

No. 13171

# Supreme Court of Illinois

<sup>u</sup>  
McA~~A~~ley

---

vs.

Carter

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no  
"

No. 100000

311

Ms. Aubrey  
Carter

13171



Argument for Appellees by  
John H. Thompson

# Supreme Court.

Murray McLuley  
vs  
William H. Carbert  
Henry Miller

} Appeal from Court.

This was a suit to enforce a Mechanics Lien upon a Lot & buildings. The Appellees claimed to recover under two contracts one for the erection of the walls of a dwelling house and the other for a barn - both on the same lot. There is no controversy here with regard to the barn and the record shows the amount which it was agreed was due for the barn. The errors assigned all relate to the evidence & an instruction in regard to the contract for the house.

I. On the trial in the Court below, after proving and giving in evidence the contract & specifications under which the house was built and showing that the house was built under the contract, the Appellees produced a certificate purporting to be made by Wm W. Boyington, the Superintendent of said building, and proved that the certificate was in the hand writing of said Boyington & was signed by him & then offered the same in evidence. The Appellant objected to its admission and



The Court overruled the objection & allowed the paper to be read in evidence. The first error assigned questions the correctness of this ruling of the Court.

The objection was a general one so that no merely formal objection can be urged in this Court, and the only question is whether the Superintendent's Certificate on proof of its execution was proper evidence in the case.

To determine this question let me ask the attention of the Court to the terms of the Contract & specifications given in evidence. By the Contract the Appellees agree to do the work "in a careful, skilful and workman-  
Record 69. like manner to the full and complete satisfaction of Wm W. Boyington or his assistant, Superintendent," and the Appellant agrees to pay the money upon the performance of the work to the full and complete satisfaction of Wm W. Boyington Superintendent, part to be paid as the work progresses upon certificates, and the balance "on completion of this Contract Provided the said Superintendent shall certify in writing that they are entitled thereto."  
Record 70. By the Specifications made part of the Contract the Contractors are required



Record 72.

to submit as to the work done to the judgment of the Superintendent.

It 72.

W. W. Boyington or his assistant are declared to be "Superintendents of the ~~Building~~ WORK for the owner".

20 72

Their duties are among other things to take care that the work is done as required by the specifications & plans, to give all certificates

24 72

that the Contractors may be entitled to and to settle all deductions of additions to the contract price which may grow out of alterations of the Design, and to determine "the amount of damage which may accrue from any cause". The owner reserves the right to add to or diminish from the contract price the difference to be adjusted as provided above (i.e. by the Superintendent.)

26 72

The owner being bound in all cases to recognize the acts of his Superintendent.

24 72.

The owner being bound in all cases to recognize the acts of his Superintendent.

26 72

1. It is obvious from these provisions that the appellees were bound to procure the certificate of the Superintendent - that this was a condition precedent to their right to recover. The Certificate itself was the best evidence that the Superintendent had certified to the claim of the appellees. I am unable to see any valid objection which can be made to the introduction of this Certificate.

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1. It is obvious from these provisions that the appellees were bound to procure the certificate of the Superintendent - that this was a condition precedent to their right to recover. The Certificate itself was the best evidence that the Superintendent had certified to the claim of the appellees. I am unable to see any valid objection which can be made to the introduction of this Certificate.



2. The Certificate of the Superintendent was the Certificate of the appellant's own agent. It was admissible on this ground. The Superintendent is declared his (the owner's) Superintendent & he (the appellant) is bound to recognize his acts.

3. It may be objected that there is a bill upon the back of the Certificate which is not in the handwriting of the Superintendent. This bill is referred to in the Certificate but the Certificate is sufficiently clear & complete without it. The Certificate shows of itself the amount allowed for extra work, for balance of contract price & amount deducted for damages. The fact that in addition it refers to this bill & is checked & crossed out items cannot possibly injure the appellant or is rather for his benefit. The Appellant could not have suffered injury from that harmless bill.

It does not appear that anything was allowed for the items for fence & stumps although checked by the Superintendent. The Jury rendered a verdict for less than the whole amount claimed & there is nothing to show that these items were considered by them.



This Court will not reverse a judgment when it is obvious that the appellant has suffered no injury and by estimating the amount due the appellees, taking the amount agreed upon for the barn the Court will see that there is no evidence that the items complained of were taken into account or anything allowed for them not to speak of the amount remitted by the appellees.

Besides it is made the special duty of the Superintendent to settle additions to the contract price growing out of alterations of design &c. & it will be presumed that these items were included under such additions and their full amount certified to is claimed by the petition.



11 The Court properly refused to permit the appellants to show that during the progress of the work the Superintendent gave notice to the appellees of defects. The Superintendent's Certificate shows for itself that it was given in final settlement, that he considered the question of damages & accepted the work & certified to the amount finally due. Can the appellants contradict this Certificate?

The third error assigned questions the ruling of the Court below in refusing to receive evidence of particular defects & in holding the certificate of the Superintendent conclusive. Under this contract the appellees did not undertake to build to the satisfaction of the appellants. Nor did they undertake to build in a skilful or workmanlike manner. They undertook to build according to the judgment of the Superintendent. The fair construction of the contract is they were to do the work in what the Superintendent should say was a skilful or workmanlike manner. The Superintendent might require them to do the work in what others would say was not the proper manner & they would be bound in that case to follow

1 Williams 64 130

13 Ohio 79

4 Texas 69

5 Gilman 526

13 Ill 147



the directions of the Superintendent.

Now the whole current of authorities is that where work is thus to be done according to the judgment or estimate of a third person the judgment or estimate of such person is conclusive and cannot be questioned except for fraud. There is no pretence of fraud in this case and the ruling of the Court below is correct unless the Certificate of the Superintendent is to be regarded as of no consequence whatever. The uniform current of

13 Ohio 79

1 William 104 130

4 Tex 69

Authorities holding the Superintendent's certificate conclusive in such cases has been followed by this Court in *The Canal Trustees v. Lynch* 5 Gilman 526. + *McVoy v. Long* 20 Cal 13 Dec 147.

It has been uniformly held that in such cases the Superintendent was the umpire or judge whose decision was to be particularly respected as he was the judge selected by the parties themselves and the parties must abide by their own contract.



III. The 4<sup>th</sup> error assigned is that the Appellant was not permitted to show that the Superintendent omitted items  
1. by mistake. 1. Whether or not the Certificate could be impeached for mistake seems hardly necessary to be considered as there was no issue on this point. The Appellant did not set up any such thing in his answer & there is no notice or pretence of any such thing in any of the pleadings.

2. It seems however to be fully decided that such a certificate can not be impeached for mistake. It is so held distinctly in the 3<sup>rd</sup> Gilman in the case already referred to. And it is difficult to see how that degree of conclusiveness uniformly given by the Courts to a certificate of this kind can be given if the question of mistake is open. If one party may assail the decision of the Superintendent for mistake the other may and the whole question may be gone into, and the judgment of the Tribunal specially fixed upon by the parties would be treated as of no account whatever.

It cannot be that the Jury are to act as Chancellors & correct a supposed mistake without any issue being made upon it or any notice given to the opposite party.

(over)



It will be time enough to consider  
whether a mistake can be corrected  
when an error is made by which  
it is prevented.



III. The Instruction asked for was properly refused. It was not necessary that the appellees should have given notice to the appellant that they had procured said certificate.

1. The Contract did not require any notice. The money was due on completion of the work provided the Superintendent certified in writing to the same. The money was due when the work was done & the certificate given & no notice or demand was necessary any more than it would be when a promissory note became due.

2. In making the certificate the Superintendent acted as the agent of the appellant. By the Contract the appellant was bound to recognize the acts of ~~this~~ Superintendent, & the Superintendent was required to make out and deliver to the appellees, when certificates. The giving of the Certificate was therefore the act of the appellant & on what ground could he be called upon to show that he gave him special notice.



3. It is well settled that in case of an award the party in whose favor the award is made may sustain his action on the award without showing any notice to the other party. The party is bound to take notice of the award. In deciding upon the matters submitted to him the Superintendent acted much in the capacity of an umpire or arbitrator and in such case both parties would be bound to take notice of his act & his certificate. But it is certainly a much stronger case as regards the appellant inasmuch as he is declared to be "his [the appellant's] Superintendent" & the appellant is bound to recognize his act. If bound to recognize much more is he bound to take notice of his act.

1 Chitt. Pl. 328 If Boyington had been <sup>merely a known third person</sup> ~~an~~ appellant would have been bound to pay on his giving his certificate, how much more when to such an extent his agent & Superintendent.

The doctrine in regard to this question is considered very fully in the case of *Douglas v. Howland* 24 Wendell 35 & the cases are collected in 2 Am. Leading cases 54.



"No one is bound to give notice to another of that - which that other person may otherwise inform himself."

5 1<sup>st</sup> Rep 606

14 Conn 479.

In this case Appellant had only to make inquiry of his Superintendent.

"If an act is to be done by a third person who is known no notice need be given."

Hammond is Richmond's adm. 14 Conn 486.

A large number of authorities are cited in this case in support of the above proposition.

It will be seen that the case at bar is a much stranger case than this. The Contract made by McQuley required ~~McQuley~~ to give the certificate, made it a part of his duty as Superintendent for the owner to give the certificate, he was bound to recognize all his acts & in any point of view McQuley was not entitled to any notice.



# Supreme Court of Illinois,

April Term, 1859.

HENRY McAULEY,  
*Appellant,*  
*vs.*  
WILLIAM H. CARTER and  
HENRY MILLER,  
*Appellees.*

} Appeal from Cook.

POINTS AND AUTHORITIES FOR APPELLEES.

VAN BUREN, THOMPSON & BISHOP for Appellees.

## I.

The Superintendent's certificate was properly received in evidence.

1. By the contract the appellees agreed to do the work to the satisfaction of Wm. W. Boyington, Superintendent, and the appellant agreed to pay on the execution of the work to the satisfaction of the Superintendent on the certificate of the Superintendent.

Record, pp. 69, 70.

The certificate, with the proof of its execution was the best evidence that the appellees had fulfilled their agreement.

2. By the contract the Superintendent was made the *agent* of the appellant, who was "bound in all cases to recognize the acts of ~~the~~ Superintendent."

Record, p. 72.

## II.

The evidence of notice of defects was properly rejected, and the certificate properly held conclusive.

The appellees were not required to build to the satisfaction of appellant. It was enough if they performed the work to the satisfaction of Boyington. There being no allegation of fraud on the part of the Superintendent, his approval and certificate were conclusive.

Canal Trustees vs. Lynch, 5 Gilm. 526; McAvoy vs Long et al., 13 Ill. 147.

*Vanderwerker et al v. W. Cent RR Co. 1 Williams 130*  
*Easton et al v. Penn & Ohio Canal 13 Ohio 79.*  
*Keeble v Black 69*

311-201  
Henry McAuley  
2

William H. Carter  
etal

Argument  
for Appellees

Filed May 16, 1859  
L. Leland  
Clerk

Ex<sup>2</sup>

(opinion in motion)

John H. Thompson  
for Appellees



# Supreme Court of Illinois,

April Term, 1859.

HENRY McAULEY,  
Appellant,  
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Canal Trustees vs. Lynch, 5 Gilman 526; McAvoy vs Long et al., 13 Ill. 147.

1 Millions vt. 130  
13 Ohio 79  
4 Texas 69

811-201

Mr. Culey no counter case

Apple Point

1859

Filed May 13. 1859

Leland

Clark



Supreme Court of the State of Illinois  
Of the April Term 1859.

Henry McAuley  
Appellant

William H. Carter &  
Henry Miller.  
Appellees

Appeal from the Circuit  
Court of Cook County

It is hereby stipulated and  
agreed by and between the Parties to the above  
Entitled Cause that the Transcript of the Record  
the Assignment of Errors and other papers necessary  
to be filed may be filed in said Supreme Court  
at any time on or before Monday the 25<sup>th</sup> day  
of April 1859. and that said Cause <sup>docketed and</sup> may be  
heard at the present Term of said Court -  
the said Appellees hereby waiving all objections  
to the Appellants ~~delay in~~ <sup>not</sup> filing the Transcript  
of the Record & other papers in said Cause  
within the time prescribed by the practice  
of said Supreme Court provided  
the same are filed by the 25<sup>th</sup> inst - as  
above specified, the said Appellees  
waiving all rights to have said Cause  
heard & disposed of at the present  
Term of said Court.

Chicago Apr. 21. 1859.

Henry Miller & Lewis  
Attys for Appellant  
Thompson & Bishop  
Attys for Appellees.



311

Supreme Court

Henry McColey  
Appellant

vs  
Wm H. Carter &  
Henry Miller.  
Appellees

Stipulation

Filed April 25, 1839

L. Leland  
Clerk



## SUPREME COURT.

HENRY McAULEY,  
Appellant,  
vs.  
WILLIAM CARTER and  
HENRY MILLER, Appellees,

April Term, A. D. 1859.

This is a suit for a mechanic's lien. The petition was filed in the Cook County Circuit Court, Nov. 6, 1857, and sets forth that the petitioners entered into a written agreement with the defendant bearing date the 25th day of April, A. D. 1856 whereby they agreed to build, finish and complete in a careful, skillful and workmanlike manner, to the full and complete satisfaction of W. W. Boyington or his assistant superintendent, the mason work of a marble front dwelling to be erected on Michigan Avenue, so as fully to carry out the design of said work as set forth in the foregoing specifications (the specifications being attached to the contract) and the plans and drawings therein especially referred to, said plans, drawings and specifications being made part and parcel of the contract; and that the said McAuley, for and in consideration of the said Carter and Miller's furnishing all materials, and fully and faithfully executing the aforesaid, so as fully to carry out the design for the same as set forth by the specifications, and according to the true spirit, meaning and intent thereof, and to the full and complete satisfaction of W. W. Boyington, or his assistant superintendent as aforesaid, agreed to pay Carter & Miller therefor, \$3300, in the following manner: as the work advances, the superintendent is to make out estimates of the work and materials furnished and inwrought into said building, and upon the presentation of  
4 a certificate of 85 per cent. on said estimate, the said McAuley is to pay the amount, and the balance in full on completion of the contract; provided the said superintendent shall certify in writing that they are entitled thereto: And by their third amended petition they allege that they performed the work and furnished the materials according to the provisions  
38 of said contract, and fulfilled all the terms, conditions and requirements of said contract and specifications to be by them kept or fulfilled, and  
39 that said work was duly accepted; that there is due the petitioners on account of work done under said contract the sum of \$700, and that that



41 sum was duly certified to by W. W. Boyington, superintendant, previous to the commencement of this suit; and that they are entitled to the further sum of \$189 50 for extra work, and that this sum was duly settled, and certified to by said superintendant.

In the specifications which set forth the particular manner in which the work is to be done are the following provisions:

43 Duties of Contractor. He shall be strictly held to make such work, and to use such materials as hereinbefore described, and to work up the building to the given design, and in all cases where the drawings are figured, the figures must be taken by him as the given dimensions without reference to what the drawings may measure on the scale. He will be further held to submit, as to the character of the materials used and the work done to the judgment of the superintendant and to procure from him all necessary interpretations of the design and all necessary certificates regarding his payments.

Superintendants and their duties. W. W. Boyington or his assistant architects are declared to be the superintendants of the work for the owner. Their duties will consist in giving on demand such interpretations either in writing, language or drawings, as in his judgment the nature of the work may require, having particular care that any and all work done and materials used for the work, be such as hereinafter described, and in giving on demand any certificates that the contractor may be entitled to, and in settling all deductions of, or additions to the contract price which may grow out of all alterations of the design after the same are declared to be contracted: also determining the amount of damages which may 44 accrue from any cause, and particularly, decide upon the fitness of all materials used and work done. The contractor being bound in all cases to remove all improper work or materials upon being directed to do so by the superintendant.

But the contractor, if after having been directed as above to remove the same, should refuse or neglect to do so, shall not only suffer a deduction from the contract price of the difference in value of proper and improper work and materials, but shall also be liable for all damages of whatsoever nature or kind, that may result from such cause, the above 45 provisions to apply in the same way to all materials or work used, made or fixed without the knowledge of the superintendent. The owner being bound in all cases to recognize the acts of his superintendant, not only as regards extra work, but also as to the sufficiency of the design.

All payments made upon the work during its progress, are on account of the contract, and shall in no case be construed as an acceptance of the 46 work executed, but the contractor shall be liable to all the conditions of the contract until the work is accepted as finished and completed.

55 The answer of Henry McAuley admits the making of the contract, but denies that the petitioners did the work or furnished the materials to be done and furnished by them according to the conditions and terms of 58 said contract and specifications. That the excavations were not made to the depth thereby required, but that the defendant was put to great trouble and expense in continuing and completing said excavations after said petitioners had left said work; that they did not level off the ground



about the walls, so as to turn the water from them; nor were said walls of stone laid in mortar mixed with proper proportions of best lime and clear coarse sand, nor was the footing of said walls built in the manner provided in said specifications, nor were the stone of which the same were composed settled in the earth as therein provided, nor were the cistern walls built as therein directed or plastered inside with two coats of water lime, nor were they made water tight, nor were they plastered as therein directed to prevent dampness; nor was the sand used for mortar clear beach washed sand as required by said articles, but a large part of the mortar used in said building was made of sand made from excavations made thereunder and was fine sand and unfit for such use; that the stone front of said building was not anchored as required by the specifications aforesaid, nor were iron anchors worked into the masonry and secured to the timbers as thereby required: that by reason of said defects the defendant has been greatly damaged, and that such damage will greatly exceed the amount of the several sums claimed by the petitioners: that the petitioners left the work before completing it and that defendant never accepted the work, but that the work was done on his land and connected with other materials and labor on the land, and defendant was compelled to appropriate it and could not reject it.

61

## GENERAL REPLICATION.

Decree that petitioners recover the sum found by the jury and that the premises described in the petition be sold by L. C. P. Freer, Esq., master in chancery for Cook County; that he advertise the sale for sixty-days and make a deed to purchaser.

66

## BILL OF EXCEPTIONS.

O. L. Wheelock testified: am an architect; assisted in drawing the plans and specifications for the building referred to in the contract handed to me. Here were handed to the witness the contract and specifications above referred to. I know of the plaintiffs going in and putting up the walls of the building, under this contract and specifications upon the premises described in the petition.

Contract and specifications read in evidence.

The plaintiffs handed to the witness the following writing:

I hereby certify that I have examined the within bill, and checked such items as I was satisfied were correct and done under my supervision, and crossed out such items as I considered not correct. The charge for the barn and for hauling earth, &c., I had no supervision over and cannot certify them. In accepting this work upon the condition of the contract, I must deduct the sum of fifty dollars for damages to the front caused by not being suitably anchored to the wall of L. C. Clarke: the anchoring has since been done, but the blemish still remains.

