

No. 13000

Supreme Court of Illinois

Central Military Tract R.R.Co.

vs.

Spurck et al

71641  7

The Central Kentucky Short
Rail Road Company

William Spruill
Geo Houston

Ch. J. Spruill
Court-
3

Assignment of appeal in to record
in opposition to the motion
filed in this case to suppress the
bill of exceptions -

Page 23 of
Record

Judgment was entered in this
case on the 21st of October
A.D. 1857 -

" "

On the same day & upon the
motion of judgment the Dist
Clerk prayed an appeal to
this Court - which was allowed
and an order of the said Court
requiring the bond & bill of
exceptions to be filed in 30 days
from date of entry of judgment

" "

Page 24 of
Record 99

The bill of exceptions was
thereby signed & sealed on the 4th
day of November 1857

On the 17th day of November
1857 the Dist Clerk filed his appeal

Record 23 - Bond -

On the 11th of November last 48
Page of Record 1859 the appellant filed his
24 - bill of exceptions in the Court
below

The Court of order of
Record may extend the time
for settling & filing bill
of exceptions -

13 Ill. 664 -

An order was made
in this case extending the
time 30 days from the 21st of
Oct 1859 -

The bill was signed and
settled on the 4th of November
and filed on the 11th Nov 1859 -
The order was then been
complied with and we
see no cause for granting
the motion -

J M Walker
Atty for Appellant

Chas J H N. Co.

21

Wm. Spruill & Co.

Suggestion of
Council for
appeals against
Motions & Supp
bills of Exceptions

SUPREME COURT
OF THE
STATE OF ILLINOIS,

THE THIRD GRAND DIVISION.

WILLIAM SPURK AND
GEORGE HOUSTON,

APPELLEES,

VS.

THE CENTRAL MILITARY TRACT
RAILROAD COMPANY,

APPELLANT.

POINTS, AUTHORITIES AND ARGUMENT OF THE
APPELLANT.

This suit was brought by the appellees in the Court below, to recover damages for the breach of written contract entered into between the parties on 19th of February, 1853, for the grading by the plaintiffs of two sections, 59 and 60, of defendant's Railroad. For abstract of contract, see *Abstract of Record, Exhibit A, pp. 16 and 17.*

The declaration in Court below contained two special counts in assumpsit upon said contract, and the common counts for work

and labor. In the special counts, the plaintiff, after setting up the contract, alleges part performance of the same and readiness to perform the balance of the contract, and notice of such readiness to the defendants, and alleges for breach of the contract that the defendant refused to have the work estimated monthly, as it progressed, and pay such monthly estimates according to contract; and that defendant refused to allow him to proceed with the work, and hindered, and prevented, and discharged them, the plaintiffs, from the same.

The defendant interposed three separate pleas to the whole declaration.

1st. General issue.

2d. Payment before suit brought.

3d. A special plea stating that all the work was done under a special contract, and setting up the same contract mentioned in the declaration, alleging performance by defendant and breach by plaintiffs, in not performing the amount of work in each month required by contract, and in quitting and abandoning the work before completion.

To the first two pleas, plaintiffs reply by general traverse, and to the 3d plea mentioned by non-assumpsit, concluding to the country. Defendant to each replication added a similiter.

By the bill of exceptions it appears that the plaintiffs offered in evidence the contract of Feb. 19, 1853, under which the work was done, and then called witnesses to prove that they entered upon the performance of the same.

The testimony of the plaintiffs tends to prove that prior to about the 15th Aug. they had executed no more than 21,000 yds. in the aggregate, including somewhere about 7,913 yards of ditches, and earth taken from pits outside the limits of the road and borrowed by them to make the fills required by this contract.

By the terms of the contract, no earth was to be borrowed to make fills or embankments until the earth had all been taken from the cuts and used for that purpose; and by comparing the respective estimates in cubic measure of the cuts and fills, as estimated by the engineer, it will be seen that the difference between the number of cubic yards in the cuts and fills on said section 60 (see *Abstract*, page 9) was no more than 1,510 yards;

which was all that could, by the terms of said contract, be borrowed, and even this amount not until the cuts were exhausted. The evidence on behalf of the plaintiffs tends to show that the engineers of the defendant, or some of them, staked out the borrowing pits for the plaintiffs, and tacitly, if not expressly, assented to this departure from the contract.

The only evidence offered by the plaintiffs of the amount of work done under the contract, was the estimate made by an engineer after the plaintiffs had quit work and the successors of the plaintiffs in the job had commenced work thereon.

