SEWER IMPROVEMENT DISTRICT NO. 1 *v.* DUGGANS.

Opinion delivered January 7, 1929.

1. MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWER—BURDEN OF PROOF.—In an action for the balance due for construction of a sewer, the burden was on the plaintiff to show that he was entitled to recover and the amount of such recovery.
2. MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWER—EVIDENCE.—In an action for a balance due for construction of a sewer, on the theory that, after the funds contributed and provided therefor had been exhausted, the commissioner of the sewer district,

through its president, authorized plaintiff to complete the sewer, evidence *held* not to support a verdict for the plaintiff.

3. MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWER—AMOUNT OF RECOVERY.—Where no agreement was made regarding the amount to be paid to a contractor for completing a sewer with his own funds after the funds provided by the sewer district were exhausted, he could not recover therefor more than the reasonable value of such work as upon *quantum meruit*.

4. MUNICIPAL CORPORATIONS—JURY QUESTION.—The reasonable value of work done by a contractor in completing a sewer, after funds provided by the district were exhausted, was a question for the jury.

5. MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWER—INSTRUCTION. —In an action for a balance alleged to be due for constructing a sewer, an instruction that, if members of the sewer district board knew the contractor was completing the sewer after the district's fund was exhausted, the commissioners were estopped from claiming that the district should not pay for the improvement, *held* erroneous in leaving out of consideration the question whether the commissioners knew that the sum contributed had been exhausted.

6. TRIAL—CONFLICTING INSTRUCTIONS.—Error in an instruction to the effect that the commissioners of the sewer district were estopped from claiming that the district should not pay the contractor for completing a sewer, in leaving out of the jury's consideration the question whether the commissioners knew that the sum contributed for construction of the sewer had been exhausted, *held* not cured by a correct instruction to the effect that the district was not liable if the contractor expended money without authority of the commissioners, unless they knew he was making expenditures in excess of the amount contributed.

Appeal from Washington Circuit Court; *J. S. Maples*, Judge; reversed.

STATEMENT BY THE COURT.

This suit was brought by appellee against the sewer improvement district to recover a balance alleged to be due him for construction of a sewer 1,245 feet long connecting the property in Gunter's Addition with the main sewer of the city.

The complaint alleged that appellee entered into a contract with the board of commissioners of Sewer Improvement District No. 1 of Fayetteville, through its

president and agent, J. H. McIlroy, to construct a sewer connecting with Improvement District No. 1, over a certain line in the city, describing it, to connect with the sewer located in Willow Street, a distance of 1,245 feet; and that a survey of the location and grade was made at the direction of the board of commissioners and J. H. McIlroy, its president and agent, for that purpose, by the city engineer, and that the sewer tile was furnished under the direction of the board. That, in order to complete said work, plaintiff was instructed and directed by said board of commissioners to pay for the labor and work of digging said sewer, laying the sewer pipe and filling the same, under the agreement made by the said J. H. McIlroy as president and agent, and individually; that said expenditures so made by him would be repaid by said sewer improvement district, the board of commissioners thereof and the said defendant, J. H. McIlroy. That, in carrying out the contract, plaintiff expended in the work of construction of the sewer certain designated sums, in all $1,517.20, for which amount judgment was prayed against the improvement district and J. H. McIlroy.

The answer denied that the board entered into any contract with appellee for the construction of the sewer; that the improvement was made at the direction of either the board or McIlroy, its president and agent; that the appellee was instructed by the defendants or any of them "to pay for the labor of digging said sewer ditch, laying the sewer pipe and filling the same, and deny that same was done by virtue of any agreement made with J. H. McIlroy, as president and agent of said board of commissioners, or individually; that such expenditures would be repaid by said improvement district, or the board of commissioners, or J. H. McIlroy individually; denied further that the sums set out in the complaint were expended under any authority from the defendants or any of them, and any indebtedness whatever to the plaintiff.

The evidence discloses certain citizens in the Gunter Addition, whose property would be benefited by the sewer, wanted it constructed, and approached the president of the board of appellant district to induce the board to make the improvement. They were told that the sewer district had no money with which to make it, but if they, being interested parties, would put up the required sum of money, the board would cause the improvement to be made and repay the parties furnishing the money whenever the improvement district had sufficient funds on hand thereafter to discharge the debt. W. E. Graham and H. E. Jackson furnished the district the sum of $600, that amount being estimated as the sum necessary to complete the improvement, and the board of commissioners executed a receipt for the sum loaned, reciting the purpose for which it was to be used, and containing a promise of repayment as soon as the district could perfect financial arrangements for doing so. The $600 was placed to the credit of the sewer district, and appellee Duggans was employed to expend it in the construction of the desired sewer line. He proceeded with the work, and expended the whole of said sum of $600 provided for that purpose, and claimed to have expended in addition thereto, for construction and completion of the sewer, the sum of $1,517.20, for which amount the suit was brought. The board of commissioners had no knowledge that appellee was expending any money in excess of the $600 provided him for said purpose, and, although some of them knew that he was doing the work of constructing the sewer, they did not know it was being done out of his own funds and at a cost in excess of the money provided.