I hereby certify, to so much of the within bill as amounts to	\$189 50
And approve the contract of the house,	3300 00

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3489 50



By deducting as aforesaid the sum of	50 00
	<hr/>
	3439 50
I have drawn certificates to the amount of two thousand and six hundred dollars,	2600 00
	<hr/>
	839 50

Respectfully submitted,

W. W. BOYINGTON.

On the back of which were the following indorsements checked and marked as follows:

85	Henry McAuley,	To Carter & Miller, Dr.
1856		
June.	For sheet lead front and rear,	' 5 40
August and September 4.	D. Fender, carrying joist,	<del>16 00</del>
"	" Altering window glass,	' 3 00
Oct. 27.	4½ Masons deafening floors, &c, \$3,	' 13 00
	14¾ Fender leveling about yard and wheeling coal	<del>22 10</del>
	325 hods of mortar, 10 cts for deafening,	' 32 50
	4 ft loupe 1-6 wide, 80 ft stone foundation additional back part, \$16	' 12 80
	7065 bricks laid at \$12	' 84 78
	Excavation for addition,	' 5 00
	1350 brick \$12 additional chimney,	' 16 00
	137 yards of excavation for barn 2	34 25
	1114 cords of stone \$16,	178 24
	42,750 brick laid 11 1-2,	491 62
	16 ft of cut stone for sills 70	11 20
		<hr/>
		\$715 31
	Hauling 100 loads of earth to street front of buildings,	12 00
1857.		
May 26.	3 day mason cleaning paint from front as ordered,	9 00
	97 feet stone wall foundation for fence,	' 15 52
	Digging trench and filling about same,	' 1 20
	Amount of contract for house,	3300 00
	Interest to October 1, 4 mos.	27 36
		<hr/>
		4281 49

86 The witness stated that he was acquainted with the hand writing of W. W. Boyington, and that the signature to the above paper was in his hand writing. The figures and writing on the back of the paper are not in his hand writing. Plaintiffs offered to read in evidence the foregoing paper. Objection made and overruled and exception taken.

Here the plaintiffs rest and the defendant

1st. Calls witness and offers to prove that W. W. Boyington, on the 25th of November, 1856, at the request of defendant, McAuley, gave no-



87 tice to the plaintiffs of defects in the building of the walls of the dwelling house and that those defects have not been remedied.

2nd. That the excavations under the building were not made of the depth required by the specifications.

3rd. That the ground about the building was not leveled off so as to turn the water as required by the specifications.

4th. That the stone of the footing of the walls was not set into the earth as required by the specifications, and that the sand used for mortar for the walls was not clear beach washed sand as required by the specifications.

5th. That the stone front of the building was not anchored as required by the specifications, nor were the iron anchors worked into and secured to the timbers as required by the specifications.

88 6th. That the stone front of the building was projected in consequence of the insufficient anchorage, and that thereby the front of the building was defaced, and that the walls in the south-east corner of the building, in consequence thereof, had settled and were still settling to the great injury of the rooms inside of the building.

7th. The extent of the damage sustained by defendant McAuley in consequence of the above defects. Evidence rejected by court and exception taken.

89 The defendant then offered to prove that the contract with respect to the house was not performed by the petitioners as required by the specifications in the following particulars: Seven fire grates not set, 12 stove pipe thimbles not put in, one range not set; that there was no pointing up under window sills around tin where the roof joins walls, that a portion of the wall between the front and rear part of the house was omitted, that the wall above and beyond J. L. Clarke's party wall was an eight inch instead of a twelve inch wall, thereby requiring a less number of brick and that in respect to the particulars last above named there should be deducted from the amount of the certificate of W. W. Boyington, given in evidence, the sum of one hundred and thirty-nine dollars and forty-four cents, and that the same were overlooked by said Boyington by mistake when he gave said certificate, but the Court over-ruled said evidence and each and every item thereof, holding that said McAuley was estopped by the certificate already given in evidence. Exception taken.

The defendant then gave in evidence their certificates, dated May 31, 1856, July 8, 1856, July 21, 1856, August 11, 1856, and September 22, 1856, all drawn by said W. W. Boyington, and amounting to \$2600, and are all in the following form:

\$300.

Chicago, May 31, 1856.

Mr. H. McAuley.

This is to certify that there is due to Messrs Carter & Miller, the sum of three hundred dollars for labor and materials furnished your building on Michigan Avenue, payable at sight at Chicago.

Yours Respectfully,

No. 1.

W. W. BOYINGTON,

Architect and Superintendent



- 90 On each of which is indorsed the receipt of Carter & Miller, the petitioners.

This being all the evidence, the defendant's counsel then asked the court to give to the jury the following instruction :

- To entitle the plaintiffs to recover in this action for any balance which may be due them for doing work and furnishing materials under the written contract given in evidence in this cause respecting the dwelling house it is necessary that they should, before the commencement of this suit, have procured from the superintendant of said work mentioned in said contract, a certificate of the amount due them and have given notice to the defendant that they had procured said certificate, and unless the jury shall believe from the evidence that the defendant was in some manner notified before the commencement of this suit, that such certificate had been procured, then the verdict in this case should not include the claim for work done and materials furnished under said written contract. Instructions refused and exception taken.
- 91

- 92 Motion for new trial made and overruled.

Errors assigned and points made by appellant.

- I The court erred in receiving in evidence the certificate and the indorsements thereon purporting to be signed by W. W. Boyington, and set forth on pages 83 and 85 of record.
- II The court erred in refusing to permit the defendant, McAuley, to show that said Boyington, on the 26th of November, 1856, at the request of McAuley, gave notice to the plaintiffs below, of defects in the building of the wall in the dwelling house and that those defects had not been remedied.
- III The court erred in refusing to permit defendant, McAuley, to prove the particular defects in the performing of the work by the plaintiffs on the dwelling house particularly set forth on pages 87 and 88 of record and the damages which resulted to the defendant therefrom.
- IV The court erred in refusing to permit the defendant, McAuley, to give evidence to the jury, that the contract read in evidence respecting the dwelling house, was not performed by the plaintiffs in the particulars set forth on page 88 of record and that the omissions there mentioned were overlooked by said Boyington by mistake.
- V The court erred in refusing to give the instruction asked by defendant and set forth on page 91 of record.
- VI The court erred in overruling defendants motion for a new trial.

HOYNE, MILLER & LEWIS.



Wm. Auley  
Appellant

William B. Carter  
Henry Miller  
Appellees

Abstract of Records  
Appels. Court

Filed May 18. 1859  
Edmund  
Clerk

Henry Miller & Lewis  
Attys for Appellants



## SUPREME COURT.

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vs  
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April Term, A. D. 1859.

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38 of said contract, and fulfilled all the terms, conditions and requirements of said contract and specifications to be by them kept or fulfilled, and  
39 that said work was duly accepted; that there is due the petitioners on account of work done under said contract the sum of \$700, and that that



sum was duly certified to by W. W. Boyington, superintendent, previous  
 41 to the commencement of this suit; and that they are entitled to the further sum of \$189 50 for extra work, and that this sum was duly settled, and certified to by said superintendent.

In the specifications which set forth the particular manner in which the work is to be done are the following provisions:

Duties of Contractor. He shall be strictly held to make such work,  
 43 and to use such materials as hereinbefore described, and to work up the building to the given design, and in all cases where the drawings are figured, the figures must be taken by him as the given dimensions without reference to what the drawings may measure on the scale. He will be further held to submit, as to the character of the materials used and the work done to the judgment of the superintendent and to procure from him all necessary interpretations of the design and all necessary certificates regarding his payments.

Superintendents and their duties. W. W. Boyington or his assistant architects are declared to be the superintendents of the work for the owner. Their duties will consist in giving on demand such interpretations either in writing, language or drawings, as in his judgment the nature of the work may require, having particular care that any and all work done and materials used for the work, be such as hereinafter described, and in giving on demand any certificates that the contractor may be entitled to, and in settling all deductions of, or additions to the contract price which may grow out of all alterations of the design after the same are declared to be contracted: also determining the amount of damages which may  
 44 accrue from any cause, and particularly, decide upon the fitness of all materials used and work done. The contractor being bound in all cases to remove all improper work or materials upon being directed to do so by the superintendent.

But the contractor, if after having been directed as above to remove the same, should refuse or neglect to do so, shall not only suffer a deduction from the contract price of the difference in value of proper and improper work and materials, but shall also be liable for all damages of whatsoever nature or kind, that may result from such cause, the above  
 45 provisions to apply in the same way to all materials or work used, made or fixed without the knowledge of the superintendent. The owner being bound in all cases to recognize the acts of his superintendent, not only as regards extra work, but also as to the sufficiency of the design.

All payments made upon the work during its progress, are on account of the contract, and shall in no case be construed as an acceptance of the  
 46 work executed, but the contractor shall be liable to all the conditions of the contract until the work is accepted as finished and completed.

The answer of Henry McAuley admits the making of the contract, but denies that the petitioners did the work or furnished the materials to be done and furnished by them according to the conditions and terms of  
 55 said contract and specifications. That the excavations were not made to the depth thereby required, but that the defendant was put to great trouble and expense in continuing and completing said excavations after said petitioners had left said work; that they did not level off the ground  
 58



about the walls, so as to turn the water from them; nor were said walls of stone laid in mortar mixed with proper proportions of best lime and clear coarse sand, nor was the footing of said walls built in the manner provided in said specifications, nor were the stone of which the same were composed settled in the earth as therein provided, nor were the cistern walls built as therein directed or plastered inside with two coats of water lime, nor were they made water tight, nor were they plastered as therein directed to prevent dampness; nor was the sand used for mortar clear beach washed sand as required by said articles, but a large part of the mortar used in said building was made of sand made from excavations made thereunder and was fine sand and unfit for such use; that the stone front of said building was not anchored as required by the specifications aforesaid, nor were iron anchors worked into the masonry and secured to the timbers, as thereby required: that by reason of said defects the defendant has been greatly damaged, and that such damage will greatly exceed the amount of the several sums claimed by the petitioners: that the petitioners left the work before completing it and that defendant never accepted the work, but that the work was done on his land and connected with other materials and labor on the land, and defendant was compelled to appropriate it and could not reject it.

#### GENERAL REPLICATION.

Decree that petitioners recover the sum found by the jury and that the premises described in the petition be sold by L. C. P. Freer, Esq., master in chancery for Cook County; that he advertise the sale for sixty-days and make a deed to purchaser.

#### BILL OF EXCEPTIONS.

O. L. Wheelock testified: am an architect; assisted in drawing the plans and specifications for the building referred to in the contract handed to me. Here were handed to the witness the contract and specifications above referred to. I know of the plaintiffs going in and putting up the walls of the building, under this contract and specifications upon the premises described in the petition.

Contract and specifications read in evidence.

The plaintiffs handed to the witness the following writing:

I hereby certify that I have examined the within bill, and checked such items as I was satisfied were correct and done under my supervision, and crossed out such items as I considered not correct. The charge for the barn and for hauling earth, &c., I had no supervision over and cannot certify them. In accepting this work upon the condition of the contract, I must deduct the sum of fifty dollars for damages to the front caused by not being suitably anchored to the wall of L. C. Clarke: the anchoring has since been done, but the blemish still remains.

I hereby certify, to so much of the within bill as amounts to	\$189 50
And approve the contract of the house,	3300 00

---

3489 50



By deducting as aforesaid the sum of 50 00

---

3439 50

I have drawn certificates to the amount of two thousand and  
six hundred dollars, 2600 00

---

839 50

Respectfully submitted,

W. W. BOYINGTON.

On the back of which were the following indorsements checked and  
marked as follows:

85 Henry McAuley,

To Carter & Miller, Dr.

1856

June. For sheet lead front and rear, ' 5 40

August and September 4. D. Fender, carrying joist, ~~10 00~~

" " Altering window glass, ' 3 00

Oct. 27. 4½ Masons deafening floors, &c, \$3, ' 13 00

14¾ Fender leveling about yard and wheeling coal ~~22 10~~

325 hods of mortar, 10 cts for deafening, ' 32 50

4 ft loupe 1-6 wide, 80 ft stone foundation additional  
back part, \$16 ' 12 80

7065 bricks laid at \$12 ' 84 78

Excavation for addition, ' 5 00

1350 brick \$12 additional chimney, ' 16 00

137 yards of excavation for barn 2 | 34 25

1114 cords of stone \$16, 178 24

42,750 brick laid 11 1-2, 491 62

16 ft of cut stone for sills 70 11 20

---

\$715 31

Hauling 100 loads of earth to street front of buildings, 12 00

1857.

May 26. 3 day mason cleaning paint from front as ordered, 9 00

97 feet stone wall foundation for fence, ' 15 52

Digging trench and filling about same, ' 1 20

Amount of contract for house, 3300 00

Interest to October 1, 4 mos. 27 36

---

4281 49

86 The witness stated that he was acquainted with the hand writing of  
W. W. Boyington, and that the signature to the above paper was in his  
hand writing. The figures and writing on the back of the paper are not  
in his hand writing. Plaintiffs offered to read in evidence the foregoing  
paper. Objection made and overruled and exception taken.

Here the plaintiffs rest and the defendant

1st. Calls witness and offers to prove that W. W. Boyington, on the  
25th of November, 1856, at the request of defendant, McAuley, gave no-



87 tice to the plaintiffs of defects in the building of the walls of the dwelling house and that those defects have not been remedied.

2nd. That the excavations under the building were not made of the depth required by the specifications.

3rd. That the ground about the building was not leveled off so as to turn the water as required by the specifications.

4th. That the stone of the footing of the walls was not set into the earth as required by the specifications, and that the sand used for mortar for the walls was not clear beach washed sand as required by the specifications.

5th. That the stone front of the building was not anchored as required by the specifications, nor were the iron anchors worked into and secured to the timbers as required by the specifications.

88 6th. That the stone front of the building was projected in consequence of the insufficient anchorage, and that thereby the front of the building was defaced, and that the walls in the south-east corner of the building, in consequence thereof, had settled and were still settling to the great injury of the rooms inside of the building.

7th. The extent of the damage sustained by defendant McAuley in consequence of the above defects. Evidence rejected by court and exception taken.

89 The defendant then offered to prove that the contract with respect to the house was not performed by the petitioners as required by the specifications in the following particulars: Seven fire grates not set, 12 stove pipe thimbles not put in, one range not set; that there was no pointing up under window sills around tin where the roof joins walls, that a portion of the wall between the front and rear part of the house was omitted, that the wall above and beyond J. L. Clarke's party wall was an eight inch instead of a twelve inch wall, thereby requiring a less number of brick and that in respect to the particulars last above named there should be deducted from the amount of the certificate of W. W. Boyington, given in evidence, the sum of one hundred and thirty-nine dollars and forty-four cents, and that the same were overlooked by said Boyington by mistake when he gave said certificate, but the Court over-ruled said evidence and each and every item thereof, holding that said McAuley was estopped by the certificate already given in evidence. Exception taken.

The defendant then gave in evidence their certificates, dated May 31, 1856, July 8, 1856, July 21, 1856, August 11, 1856, and September 22, 1856, all drawn by said W. W. Boyington, and amounting to \$2600, and are all in the following form:

\$300.

Chicago, May 31, 1856.

Mr. H. McAuley.

This is to certify that there is due to Messrs Carter & Miller, the sum of three hundred dollars for labor and materials furnished your building on Michigan Avenue, payable at sight at Chicago.

Yours Respectfully,

No. 1.

W. W. BOYINGTON,

Architect and Superintenden t



- 90 On each of which is indorsed the receipt of Carter & Miller, the petitioners.

This being all the evidence, the defendant's counsel then asked the court to give to the jury the following instruction :

To entitle the plaintiffs to recover in this action for any balance which may be due them for doing work and furnishing materials under the written contract given in evidence in this cause respecting the dwelling house it is necessary that they should, before the commencement of this suit, have procured from the superintendant of said work mentioned in said contract, a certificate of the amount due them and have given notice to the defendant that they had procured said certificate, and unless the jury shall believe from the evidence that the defendant was in some manner

- 91 notified before the commencement of this suit, that such certificate had been procured, then the verdict in this case should not include the claim for work done and materials furnished under said written contract. Instructions refused and exception taken.

- 92 Motion for new trial made and overruled.

Errors assigned and points made by appellant.

- I The court erred in receiving in evidence the certificate and the indorsements thereon purporting to be signed by W. W. Boyington, and set forth on pages 83 and 85 of record.
- II The court erred in refusing to permit the defendant, McAuley, to show that said Boyington, on the 26th of November, 1856, at the request of McAuley, gave notice to the plaintiffs below, of defects in the building of the wall in the dwelling house and that those defects had not been remedied.
- III The court erred in refusing to permit defendant, McAuley, to prove the particular defects in the performing of the work by the plaintiffs on the dwelling house particularly set forth on pages 87 and 88 of record and the damages which resulted to the defendant therefrom.
- IV The court erred in refusing to permit the defendant, McAuley, to give evidence to the jury, that the contract read in evidence respecting the dwelling house, was not performed by the plaintiffs in the particulars set forth on page 88 of record and that the omissions there mentioned were overlooked by said Boyington by mistake.
- V The court erred in refusing to give the instruction asked by defendant and set forth on page 91 of record.
- VI The court erred in overruling defendants motion for a new trial.

HOYNE, MILLER & LEWIS.



3117201  
Supreme Court

Henry McC. Auley  
Appellant

vs.  
William H. Charters

Henry Miller  
Appellees

Abstract of Record  
& app'ts P'ts

Filed May 13, 1854

L. Leland  
Clerk

Hoynes, Miller & Lewis  
Attys for Appellants



# Supreme Court of Illinois,

April Term, 1859.

HENRY McAULEY, *Appellant,*  
vs.  
WILLIAM H. CARTER and  
HENRY MILLER, *Appellees.* } Appeal from Cook.

## POINTS AND AUTHORITIES FOR APPELLEES.

VAN BUREN, THOMPSON & BISHOP for Appellees.

### I.

The Superintendent's certificate was properly received in evidence.

1. By the contract the appellees agreed to do the work to the satisfaction of Wm. W. Boyington, Superintendent, and the appellant agreed to pay on the execution of the work to the satisfaction of the Superintendent on the certificate of the Superintendent.

Record, pp. 69, 70.

The certificate, with the proof of its execution was the best evidence that the appellees had fulfilled their agreement.

2. By the contract the Superintendent was made the *agent* of the appellant, who was "bound in all cases to recognize the acts of the Superintendent."

Record, p. 72

### II.

The evidence of notice of defects was properly rejected, and the certificate properly held conclusive.

The appellees were not required to build to the satisfaction of appellant. It was enough if they performed the work to the satisfaction of Boyington. There being no allegation of fraud on the part of the Superintendent, his approval and certificate were conclusive.

Canal Trustees vs. Lynch, 5 Gilm. 526; McAvoy vs Long et al., 13 Ill. 147.

1 William 86-130.  
13 Ohio 79  
4 Texas 69



## III.

The evidence offered to show defect was properly excluded. It is immaterial whether or not there were defects or omissions in the work, provided it was done to the satisfaction of the Superintendent. The parties had made their own contract and the Court could not make another for them. They made the decision of the Superintendent final and conclusive, and it could not be contradicted or varied.

## IV.

The certificate of the Superintendent could not be questioned for mistake.

1. There was no such issue.
2. Even if there had been such an issue this certificate could not be questioned on that ground. Canal Trustees vs. Lynch, 5 Gilm. 526.; 17 T. R. 639; 13 Ohio, 79; 1 Harr. 233.

