage which he may have suffered on account of the making of said street unless such damages were caused by some act of omission or negligence in performance of the work for which the City of St Louis would have been responsible in damages to defendant.

The ~~plaintiff~~ defendants 4th instruction is based upon error of law and fact. It asserts as follows.

If it appear from the pleadings or the proof that the contract for the work in question was assigned by McGrath & Cahill to Alice Sullivan after the completion of the work or any portion of it, then the certificate issued to the wrong party and the plaintiff cannot recover in this action

The Court will observe that by the ordinance the cost of grading the street was to be paid by the City, and an appropriation was made by the City out of the City treasury for the doing of this kind of the work.
the cost of ~~grading~~ curbing guttering macadamising and constructing side and crosp walks on Twenty fourth street was to be apportioned and charged on the adjoining lots and collected of and paid by the owners of the lots.-

Now according to all the testimony, that is, according to the only testimony on the subject, that of City Engineer Homer, the original contractors McGrath and Cahill did not finish the work they only did a part of the grading Walter Sullivan who succeeded them finished the grading between Carr & Biddle street, and between Biddle & O'Fallon in part and died.
for this work being payable by the City no certificates were to issue against the owners of property for they were not liable to pay for this kind of work, and the only person who did work, the work for which alone the Engineer could properly issue certificates so as to charge property was the plaintiff Alice Sullivan..

So that the instruction was erroneous in assuming a completion of the work or any

portion of it before the assignment of the contract to plaintiff and that thereupon the certificate was improperly issued to her. This disposes of the 6th and 8th instructions of Deft.

Another point made by the defendant and which it is supposed will be relied upon in this Court arises out of a fundamental error which is incorporated in the first instruction which was asked by the defendant and was refused by the Court.

The instruction is as follows.

If it appears from the evidence that the contract No 1131 referred to in the cer= =tificates upon which this suit is brought was made by the City of St Louis with other party or parties than the said Alice Sullivan then the plaintiff cannot re= cover in this action.-

The second instruction of the defendant asked and refused is substantially the same as the foregoing and variant from it only in its phraseology.-

The two may therefore be considered together.

A general answer may serve as thus.
St Louis needed to have made no contract at all for the doing of this work by written contract. Supposing by its Engineer it had made a verbal contract as indeed it did

with Alice Sullivan to do the curbing guttering macadamising and construc= ting side and crosp walks on Twenty fourth street, and when she did the work as she did according to the verbal contract which was simply an adoptim of the terms to be found in a written contract between it, and Mc Grath and Cahill for the doing of the same work, had delivered as it, deliver the certified bill to Alice Sullivan for her services and work, would it be answer for Mr Clemens who has en= joyed the benefit of the work to say to her as he does. the original contract was made with other party or parties than you Mistres ~~Clemens and you~~ Sullivan, and you have no right to recover against me.

Her answer is, under that contract no person other than myself ever did a dollars worth of any kind of work for which you could be chargeable.

If Messrs McGrath & Cahill did any work under the contract it was simply grading which the property owners could not be called to pay for.

If my deceased husband did any work under the contract it was likewise for grading.

You have no interest in this contract not made with you, except as are called to pay for the work, to have it done according to the contract which has been done

The facts of this case are not very dissimilar from those in the case of The City to use of George I Decker assignee of Ursula Buol administratrix of P. Buol deceased v Wiley Rudolph reported in 36 Mo Rep. p. 465.

Judge Holmes delivering the opinion of the Court in the case emphatically remarks. "The certified bill was made out "to Ursula Buol administratrix of Paul "Buol deceased, the certified bill recognises "her as the contractor who performed the "work, and the mere fact that it describes "her as administratrix is immaterial"

So in the case at bar, the certified bill recognises Alice Sullivan as the contractor and there is no possibility of Mr Clemens ever being called upon to pay for the work to any one else, for not only does the ~~act~~ certified bill recognise her as the contractor, but in point of fact she was the only person who did the work and Mr Clemens has no interest in the question as to who was the original contractor, but solely as to his liability to pay for the work done and the Court sitting as a Jury has found as a matter of ~~fact~~ fact that the work was well done in a skillful and workmanlike manner in all respects according to the terms of the contract

With reference to any claim for damage arising from delay in completing the work the Court is referred to the testimony of City Engineer Comer p. 186 of Record (which is stuffed with all manner of unnecessary matter the record.) The work on 24th Street was left for about 2 years in a rugged and incomplete condition. The curbing was left lying promiscuously in the Street. The work was suspended on account of the hard times growing out of the late war Most of the city work was suspended on that account. Among others the deft called on me and suggested that the work should be suspended. I was authorised by the ordinance and by the terms of the contract to suspend the execution of the work.

Finally, the defence is not only technical but unfounded in law or fact.

Mrs Sullivan after years of effort to recover her rights was defeated and delayed until her death has left her orphan children to litigate against with this defendant who has derived the benefit of the work of their deceased mother and it is believed that the appeal in this case was taken solely for vexation and delay.

Jecko & Clover

for Respondent.

In Supreme Court of Mo
October Term 1867

The City of St. Louis to the use
of Joseph Davis admr of
Alice Sullivan dec'd
Respondent.
v
James Clemens Jr
appellant.

Brief & argument for Respon:
:dent

Jeckot Glover
for Respondent

Filed November 7 1867
O. T. Fishback Clerk
Per E. P. McCarty Dp