Appellee testified that he made no contract with Mr. McIlroy to construct 1,245 feet of sewer in Fayetteville. But Mr. McIlroy, chairman of the sewer commission, instructed him to construct a sewer line from Walnut Street to North Willow; that Mr. Graham and Mr. Jackson had put up some money to construct the line with, "and he instructed me to take my men and that tile and

construct the sewer line, and I did so. The board had no meeting and gave me no instructions. Mr. McIlroy dominated the matter, and always gave me instructions, and I always followed them to the letter, and I took him as agent of the district." Described the location of the line, its length, and the kind of tile with which it was to be constructed. Said Mr. McIlroy directed him to do the work, but in laying the tile he followed the instructions of Mr. Ratliff, city engineer; and that Mr. Jackson and Graham bought and paid for the tile, and the city repaid them. That the work was done according to the survey and grade established by Mr. Blood, assistant to Ratliff, the city engineer. Said further that, when he had constructed part of the work, the money gave out, and he stopped and talked to Mr. Graham about it, and told him that we were out of money and told Mr. McIlroy that we were out of money. "Mr. Graham told me that he would see that it was paid, but I looked to the sewer board. I can't recall definitely that Mr. McIlroy ever told me that he would see that it was paid, but I had perfect confidence in the sewer commission, and felt like that if I built the line and paid for it they would see me reimbursed, and I went ahead and did the work. After the money gave out that Graham and Jackson put up, I furnished the money to finish it. I advanced $1,517.20, and have never gotten back a penny of it, and all I am asking is what I paid out of my own funds." Gave the dates the work was begun and completed, and specified the amounts paid by him during certain dates to its completion. Said it was a difficult line to construct, there being much blasting required, and that the banks were caving constantly on account of the rain, and the ditch had to be filled in after the sewer was laid. Admitted that there were places in town where a sewer could be constructed for 78 cents a foot, but said it could not be done where blasting was required as in this line. That he had not paid out a cent to the workmen that was not just, and that the sewer could not have been built for less money. "Mr. McIlroy asked me several times how I was getting along. He

knew that I was doing the work, and never told me to stop. * * * The city engineer knew the work was going on. I had a conversation with Mr. McIlroy after I completed the sewer in January. I told him about the work I had done and the money that I had spent, and he said he would take it up and settle it later. The only contract that I ever had with the sewer board was with reference to expending the $600 put up by Homer Jackson and W. E. Graham. He didn't say anything about stopping when I got through with that money. The agreement about expending the $600 was made in the water office, in the basement of the courthouse. Mr. McIlroy was the only commissioner present. I realized that he was representing the board, there is no doubt about that. I suppose the $600 built about 200 or 300 feet of the 1,245 feet constructed. * * * When the $600 ran out, I reported it to McIlroy and also to Mr. Graham, but had no further agreement with Mr. McIlroy, nor did he direct me to proceed further. Mr. Graham directed me to go on, and guaranteed the payment. He is not a member of the board, but he is the only man that ever guaranteed the payment and the only man who ever told me to proceed. I proceeded on what Mr. Graham told me and on the confidence that I had in the board." Stated the amount of blasting required to be done in the construction of the work and the amounts paid for the labor done.

Other witnesses stated the necessity for filling the ditch along as the work was done, the depth of it, and the amount paid the laborers per hour, and that it was reasonable.

Jackson testified that he lived in the Gunter Addition, and that Mr. McIlroy told him when they wanted the sewer constructed that, if he would get some one else and they would put up $600, it would be done. Said he supposed that the sewer was put in by the sewer commission, but Mr. Duggans was in charge of the work. "Mr. Graham and I put up $600, and later got it back. * * * It was my understanding that this $600 was to put the sewer

in." Got this information from Mr. Graham. Knew that $600 would not put the sewer in, but understood that if we put up $600 it would be completed, "but the estimate of the cost that came to us was $600."

W. J. Lewis, one of the commissioners, did not think he was a member at the time the sewer was constructed, and was not consulted about it anyway. He knew the work was going on, and made no effort to stop it. Understood they borrowed the money to do the work, and knew it was going on, "but I did not know it was going on out of Mr. Duggans' pocket."