## V.

The instruction was properly refused.

1. No notice was required by the contract, and none was necessary.  
2 Greenl. Ev., § 75, 76.
2. The Superintendent was made the agent of appellant, and the appellant was certainly bound to take notice of the acts of his agent.
3. If Boyington was no more than an arbitrator or umpire appellant was bound to take notice of his acts in giving the certificate.  
2 Greenl. Ev. § 75, 76.
4. The bringing of the suit was a sufficient demand if any was necessary.  
2 Greenl. Ev. § 76.



311-21  
Chas. Carter

Appellee's Points

Filed May 13. 1859  
L. L. Leland  
Clerk



# Supreme Court of Illinois,

April Term, 1859.

HENRY McAULEY,  
Appellant,  
vs.  
WILLIAM H. CARTER and  
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1 Williams 27-130  
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*1 Chilly R. 328, 329  
Over in Rich. et al. 1 Metcalf 180*

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4. The bringing of the suit was a sufficient demand if any was necessary.

2 Greenl. Ev. § 76.

*2 Amer. L. C. 54*

*24 Wendell 35.*

*14 Conn 479*

*5 T. R. 606*







Supreme Court

May Term AD 1859

Henry McAuley  
appellant

William H. Learton &  
Henry Miller appellees

The action was brought by the appellees against the appellant, upon a building contract to erect a balance alleged to be due them -

By the terms of the written contract McAuley was to pay Learton & Miller for work and materials on the dwelling house \$3300, as follows -

85 per cent on the estimates of the work and materials made by Mr. W. Prayington upon production of certificates therefor. Made of said Prayington and the balance on the completion of the contract provided that Prayington should certify in writing that they were entitled thereto. -

and it is made the duty of the contractors to procure all necessary certificates from Mr. W. Prayington regarding their payments.

See page 43 of records. - and it is made the duty of Mr. W. Prayington to give on demand any certificates that the contractor may be entitled to.

The 85 per cent of the contract price was duly paid and it is only in respect to the final balance claimed that there is any dispute.

The only evidence after the written contract offered by the complainants below, touching



This balance was the paper claimed when the final certificate under the contract of Mr. Braginton could not find on pages 83, 84, & 85 of Record.

It was proved (see page 86 of the record) that the endorsement with back of this paper purporting to be a bill of charges against McCurdy of Boston & Miller was not in the hand writing of Braginton.

The certificate of Braginton states that he has examined this bill and checked such items as he was satisfied were correct, and crossed out such items as he considered not correct.

It does not therefore purport to be a certificate that the work had been done according to the terms of the contract, or of the manner in which the work was done and the amount to which the builders were entitled. It purports simply to relate to the propriety of the builders' charges.

It was not therefore such a certificate as is contemplated by the terms of the contract, and should not therefore have been given in evidence.

"If a building agreement contains the  
"usual clause that the party will pay upon  
"receiving an architect's certificate that the  
"work has been done to his satisfaction, the  
"obtaining a proper certificate is a condition  
"precedent to the payment, and the architect  
"must check the builders' charges and  
"send them to the party who employed the  
"builder is not a sufficient certificate to  
"entitle the builder to pay."



Chetty in Gen. (7<sup>th</sup> Ann. Ed.) 571

Morgan vs. Birnie & Bingham 572

There are two items in the bill of charges checked by the architect as allowed to wit: "47 feet Stone Wall foundation for pier \$15<sup>52</sup>" and "digging trench and filling about the same \$1<sup>20</sup>" which are not embraced in the terms of the contract, - nor mentioned in the ~~particulars~~ -

~~This~~

There is no provision in the contract that Mr. M. Bingham should be the sole judge of the quantity and quality of the work done & of the character of the materials furnished and that his decision should be final and conclusive upon the parties.

The consideration for Mr. Birnie's promise to pay the contract price was that the builders should furnish all materials and fully and faithfully execute the work so as fully to carry out the design for the same as set forth by the specifications and according to the true meaning and intent thereof, - and ~~also~~ also to the full and complete satisfaction of Mr. M. Bingham (see page 1 of abstract. -)

It is evident from the whole spirit and tenor of the contract that the further representation that the work should be done to the full and complete satisfaction of Mr. M. Bingham was intended as an ~~additional~~ additional security for the construction of the building according to the plans and



Specifications annexed to the contract. -

It was therefore competent for McAuley upon the issues made and he should have been permitted to prove the facts set forth on pages 87 & 88. of the record. - Knowing that the work was not done in accordance with the specifications

Even if it should be considered that W. W. Bingham occupied the position of arbitrator between the parties, it was competent for McAuley to prove the particulars set forth on page 88. of the record wherein the builders had failed to complete the contract as required by the specifications and the amount which should be deducted from the contract price in consequence thereof - of their omissions if they could show that Bingham had by accident or mistake overlooked them. - McAuley offered to prove this by Bingham himself and he should have been permitted to do so. -

It was a chancery proceeding and is governed by rules applicable to suits in equity West. vs. Fleming 19 Wm. 248. -

The mistake sought to be proved was not a mistake of judgments on the part of the arbitrator but a mistake of a material fact in respect to which the arbitrator was misled and failed to exercise any judgments at all. -

Mistakes of this character will always



the right of action accrued for the balance due for work ~~of the~~ <sup>the</sup> ~~contractors~~ <sup>contractors</sup> until the architect had given a certificate certifying the amount to which the contractor was entitled. Mr. Carley was only bound to pay the contractors the balance of the contract price provided the engineer should certify in writing that they were entitled thereto - and it was necessary also that Mr. Carley should in some manner be satisfied that a certificate for the final balance had been given by the architect before he could be treated as being in default, and before any right of action accrued to the contractors. -

The rule on this subject is stated in 2 Parsons on Contracts, at page 182. as follows -

"Generally when any thing is to be done  
"by one party on the performing of some act  
"by the other this other must give notice of  
"such act unless it be one that carries  
"notice of itself"

Whenever the fact of which the defendant's liability is to arise lies more properly, and peculiarly within the knowledge of the Plaintiff than the defendant, notice should be given before the action brought.

Chitty on Ev. (7 Am. Ed.) 732



Nation v. S. Walker & Foster N. H. 491.

and in some instances the necessity of a notice Shrimp from the Nation of the contract though nothing is said about it. -

2 Parvov on Con. 181

If McAuley had undertaken to pay the balance of the contract price to the plaintiffs provided the Superintendent should certify in writing that they were entitled thereto and nothing more had been said upon that subject then it might perhaps be said that no notice would be necessary for it would be like the case where the defendant had engaged to do an act on a stranger performing a certain thing and this each party has in legal contemplation equal means of information

But here by the terms of the contract it is made the duty of the Superintendent to give on demand to the contractor "any certificate that he may be entitled to" and of the contractor "to procure from the Superintendent all necessary certificates regarding his payments" (See page 9 abstract)

These certificates are then in all cases to be given by the Superintendent to the contractor before he is ~~entitled to demand payment~~ and the contractor before he is entitled to demand payment is bound to procure them from the Superintendent -

The giving of the final certificate upon which the liability of McAuley now was "more properly within the knowledge of the plaintiffs



than of the defendant. It was peculiarly  
within their knowledge for it was to be given  
to and received by them. - They bound  
themselves by the terms of their contracts.  
(See Specifications attached to contracts entitled  
articles of Contractor on page 2 of abstract.)  
to procure this certificate from the Super  
intendents. -

It cannot be said that the Superintendents in  
giving them certificates was the agent of McAuley  
for if he is to be held to occupy the position of  
arbitrator he is as much the agent of one  
party as of the other -

The certificates given in evidence by the defen-  
dant were all addressed to McAuley and  
were made payable at sight. Knowing that  
the parties understood that no demand  
for payment could be made except upon  
production of the certificates

The suit was commenced Nov. 11, 1858.  
While the certificate was dated Nov. 3. (See page  
83. & 84. of record.) and there was no evidence  
showing that McAuley had any  
knowledge whatever that a certificate had  
been given. nor was any demand for  
payment made before bringing it suit.  
The Court we think would in refusing to give  
the instruction asked for by the defendant.

Henry Miller Lewis  
for plaintiff. )



311-201  
Supreme Court  
"

Henry McAnley  
appellant  
vs.

Coates & Miller  
-----

Brief for Appellant  
"

Filed May 18. 1839  
Leland  
Clk.

Margie Miller Lewis  
for appellant  
— " —



## SUPREME COURT.

HENRY McAULEY,  
Appellant,  
vs.  
WILLIAM CARTER and  
HENRY MILLER, Appellees,

April Term, A. D. 1859.

This is a suit for a mechanic's lien. The petition was filed in the Cook County Circuit Court, Nov. 6, 1857, and sets forth that the petitioners entered into a written agreement with the defendant bearing date the 25th day of April, A. D. 1856 whereby they agreed to build, finish and complete in a careful, skilful and workmanlike manner, to the full and complete satisfaction of W. W. Boyington or his assistant superintendant, the mason work of a marble front dwelling to be erected on Michigan Avenue, so as fully to carry out the design of said work as set forth in the foregoing specifications (the specifications being attached to the contract) and the plans and drawings therein especially referred to, said plans, drawings and specifications being made part and parcel of the contract; and that the said McAuley, for and in consideration of the said Carter and Miller's furnishing all materials, and fully and faithfully executing the aforesaid, so as fully to carry out the design for the same as set forth by the specifications, and according to the true spirit, meaning and intent thereof, and to the full and complete satisfaction of W. W. Boyington, or his assistant superintendant as aforesaid, agreed to pay Carter & Miller therefor, \$3300, in the following manner: as the work advances, the superintendant is to make out estimates of the work and materials furnished and inwrought into said building, and upon the presentation of a certificate of 85 per cent. on said estimate, the said McAuley is to pay the amount, and the balance in full on completion of the contract; provided the said superintendant shall certify in writing that they are entitled thereto: And by their third amended petition they allege that they performed the work and furnished the materials according to the provisions of said contract, and fulfilled all the terms, conditions and requirements of said contract and specifications to be by them kept or fulfilled, and that said work was duly accepted; that there is due the petitioners on account of work done under said contract the sum of \$700, and that that



41 sum was duly certified to by W. W. Boyington, superintendent, previous to the commencement of this suit; and that they are entitled to the further sum of \$189 50 for extra work, and that this sum was duly settled, and certified to by said superintendent.

In the specifications which set forth the particular manner in which the work is to be done are the following provisions:

43 Duties of Contractor. He shall be strictly held to make such work, and to use such materials as hereinbefore described, and to work up the building to the given design, and in all cases where the drawings are figured, the figures must be taken by him as the given dimensions without reference to what the drawings may measure on the scale. He will be further held to submit, as to the character of the materials used and the work done to the judgment of the superintendent and to procure from him all necessary interpretations of the design and all necessary certificates regarding his payments.

Superintendents and their duties. W. W. Boyington or his assistant architects are declared to be the superintendents of the work for the owner. Their duties will consist in giving on demand such interpretations either in writing, language or drawings, as in his judgment the nature of the work may require, having particular care that any and all work done and materials used for the work, be such as hereinafter described, and in giving on demand any certificates that the contractor may be entitled to, and in settling all deductions of, or additions to the contract price which may grow out of all alterations of the design after the same are declared to be contracted: also determining the amount of damages which may 44 accrue from any cause, and particularly, decide upon the fitness of all materials used and work done. The contractor being bound in all cases to remove all improper work or materials upon being directed to do so by the superintendent.

But the contractor, if after having been directed as above to remove the same, should refuse or neglect to do so, shall not only suffer a deduction from the contract price of the difference in value of proper and improper work and materials, but shall also be liable for all damages of whatsoever nature or kind, that may result from such cause, the above 45 provisions to apply in the same way to all materials or work used, made or fixed without the knowledge of the superintendent. The owner being bound in all cases to recognize the acts of his superintendent, not only as regards extra work, but also as to the sufficiency of the design.

46 All payments made upon the work during its progress, are on account of the contract, and shall in no case be construed as an acceptance of the work executed, but the contractor shall be liable to all the conditions of the contract until the work is accepted as finished and completed.

55 The answer of Henry McAuley admits the making of the contract, but denies that the petitioners did the work or furnished the materials to be done and furnished by them according to the conditions and terms of 58 said contract and specifications. That the excavations were not made to the depth thereby required, but that the defendant was put to great trouble and expense in continuing and completing said excavations after said petitioners had left said work; that they did not level off the ground



about the walls, so as to turn the water from them; nor were said walls of stone laid in mortar mixed with proper proportions of best lime and clear coarse sand, nor was the footing of said walls built in the manner provided in said specifications, nor were the stone of which the same were composed settled in the earth as therein provided, nor were the cistern walls built as therein directed or plastered inside with two coats of water lime, nor were they made water tight, nor were they plastered as therein directed to prevent dampness; nor was the sand used for mortar clear beach washed sand as required by said articles, but a large part of the mortar used in said building was made of sand made from excavations made thereunder and was fine sand and unfit for such use; that the stone front of said building was not anchored as required by the specifications aforesaid, nor were iron anchors worked into the masonry and secured to the timbers as thereby required: that by reason of said defects the defendant has been greatly damaged, and that such damage will greatly exceed the amount of the several sums claimed by the petitioners: that the petitioners left the work before completing it and that defendant never accepted the work, but that the work was done on his land and connected with other materials and labor on the land, and defendant was compelled to appropriate it and could not reject it.

61

## GENERAL REPLICATION.

65

Decree that petitioners recover the sum found by the jury and that the premises described in the petition be sold by L. C. P. Freer, Esq., master in chancery for Cook County; that he advertise the sale for sixty days and make a deed to purchaser.

66

## BILL OF EXCEPTIONS.

68

O. L. Wheelock testified: am an architect; assisted in drawing the plans and specifications for the building referred to in the contract handed to me. Here were handed to the witness the contract and specifications above referred to. I know of the plaintiffs going in and putting up the walls of the building, under this contract and specifications upon the premises described in the petition.

69

Contract and specifications read in evidence.

83

The plaintiffs handed to the witness the following writing:

I hereby certify that I have examined the within bill, and checked such items as I was satisfied were correct and done under my supervision, and crossed out such items as I considered not correct. The charge for the barn and for hauling earth, &c., I had no supervision over and cannot certify them. In accepting this work upon the condition of the contract, I must deduct the sum of fifty dollars for damages to the front caused by not being suitably anchored to the wall of L. C. Clarke: the anchoring has since been done, but the blemish still remains.

I hereby certify, to so much of the within bill as amounts to \$189 50  
And approve the contract of the house, 3300 00

---

3489 50



By deducting as aforesaid the sum of	50 00
	<hr/>
	3439 50
I have drawn certificates to the amount of two thousand and six hundred dollars,	2600 00
	<hr/>
	839 50

Respectfully submitted,

W. W. BOYINGTON.

On the back of which were the following indorsements checked and marked as follows:

85	Henry McAuley,	To Carter & Miller, Dr.
1856		
June.	For sheet lead front and rear,	' 5 40
August and September 4.	D. Fender, carrying joist,	<del>36 00</del>
"	" Altering window glass,	' 3 00
Oct. 27.	4½ Masons deafening floors, &c, \$3,	' 13 00
	14¾ Fender leveling about yard and wheeling coal	<del>22 10</del>
	325 hods of mortar, 10 cts for deafening,	' 32 50
	4 ft loupe 1-6 wide, 80 ft stone foundation additional	
	back part, \$16	' 12 80
	7065 bricks laid at \$12	' 84 78
	Excavation for addition,	' 5 00
	1350 brick \$12 additional chimney,	' 16 00
	137 yards of excavation for barn 2	34 25
	1114 cords of stone \$16,	178 24
	42,750 brick laid 11 1-2,	491 62
	16 ft of cut stone for sills 70	11 20
		<hr/>
		\$715 31
	Hauling 100 loads of earth to street front of buildings,	12 00
1857.		
May 26.	3 day mason cleaning paint from front as ordered,	9 00
	97 feet stone wall foundation for fence,	' 15 52
	Digging trench and filling about same,	' 1 20
	Amount of contract for house,	3300 00
	Interest to October 1, 4 mos.	27 36
		<hr/>
		4281 49

86 The witness stated that he was acquainted with the hand writing of W. W. Boyington, and that the signature to the above paper was in his hand writing. The figures and writing on the back of the paper are not in his hand writing. Plaintiffs offered to read in evidence the foregoing paper. Objection made and overruled and exception taken.

Here the plaintiffs rest and the defendant

1st. Calls witness and offers to prove that W. W. Boyington, on the 25th of November, 1856, at the request of defendant, McAuley, gave no-



87 tice to the plaintiffs of defects in the building of the walls of the dwelling house and that those defects have not been remedied.

2nd. That the excavations under the building were not made of the depth required by the specifications.

3rd. That the ground about the building was not leveled off so as to turn the water as required by the specifications.

4th. That the stone of the footing of the walls was not set into the earth as required by the specifications, and that the sand used for mortar for the walls was not clear beach washed sand as required by the specifications.

5th. That the stone front of the building was not anchored as required by the specifications, nor were the iron anchors worked into and secured to the timbers as required by the specifications.

88 6th. That the stone front of the building was projected in consequence of the insufficient anchorage, and that thereby the front of the building was defaced, and that the walls in the south-east corner of the building, in consequence thereof, had settled and were still settling to the great injury of the rooms inside of the building.

7th. The extent of the damage sustained by defendant McAuley in consequence of the above defects. Evidence rejected by court and exception taken.

89 The defendant then offered to prove that the contract with respect to the house was not performed by the petitioners as required by the specifications in the following particulars: Seven fire grates not set, 12 stove pipe thimbles not put in, one range not set; that there was no pointing up under window sills around tin where the roof joins walls, that a portion of the wall between the front and rear part of the house was omitted, that the wall above and beyond J. L. Clarke's party wall was an eight inch instead of a twelve inch wall, thereby requiring a less number of brick and that in respect to the particulars last above named there should be deducted from the amount of the certificate of W. W. Boyington, given in evidence, the sum of one hundred and thirty-nine dollars and forty-four cents, and that the same were overlooked by said Boyington by mistake when he gave said certificate, but the Court over-ruled said evidence and each and every item thereof, holding that said McAuley was estopped by the certificate already given in evidence. Exception taken.

The defendant then gave in evidence their certificates, dated May 31, 1856, July 8, 1856, July 21, 1856, August 11, 1856, and September 22, 1856, all drawn by said W. W. Boyington, and amounting to \$2600, and are all in the following form:

\$300.

Chicago, May 31, 1856.

Mr. H. McAuley.

This is to certify that there is due to Messrs Carter & Miller, the sum of three hundred dollars for labor and materials furnished your building on Michigan Avenue, payable at sight at Chicago.

Yours Respectfully,

No. 1.

W. W. BOYINGTON,

Architect and Superintendent



- 90 On each of which is indorsed the receipt of Carter & Miller, the petitioners.