The testimony of the def'ts tends to show that all the work done by plaintiffs was regularly estimated monthly, and the estimates were promptly paid according to contract. Also, that owing to the manner in which plaintiffs performed the work done by them, it, in the whole, was not worth more than 10c per yard, assuming the whole job worth 19c.

That they finished none of the work which they commenced, and that it was defective in height and width of embankment and depth and width of excavation, and after doing in this manner about $\frac{1}{3}$ of the work in more than $\frac{2}{3}$ the time, and receiving much more than it was worth in proportion to the average value per yard of the whole job, they then of their own accord abandoned the work, leaving more than two-thirds of the most expensive portion of the work undone, for the completion of which the defendant was compelled to pay about \$5,000 over the contract price.

The only error of the Court below, on which the defendant can rely for the reversal of this iniquitous judgment, is

That the Court erred in overruling and denying the motion for new trial on the grounds stated in the motion, and that the verdict and judgment are against the law and evidence in the cause.

I. It will be seen by the above abstract of the pleadings that the defendant interposed three separate pleas, each to the whole declaration, upon each of which pleas the plaintiffs took issue.

The third plea interposed by the defendant was in effect that all the work and labor alleged in the declaration was done under

a special contract, which is set up in said plea and is the same stated in plaintiffs declaration, and that the defendants have in all respects performed the same and alleging special breaches by the plaintiffs.

To this plea the plaintiffs replied, denying the contract mainly, and concluding to the contrary.

Now this plea was both in form and substance a complete answer to the whole declaration, and as the replication denies but a single part alleged in it, to-wit: The agreement, if it appear by the record that the agreement as therein alleged was proved on the trial, it follows that the defendants were entitled to a verdict in their favor.

Now it appears by the record, see p. 3 of Abstract, that the said agreement as stated and set forth in *hæc verba* in said special plea, was the first piece of evidence introduced by the plaintiffs on the trial. Hence the defendants were entitled to the verdict, and the Court erred in overruling the motion for a new trial.

On the trial the plaintiffs abandoned all claim on account of sec. 59, and the verdict was rendered for damages on sec. 60 alone, to which the enquiry here will be limited. See Abstract, page 14, record page 95.

The record contains no evidence of the abandonment of the written contract by either party, and the verdict and judgment must be sustained upon the special counts of the declaration, if sustained at all.

The only question therefore is whether the evidence set forth in the record is sufficient to support the verdict upon the special counts upon the contract.

Both of these counts allege a partial performance of the contract by the plaintiffs, and readiness to perform in full, and both allege specific breaches by the defendant.

The breach alleged in the first of these counts is that defendant refused to pay the per cent. of each monthly estimate as the work progressed, and that on or about 1st September, 1853, defendants refused to allow plaintiffs to proceed with the work, but hindered, prevented and discharged them.

The breach alleged in the second special count is the same as the first, and also, that although plaintiff had performed 21,000

yards of excavation, and was entitled to have it approved, accepted and estimated by defendants' engineer, yet neither the defendants nor its engineer approved, accepted or estimated said work, but fraudulently refused to do so at the instance of the defendant.

Now both these allegations of performance and readiness to perform by plaintiffs and breach by the defendants, are material and must be proved substantially as stated to entitle the plaintiffs to recover, and unless the record (which contains the whole evidence) furnishes at least some legitimate proof in support of these allegations, the judgment cannot be supported. Now, the only evidence of performance, or readiness to perform, offered by the plaintiffs, consists of the testimony of *N. H. Brewley*, who swears that he measured the work done in sec. 60 by plaintiffs, somewhere between 1st and 20th November, 1853. Measured cuts, ditches and borrowing pits, all excavations of every kind, and found them to amount to 21,550 yards, of these 7973 yards were ditches and borrowing pits; he measured all excavities without allowing anything for gullying; the width of cuts was in some of them 22 and some 25 feet at base, slopes some correct and some not, some of the cuts and banks rough and unfinished, and some of banks above grade; did not measure ditches and pits separately.

Austin Fink who testifies that he pointed out work done by plaintiffs to Brewley to measure. Plaintiffs commenced in March and quit in July, mainly for want of funds. The difficulty was in not getting money for borrowed earth; the borrowed earth was put in at half price.

The borrowing pits were staked out by the engineers. Plaintiffs quit because they could not get larger monthly allowances. I claimed more due. Plaintiffs received over \$2,700 of defendants. The plaintiffs took the earth nearest to the fills to make fills with.