Appleby, the other commissioner, knew the work was being done out there and that Duggans was doing it, and that, as a commissioner, he did not try to stop it. Had made the statement that he thought Mr. Duggans ought to be paid for it, but meant only if the district owed it. Did not know whether he owed it or not. "I did not know the work was going beyond the money we borrowed for that purpose. I assumed it was being built out of the money we borrowed for that purpose, and never thought to the contrary."

McIlroy testified that he told Graham and Jackson they had no money with which to finance the building of the sewer they desired, and they agreed to put up the money if he would have it built. He agreed if they would have an estimate made and put up the money—deposit it, and put up the cost of the line—he would have it built and supervised by Mr. Duggans, the superintendent of the water plant. Did not remember who made the estimate, but was under the impression that Graham and Jackson had Mr. Duggans make it, and that it was $600. "This was for the entire line, as I understood it." Had no knowledge that any money was being expended on this line except the $600 Jackson and Graham put in for that purpose. "That is what the estimate was made for." Knew nothing about this expenditure for a year after the work was finished. Had no notice that Mr. Duggans was putting up a dollar of his own money. Was not shown any ledger sheet of any such expenditures until now. Had

the office searched, and found no record of this expenditure. Had no knowledge that they were going beyond the $600 furnished, and they had no authority from the board to do so. "We had no money, and Mr. Duggans knew it. * * * Why Duggans would spend his own money out there is a mystery to me. I would not take my own money and put it out, and I don't see why he should. These men who were interested might, and that was the proposition, for them to finance it. We never authorized any expenditure beyond the $600, and when that money was gone Mr. Duggans should have quit. * * * I supposed he was expending the $600. I never had any conversation in which I asked that Duggans put his money in this job and finance it. I wouldn't advise him to do it. * * * I did ask Mr. Duggans several times how he was getting along out there, but I had reference to how he was getting along generally, and as to how he was getting along expending this money that Mr. Graham and Mr. Jackson advanced. That's what I meant. I couldn't have agreed with Mr. Graham that we would go ahead and finish the sewer, for we had no visible means of revenue. They were to finance it. I never saw a voucher or anything that was paid out on that job. Don't know if Mr. Duggans expended the amount he claims out of his own funds. We have no record in the office about it. I did not tell him to go ahead and spend more money than these men put up, and I don't think he will say I did. His account is excessive. * * * Mr. Appleby and I were the only commissioners when Mr. Graham and Mr. Jackson put up the money. We had no contract to pay Dock Duggans."

Ratliff, the city engineer and superintendent of the water plant, made an investigation of the matter after Duggans had made some kind of a claim, which was referred to him by the commission to determine the reasonable cost. Could not make a complete investigation, as the work had been covered, but saw some of it going on and knew the character of the work done, and thought, from his experience and seeing the work going on and the investigation made, that "75 cents per running foot for

the labor on that job would be an outside figure. I mean that it should not cost more than that under any circumstances."

Witness had had a lot of experience in Fayetteville, and knew what it ought to cost. Had constructed 52,000 feet of sewer lines in Fayetteville in different kinds of soils and rock, and "tell the jury, in my judgment, it should not have cost more for labor than 75 cents per running foot." Witness had seen the work as it progressed, but never saw Mr. Duggans on the job, and did not know the work was going on out of Mr. Duggans' pocket. Never heard it was claimed Mr. Duggans put his own money into the job until more than a year after it was done.

The court instructed the jury to find the verdict for defendant McIlroy, and gave instructions Nos. 4 and 7 over appellant's objection, and from the judgment against it for the amount sued for the district has appealed, and a cross-appeal is taken on the judgment on the instructed verdict in favor of McIlroy.

Pearson & Pearson, for appellant.

W. A. Dickson and *Price Dickson,* for appellee.

KIRBY, J., (after stating the facts). It is insisted for reversal of the judgment that it is not supported by sufficient testimony and that the court erred in giving said instructions No. 4 and No. 7.

The burden was upon appellee to show that he was entitled to recover in the action and the amount of such recovery. He testified that the only contract made by him with the sewer board was limited to the expenditure of the $600 paid in by Jackson and Graham for its construction, and that nothing was said about stopping the work when the money was expended. That he reported that the $600 had been expended, when it was done, to McIlroy and also to Mr. Graham, but had no further agreement with McIlroy, nor was he directed by him to proceed further. He relied for recovery upon the fact that he continued with the construction, after the expenditure of the $600 provided therefor, at his own expense,

upon the theory that the members of the commission saw him doing the work without any objection thereto, allowing him to complete the sewer, which was accepted and used by the city.