This being all the evidence, the defendant's counsel then asked the court to give to the jury the following instruction :

- To entitle the plaintiffs to recover in this action for any balance which may be due them for doing work and furnishing materials under the written contract given in evidence in this cause respecting the dwelling house it is necessary that they should, before the commencement of this suit, have procured from the superintendant of said work mentioned in said contract, a certificate of the amount due them and have given notice to the defendant that they had procured said certificate, and unless the jury shall believe from the evidence that the defendant was in some manner notified before the commencement of this suit, that such certificate had been procured, then the verdict in this case should not include the claim for work done and materials furnished under said written contract. Instructions refused and exception taken.
- 91

- 92 Motion for new trial made and overruled.

Errors assigned and points made by appellant.

- I The court erred in receiving in evidence the certificate and the indorsements thereon purporting to be signed by W. W. Boyington, and set forth on pages 83 and 85 of record.
- II The court erred in refusing to permit the defendant, McAuley, to show that said Boyington, on the 26th of November, 1856, at the request of McAuley, gave notice to the plaintiffs below, of defects in the building of the wall in the dwelling house and that those defects had not been remedied.
- III The court erred in refusing to permit defendant, McAuley, to prove the particular defects in the performing of the work by the plaintiffs on the dwelling house particularly set forth on pages 87 and 88 of record and the damages which resulted to the defendant therefrom.
- IV The court erred in refusing to permit the defendant, McAuley, to give evidence to the jury, that the contract read in evidence respecting the dwelling house, was not performed by the plaintiffs in the particulars set forth on page 88 of record and that the omissions there mentioned were overlooked by said Boyington by mistake.
- V The court erred in refusing to give the instruction asked by defendant and set forth on page 91 of record.
- VI The court erred in overruling defendants motion for a new trial.

HOYNE, MILLER & LEWIS.



311-201  
Supreme Court  
Henry McCauley  
Appellant

vs  
William B. Masters  
Henry Miller  
Appellees

Abstract of Record  
& Appellate Points

Filed Aug 13, 1859  
L. L. Linn  
Clerk

Hoynes, Miller & Lewis  
Attys for Appellant



United States of America

STATE OF ILLINOIS, COUNTY OF COOK, S. S.

Pleas, before the Honorable George Manis

Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding  
Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof  
begun and held at the Court House in the City of Chicago, in said County, on the  
Third Monday, (being the Twenty Sixth day) of  
February in the year of our Lord one thousand eight hundred and  
fifty nine and of the Independence of the said United States the  
Eighty Third

Present, Honorable George Manis Judge of the 7th Judicial  
Circuit of the State of Illinois.

Charles Haven States Attorney.

John Gray Sheriff of Cook County.

Attest: Wm L. Chubb Clerk.



Page 1  
Be it Remembered that heretofore, to wit:  
on the Sixth day of November in the  
year of Our Lord One thousand Eight-  
hundred and fifty seven William H Carter  
and Henry Miller Petitioners by Thompson &  
Bishop their Solicitors filed in the office  
of the Court aforesaid their certain  
Petition in the words and figures following  
to wit

State of Illinois  
County of Cook }

To the Honorable George  
Manierre Judge of the Circuit Court of  
Cook County.

The Petition of William H Carter  
and Henry Miller respectfully shews unto  
your Honor

That your Petitioners are builders &  
masons and are partners doing business in the  
City of Chicago in the County of Cook &  
State of Illinois under the name and firm  
of Carter & Miller.

That Henry McQuiley  
of said City of Chicago was on the 25th  
day of April AD 1856 and on the first &  
twenty fifth days of October 1856 the owner of  
a certain piece of land situate in said City  
of Chicago and described and known as the



Page 1  
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State of Illinois }  
County of Cook }

To the Honorable George  
Manierre Judge of the Circuit Court of  
Cook County.

The Petition of William Carter  
and Henry Miller respectfully shews unto  
your Honor

That your Petitioners are builders &  
masons and are partners doing business in the  
City of Chicago in the County of Cook &  
State of Illinois under the name and firm  
of Carter & Miller.

That Henry McCuley  
of said City of Chicago was on the 20th  
day of April A.D. 1856 and on the first &  
twenty fifth days of October 1856 the owner of  
a certain piece of land situate in said City  
of Chicago and described and known as the



Page 2  
Said one third (1/3) of Lot Numbered four  
(5) in Block Numbered Nine (9) in the  
Canal Commissioners Subdivision of Fractional  
Section Number fifteen (15) in Township No  
Thirty nine (39) North of Range No fourteen  
(14) East of the 3<sup>d</sup> Principal Meridian said  
lot fronting on Michigan Avenue and  
said premises being the same referred to in  
the contract and specifications hereinafter  
mentioned and being the same premises and  
land upon which your Petitioners performed  
all the work furnished the materials and put  
up all the buildings hereinafter stated.

That on said 25<sup>th</sup> day of April A.D. 1856  
your petitioners under their Company name  
of Carter & Miller made and entered into a  
contract in writing of which Contract the  
following is a copy, viz:

These Articles of Agreement  
made and entered into this Twenty fifth  
day of April A.D. 1856 Between Messrs Carter  
& Miller of the first part building masons  
of the City of Chicago and H. McCauley  
of the same place of the second part.  
Witnesseth that the said Carter & Miller or  
their executors administrators and assigns for  
and in consideration of the payment  
hereinafter to be made to them by the said



3. 10 H McAuley or his executor do on their part contract and agree to build finish and complete in a careful skilful and workmanlike manner to the full and complete satisfaction of H W Borington or his Assistant Superintendent and by and at the times mentioned in the foregoing specifications. The masonry work of a marble front dwelling that is to be erected on Michigan Avenue in connection with Dickey King & others as aforesaid so as fully to carry out the design of said work as it is set forth in the foregoing specifications and the plans and drawings therein especially referred to said specifications plans and drawings being hereby declared part and parcel of this contract. And the said H McAuley or his executor administrator or assigns for and in consideration of the said Carter & Miller furnishing all materials and fully and faithfully executing the aforesaid work so as fully to carry out the design for the same as set forth by the specifications and according to the true spirit meaning and intent thereof and to the full and complete satisfaction of H W Borington or his Assistant Superintendent as aforesaid and at the times mentioned in the foregoing specifications doth hereby agree to pay the



said Carter & Miller the sum of Thirty  
 Two Hundred Dollars in the following  
 manner. As the work advances the  
 Superintendent is to make out estimates  
 of the work & material furnished and  
 wrought-into the building & upon the  
 presentation of a certificate of Eighty five  
 (85) per cent on said estimates the said  
 H McAuley is to pay the amount & the  
 balance in full on completion of the  
 contract, Provided the said Superintendent  
 shall certify in writing that they are  
 entitled thereto.

In Witness Whereof the  
 parties hereto have set their hands the day  
 and year first above written

Signed { Henry McAuley  
 Carter & Miller

That a copy of the specifications mentioned  
 in the said contract is hereto annexed  
 marked "Schedule A" and is made a part  
 of this petition

And your petitioners further show that  
 immediately after making said contract  
 they proceeded to the performance of the  
 same on their part and that they did  
 all the work and furnished all the



5 materials to be by them done and furnished according to the provisions of said Contract and that the said building so built under said Contract has been accepted by said H McAuley.

And your petitioners further show that they have received from the said H McAuley upon said Contract the sum of Two Thousand and six hundred dollars and that there is now due them from said McAuley upon said Contract the sum of Seven Hundred Dollars balance due on said Contract & that said sum was due by said Contract on or about the 15th day of May 1857.

And your petitioners further show that the said H McAuley is indebted to them in the further sum of Two Hundred & thirty Eight <sup>42</sup>/<sub>100</sub> Dollars for extra work done & materials furnished for additions and alterations growing out of alterations of the design of and additions to said building referred to in said Contract and specifications, said extra work and materials being done and furnished in pursuance of said Contract and a bill of the same being hereto annexed marked "Schedule B" and which is hereby referred to and made part of this petition, And



the said work and material, so done and furnished have been accepted by said McAuley and that said sum was due & payable about the fifteenth day of May last.

And Your petitioners further show that on or about the first day of October A.D. 1856 they made a contract with the said H. McAuley, whereby they agreed with the said McAuley to build upon the premises hereinbefore described the walls and foundation of a barn and to make the excavations necessary therefor, that the price agreed upon by and between the said parties was to be two shillings per yard for each yard of excavation and sixteen dollars a cord for each cord of stone furnished and laid, and eleven and one half dollars per thousand for the bricks furnished and laid by your petitioners for the building of said barn, that the amount of excavation made under said contract was one hundred & thirty seven yards, and the amount of stone furnished and laid was Eleven & fourteen one hundredths cord and the amount of bricks furnished and laid was forty two and seven hundred & fifty one thousandths, amounting in all to the sum of Seven hundred and fifteen dollars and thirty



7  
one cent, and that all of said work was done and <sup>used</sup> materials furnished under and in pursuance of said Contract, And that said Contract has been kept and complied with by your petitioners and that said work has been accepted by said McAuley. And that your petitioners have been paid by said McAuley the sum of Three Hundred dollars on account of said Contract and that there is now due and owing them from said McAuley for work and labor done and materials furnished in and about the building of said barn under said Contract the sum of Four Hundred and fifteen dollars and thirty One cents and that said sum has been due since about the first day of May last.

And your petitioners further show that the said H McAuley is indebted to them in the further sum of Two Hundred Dollars for extra work and labor done and extra materials furnished by them in and about the erection and completion of the dwelling house in the Contract first mentioned referred to under a contract made by them with the said H McAuley on or about the 25<sup>th</sup> day of October A.D. 1856 by which said contract last mentioned your petitioners were to do said work & labor & furnish said



materials and the said H McAuley was to pay them therefor as much as the same should be reasonably worth, and your petitioners aver that the same were reasonably worth the sum of Two Hundred Dollars

Your Petitioners therefore claim that the said Henry McAuley is justly indebted to them as follows, viz:

For balance of the price mentioned in the first mentioned contract for marble front dwelling after deducting all payments made on said Contract	\$700.00
For Cont Extra work under contract	238.42
For balance due on contract for barn	415.81
" Cont Extra work on Contract Oct 25	<u>200.00</u>
Total	\$1553.73

And your Petitioners further show that the said Henry McAuley refuses to pay to your petitioners the above mentioned sum or any portion thereof although often requested to pay the same

And your Petitioners further show that as they are advised and verily believe they have a lien upon the premises hereinbefore described and upon the said buildings thereon erected for the sums so due them as aforesaid, and they ask the aid of this Honorable Court in the premises



9 and pray that such lien may be enforced and that a judgment or decree may be entered or made directing the sale of said premises and of said buildings and of all the right title and interest of the said Henry McAuley in and to the same to pay the sum due to your petitioners and that such other further or different order or decree may be made in the premises as to your Honor shall seem meet and as shall be agreeable to equity.

Your petitioners further pray that a summons may issue from this Court directing the Sheriff of Cook County to summon the said Henry McAuley to be and appear at the term of this Court to be begun and held on the third Monday of November next then and there to answer this petition and abide by the order of this Court in the premises and your Petitioners will ever pray  
tc

Thompson + Bishop	}	W N Carter
Solo for Petitioners		Henry Miller

State of Illinois }  
County of Cook }

The above named William N Carter + Henry Miller being severally duly sworn each for himself doth say that he has



11  
heard read the foregoing petition and knows  
the contents thereof and that the same is true  
according to the best of his knowledge and  
belief

Subscribed & sworn to before  
me this Thirty Sixth day of  
November AD 1857

(L. J.)

J. H. Thompson  
Notary Public

W. D. Carter

Henry Miller

### Schedule A

Specification for the Masonry of Wm McAuley's  
Dwelling. Copy

Jm W Poynington  
Architect Chicago

Specifications for the Masons.

Work and Materials required for the Erection and  
completion of a Stone front dwelling that  
Mr Wm McAuley is about to have erected in  
the block on Michigan Avenue between Van  
Buren & Taylor Streets adjoining J. L. Clark on  
the South whose building is already erected  
and the Hon W. O. Dickey on the North  
Special reference will be had by the Contractor  
to the following specifications and the  
accompanying design as made by Jm W  
Poynington Architects and which consists of the  
following drawings, viz:



and all work done and material used for the work be such as is hereinafter described and in giving on demand any certificates that the Contractor may be entitled to and in settling all deductions of or additions to the Contract Price which may grow out of alterations of the design after the same is declared to be Contract Also determining the amount of damages which may accrue from any cause and to particularly decide upon the fitness of all material used and work done. The Contractor being bound in all cases to remove all improper work or materials upon being directed so to do by the Superintendants. But the Contractor if after having been directed as above to remove the same should neglect or refuse or neglect so to do shall not only suffer a deduction from the Contract price of the difference in value of proper and improper work and materials but shall also be liable for all damage of whatever nature or kind that may result from such cause. The above provisions to apply in the same way to all materials or ~~work~~ used made or fixed without the knowledge of the Superintendant



And it is hereby expressly provided that in case the Contractor should feel aggrieved by the decision of the Superintendent an appeal may be taken from such decision to an arbitration chosen indifferently and whose decision in the matter shall be final and binding on all parties. The owner reserves the right to alter or modify the design, and to add to or diminish from the Contract price the difference to be ascertained as provided above. The owner being bound in all cases to recognize the acts of his Superintendents not only as regards extra work but also the sufficiency of the design the Contractor being in no case responsible for any accident resulting to the work from any defective design which fact must be determined by an arbitration of three disinterested men chosen indifferently and if found that the damages resulted from a want of proper care on the part of Contractor then and in that such cases the damages added shall be paid for and made good by him, but if found that the accident or damage resulted from an improper design then and in such case all damages shall be sustained by owner; which in all cases must be real and in no case Constructive damages.



to be allowed. All payments made upon the work during its progress are on account of the contract and shall in no case be construed as an acceptance of the work executed, but the Contractor shall be liable to all the conditions of the contract until the work is accepted as finished and completed.

Dimensions of the Building as represented by and figured on the drawings

Heights	Casement Story (Cellar)	to be	—
Principal	do	do	
Second	do	do	
Third	do	do	
Fourth	do	do	
Fifth	do	do	

This Building is intended to be first class in every particular and must be finished throughout as hereinafter described and anything shown by the drawings and not hereinafter particularly reserved or described, which is necessary to complete the masons work of the building is to be done at the cost of the Contractor notwithstanding such omission.

Grade of building

Top of first floor of joist to be fixed to correspond <sup>with</sup> the Clarke House now



erected on the block and all other  
15 floors the same.

### Excavations

The entire area of the proposed building as required by plan to be dug out five feet deep below the natural surface. Excavation for footings of walls to be dug eight inches below the first named excavation. All other excavations for drains and cisterns and for foundation of piers and for vaults of water closets as required by plans also for areas & foundations of steps. All the excavated earth must be ~~placed~~ deposited in front & rear in proportion as it may be most needed. Contractor to properly level off the earth above the walls so as to turn the water from the walls and refill the excavations for drains after the same is put in and properly fixed to the direction of the Superintendent.

### Rubble Stone Work

All walls shaded blue to be of stone of dimensions and heights figured on the drawings and composed of good quarry stone laid in the best manner with mortar mixed of proper proportions of best lime and clean coarse sand the whole to be well bedded and bonded together and well faced.



on both sides. Dwarf walls to have stone foundations same kind of work as described above and the same to be three feet deep and average sixteen inches thick.

Footings of wall for bottom of trenches to be composed of large stone and will be  $3'6" \times 3'2"$  wide the first course or layer must not be less than eight inches thick by six feet square surface, and must be well settled in the earth with a heavy instrument of wood and laid in a Mortar made as above described. Bearing walls for the support of the front steps and area to be put at least three feet below the bottom of area and of sufficient thickness to support the steps or earth that may be put upon or against them. Cistern walls to be built as shown by plans, plastered inside with two good coats of firm water lime and made water tight on all sides and bottom and the overhead to be plastered with concrete to prevent dampness from affecting the Servants room above. Walls of areas of the Cellar windows to be of stone for height and thickness see sections & plans. All sand used for Mortar must be clear beach washed sand for everything about the building. All proper holes left for drains and gas pipes as directed or shown by plans.



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## Cut Stone

For the quality and kind reference will be had to the accompanying bill and drawings where the same is plainly described and shown and must all be properly set; and after the walls are finished, to be properly cleaned off and pointed up. all the Cut stone work is to be furnished all squared & fitted for anchor and delivered on the ground at the place of building at the owners cost after the stone are thus delivered the Contractor for the masonry is to take charge of the same & must become responsible for any damages that may be done until the building is completed & accepted.

## Brick Work

All walls shaded red on the plans are to be of bricks of the thicknes and size marked on plans laid in the best manner with solid head and bed joints and thoroughly flushed solid. The side walls will be laid in connection - N. E. Dickey on the north side and will be a party wall the south side is that of J. L. Clark and now up except the portion beyond said Clarks wall. All necessary holes for joist & other timbers that may be necessary are to be cut in the Clarks wall for all the different floors.



All brick used for facing the outside walls must be hard burned all soft brick to be rejected from the work. The joints of the rear outside wall to be neatly struck. Fire walls to extend 4 inches above the roof and cased with tin. Owners will furnish at the time they are wanted in all cases when the roof is to be built of tin and composition a sufficient amount of 2x4 inch scantling to surround the whole roof of building and which must be built in the fire walls by contractor in such manner as the lower side of the piece will be flush with the top of the roof boards. All chimneys to be built as shown by drawings and when the same pass through the different floors a projection of four inches is to be made on all sides and in no case allow less than six inches of brick work between the timbers & smoke flues, all the flues to be smoothly plastered on the inside and have stove pipe chimneys with tin stoppers as directed and be finished above the roof at least 12 inches above the highest point. all openings for fire grates to be anchored with bricks and all trimmings for the support of hearths will be turned with brick arches. Seasoned laths



19

to be worked in the joints of the brick of the outside walls of the different floors one to each 12<sup>th</sup> Course. Contractor to execute all the masonry and furnish the materials necessary for setting Coal grates and hot air furnaces and the Cooking ranges. Iron grating for Areas.

#### Iron Anchors

For each of the piers and for at least every ten feet of the dead walls to be carefully worked in the masonry and secured to the timber of each of the floors and roof. The stone front will be anchored with strap anchors two to each block of stone, size  $1\frac{3}{8}$  by 1 inch turned at each end & fitted to the stone and well bound in the brick work. Timber anchors will be all pin anchors made to suit. Pin 8 inches long of  $\frac{7}{8}$  round iron the shank to be 20 inches long properly welded around the pin and will be fastened to the timber with two spikes. Those for the Stone Lintel of fronts to be extra heavy and must be long enough to reach the second joint from the stone to be anchored. Straps of  $\frac{3}{8} \times 1\frac{1}{2}$  Iron to be placed on the timber of all the floor and roof where the same lie upon and meet on division wall, these straps must be 20 inches long American Iron and



Have 4 Spikes each

Plastering is not to be included All throughout the building to be of the best quality Plaster of Paris finish and all these coats work except which will be good two coat work. The first coat must be well & proportionately mixed with Clean sharp lake sand, quick lime hair and the second coat or brownish must be evenly laid & floated true to straight edge with equal plumb angles & corners & the last coat thoroughly polished.