Myron Prince whose testimony is of no importance.

This was all the testimony offered by the plaintiffs on the trial.

Now, the utmost effect of this evidence is to show, that plaintiffs commenced the job in March, and quit without finishing it in July, and that between those dates, the excavations

made by them, according to measurement of the witness, Brewley, made some months after, amounted to over 21,000 yards. It clearly appears that he, Brewley, included in his measurement more excavation than plaintiffs were entitled to have estimated to them under the contract, for he says that the cuts were some 22 feet and some 25 feet wide at the base, while the contract width was 22 feet, and therefore no more than 22 feet could be estimated. Some of the embankments were above grade and would have to be taken down, and the cuts and fills were rough and unfinished, and the pits and cuts had gullied and no allowance was made for this. Now, by the contract and the law applicable to it, the plaintiffs would be entitled to have no work estimated which was unfinished, or if estimated, at all, it ought to be subject to such deduction as would be required to finish it.

This evidence furnishes no means to determine how much work was done by the plaintiffs in each or any month, or how much, if any, was estimated to them in each or any month or in the aggregate, or how much the plaintiffs were entitled to have estimated and paid for.

The whole of the excavations, some three months after plaintiffs left them without deduction for gullying, including unfinished work and excessive width of cuts over contract width, amounted to over 21,000 yards, but this amount was more than plaintiffs were entitled to have estimated, but how much more we have no means to ascertain. For this work he had received, by the testimony of his own witnesses, over \$2700; how much over does not appear.

Now, by the terms of the contract, plaintiffs were bound to excavate as follows on said job: In March, 5,000, April 10,000, May 15,000, June 20,000 and July 20,000 yards, making due on said contract on 1st August, when plaintiffs quit the job, 70,000 yards, about fifty thousand yards more than was done. By the terms of the contract, the defendant was bound to pay 80 per cent. of the monthly estimates of the engineers of defendant, retaining 20 per cent. as security for completion of the work, and both parties were bound to abide the measurement and estimates of the engineer. See contract, pages 16 and 17, abstract. No evidence is offered of the refusal of or neglect of the engineer to make the proper monthly estimates, or of the neglect or refusal

of defendant to pay such estimates. Nor is there anything in this evidence tending to show that plaintiffs had, in fact, entitled themselves to have estimated and paid to them any more than they had recovered. The evidence shows that they had done a part of the job and received a part of the pay, but whether more or less than they were entitled to there is nothing in the record to show.

This testimony, it is insisted, discloses no legal excuse or reason for the plaintiffs failure to perform the labor in the times and in the proportions required by the contract, nor for abandoning it before completion, and instead of showing any breach of the contract by the defendant, clearly convicts the plaintiffs of such breach, both in failing to progress with the work as fast as the contract required and in quitting it before completion. If no evidence had been offered by the defendant the verdict could not be sustained.

On the part of defendants, the testimony of Bergen and Sessions, the subsequent contractors on sec. 60 shows, that none of the work on said section done by plaintiffs was actually finished; that the cuts were over the contract width; (22 feet); that the embankments were above grade, and of improper width, and unfinished; that the plaintiffs had selected the easiest and cheapest work, making such portions of the fills or embankments only as were nearest the cuts and where the haul was shortest, and that consequently the work done by them was worth no more than 10 cents per yard, assuming the whole to be worth on the average 19 cents per yard.

By the testimony of J. M. Green, Jno. M. Berrien and Alexander Knapp, the two latter engineers of said road, it was proved that plaintiffs commenced work in March 1853, and that all the work done by them on said sections was regularly estimated and paid for each month, and that the work so done, estimated, and paid for, was as follows:

March,	4,195			
April,	3,732			
May,	3,513	yards excavation in cuts and	2,349	borrowed earth.
June,	3,128			
July,	1,008	"	"	312
Total,	15,576	excavations in cuts;	2,661	borrowed earth,
	<u>2,661</u>			
	18237			

Making a total of both cuts, ditches, and pits of 18,237 yards. That by original agreement the plaintiffs could borrow no earth until all the cuts were exhausted; that the engineers of defendant consented to the plaintiffs borrowing earth from borrowing pits, upon condition that it should be done at 10 cents per yard, instead of 19 cents, the contract price.