According to McIlroy, the officer and agent of the district, with whom the contract was claimed to have been made, no authority whatever was given for the expenditure of any more money than the $600 that had been provided for the purpose by individuals living in the territory to be served by the construction of the sewer. He denied any knowledge whatever of any expenditures by appellee of his own funds in the completion of the sewer after the expenditure of the said $600 provided therefor until more than a year after its completion, and explained his asking appellee about the progress of the work in the belief only that appellee was proceeding with the construction of the sewer under the authorization only for the expenditure of the said amount contributed therefor, the estimated cost of construction, $600.

There was therefore no substantial testimony warranting the jury's finding, and the contention that the judgment is not supported by sufficient evidence must be sustained. Since the judgment must be reversed, and there may be a new trial, it is necessary also to pass upon the other assignments of error.

Instruction No. 4, objected to, was erroneous in telling the jury that, if they found that McIlroy was employed to oversee the building of the sewer, and performed the services, and if they found, after the funds provided had been exhausted, that the agent and officer of the district, McIlroy, further authorized plaintiff to go ahead and finish the sewer, and that he had completed it in good faith and paid for its construction out of his own money, the verdict should be for the plaintiff against the district "for the amount you find plaintiff has expended."

There was no testimony showing any contract or agreement on the part of the district by any of its officers to repay for the construction of the sewer the amount

expended by appellee in having it done, and if the facts proved had warranted a continuation and completion of the work by appellee after the expenditure of the fund provided therefor, he was not entitled to recover more for such work than the reasonable value thereof as upon *quantum meruit,* no agreement having been made relative to the amount to be paid therefor.

McIlroy testified that the amount charged was excessive, and the city engineer, who had investigated the construction after the claim for compensation, testified that 75 cents per foot was the outside reasonable price for such work of construction.

Under the instruction given, this testimony was disregarded and the jury directed to find against the district for the amount of money expended in the completion of the sewer, without regard to the reasonable value of the work done, which was a question for the jury.

The court erred also in giving said instruction No. 7, allowing the jury, if they found from a preponderance of the evidence that members of the board of the sewer district had personal knowledge that appellee was constructing the sewer and "permitted him to complete same without notifying him to cease work, and you further find from a preponderance of the evidence that plaintiff expended his own money in completing same, and that the money of his own was actually spent in good faith by him, and it was necessary to spend same for the proper completion of said improvement, then defendant, commissioners, are estopped from claiming that the district should not pay for said improvement, and you will find for plaintiff against said district."

This instruction was erroneous, as contended, since it left out entirely of the jury's consideration the question of whether the commissioners had knowledge that the sum contributed for construction of the sewer had been exhausted and any knowledge on the part of the commissioners that the appellee was proceeding to the completion of the construction of the sewer after the expendi-

ture of the money provided therefor, in which event only could the district have been estopped, if at all.

It is true that in instruction No. 8 the court told the jury that the district would not be liable if the money was expended by appellee without authority of the board of commissioners, unless "you find that said commissioners, or some of them, had knowledge or information that the plaintiff was making such expenditures in excess of the amount of money borrowed from H. E. Jackson and W. E. Graham for that purpose." This statement, however, was not a qualification of instruction No. 7, which allowed the jury to find against the district if any of the members of the board had information that he was constructing the sewer and permitted him to complete same without notifying him to cease work. He was directed by the board to construct the sewer, for which they expected to pay out of the money contributed for the purpose, and certainly their knowledge that he was proceeding with the work, and failure to notify him to cease operation if such amount had been expended, could not estop the district from denying liability for payment for work done after the amount contributed had been exhausted, nor without it being shown, which was not done, that the members knew of the continuation of the work to completion by the appellee at his own expense after exhaustion of the fund provided for its construction.

In cases of conflicting instructions the jury is left without proper direction, and the error in giving said instruction No. 7, which authorized the jury to find against the district, was not relieved against by the provision in correct instruction No. 8.

On the cross-appeal it will suffice to say that the undisputed testimony shows that appellee had no contract with the district through its Commissioner McIlroy, warranting his expenditure of his own funds in the completion of the construction of the sewer with the expectation of its repayment by the district, nor was there any testimony showing any conduct on the part of McIlroy, as commissioner, that warranted any inference or finding

that he had induced the appellee to expend his money in the completion of a contract which he had attempted without authority to make for the sewer district. The court properly directed the verdict as to him.

For the errors designated the judgment will be reversed, and the cause remanded for a new trial. It is so ordered.