Finally the whole job to be fully completed in a careful skillful and workmanlike manner and every material to be furnished therefor and anything shown by the plans relating to or is necessary to complete the masonry of the building and not herein particularly reserved or described is to be done at the cost of the Contractor notwithstanding such omission

Time

Owner to give possession of the ground on or before the first day of March 1856 Contractor must agree to build the wall and Chimneys ready for roof on or before the first day of September 1856, and must set the front steps as soon as the same are furnished and clean down the



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front and finish whole work as soon as practicable after the above mentioned time. Said work in no case shall be considered as finished unless the same is so reported to the Superintendent and accepted by him. The owner hereby agreeing to have in readiness all necessary timber and Carpenter's work as they may be wanted so that in no case the masonry shall be hindered for the want of the same and will put on each floor of first wall the building within three days after the walls are made ready to receive the same and in case he should fail to do so then and in such case he hereby agrees to extend the time for finishing said work in a pro rata proportion for such delay, and will also pay all damages resulting to the Contractor from such cause of delay. Provided the Contractor shall at the time of such delay notify the Superintendent in writing of the extent thereof and the damages to him arising therefrom and if required by owner must prove the same.

### Damages

And in order to secure the execution of the work in the manner and at the times specified it is hereby distinctly declared that the damages arising from the non fulfillment



of the contract as regards time shall be a fair rent of the premises for each and every day to work remains unfinished and which sum of damages shall be deducted from the contract price

### Payments

To be made on the work as may be hereafter agreed

### "Schedule D"

Henry McAuley

	To Carter & Miller L <sup>r</sup>	
1856 June	To Shut lead front-stair	\$5.00
Aug & Sept	" 4 days tender carrying joist	6.00
"	" Altering window cap	3.00
Oct 27	" 4 1/2 days deafening floors w <sup>th</sup> <sup>17</sup>	13.50
"	" 14 1/2 days tender wheeling coal wheeling about yard	22.12
"	" 325 hod. mortar w 10 cb-	32.50
"	" <del>325</del> 80 ft stem formation additional size of back post - w \$16	12.50
"	" 706 Bricks laid w \$12.	84.75
"	" Excavation for Addition	5.00
"	" 1350 Bricks additional Chimney w \$12	16.20
Nov 1	" Hauling 100 loads earth to street	12.00
1857 May 26	" 3 days work cleaning front ordered	9.00
"	" 9 1/2 feet stone wall foundation for fence	15.52
"	" digging tracts & filling about same	1.00
		2138.42



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And thereupon on the day year last aforesaid to wit:  
November 6<sup>th</sup> AD 1857 there issued out of the office of the Clerk  
of said Court People writ of summons directed to the Sheriff  
of Cook County & clothed in the words and figures following  
to wit:

State of Illinois }  
County of Cook } ss

The People of the State of Illinois, to the Sheriff  
of said County - Greeting:

We command you that you  
Summon Henry McAuley if he shall be found in your  
County, personally to be and appear before the Circuit Court  
of Cook County on the first day of the next term thereof to  
be holden at the Court House in Chicago in said County  
on the third Monday of Nov next ~~next~~, to answer unto William  
H. Laster & Henry Miller in their Petition for a Mechanics  
Lien.

And <sup>have</sup> you then and there this writ, with an endorsement  
thereon, in what manner you shall have executed the same  
Witness William L Church Clerk of our  
said Court, and the seal thereof, at Chicago aforesaid, this  
sixth day of November AD 1857

(LS)

W L Church Clerk

And afterwards to wit: on the 14<sup>th</sup> day of November in  
the year last aforesaid said writ was returned into the  
Court aforesaid by said Sheriff Endorsed as follows to wit:  
Served by reading to the within named Henry McAuley  
& giving him a copy of this writ the 14<sup>th</sup> day of Nov 1857



1 Copy 50¢  
 Dec: 1 Service 50  
 1 mile Pd by Plt 15  
 1 Return atty 12

\$1.15  
 John L Wilson Sheriff  
 By Seth Taylor Deputy

And afterwards to wit: on the 30<sup>th</sup> day of January AD  
 1858 the said defendant by Henry Miller & Lewis his  
 attorney, filed in the Court aforesaid his answer to the  
 said Petition in the words and figures following to wit:  
 Cook County Circuit Court

Henry M<sup>c</sup> Auley  
 ad.

William H Carter &  
 Henry Miller

And the said Henry M<sup>c</sup>  
 Auley for answer to the petition filed in said  
 cause says that he admits that he is and was  
 at the time of the making of the Contract in said  
 petition mentioned the owner of the Real Estate  
 therein described and he further admits that on  
 or about the 23<sup>rd</sup> day of April AD 1854 he made  
 a Contract in writing with said Petitioners for  
 doing the Mason work a building thereabouts  
 to be erected by this defendant upon the Real Estate  
 described in said petition and he presumes that  
 said Contract is correctly set forth in said petition



25- But this defendant expressly denies that said Complainants did all the work or furnished all the material to be by them done and furnished under and in pursuance of said contract, or that said building has ever been accepted by this defendant as stated in said petition.

This defendant further answering denies that there is due from this defendant to said Complainants ~~in~~ said contract the sum of Seven hundred Dollars or any other sum or that he is indebted to said Complainants in the sum of \$238<sup>42</sup> for Extra work done and material furnished for additions and alterations growing out of alterations of the design of and additions to said Building referred to in said Contract and specifications and he denies that said work and material have ever been accepted by him as stated in said bill of Complaint.

This defendant further answering says he admits that said Petitioners agreed with this defendant to build the walls and foundation for a barn upon said premises but at what price this defendant is unable to state from his recollection. Nor does he know the dimensions of said foundation and walls, and he does not therefore admit that there is due on account thereof the sum of Four hundred and fifteen dollars as stated in said petition.

This defendant further answering



21 denies that he is indebted to said Petitioners in the sum of Two hundred Dollars<sup>or</sup> in any sum whatever for Extra work and labor done and extra materials furnished by them in and about the Erection and Completion of the dwelling House in the Contract just above mentioned referred to, or that he made any Contract with said Petitioners in respect thereto on the 25<sup>th</sup> day October AD 1856 and he denies that he is justly indebted to said Petitioners for the said several sums in said petition specified.

This defendant further answering says that the work done or pretended to be done by said Petitioners upon said dwelling House was not done in accordance with the terms of said Contract and the plans and specifications attached thereto. That the Excavations are not made to the depth thereby required, but that this defendant was put to great trouble and Expense in continuing and completing said Excavations after said complainants had left said work that they did not level off the Earth about the walls so as to turn the water from them, nor were said walls of Stone laid in mortar mixed of proper proportion of best lime and clean coarse sand - nor was the footing of said walls built in the manner provided in said specifications nor were the Stone of which the same were composed settled in the Earth as therein specified, nor were the cistern walls built as therein directed or plastered inside with two coats of Water lime nor were they made



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water tight nor were they plastered as therein directed to prevent dampness nor was the ~~sand~~ used for the Mortar clean beached washed sand but all the Mortar used in said building was taken from the Excavations made there under and was fine dead sand and unfit for such use That the Stone Front of said building was not anchored with Strap Anchors nor were Iron Anchors worked in the masonry and secured to the timbers of Each of the Floors and Roof, and that in consequence thereof that the portion of said work done by said Petitioner was in other respects very imperfectly done that by reason of the defects aforesaid and the other defects of said work the said defendants hath been greatly damaged and that the amount of the damage so sustained by him will greatly exceed the whole amount claimed by said Petitioner, and said defendants further says that said Complainants left said work without completing the same, that this defendant now accepted said work but that the same so far as it was performed was performed on defendants land and connected with other materials and labor, and this defendant was compelled to appropriate the same and could not reject it, but said Complainants were duly notified by this defendant and by the Superintendent W<sup>m</sup> H Boyington before they had discontinued said work, that the work done by them in



said contract ~~would~~ not be accepted. 6  
 and this defendant further answering says  
 that was in consideration that the said Petitioners  
 should furnish all the material and fully and  
 faithfully execute the aforesaid work so as fully  
 to carry out the design for the same as set forth  
 by the specifications and according to the true  
 spirit meaning and intent thereof and to the  
 full & complete satisfaction of said Boyington  
 or his assistant superintendent & at the times  
 mentioned in said specifications that he agreed  
 to pay the said Foster & Miller therefor and this  
 defendant ~~denies~~ <sup>avows</sup> and expressly charges that  
 said work was not so done and this defendant  
 further says that he was only to pay for said  
 work so far as thereon as said work progress  
 is on estimates made by the superintendent  
 and the balance when said superintendent  
 should certify that said Complainants were  
 entitled thereto and this defendant ~~denies~~ <sup>avows</sup>  
 that no estimates have been made of the am-  
 ount due said Petitioners except in respect  
 to the several sums paid to them. Nor has any  
 Certificate been given as aforesaid of the amount  
 due to them as required by the terms of said  
 Contracts

Henry McAuley

Boyer, Miller & Lewis for Def<sup>ts</sup>



State of Illinois }  
 Cook County } For Henry McAuley being  
 duly sworn deposes and says  
 that he has read the foregoing answer and that  
 the same is true except as to the matter stated on  
 information and belief & that as to those matters  
 he believes it to be true Henry McAuley

Subscribed & sworn to before  
 me this 30<sup>th</sup> day of January  
 A.D. 1858  
 J. L. Church

Alk

And afterwards to wit at the April Term of  
 said Court to wit: on the 20<sup>th</sup> day of April A.D.  
 1858 the following proceedings among others were  
 had and Entered of Record therein to wit:  
 William Hatten and  
 Henry Miller

11085

vs

Petition Mechanics Lien

Henry McAuley

This day comes the said Petitioners  
 by Thompson and Bishop their solicitors and on their  
 Motion leave is given said petitioners to amend  
 their petition filed herein.

And thereupon afterwards  
 to wit: on the 5<sup>th</sup> day of June in the year last  
 aforesaid the said Petitioners by their attorneys  
 filed in the Court aforesaid their certain



amendments to the Petition filed in said cause  
in the words and figures following to wit:

In the Circuit Court of Cook County  
William H. Carter &  
Henry Miller } Petition to Enforce a  
vs } Mechanic's Lien  
Henry McAuley }

Amendment to the  
Petition in the above Entitled Case

And now  
the said William H. Carter and Henry Miller  
by leave of the Court for this purpose first had  
and obtained leave and amend their petition  
by their heretofore filed in said Court in said  
cause by striking out so much of said petition  
as relates to work done upon the Excavations  
walls and foundations for and of a barn, the  
part struck out commencing on the top of the  
5<sup>th</sup> page of said petition and ending with the 7<sup>th</sup>  
line from the top of the 6<sup>th</sup> page of the same and  
inserting in place thereof the following to wit

Your Petitioners further show unto  
Your Honor that on or about the first day of  
November AD 1856 Your Petitioners made a con-  
tract with the said Henry McAuley by which  
Your Petitioners agreed with said McAuley that  
they would make the Excavation necessary for  
a barn to be built on the premises in your Petition-  
ers petition described and that they would



31  
Furnish and lay the necessary stone and brick for the building and Erection of a barn on said premises for the said McAuley and in Consideration of these agreements the said McAuley agreed with your Petitioners that he would pay them for such Excavations and such materials & labor furnished and done in laying said stone and brick so much as the same should be reasonably worth when said work was completed

And Your Petitioners further show that said Contract was a verbal one, and that relying upon the agreement of said McAuley to pay them as above stated they went on and made the necessary Excavations for a Barn on said premises and that they furnished and laid the necessary stone and brick for the building and Erection of a barn on said premises for the said McAuley that the Amount of excavation made by them under said Contract was one hundred and thirty seven cubic yards and that the same was reasonably worth twenty five cents for each & every cubic yard amounting to the sum of thirty four dollars and twenty five cents, that they furnished and laid sixteen feet of cut stone for sill for said barn and that the same was reasonably worth seventy cents per foot amounting to the sum of Eleven dollars and twenty



# 11.20(32)

cents; that they furnished and laid Eleven & 14/100 cords of Stone for said barn and that the same was reasonably worth sixteen dollars per cord amounting to the sum of One hundred & Seventy Eight dollars and twenty four cents and that they furnished and laid for said barn Forty two thousand seven hundred & fifty bricks and that the same were reasonably worth Eleven & one half dollars per thousand and amounting to the sum of Four hundred and ~~thirty~~ one dollar and sixty cents

# 14874

# 491.60

And Your Petitioner further show that the said Excavations so made as aforesaid & the said Stone and brick so furnished & laid as aforesaid were all the Excavations necessary and all the Stone & brick necessary for the building & Erection of said barn and that the said Excavations were made & said Stone & brick furnished & laid by the 4<sup>th</sup> day of May AD 1857 and that on said 4<sup>th</sup> day of May AD 1857 the whole of the money due to Your petitioner for said work, labor & materials in and about said Excavations & laying said brick & Stone became due & payable by the terms of said contract

That the Bill annexed marked Exhibit "A" & made a part of this petition is a true & correct account of the work done & materials furnished by Your Petitioner for



said McAuley as aforesaid.

That said work was done & said Materials furnished as therein set forth in Erecting a Barn for said McAuley on the premises in your Petitioner's Petition set forth.

That the prices therein charged are fair & just and that said work and materials were reasonably worth and that the whole amount due for said work & materials is seven hundred and fifteen dollars and thirty one cent, that no part thereof has been paid but that the whole together with interest thereon since the 4<sup>th</sup> day of May AD 1857 is now justly due and payable.

And your Petitioner would amend the statement of the indebtedness of said defendant to them set forth in their said petition by striking out the item "a balance due on contract for barn \$ 415.31 and inserting in place thereof the account hereto annexed marked "Exhibit A"

William H Carter &  
Henry Miller  
By Thompson & Bishop  
their Attorneys

"Exhibit A"

Henry McAuley

To Carter & Miller

Nov 1. 1856

To	137 yds of Excavation for Barn	a 2	\$ 34.25
"	11 1/4 cords of stone	#11	17 8/10 34
"	42 7/10 Bricks laid	#11 1/2	48 1/10 39
"	165 ft of cut stone for sills	#11 1/2	70 1/2 39
			\$ 715 39



And your petitioners further amend their<sup>12</sup>  
petition by inserting at the foot of the 4<sup>th</sup> Page  
of their Petition the following

And your Petitioners  
aver that they have kept and fulfilled all  
the terms and Conditions of said Contract  
so made by them with said defendant as  
aforesaid and that the said W W Boyington  
the said Superintendent previous to the Com-  
mencement of this suit certified in writing that  
your petitioners were entitled to the sum of  
Eight hundred and thirty nine Dollars on  
account of work done & materials furnished  
under said contract & that said sum being  
part of the sum claimed in this suit together  
with interest since the 3<sup>d</sup> day of November AD  
1857 was at the Commencement of this suit  
& still is wholly due and unpaid

W<sup>m</sup> H. Carter &  
Henry Miller By  
Thompson & Bishop  
Plaintiffs Attorneys

And afterwards to wit: on the 22<sup>d</sup> day of  
January AD 1859 the said Petitioners by their said  
attorneys filed in the court aforesaid their amended  
Petition in & as contained in the words and  
figures following, to wit:



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To the Honorable George Manierre  
Judge of the Circuit Court of Cook  
County —

State of Illinois

Cook County, ss } The amended Petition of  
William H. Carter and Henry Miller,  
respectfully shews unto your Honor

That your petitioners were <sup>at</sup> about the  
time & times of making the Contracts herein  
after mentioned and each of them and since  
hitherto have been building contractors and  
Masons and Partners doing business in the  
City of Chicago in the County of Cook & State  
of Illinois under the name and firm of  
Carter & Miller —

That Henry M.<sup>r</sup> Guley who is made  
Defendant in this suit was on the 25<sup>th</sup> day  
of April A.D. 1856 and since hitherto hath  
been the owner in fee of a certain lot or piece  
of land situate in said City of Chicago & known  
and described as the South one third ( $\frac{1}{3}$ )  
of lot Numbered Five (5) in Block Numbered  
Nine (9) in the Canal Commissioners sub-  
division of Fractional sections Number  
fifteen (15) in Township Number thirty  
three (33) North of Range fourteen (14) East  
of the 3<sup>d</sup> Principal Meridian said premises  
being the same referred to in the Contract &  
Specifications hereinafter mentioned & being



the same premises and land upon which your petitioners performed all the work, furnished the materials and put up all the buildings hereinafter stated and referred to.

And your petitioners further show that on or about the 25<sup>th</sup> day of April A.D. 1856 your petitioners under this Company name of Carter & Miller made a contract in writing with the said Henry M.<sup>c</sup> Auley for the building, furnishing & completion of the masonry work of a marble front dwelling on the premises hereinbefore described then owned by said M.<sup>c</sup> Auley which said contract is in the words and figures following, to wit,

These Articles of Agreement made and entered into this twenty fifth day of April A.D. 1856 between Messrs. Carter & Miller of the first part, building masons of the City of Chicago and H. M.<sup>c</sup> Auley of the same place of the second part. Witnesseth that the said Carter & Miller or their executors administrators and assigns for and in consideration of the payment hereinafter to be made to them by the said H. M.<sup>c</sup> Auley or his executors do on their part contract and agree to build finish and complete in a careful skillful & workman like manner, to the full and complete satisfaction of Wm. W. Hayington or his assistant superintendants, and by and at the times mentioned



in the foregoing specifications. The masonry work of a marble front dwelling that is to be erected on Michigan Ave. in connection with Dickey, King & others as aforesaid, so as fully to carry out the design of said work as it is set forth in the foregoing specifications and the plans and drawings therein especially referred to, said specifications & plans & drawings being hereby declared part & parcel of this Contract. And the said H. M. C. Aubrey or his co-executors administrators or assigns for and in consideration of the said Carter & Miller furnishing materials and fully & faithfully executing the aforesaid work so as fully to carry out the design for the same as set forth by the specifications and according to the true spirit meaning and intent thereof and to the full and complete satisfaction of W. W. Boyington or his assistant superintendent as aforesaid and at the times mentioned in the foregoing specifications doth hereby agree to pay the said Carter and Miller the sum of thirty three Hundred \$33,000 dollars in the following manner:

As the work advances the Superintendent is to make out estimates of the work & materials furnished and brought into the building & upon the presentation of a certificate of eighty five (85) per cent on said estimates the said H. M. C. Aubrey is to pay the amount & the balance



is full on completion of the Contract provided the said Superintendents shall certify in writing that they are entitled thereto.

In Witness whereof the parties hereto have set their hands the day and year first above written -

(Signed) Henry M. Aubrey,  
Carter & Miller.

And your petitioners further show that a copy of the Specifications referred to in said contract is hereto annexed, marked Schedule A and hereby made a part of this amended petition.