It further appears by the testimony of these engineers, Berrien and Knapp, that the defendant actually paid to the plaintiffs, and to their order, the following sums for said work, to wit:

April 5,	\$637 64
May 3,	367 29
June 7,	721 50
July 6,	495 46
July 6,	194 18
Aug. 4,	178 18

\$2,774 47

While the whole amount of work done by plaintiffs in the same time was 18237 yards, which at the contract price, 19 cents per yard for the whole, would amount to \$3,465.03, 80 per cent. of which only was to be paid as the work progressed, which \$1772.02, but reckoning the 2661 yards borrowed earth at 10 cents the yard, the price at which the plaintiffs agreed to do it, and paying this 10 cents per yard in full, instead of retaining the 20 per cent. the whole sum to which plaintiffs were entitled would be \$229.49 less. Making no deduction on account of borrowed earth, and allowing the plaintiffs 80 per cent. on the whole work done at each estimate, it appears by these estimates that defendant overpaid the plaintiffs between two and three dollars, while if the deduction of 9 cents per yard were made to which defendant was entitled on account of borrowed earth, then the plaintiffs have received over \$240 more than they were entitled to by contract.

It appears by the testimony of these witnesses and the exhibits showing the amount of work done and estimated each month, that plaintiffs utterly failed to perform the amount of work in each month required by contract.

That they fell short the first month, and although they made up the deficient in the next month, they failed in each subsequent

month, and when more than two-thirds of the time had elapsed and more than that proportion of the work was due, the plaintiffs had performed less than one-third of the work, and that third the cheapest part, and although the work done was unfinished and therefore not entitled to be estimated yet the defendants promptly estimated it monthly, and although between 2,000 and 3,000 yards was borrowed under special contract in violation of original agreement and was to be done at 10c per yard, yet the defendant actually paid for the whole at 19c per yard, retaining only the 20 per cent. stipulated in the original contract.

That the failure of the plaintiffs to perform the amount of work in each month required by the contract was without the consent and against the remonstrances of defendants and that some time in July the plaintiffs without the consent of the defendants quit the work wholly and declared their determination to do no more on it.

That the defendants were obliged to and did pay about \$5,000 over the contract price to the parties who completed the job.

Now, from the above statement of the evidence contained in this record, it appears that there is no actual conflict between the testimony of the respective parties, and no appearance of conflict, except upon one point, to wit: the total amount of excavation on section 60 done by plaintiffs.

Upon this point the plaintiffs prove a measurement and estimate made by witness Brewley, an engineer, some two months after they had quit the job. Brewley measured all the excavations found on the section and pointed out to him by Fink, without making any allowance for gullying since work was done, or for unfinished work, or for excess of width of cuts over contract width of 22 feet.

The evidence introduced by the defendant of the monthly measurement and estimates by its engineers of the amount of work done each month and the payments made by it, are entirely uncontradicted, and as to the amount of payments are corroborated by the testimony of the plaintiffs. The aggregate of these monthly estimates made by the defendant's engineers, however, falls short of the whole amount of excavation measured by plaintiffs' witness Brewley, by some 3,200 yards; but this small

difference may easily be accounted for by the the gullying of the pits and cuts after the work was done, by excess in width of cuts over 22 feet, and unfinished work not entitled to be estimated, without impeaching the correctness of the estimates of the engineers of the defendants.

But it is insisted by the defendant that the measurement and estimates of plaintiffs' work by defendant's engineer are (under the contract) conclusive on the plaintiffs, unless impeached for fraud, which is not attempted:

McAray vs. Long et al., 13 Ill. R., 150:

Canal Trustees vs. Lynch, 5 Term, 526.

It is expressly agreed that the work shall be measured and estimated by the engineers of the defendant, and paid for upon such measurement, monthly. Now, unless the engineer refused, upon request to make such estimates, or unless he is shown to be guilty of fraud or misconduct in the performance of this duty, his measurement is the only mode of determining the amount of work done, and such measurement and estimate is conclusive upon both parties.

Now it is insisted that the evidence offered by the plaintiffs of the amount of work done by them, although uncertain and unsatisfactory instead of impeaching the measurement and estimates made by the engineers of defendant, tends strongly to show that those estimates were correct, or at all events that the plaintiffs received all they were entitled to. The difference being only some 3,000 yards in 21,000, and the estimate of plaintiffs' witnesses embracing excess of width of cuts over 22 feet, gullying of pits, cuts and ditches since work done, (some three months,) and unfinished work.