And your petitioners further show that immediately after making said contract they proceeded to the performance of the same on their part and that they did the work and furnished the materials to be by them done & furnished according to the provisions of said contract and they aver that they kept and fulfilled all the terms conditions & requirements of said contract & Specifications to be by them kept or fulfilled except so far and in such particulars as the said Specifications were deviated from in particulars by mutual consent, and except also so far and in such particulars as they your petitioners were prevented by the said H. M. Aubrey and that your petitioners were ready to perform each & every particular in said Specifications & contract.



contained, and that said work was duly accepted, that by the terms of said contract the said M.<sup>c</sup> Aubrey agreed to pay your petitioners the sum of thirty three hundred dollars for said work in manner as set forth in said contract, that said M.<sup>c</sup> Aubrey has paid your petitioners on account of said work the sum of twenty six hundred dollars, that there is a balance of seven hundred dollars due your petitioners on account of work done under said contract and being a part of said contract price, that said sum of seven hundred dollars was duly certified to by said W. W. Boyington the said Superintendent in said contract - mentioned previous to the commencement of this suit, that said M.<sup>c</sup> Aubrey has neglected and refused to pay the same & that the same together with interest since the 3<sup>d</sup> day of November A.D. 1887 is now due & unpaid.

And your petitioners further shew that under such contracts and specifications herein before referred to the said Henry M.<sup>c</sup> Aubrey reserved the right to alter or modify the design of said Building and that he was liable under said contract to pay to your petitioners for all extra work and additions which might grow out of the alterations of the design, that your petitioners became entitled to the further sum of one hundred and eighty nine dollars & fifty cents



for extra work and additions growing out of such alterations a bill of which extra work is herewith annexed marked "Schedule B" that said sum was duly settled & certified to by the said Superintendants, but that the said M<sup>r</sup>. Aulay has neglected & refused to pay the same & that the same together with interest since the 3<sup>d</sup> day of November A.D. 1857 is now due & unpaid and is due under said contract for work done & materials furnished in and for erecting said dwelling house on said premises - And your Petitioners further shew unto your honor, that on or about the first day of November A.D. 1856 your Petitioners made a verbal contract with the said M<sup>r</sup>. Aulay in and by which your Petitioners agreed that they would make the necessary excavations and furnish and lay the necessary stone and brick for a brick house bare with stone foundation on said premises for said M<sup>r</sup>. Aulay and in consideration of these agreements the said Henry M<sup>r</sup>. Aulay agreed with your Petitioners that he would pay them for the labor and materials which should be done and furnished in and about said house so much as the same should be reasonably worth when requested on the completion of said work.

That relying on said agreement of the said M<sup>r</sup>. Aulay your Petitioners made the excavations and furnished and laid the stone and brick



for the building and erection of a Barn on said premises for said M<sup>r</sup>. Auley, and that the work done & materials furnished under said last mentioned contract were reasonably worth the sum of seven hundred and thirty six dollars and sixty cents, a bill of the items of which work is hereto annexed marked Schedule B. of which the said M<sup>r</sup>. Auley had due notice, which said sum of seven hundred and thirty six dollars and sixty cents was at the commencement of this suit and still is due and unpaid and the said Henry M<sup>r</sup>. Auley neglects and refuses to pay the said sum or any part thereof although often requested so to do, and that said sum has been due since the 15<sup>th</sup> day of May A.D. 1857 and that the same has been withheld by an unreasonable and vexatious delay of payment and that your Petitioners are entitled to interest thereon since said 15<sup>th</sup> day of May A.D. 1857 —

Your petitioners therefore claim that the said Henry M<sup>r</sup>. Auley is indebted to them for labor & materials by them furnished for erecting the buildings hereinbefore mentioned on the lot hereinbefore described for the amounts following to wit — Amount of balance of contract  
Price for barn after deducting payments \$ 700

For extra work under contract — 189. 80

For excavations & Walls of Barn &c. 784. 60

\$1624. 10



Together with interest on the amount due on the Bond from May 15<sup>th</sup> 1857 And on the remaining sums from Nov 3. 1857 —

And on the remaining sums from your Petitioners further show that as they are advised and verily believe they have a lien upon the lot hereinbefore described for the amount so due them as aforesaid and that the amount due them from said M<sup>r</sup>. Aubrey may be ascertained by and under the direction of this honorable Court and that a judgment or decree may be entered or made by this Court directing the sale of said premises and of all the right title and interest of the said Henry M<sup>r</sup>. Aubrey in and to the same or so much thereof as may be necessary to pay the amounts due to your petitioners as aforesaid and that such other, further or different order or decree may be made in the premises as to your Honor shall seem meet & as shall be agreeable to equity —

Hompson & Bishop }  
Sols<sup>r</sup> for Petitioners }

W<sup>m</sup> H. Carter  
Henry Miller

(Schedule A.)

Specifications for the Masons Work and Materials required for the erection and completion of a stone front dwelling that H. M<sup>r</sup>. Aubrey is about to have erected in the



43  
Block on Michigan Avenue between Van Buren  
and Tyler Streets adjoining J. L. Clarke on the  
South whose building is already erected and the  
Hon. B. V. Hickey on the North. Special  
reference will be had by the contractor to the following  
Specifications and the accompanying designs  
as made by W. M. Weyington, Architect and  
which consists of the following drawings, viz.  
Plan of Foundations and sections,

" Basements

" First Floor

" Second

" Third

Front Elevations —

Duties of Contractor. He shall be strictly  
held to make such work, and to use such mater-  
ials as herein after described and to work up  
the building to the given design, and in all  
cases where the drawings are figured, the figures  
must be taken by him as the given dimensions  
without reference to what the drawing may  
measure on its scale. He will be further held  
to submit as to the character of the materials  
used and the work done, to the judgment of the  
Superintendent, and to procure from him all  
necessary interpretations of the design and all  
necessary certificates regarding his payments

Superintendent & their duties, W. M. Weyington  
or his assistant architects are declared to be the



Superintendents of the work for the owner, their duties will consist in giving on demand such interpretations, either in language writing or drawing as in his judgment the nature of the work may require having particular care that any and all work done and material used for the work be such as is hereinafter described, and in giving on demand any certificates that the Contractor may be entitled to and in settling all deductions of or additions to the contract price, which may grow out of alterations of the design after the same is declared to be — contract, also determining the amount of damages which may accrue from any cause, and particularly decide upon the fitness of all material used and work done —

The Contractor being bound in all cases to remove all improper work or materials upon being directed so to do by the Superintendents

But the Contractor if after having been directed as above to remove the same should refuse or neglect so to do, shall not only suffer a deduction from the contract price of the difference in value of proper and improper work and materials but shall also be liable for all damages of whatever nature or kind that may result from such cause. The above provisions to apply in the same way to all materials or work used made or fixed without the knowledge



of the Superintendents. And it is hereby expressly provided that in case the Contractor should feel aggrieved by the decision of the Superintendents an appeal may be taken from such decision to an arbitration chosen indifferently & whose decisions in the matter shall be final & binding on all parties —

The owner reserves the right to alter or modify the design, and to add to or diminish from the contract price, the difference to be adjusted as provided above. The owner being bound in all cases to recognize the acts of his Superintendents not only as regards extra work but also to the sufficiency of the design, the Contractor being in no case responsible for any accidents resulting to the work from any defective design, which fact must be determined by an arbitration of three disinterested men chosen indifferently and if found that the damages resulted from a want of proper care on the part of Contractor then and in such case the damages & loss shall be paid for and made good by him but if found that the accidents or damage resulted from an improper design, then and in such case all damages shall be sustained by owners, which in all cases must be real, and in no case constructive damages to be allowed —

All payments made upon the work during



its progress are on account of the contracts and shall in no case be construed as an acceptance of the work executed, but the Contractor shall be liable to all the conditions of the contract until the work is accepted as finished & completed.

Dimensions of the building as represented by and figured on the Drawings -

### Heights

Basement Story (cellar to be	6 6
Principal "	13 4
Second "	12 3
Third "	10 3
Fourth "	10 or to roof
Fifth "	

This building is intended to be first class in every particular and must be finished throughout as herein after described & anything shown by the Drawings and not herein after particularly reserved or described which is necessary to complete the masonry work of the building is to be done at the cost of the Contractor notwithstanding such omission.

### Grade of Building

Top of first floor joist to be fixed to correspond with the Clarke House now erected on the block and all other floors the same.

### Excavations

The entire area of the proposed building



as required by Plans to be dug out five feet deep below the Natural Surface.

Excavations for footing of Walls to be dug eight inches below the first named excavation. All other excavations for drains & cisterns and for foundation of Piers and for Vaults of Water closets as required by Plans. Also for areas and foundations of steps —

All the excavated earth must be deposited in front and rear in proportion as it may be most needed —

Contractor to properly level off the earth about the walls so as to turn the water from walls and refill the excavations for drains after the same is put in and properly fixed to the discretion of the Superintendent.

### Rubble Stone Works.

All walls shaded blue to be of stone of dimensions and heights figured on the drawings, and composed of good quarry stone laid in the best manner with mortar mixed of proper proportions of best lime and clean coarse sand the whole to be well bedded and bonded together and well faced on both sides — Dwarf walls to have stone foundations same kind of work as described above and the same to be three feet deep and average sixteen inches thick —



Footings of wall bottoms of trenches to be composed of large stone, and will be 3.6" and 3.2" wide the first course or layer must not be less than eight inches thick by six feet square surface, and must be well settled in the earth with a heavy instrument of wood and laid in a mortar made as above described.

Bearing walls for the support of the front steps and areas to put at least three feet below the bottom of area, and of sufficient thickness to support the steps or earth that may be put upon or against them -

Wister walls to be built as shown by Plans, plastered inside with two good coats of water lime and made water tight on all sides and bottom and the overhead to be plastered with concrete to prevent dampness from affecting the servants room above -

Wall of areas of the cellar windows to be of stone, for height & thickness see sections and plans, All sand used for mortar must be clear beach washed sand for every thing about the building -

All proper holes left for drains & gas pipes as directed or shown by plans  
Best Stone.

For the quality and kind reference will



be had to the accompanying bills and drawings where the same is plainly described and shown and must all be properly set, and after the walls are finished to be properly cleaned off and pointed up. —

All the cut stone work is to be furnished all Quarried and fitted for anchors and delivered on the ground at the place of building at the owners cost. After the stone are thus delivered the contractor for the masonry is to take charge of the same and must become responsible for any damage that may be done until the building is completed and accepted.

### Brick Work

All walls shaded red on the plans are to be of brick, of the thickness and size marked on plans laid in the best manner with solid head and bed joints and thoroughly dressed solid. The side walls will be laid in connection with D. F. Leiby on the North side and will be a party wall —  
The South side is that of J. F. Clark and now up except the portion that extends beyond said Clark's wall —

All necessary holes for joists & other timbers that may be necessary are to be cut in the Clark wall for all the different floors  
All brick used for facing the outside



Walls must be hard burned, all soft brick to be rejected from the work. The joints of the rear outside wall will be neatly struck. Fire walls to extend 4 inches above the roof and capped with tin. Owners will furnish at the time they are wanted, in all cases where the roof is to be of tin and composition a sufficient amount of 2x4 inch scantling to surround the whole roof of building & which must be built in the fire walls by Contractor in such manner as the lower side of the piece will be flush with the top of the roof boards —

All chimneys to be built as shown by drawings and where the same pass through the different floors a projection of four inches is to be made on all sides, and in no case allow less than six inches of brick work between the timbers and smoke flues. All the flues to be smoothly plastered on the inside and have stove pipe chimneys with tin stoppers as directed and be finished above the roof at least 12 inches above the highest point. All openings for fire grates to be anchored with bricks and all trimmers for the support of hearths will be turned with brick arches, rounded both to be worked in the joints of the brick of the outside walls of the different stories one to each 12<sup>th</sup> course —



Contractor to execute all the masonry and furnish the materials necessary for setting the coal grates and hot air furnaces and the cooking range, wrought iron grating for grate -

### Iron Anchors

For each of the Piers and for at least every ten feet of the dead walls, to be carefully worked in the masonry, and secured to the timbers of each of the floors and roof, the stone front will be anchored with strap anchors two to each block of stone, size  $\frac{3}{8}$  by 1 inch turned at each end and fitted to the stone and well bound in the brick work -

Timber anchors will be all pine anchors made to order Pine 8 inches long of  $\frac{7}{8}$ " round iron, the Shank to be 20 inches long properly welded around the pin and will be fastened to the timber with two spikes -

Those for the Stone lintel of Fronts to be extra heavy, and must be long enough to reach the second joist from the stone to be anchored. Straps of  $\frac{3}{8}$  by  $1\frac{1}{2}$ " Iron to be placed on the timbers of all the floor & roof where the same lie upon and meet on divisions Walls these straps must be 20 inches long, American Iron, and have 4 spikes each - Plastering is not to be included - All throughout the building



to be of the best quality, Plaster of Paris finish and all three coat work, except which will be two coat work. The first coat must be well and proportionally mixed with clear sharp lake sand, quick lime and hair. And the second coat or browning must be evenly laid and floated true to a straight edge with equal plumb angles and corners, and the last coats thoroughly polished.

Finally the whole job to be completed in a careful, skillful, and workmanlike manner, and every material to be furnished therefor, and every thing shown by the plans relating to, or is necessary to complete the masonry of the building, and not hereinbefore particularly reserved or described, is to be done at the cost of the contractor notwithstanding such omission.

Time - Owner to give possession of the ground on or before the first day of March AD 1886.

Contractor must agree to build the walls and chimneys ready for roof on or before the first day of September 1886. and must set the front steps as soon as the same are finished, and clean down the front and finish whole work as soon as practicable upon the above mentioned time. Said work shall in no case be considered as finished unless the same is so reported to the superintendent and accepted by him. The owner hereby agreeing



to have in readiness all necessary timber and carpenter work as they may be wanted so that in no case the masonry shall be hindered for the want of the same, and will put on each floor of joists on all the building within three days after the walls are made ready to receive the same, and in case he should fail to do so, then and in such case he hereby agrees to extend the time for finishing such work, in a pro rata proportion for such delay, and will also pay all damages resulting to the contractor from such course of delay; provided, the contractor shall at the time of such delay notify the Superintendent in writing of the extent thereof, and the damages to him arising therefrom, and if required by owner must prove the same.

Damages - And in order to secure the execution of the work in the manner, and at the times specified, it is hereby distinctly declared, that the damages arising from the non-fulfillment of the contract as regards the time shall be a fair rent of the premises for each and every day the work remains unfinished and which sum of damages shall be deducted from the contract price.

#### Payments

To be made on the work as may be hereafter agreed -



## "Schedule B"

Henry M. Aulby  
To Carter & Miller Dr

June 1856.	For sheet Lead front & Rear	\$5.40
Aug. & Sept.	" Altering Window Saps	3.00
Oct. 27	" 4 1/2 days Mason deepening floor a 300	13.50
	" 320 Hods Work. c for deepening	32.50
	" 80 feet 3/4 m foundation additional <sup>of back part</sup> Sigs	12.80
	" 7065 Bricks laid @ \$12	84.78
	" Excavation for addition	5.00
	" 1350 Bricks @ \$12 additional Chimney	16.20
May 26. 1857	" 97 feet stone wall foundation for stone fence	15.52
"	" Digging Trench & filling about same	1.00
		<hr/> 189.70

## ("Schedule C")

Henry M. Aulby  
To Carter & Miller Dr,

May 15. 1857	To 137 yards Excavation for bank	\$34.75
"	" 11.14 Cords of Stone @ \$16.	178.24
"	" 42.75 Bricks laid @ \$12	513.00
"	" 16 feet of cut stone @ 70	<hr/> 11.11
		736.60



(4)  
55- And afterwards. to wit: at the January special term of said court. to wit: on the 22<sup>nd</sup> day of January A.D. 1859 the following proceedings among others. were had and entered of record. to wit:

"On motion of Thompson and Bishop of counsel for said plaintiffs it is ordered that they have leave to file an amended Petition herein which is accordingly done. Whereupon it is ordered that the said defendant be and he hereby is ruled to plead to said amended Petition by the 2<sup>nd</sup> Monday of February next"

And afterwards. to wit: on the 17<sup>th</sup> day of February in the year last aforesaid the said defendant filed in said court his answer to the amended Petition in said cause in the words and figures following to wit:

Cook County Circuit Court  
Henry McAuley  
                    ads  
William H Carter  
And Henry Miller

The answer of Henry McAuley to the amended petition of William H Carter and Henry Miller.

And the said Henry



McAuley for answer to the amended petition filed in said cause says that he admits that he is and was at the time of the making of the contract in said amended petition mentioned the owner of the real estate mentioned therein described and he further admits that on or about the 25<sup>th</sup> day of April A.D. 1856 he made a contract in writing with said petitioners for doing the mason work of a building then about to be erected by this defendant upon the real estate described in said petition and he presumes that said contract is correctly set forth in said petition but for the reason that this defendant has not the original contract or agreement now in his possession he will neither admit nor deny that the same is truly set forth in said amended petition but will leave the said plaintiffs to make proof thereof. but this defendant denies that said petitioners did the work and furnished the materials to be done by them and furnished according to the provisions of said contract or that they kept and fulfilled all the terms considerations and requirements of said contract and specifications therein referred to be by them kept and fulfilled as stated.



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and alledged in said amended petition  
or that they were ready to perform each  
and every particular in said specifications  
contained or that said work was ever  
accepted by this defendant as therein  
alledged or that this defendant is justly  
indebted to said petitioners in the sum  
of seven hundred dollars on account  
thereof or in any sum whatever or that  
said petitioners are entitled to the further  
sum of One hundred and eighty nine  
dollars for extra work growing out of alter-  
-ations made in the design of said building  
made by this defendant as stated and  
alledged in said petition.

This defendant further  
answering admits that said petitioners did  
make excavations for and furnished and  
laid @ quantity of stone and brick for  
the erection of @ barn on said premises  
and he denies that the labour ~~done~~  
performed and materials so furnished  
by said petitioners was reasonably worth  
the sum of seven hundred and thirty  
six dollars as stated and alledged in  
said amended petition or any thing like  
that sum and the said defendant  
further says that said petitioners agreed  
to do said work and furnished said



materials for a specific price and not for what the same should be reasonably worth as stated in said petition.

This defendant further answering says that the work done by said petitioner upon said dwelling house was not done in accordance with the terms of said contract and the plans and specifications attached thereto. That the excavations were not made to the depth thereby required but that this defendant was put to great trouble and expense and in continuing and completing said excavations after said petitioner had left said work that they did not level off the work about the walls so as to turn the water from them nor were said walls of stone laid in mortar mixed with proper proportions of best lime and clean coarse sand nor was the footing of said walls built in the manner provided in said specifications nor were the stone of which the same were composed settled in the earth as therein specified nor were the cistern walls built as therein directed or plastered inside with two coats of water lime nor were they made water tight nor were they plastered as therein directed to prevent dampness. nor was the sand used for



the mortar clear beach washed sand  
 as required by said articles but nearly all  
 or a large part of the mortar used in said  
 building was made of sand taken from  
 excavations made thereunder and was  
 fine sand and unfit for such use  
 that the stone front of said building  
 was not anchored as required by the spec-  
 -ifications ~~of~~ said nor were iron anchors  
 worked into the masonry and secured  
 to the timbers as thereby required. that  
 the work done by said petitioners in said  
 building was in other respects imperfectly  
 done that by reason of the defects afore-  
 -said and the other defects of said work the  
 said defendant hath been greatly dam-  
 -aged and that the amount of damages so  
 sustained by him will greatly exceed  
 the whole amounts of the several sums  
 claimed by said petitioners in their said  
 petition which said damage and injury  
 this defendant prays may be set off  
 against the several sums claimed of  
 this defendant by said petitioners in  
 their said petition and this defendant  
 further says that said complainants  
 left said work without completing  
 the same that this defendant never  
 accepted said work but that the



same so far as it was performed was performed on defendants land and connected with other materials and labor and this defendant was therefore compelled to appropriate the same and could not reject it.

Subscribed and sworn Henry McAuley  
to before me this 17<sup>th</sup>  
day of July A D 1859  
J. M. Church cler

And for further answer the said defendants says that said petitioners are indebted to him in the sum of twenty one dollars for money paid by him for Carter and Miller and at their request for the purchase of ten cords of stone on or about the first day of April A D 1857 and also in the further sum of about ninety five dollars for sand used by said petitioners in doing the work on the dwelling house of this defendant set forth in said petition and which was furnished by this defendant and the said defendants prays that said sums may be set off against the claim made by said petitioners in this said Petition.

Subscribed and sworn to before me this 17 day of July 1859  
Henry McAuley  
J. M. Church cler



And afterwards. to wit: on the same day and year last aforesaid said Petitioners by their said attorneys filed in said Court their replication to said defendants answer in the words and figures following. to wit:

Circuit Court of Cook  
County, February Term A.D. 1859

William H. Carter

And Henry Miller

Henry McAnley

Replications

These repliants

William H. Carter and Henry Miller the said plaintiffs saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer for replication shew unto say that they will aver and prove their said petition to be true certain and sufficient in the law to be answered unto and that the said answer of the said defendant is uncertain untrue and insufficient to be replied unto by these repliants without shew that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto confessed and avoided traversed or denied is true all which



matters and things these repliants are  
and will be ready to aver and prove  
as this Honorable Court shall direct  
and humbly pray as in and by the  
said petition they have already prayed

Thompson & Bishop

Atty for Petitioners

And afterwards. To wit: at the February  
Term of said court. to wit: on the 2<sup>nd</sup>  
day of February A D 1859 the following  
proceedings among others, were had and  
entered of record therein. To wit:

William H Carter

and Henry Miller

Henry McAnley

Petition for Moch's Seis

This day comes the said  
plaintiffs by Thompson & Bishop their  
attorneys. and the said defendant by Henry  
Miller & Lewis his attorneys also comes and  
issue being joined herein it is ordered that  
a jury come. Whereupon come the jurors  
of a jury of good and lawful men. to wit:  
William J Russell. J. E. Brandall. E. Cobb  
W. Southerland. George Demlap. J. L. Allen  
John Savage. J. A. Reed. Henry Mersching  
Symon Staples. M. McIntosh. B. Watters

Who being duly elected tried and sworn  
well and truly to try the issues joined herein



aforesaid and a true verdict give according to law and the evidence and after hearing @ part of the evidence. the same not being closed. and the hour of adjournment having arrived it is ordered that said Jury have leave to separate to meet the court at the coming in thereof thereof on Wednesday morning 9 O'clock

And afterwards. to wit: at the same term of said court. to wit: on the 23<sup>d</sup> day of February in the year aforesaid. the following proceedings. among others in said court. were had and entered of record therein. to wit:

William M Carter  
and Henry Miller

Henry McAuley

This day again come as well the said plaintiffs. by Thompson and Bishop their attorneys as the said defendant by Hoynes. Miller and Lewis his attorneys and the Jurors of the Jury aforesaid also come and the testimony in this cause having been closed and the said Jury having heard the arguments of counsel as well on the part of the said plaintiffs as of the said defendant and the instructions from the court retire to consider



of their verdict under the charge of a sworn officer of the court, and afterwards come into court and say, "We the jury find the issues for the plaintiffs and that the sum of one thousand two hundred and eighty nine dollars and forty six cents remains due to them for work done under the contracts mentioned in the Petition upon the premises therein described."

Whereupon the said defendants moved the court for a new trial of this cause.

And afterwards to wit; at the term last aforesaid to wit; on the fifth day of March in the year last aforesaid the following proceedings, among others, were had and entered of record therein, to wit:

William W. Carter

And Henry Waller

for  
Henry McAuley

Petition for Meek's Lien

This day again come the said parties by their respective attorneys and the said Petitioners now remit ten dollars which was alleged by said defendant to have been had and received



By said Petitioners, and now on motion  
 of Thompson and Bishop said Petitioners  
 Solicitors. It is ordered adjudged and  
 decreed that said Petitioners recover of  
 said defendants the sum of twelve hun-  
 dred and seventy nine dollars and  
 forty six cents. Together with their costs  
 and charges by them about their suit  
 expended to be taxed, and that all  
 singular the premises described in said  
 Petitioners amended Petition and described  
 as follows to wit: The south one third  
 (1/3) of Lot number five (5) in Block  
 numbered nine (9) in the canal commis-  
 sioners subdivision of fractional section num-  
 ber fifteen (15) in Township number  
 thirty nine (39) North of range fourteen  
 (14) East of the 3<sup>d</sup> principal meridian  
 or so much thereof as may be sufficient  
 to pay the said amount of twelve hund-  
 red and seventy nine dollars and forty  
 six cents and said costs and charges  
 with interest from the date of this decree  
 provided said premises are susceptible  
 of division without injury, be sold  
 at public auction by and under the  
 direction of S. C. Parke Greer Esq (master  
 in chancery for Cook County) who is  
 hereby appointed and constituted a



commissioner for the purpose of making such sale that said commissioner give public notice of the time and place of said sale by notice in a daily newspaper printed and published in the city of Chicago at least sixty days previous to said sale and that the same be published at least ten days during the said sixty days and that said commissioner execute and deliver to the purchaser or purchasers a deed or deeds of said premises upon said sale and that out of the proceeds of said sale the said commissioner retain his fees and costs and commissions upon said sale and pay to the Petitioners or their solicitors the said amount found due said petitioners as aforesaid together with their costs and legal interest on said amount from the date of this decree or so much thereof as the said purchase money will pay and that he bring the surplus money arising from said sale if any there be into court to abide the further order of this Court said premises to be sold subject to whatever claim George Scoville Jacob P. Willard & John D. Jennings may hereafter be adjudged to have thereto against said petitioners.

Whereupon the said defendant



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McAuley prays an appeal to the supreme Court of the State of Illinois which is granted by the court on condition, that the said Defendant executes and files with the Clerk of this Court his appeal Bond herein in the penal sum of One thousand two hundred and seventy nine dollars and six cents, conditioned according to law within twenty days from this date with J. D. Jennings as surety thereto. And that the said defendant have twenty days to file his bill of exceptions, herein.



And after words to wit; On the 24<sup>th</sup> day of March  
in the year last aforesaid said Defendant by his att-  
orneys filed in the Court aforesaid his certain Bill  
of Exceptions in the words and figures following to wit;  
Cook County Circuit Court

William H. Carter and  
Henry Miller } ss  
Henry M<sup>c</sup> Auley } ss

Be it remembered  
that on this the            day of February A.D. 1859  
at the February Special Term of said Court said  
cause came on to be tried and the parties, the plain-  
tiffs and the said Henry M<sup>c</sup> Auley appearing  
by their respective counsel a Jury was duly Empan-  
nelled and sworn and the Plaintiff, then upon in-  
troduced as a Witness

Q L Wheelock who being duly sworn testified  
as follows. I am acquainted with the parties  
to this suit, am an Architect by profession, I as-  
sisted in drawing up plans for the building ref-  
erred to in the written Contract now shown to  
me (Here the contract and specifications set forth  
in the petition were handed to the witness)

This is the contract and specifications under  
which the building was put up. I know of the  
plaintiffs going on and putting up the walls  
of the building under this contract and



Specifications on the premises described in the  
 amended petition. It was not my business to  
 Superintend the work though I saw it some  
 times. Were the plaintiffs read in  
 Evidence the following writing

These Articles of Agreement Made and En-  
 tered into this twenty fifth day of April A.D. 1880  
 between Messrs Laster & Miller of the first part  
 Building Masons of the City of Chicago and H.  
 McAuley of the same place of the second part  
 Witnesseth That the said Laster & Miller or their  
 Executors, Administrators and assigns, for and in  
 Consideration of the payment hereinafter<sup>to be</sup> made to them  
 by the said H. McAuley or his Executors &c on their  
 part Contract and Agree to Build, Finish and  
 Complete in a careful, skilful and workman-  
 like manner to the full and complete satisfac-  
 tion of Messrs Boyington or his Assistant Superinten-  
 dent and by and at the times mentioned in the  
 foregoing Specifications, The Masonry work of a  
 Marble Front dwelling that is to be Erected on  
 Michigan Avenue in connexion with Dickey,  
 King & others as aforesaid so as fully to carry out  
 the design of said work, as it is set forth in the  
 foregoing Specifications, and the plans and draw-  
 ings therein especially referred to. Said specifica-  
 tions, plans and drawings being hereby declared part  
 and parcel of this Contract.



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15  
And the said H. McAuley or his Executors  
Administrators or assigns for and in Consideration  
of the said Carter & Miller furnishing materials and  
fully and faithfully executing the aforesaid work  
so as fully to carry out the design for the same  
as set forth by the Specification and according to  
the true spirit meaning and intent thereof, and  
to the full and complete satisfaction of W<sup>m</sup> H  
Boyington or his Assistant Superintendent as  
aforesaid and at the times mentioned in the fore-  
going Specifications, doth hereby agree to pay the  
said Carter & Miller the sum of Thirty Three Hun-  
dred Dollars \$3300 - in the following Man-  
ner. As the work advances the Superintendent  
is to make out Estimates of the work and ma-  
terial furnished and wrought into the  
Building and upon the presentation of a  
certificate of Eighty Five (85) per cent on said  
Estimates. The said H. McAuley is to pay  
the amount and the balance in full on  
completion of the Contract. Provided the said  
Superintendent shall certify in writing that  
they are entitled thereto. <sup>Witness</sup> Whereof  
the parties have set their hands the day and  
Year first above written.

H. E. McAuley  
Carter & Miller



Work and Materials Required for the Erection  
And Completion of a Stone Front Dwelling  
that H McAdley Esq is about to have Erected  
in the 1 Block on Michigan Avenue between  
Van Buren and Tyler Streets. Adjoining I  
L Clark on the South whose Building is all  
ready Erected; and the Hon H T Dickey on  
the North

Special Reference will be had by the  
Contractor to the following Specifications and  
the accompanying Design as made by W W  
Boymington Architect, and which consists of  
the following drawings viz;

Plan of Foundation and Section

" " Basement

" " First Floor

" " Second "

" " Third "

Fronts Elevation "

Oath of Contractor: He shall be strictly  
held to make such Work and to use such  
Materials as is hereinafter described, and  
to work up the Building to the given design  
And in all cases where the drawings are figured  
the Figures must be taken by him as the  
given dimensions, without reference to what  
the drawing may measure on its scale.



He will be further held to Submit as to the Character of the Materials, used, and the Work done, to the judgment of the Superintendent And to procure from him all necessary interpretations of the Design and all necessary certificates regarding his payments.

Superintendents and their duties: It is hereby declared that the Assistant Architect are declared to be the Superintendents of the Work for the Owner; their duties will consist in giving, on demand such interpretations, either in language, writing or drawing, as in their judgment the Nature of the Work may require, having particular care that any and all work done, and Material used for the work, be such as is hereinafter described; in giving, on demand any certificate that the Conditions may be entitled to, and in settling all deductions of or additions to the Contract price, which may grow out of alterations of the Design, after the same is declared to be Contract, also determining the Amount of damages which may accrue from any cause and to particularly decide upon the fitness of all Material used and Work done.

The Contractor being bound in all cases to remove all improper Work or Materials upon being directed so to do by the Superintendent But the Contractor if after having been



directed as above, to remove the same. Should  
refuse or neglect so to do. Shall not only suffer  
a deduction from the Contract Price of the  
Difference in value of proper and improper  
Work and Material, but shall also be Liable  
for all Damages of whatever Nature or Kind  
that may result from such Cause. The above  
provisions to apply in the same way to all Ma-  
terials or Work used Made or Fixed without  
the Knowledge of the Superintendent.

And it is hereby expressly provided that in  
case the Contractor should feel aggrieved  
by the decision of the Superintendent an  
appeal may be taken from such decision to  
an Arbitration Chosen indifferently, and  
whose decision in the matter shall be final  
and binding on all parties.

The owner reserves  
the right to alter or modify the Design, and  
to add to or diminish from the Contract  
price the difference to be adjusted as provided  
above. The owner being bound in all  
cases to recognize the acts of his Superinten-  
dents, not only as regards Extra Work, but also  
to the sufficiency of the Design the Contractor  
being in no case responsible for any accident  
resulting to the Work from a defective Design  
which fact must be determined by an arbi-



ration of Three disinterested Men, chosen indifferently, and if found that the damage resulted from a want of proper care on the part of Contractor then and in such case the ~~damage~~ ~~resulted~~ ~~from~~ ~~a~~ ~~want~~ ~~of~~ ~~proper~~ ~~care~~ ~~on~~ ~~the~~ ~~part~~ ~~of~~ ~~Contractor~~, then and in such case the ~~damage~~ and ~~costs~~ shall be paid for and made good by him; but if found that the accident or damage results from an improper Design, then and in such case all damage shall be sustained by owner. Which, in all cases must be real and in no case Constructive Damage to be allowed.

All payments made on the work during its progress are on account of the contract, and shall in no case be construed as an acceptance of the work executed, but the Contractor shall be liable to all the conditions of the contract until the work is accepted as finished and completed.

Dimensions of the Building as represented by and figured on the Drawings

Height Basement Story & Cellar to be	11' 1" feet
Principal "	do 13.9 "
Second "	do 12.3 "
Third "	do 10.3 "
Fourth "	do 10. or 10' to roof.

This Building is intended to be first class in every particular and must be finished



throughout as hereinafter described and anything shown by the Drawing and not hereinafter particularly reserved or described, which is necessary to complete the work of the building is to be done at the cost of the Contractor notwithstanding such Mason's omission.

### Grade of 1 Building

Top of First Floor of joint to be fixed to correspond with the Clark House now erected on the block and all other floors the same.

### Excavations

The entire area of the proposed 1 Building as required by Plans to be dug out five feet deep below the natural surface. Excavation for footing of walls to be dug eight inches below the first named Excavation. All other Excavations for drains and cisterns, and for foundation of piers and for vaults of water closets, as required by plans. Also for areas and foundation of <sup>steps</sup> all the excavated earth must be deposited in front and rear in proportion as it may be most needed. Contractor to properly level off the earth about the walls so as to turn the water from the walls and refill the excavations for drains after the same is put in and properly fixed to the direction of the Superintendent.



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## Rubble Stone Work

All wall shaded blue to be of stone of dimensions and heights figured on the Drawings and composed of good Quarry Stone laid in the best manner, with Mortar mixed of proper proportions of best lime and clear coarse sand, the whole to be well bedded and bonded together and well faced on both sides.

Dwarf walls to have stone foundations the same kind as described above and the same to be three feet deep and average sixteen inches thick.

Footings of wall to be composed of large stone and will be 3' 1" and 3' 2" wide the first course or layer must <sup>not</sup> be less than eight inches thick by six feet square surface and must be well settled in the earth with a heavy instrument of broad and laid in a mortar made as above described.

Bearing walls for the support of the front steps and area to put at least three feet below the bottom of area and of sufficient thick new to support the steps or earth that may be put upon or against them <sup>as shown by plans, please refer to</sup> ~~system~~ walls to be built with two good loads of water lime and made water tight on all sides and bottom, and the over head to be plastered with ~~sement~~ <sup>sement</sup>.



39  
concrete, to prevent dampness from affecting  
the servant room above.

Walls of Area of the cellar windows  
Joke of stone for height and thickness see  
Sections and plans. All sand used for mortar  
must be clear beached washed sand for  
Everything about the Building. All proper  
holes <sup>left</sup> for drains and gas pipes as directed  
or shown by Plans

### Cut Stone

For the quality and kind, reference  
will be had to the accompanying bills  
and drawing where the same is plainly  
described and shown and must all be  
properly set, and after the walls are finished  
- ~~red~~ to be properly cleaned off and pointed  
up.

All the cut stone work  
is to be furnished all squared and fitted  
for anchors and delivered on the ground at  
the place of building at the owner's cost.

after the stone are thus delivered, the contractor  
for the masonry is to take charge of the same  
and must become responsible for any dam-  
age that may be done until the building  
is completed and accepted

### Brick Work

All walls shaded red on plans are.



to be of brick of the thickness and size marked on Plan laid in the best manner with solid head and bed joints, and thoroughly slushed solid.

The side walls will be laid in connection with H T Dickey on the North side and will be a party wall.

The south side is that of J L Clark and goes up except the portion that extends beyond said Clark's wall. All necessary holes for joists and other timbers that may be necessary, are to be cut in the Clark wall for all the different floors.

All brick used for facing the outside wall must be hard burned, all soft brick to be rejected from the work. The joints of the rear outside wall be neatly struck.

Fire walls to extend 4 inches above the roof and coped with with tin. Ormen will furnish at the time they are wanted in all cases where the roof is to be of tin and composition; a sufficient amount of 2 x 4 inch scantling to surround the whole roof of buildings, and which must be built in the fire walls by Contractor in such manner as the lower side of the piece will be flush with the top of the roof board.

All chimneys to be built



a. shown by drawings, and where the same  
 pass through the different floors a  
 projection of four inches is to be made on  
 all sides and in no case allow less than  
 six inches of brick work between the timber  
 and smoke flues, all the flues to be smoothly  
 plastered on the inside and have stove  
 pipe thimbles with tin stoppers as directed  
 and finished above the roof at least 12  
 inches above the highest point.

All openings  
 for fire grates to be anchored with bricks  
 and all trimmings for the support of  
 hearths will be turned with brick arches.

Seasoned Lath to be marked  
 in the joints of the brick of the outside  
 walls of the different stories one to each  
 12 courses.

Contractor to execute  
 all the masonry and furnish the materials  
 necessary for setting coal grates and  
 hot air furnaces, wrought iron grating  
 for areas.

### Iron Anchors

For each of the fire and for at least  
 every ten feet of the dead walls to be care-  
 fully worked in the masonry and secured  
 to the timbers of each of the floors and  
 roof.

The stone front will be anchored



80

With Strap Anchors two to each block of Stone Size  $7\frac{1}{2}$  by 1 inch turned at Each block End and fitted to the Stone and well bound in the brick Work Timber Anchors will be all Pin Anchors made to fit: Pin 8 inches long of  $7\frac{1}{8}$  round Iron the Shank to be 20 inches long properly welded around the Pin, and will be fastened to the timber With two Spikes.

Shoy for the Stone Lintel of Fronts to Extra heavy and must be long enough to reach the second joint from the Stone to be Anchored. Straps of  $3\frac{1}{2}$  by  $1\frac{1}{2}$  Iron to be placed on the timbers of all the floor and roof where the same lay upon and meet on division walls, these Straps must be 20 inches long American Iron and have 4 Spikes Each.

### Plastering

Is not to be included. All throughout the building to be of the best quality Plaster of Paris finish and all three coat work Except which will be two coat work. The first coat must well and proportionally mixed with clean sharp lake sand, quick lime and Hair. And the second coat or browning must be evenly laid and floated true to a straight Edge, with



Equal plumb angles and corners, and the last coat thoroughly polished

Finally the whole job to be fully completed in a careful, skilful, and workmanlike manner and every material to be furnished therefor, and anything shown by the plans relating to or is necessary to complete the masonry of the building and not herein before particularly reserved or described is to be done at the cost of the contractor notwithstanding such omission

Time

Owner to give possession of the ground on or before the first day of March AD 1856 Contractor must agree to build the walls and Chimneys ready for the roof on or before the first day of September 1856 And must set the front steps as soon as <sup>the same are furnished, and clean down the front and finish the whole work as soon as</sup> practicable after the above mentioned time

Said work in no case shall be considered as finished unless the same is so reported to the Superintendent and accepted by him

The owner hereby agreeing to have in readiness all necessary timber and carpenter work as they may be wanted so that in no case



the masonry shall be hindered for the want of the same, and will put on each floor of joint on all the Buildings within three days after the walls are made ready to receive the same and in case he should fail to do so then and in such case he hereby agrees to extend the time for finishing. Said work, in a pro rata proportion for such delays and will also pay all damages resulting to the contractor from such cause of delay. Provided the Contractor shall at the time of such delay notify the Superintendent in writing of the extent thereof, and the damages to him arising therefrom, and if required by owner must prove the same.

### Damages

And in order to secure the execution of the work in the manner, and at the times specified it is hereby distinctly declared, that the damages arising from the non fulfillment of the contractor's regards time shall be — a fair Rent of the Premises for each and every day the work remains unfinished and which sum of Damages shall be deducted from the Contract price.



Payments  
To be made on the work as may be here-  
after agreed.

And there ~~upon~~ plaintiff  
comul handed to the within the following  
Certificate or writing:

I hereby certify that  
I have Examined the within bill and  
checked such items as I was satisfied was  
Correct and done under my Supervision  
and crossed out such charges as I con-  
sidered not correct. The Charges for the  
Barry and for the hauling Earth &c I had  
No Supervision over, and cannot certify  
to them.

In accepting this work  
upon the condition of the Contract I must  
deduct the sum of Fifty Dollars  
for Damages to the Front caused by  
not being suitably anchored to the wall  
of L. C. Clark. The anchoring has since  
been done but the blemish still remains.

I hereby certify to so much of the  
Within bill as amounts to \$189.50  
And approve the Contract for the house \$3300.00  
by deducting as afore said the sum of  $\begin{array}{r} 3489.50 \\ 50.00 \\ \hline \$3439.50 \end{array}$

I have drawn Certificates to the  
Amount of Two thousand, Six hundred  $\begin{array}{r} 2600.50 \\ \hline \end{array}$   
on the Contract for house  $\begin{array}{r} 839.50 \\ \hline \end{array}$

Respectfully submitted

Chicago Nov 3<sup>rd</sup> 1889

W. H. Boyington  
Superintendent & Architect



84

Respectfully submitted

W W Boyington

Chicago Nov 3 1839

Superintendent & architect

On the back of which was the following endorsement  
checked and marked as follows.



29

Henry McCauley  
1851  
J. Carter & Miller D.

J. Carter & Miller Dr

✓ 5,40

19. 11

✓ 3.00

19. 57

4/2/18

✓ 32.50

✓ 12.80

✓ 84.78

✓ 5.00

✓ 16.11.11

34.25

178. 244

491.62

11.20, 7/5.31

12.00

9.00

U.S. 52

✓ 1.00

✓ 00.00

27. 36

4281. 49

4281. 49  
Sediment of black earthy sand  
from the bottom of the lake.



The said witness further testified I am acquainted with the hand writing of Wm H Boyington the Signature to this paper referring to the Aforesaid Certificate is in his hand writing

The writing and figures and his signature are in his hand writing. The figures and writing on the back of the paper are not in his hand writing; and thereupon the plaintiffs by their Counsel offered to read said Certificate or writing with the Endorsements aforesaid thereon in evidence to the Jury, to the reading of which in evidence the defendant McAuley by his Counsel then and there objected, but the Court overruled said objection and the same was thereupon read as evidence to the Jury and to the ruling and decision of the Court in overruling said objection the defendant McAuley by his Counsel then and there Excepted. And thereupon the plaintiffs called witnesses who testified that the work was done & materials furnished for the barn under the contract & on the premises alleged in the Amended petition and the following was admitted to be correct so far as the work done on the Barn and the materials furnished by the plaintiffs therefor.

42445 Bricks at \$11.50 per M

10 <sup>93</sup>/<sub>100</sub> cords Stone Rubble @ \$16 per cord

16 feet of Cut Stone 70¢ per foot

137 yard of Excavation at 20¢ per yard

#105.24  
#105.24



Now the Plaintiff rested, and the defendant Henry McAuley called witnesses and offered to prove First That W. H. Boyington on the 25<sup>th</sup> of February 1856 at the request of the defendant McAuley gave notice to the plaintiff of defects in the building of the walls of the dwelling house and that those defects have not been remedied Second That the excavations under the building were not made to the depth required by the Specifications

Third That the ground about the walls was not levelled off so as to turn the water as required by the Specifications

Fourth That the stone of the footing of the walls was not set in the Earth as required by the Specifications and that the Sand used in the Mortar for the walls was not clear beach washed Sand as required by the Specifications

Fifth That the stone front of the building was not anchored as required by the Specifications nor were the iron anchors worked into and secured to the timbers as required by the Specifications

Sixth That the stone front of the building has projected in consequence of the insufficient anchorage as aforesaid and thereby the front is defaced and that the walls in the South East corner of the building in consequence



Here the Plaintiff rested, and the defendant Henry  
 McAuley called witnesses and offered to prove  
 First That W. H. Boyington on the 25<sup>th</sup> of May  
 November A.D. 1851, at the request of the defendant  
 McAuley gave notice to the plaintiff of defects in  
 the building of the walls of the dwelling house  
 And that those defects have not been remedied  
 Second That the Excavations under the  
 building were not made to the depth required  
 by the Specifications  
 Third That the ground about the walls  
 was not levelled off so as to turn the water  
 as required by the Specifications  
 Fourth That the Stone of the Footing of the  
 Walls was not set in the Earth as required  
 by the Specifications and that the Sand  
 used in the Mortar for the Walls was not  
 clear beach washed sand as required by  
 the Specifications  
 Fifth That the Stone Front of the building  
 was not anchored as required by the Specifi-  
 cation nor were the Iron Anchors worked into  
 and secured to the timbers as required by the  
 Specification  
 Sixth That the Stone Front of the Building  
 has projected in consequence of the insufficient  
 Anchorage as aforesaid and thereby the front  
 is defaced and that the Walls in the South  
 East corner of the Building in consequence



thereof has settled and is still settling to the great injury of the rooms inside of the building of Everett. The Extent of the damages sustained by the defendant McAuley in consequence of the above defect.

Eighth That the contract in respect to the house was not performed by the plaintiffs in the following particulars

Seven fire grates were not set. Twelve stove pipe thimbles not put in, one Range not set, No pointing up under window sills around tin where roof joins wall, That a portion of the wall between front and rear part of the house was omitted that the wall above and beyond J L Clark party wall was an eight inch instead of a twelve inch wall thereby requiring a less number of brick And that in respect to the particulars last above named there should be deducted from the amount of the Certificate of Mr W Boyington given in Evidence the sum of One hundred thirty nine dollars & forty four Cents And that the same was overlooked by said Boyington by mistake when he gave said Certificate

But the Court rejected the same in respect to each and all of said items of Evidence the Court ruled and determined that said evidence And



Every item and part thereof was incompetent under the issues made in said cause, <sup>and</sup> that said defendant McAuley was estopped from making said proof and giving said Evidence by the certificate of Mr W Boyington already read in Evidence in said Cause, to which ruling and decision of the Court in rejecting said Evidence and every part thereof the defendant by his Counsel then and there duly Excepted. The defendant McAuley thereupon offered and read in Evidence the following Certificate with the receipt Endorsed thereon

\$ 300- Chicago May 31. 1856  
 Mr H McAuley  
 This is to certify  
 That ~~there is due~~ <sup>is due</sup> to Messrs Foster & Miller the sum of Three Hundred Dollars for Labor and Material furnished upon & Building on Michigan Avenue as per Contract payable at sight at Chicago.  
 Yours respectfully  
 W Boyington  
 Architect & Superintendent

\$ 300 Chicago July 8. 1856  
 Mr H McAuley  
 This is to certify  
 That there is due to Foster & Miller the sum of Three Hundred Dollars for Labor and



90

Materials furnished for your Building on Michigan  
 at sight at Chicago  
 as per Contract payable  
 at sight at Chicago

N<sup>o</sup> 2

Received Aug. 10 1856  
 July 21 1856  
 J. M. Boyington  
 Architect & Superintendent

Respectfully  
 J. M. Boyington  
 Architect & Superintendent

\$400 - Mr. J. M. Boyington  
 Chicago July 21. 1856

This is to certify  
 that there is due to J. M. Boyington & Miller the sum of  
 Four Hundred Dollars for Labor and Materials  
 furnished for your Building on Michigan  
 as per Contract payable at sight at Chicago

N<sup>o</sup> 3

Respectfully  
 J. M. Boyington  
 Architect & Superintendent

\$800. Mr. J. M. Boyington  
 Chicago Aug 11. 1856

This is to certify  
 that there is due to J. M. Boyington & Miller the sum of  
 Eight Hundred Dollars for Labor and  
 Material furnished for your Building  
 on Michigan as per Contract payable  
 at sight at Chicago

N<sup>o</sup> 4

Respectfully  
 J. M. Boyington  
 a + s



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Rec'd Chicago Sept. 27/56 of Henry Mealey  
 Four hundred & Ninety dollars to apply on  
 Ac of building contract  
 Carter & Miller

Chicago Sept. 22. 1856

\$800

M<sup>r</sup> H. Mealey

This is to Certify  
 That there is due to Carter & Miller the sum  
 of Eight Hundred & Ninety Dollars for Labor and Materials  
 furnished for your building on Michigan  
 As per contract at eight at Chicago

Rec'd Oct. 20  
 \$800  
 Henry Mealey

Respectfully  
 J. H. Boyington  
 Architect & Superintendent

No 5

The above being all the Evidence given in  
 the cause the defendant by his Counsel asked  
 the Court to instruct the jury as follows

To Entitle the plaintiffs to recover  
 in this Action for any balance which may  
 be due them for doing work and furnish-  
 ing Materials under the written Contract given  
 in Evidence in this Cause respecting the  
 dwelling house it is Necessary that they should  
 before the commencement of this suit have  
 procured from the Superintendent of said  
 work mentioned in said Contract a certifi-

Refused



36  
 Refused - state of the Amount due them And have  
 given Notice to the defendant that they had  
 procured said Certificate And unless the  
 jury shall believe from the Evidence that the  
 defendant was in some manner notified  
 before the Commencement of this Suit that  
 such Certificate had been procured then their  
 Verdict in this case should not include the  
 claim for work done & materials furnished  
 under said written Contracts

But the Court  
 Refused to give such instruction to which  
 ruling And decision of the Court in refusing  
 to give such instruction the defendant McAuley  
 by his Counsel then and then duly Excepted

And thereupon said Cause upon the  
 Evidence aforesaid was given to the jury, And  
 the Jury returned the following Verdict -

" We the Jury find the issue for the plain-  
 tiff and that the sum of One Thousand  
 Two hundred and Eighty Nine dollars and  
 forty Six Cents remains due to them for work  
 done under the Contract mentioned in the  
 Petition upon the premises therein described

Whereupon the defendant McAuley  
 by his Counsel Entered his Motion for a  
 New Trial of said Cause

The Court overruled  
 said Motion for a new trial to which



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ruling and decision of the Court in overruling  
Said Motion the said defendant McAuley  
by his Counsel then & there duly Excepted

And thereupon the defendant McAuley  
by his Counsel Entered his Motion in arrest  
of judgment but the Court overruled Said  
Motion to which ruling and decision of the  
Court in overruling Said Motion said defen-  
dant by his Counsel then and there duly ex-  
cepted And for as much as the several matters  
aforesaid do not appear of record in said  
Cause the said defendant by his Counsel  
prays that this his bill of Exceptions may be  
signed and sealed And made a part of  
such record pursuant to law in such cases  
Which is done this 24<sup>th</sup> day of March 1859

George Manierre (Seal)  
Judge of 7<sup>th</sup> Judicial Circuit  
Illinois

Afterwards to wit on the 24<sup>th</sup> day of March last  
aforesaid said defendant filed in said Court  
this Certain Appeal & Bond in the words And  
figures following to wit:

Know all men by  
these presents that we Henry McAuley as  
Principal and John D. Denning as  
Surety are held and firmly bound



94  
unto William H Carter and Henry Miller  
in the penal sum of Thirteen Hundred  
and Twenty Nine Dollars (\$1329) lawful  
Money of the United States of America for  
the payment of which sum well and truly  
to be made we do hereby bind ourselves our  
Heirs Executors and ad Ministrators firmly by  
these Presents

Sealed with our Seals and dated  
the Twenty fourth day of March A.D. 1859  
Wherein the said William H Carter and  
Henry Miller at the February Special Term  
of the Circuit Court of Cook County in a  
suit for a Mechanics Lien depending in said  
Court wherein the said William H Carter  
and Henry Miller were Plaintiffs and the  
said Henry McAuley was Defendant rendered  
a Judgment Against the said Henry McAuley  
for the sum of Twelve Hundred Seventy Nine  
Dollars and Forty Six Cents beside Costs of suit  
from which Judgment the said Henry McAuley  
has prayed an Appeal to the Supreme Court  
of the State of Illinois. Now therefore the  
Condition of this obligation is such that if  
the said Henry McAuley shall duly pro-  
secute his said appeal and shall well  
and truly pay the said Judgment to-  
gether with all costs interest and damages



95  
in, case the said Judgment shall be  
affirmed then this obligation to be void  
otherwise to remain in full force and  
Effect

Henry McAuley (Seal)  
J. S. Jennings (Seal)

State of Illinois, }  
COUNTY OF COOK. } S. S.

J. WILLIAM L. CHURCH, Clerk of the Circuit

And now comes the said McAuley by  
Hoag, Miller & Lewis his attorneys and  
says that in the record and proceedings  
aforesaid there is manifest error in  
this, to wit;

The court erred in receiving in ev-  
idence on the trial of said cause the  
certificate purporting to have been  
signed by W. W. Boyington set forth  
on page 83 & 85 of record and overrul-  
ing Defendants objections thereto.

The Court erred in refusing to permit  
the Defendant McAuley to prove on the trial  
of said cause that the said W. W. Boyington



State of Illinois, }  
COUNTY OF COOK. } S. S.

I, WILLIAM L. CHURCH, Clerk of the Circuit  
Court of Cook County, in the State aforesaid, do hereby  
certify the above and foregoing, to be a true, perfect and complete  
copy of the writ, Hearings proceedings Bill of  
Exceptions & appeal bonds  
in a certain cause lately pending in said Court on the  
Common Law side thereof, wherein William Healy  
Henry Miller were Petitioners and  
Henry Miller was defendant

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our  
said Court at Chicago, this twenty first day of April A. D. 1889

W. L. Church  
Clerk.



on the 23<sup>rd</sup> day of November A.D. 1836 at the request of McCutley gave notice to the Plaintiffs below of defects in the building of the wall in the dwelling house and that those defects had not been remedied.

The Court erred in refusing to permit the Defendant McCutley to give evidence to the jury of the particular defects in the performing of the work by the Plaintiffs on the dwelling house and particularly set forth on pages 87 & 88 of the record, and the damages which had resulted to the Defendant therefrom.

The Court erred in refusing to permit the Defendant McCutley to give evidence to the jury that the contract respecting the dwelling house and read in evidence was not performed by the Plaintiffs below in the particulars set forth on page 88 of the abstracts, and that the several omissions there specified were by mistake of said W.W. Boyington overlooked by him when he made the certificate read in evidence in said cause. The Court erred in refusing to give to the jury the instruction asked by the Defendant McCutley and set forth on page 91 of the record.

The Court erred in overruling Defendant's motion for a new trial of said cause.

The Court erred in overruling Defendant's motion for an arrest of judgment. Wherefore said McCutley by his attorneys aforesaid prays that the said judgment may be reversed and held for naught.



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ruling and decision of the Court in overruling  
Said Motion the said defendant McAuley  
by his Counsel then & there duly Excepted

And thereupon the defendant McAuley  
by his Counsel Entered his Motion in arrest  
of judgment but the Court overruled Said  
Motion to which ruling and decision of the  
Court in overruling Said Motion said defen-  
dant by his counsel then and there duly ex-  
cepted and for as much as the several matters  
aforesaid do not appear of record in said  
Cause the said defendant by his Counsel  
prays that this his bill of Exceptions may be  
signed and sealed and made a part of  
such record pursuant to law in such cases  
Which is done this 24<sup>th</sup> day of March 1859

George Manierre (Seal)  
Judge of 7<sup>th</sup> Judicial Circuit  
Illinois

Afterwards to wit on the 24<sup>th</sup> day of March last  
aforesaid said defendant filed in said Court  
his certain Appeal & Bond in the words and  
figures following to wit:

Know all men by  
these presents that we Henry McAuley as  
Principal and John D. Denning as  
Surety are held and firmly bound



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unto William H Carter and Henry Miller  
in the penal sum of Thirteen Hundred  
and Twenty Nine Dollars (\$1329) lawful  
Money of the United States of America for  
the payment of which sum well and truly  
to be made we do hereby bind ourselves our  
Heirs Executors and Administrators firmly by  
these Presents

Sealed with our Seals and dated  
this Twenty fourth day of March AD 1859  
Wherein the said William H Carter and  
Henry Miller at the February Special Term  
of the Circuit Court of Cook County in a  
suit for a Mechanics Lien depending in said  
Court wherein the said William H Carter  
and Henry Miller were Plaintiffs and the  
said Henry McAuley was Defendant rendered  
a Judgment Against the said Henry McAuley  
for the sum of Twelve Hundred Seventy Nine  
Dollars and Forty Six Cents besides Costs of suit  
from which Judgment the said Henry McAuley  
has prayed an Appeal to the Supreme Court  
of the State of Illinois. Now therefore the  
Condition of this obligation is such that if  
the said Henry McAuley shall duly pro-  
secute his said appeal and shall well  
and truly pay the said Judgment to-  
gether with all costs, interest and damages



Hoyme Miller & Lewis  
Atty's for Mc. Auley

Supreme Court

Henry Mc Auley Appellant

vs

William H. Miller & Co.

& Henry Miller Apprs

By J. H. Thompson their Attorney and say  
that is no error in the Record & pro-  
ceedings aforesaid & pray that the Judge  
must may be in all things affirmed  
with Costs

And now comes  
the said Henry Miller  
& William Center

J. H. Thompson  
Atty for Appellees



311-301

Henry McAuley  
27

William H. Barker et al

Transcript &  
Assgt. of errors

Filed April 25, 1859  
L. Leland  
clerk