It is further to be remarked that if the defendants' engineers, in making their estimates of the work, made the deduction of 9c per yard on the 2661 yards of borrowed earth, which they were entitled to, they paid over to the plaintiffs enough of the retained per cent. to make this up, as will be seen by computing the price of the whole 18,237 yards, the aggregate of all the estimates, borrowed earth included, at the full contract price, 19c, and deducting 20 per cent.

By this calculation it will appear that the price of the whole amount of labor so measured and estimated at 19c per yard is

\$3,465 13, and that 80 per cent. of this sum, which was the proportion to be paid as the work progressed, amounts to \$2,772. 10—while the sum received by the plaintiffs was \$2,774 47, \$2 37 more than they were entitled to for all the work done by them according to the engineer's measurement, making no deduction for the borrowed earth. It is therefore quite immaterial whether the engineer made any deduction in his estimates for the borrowed earth, or whether the proof justifies him in doing so, as the plaintiffs have in either case received more than they were entitled to by the contract.

Upon a review of the whole of the evidence it is manifest that there is not the slightest proof to support the verdict. That all the evidence, as well that offered by the plaintiffs as that of the defendants, shows clearly that the plaintiffs from the commencement failed entirely to discharge their duty under the contract, and in the small amount of work they did under it carefully prepared to abandon and leave the job unfinished with advantage to themselves.

A portion of the work could be done at half the contract price, to-wit: That part of the cuts which was nearest the fills or embankments, where the haul was short; if they could do this, which was worth no more than half contract price, and get it estimated and paid for at 80 per cent. upon full price, and then abandon the residue, it would be a speculation. This is precisely what the plaintiffs did.

They did about one-third of the work worth about 10c per yard, and left the remaining two-thirds where the haul was long and the work expensive, and which cost the defendant 31c per yard undone, and thus inflicted a loss of near \$5,000 on the defendant.

The plaintiffs stand clearly convicted by all the evidence of performing the easiest and most profitable part of the work, and then deliberately and without excuse abandoning the job.

In no particular has the defendant failed to meet its obligations, nor is there in any part of the record the slightest evidence of such failure, and it seems impossible to account for the verdict against the defendants on any hypothesis consistent with common honesty and common intelligence of the jury which rendered it,

and it is respectfully insisted that it was the obvious duty of the Court below to set it aside as equally against the evidence in the case and repugnant to justice and right.

WALKER, VAN ARMAN & DEXTER,

Counsel for Appellant.

George Houston Tal

~~and~~ } In the Supreme
Central Military tract } Court April
Rail Road Company } Term 1860

Affiant of lawful age being
duly sworn deposes that he was
Counsel for the plaintiffs on the trial
of this cause in the County of Knox
where judgment was had for the plaintiffs
below, and had the entire manage-
ment of this cause. That the Bill
of exceptions filed in the case was
not filed during the term of the
Court at which judgment was
rendered, that he did not consent
to have the Bill of exceptions filed
during vacation, nor would he have
done so if requested - That the
Bill of Exceptions was made out by
defendants Attorney in the absence
of this Counsel, and was never
submitted to him, nor to any Counsel
for the plaintiffs below

That after the Bill of Ex-
ceptions was made out, a copy thereof
was forwarded to affiant, and
affiant examined it, allowed it

by interlineations writing on the margin & returned it to Mr Douglass the counsel for defendants below, but no notice whatever was taken of the alterations & suggestions of this affiant, and this affiant believes they were never submitted to the judge and that he never saw. He further swears that the Bill of Exceptions filed herein is not correct, & does not set forth fairly the evidence in the case & he believes the judge who signed it, must have done so under the impression that it had been submitted to affiant & no objection made to it, wherefore he prays the Court to dismiss this case from the docket

Subscribed & sworn before me

this 25th day of April A.D. 1860

L. Leland Clerk of said Court
by J. W. Rice Deputy

J. W. Rice

205
mm

The Central Tract R.R. Co

vs

George Houston & al

affidavit

Filed April 25, 1880

L. Leland

Clk

Central Military & Rail Road Company, } In the Supreme
vs } Court April
William Spurek & } Term A.D. 1860
George Houston }

The Appellant moves the Court to strike from the files what purports to be a bill of exceptions filed in said Cause, and for the reasons following to-wit:

- 1st Because said Bill of Exceptions does not appear to have been signed and sealed, at the same term, at which said Cause was tried and determined
- 2nd Because there is nothing appearing of records to show that the Judge who signed and sealed said Bill of Exceptions, had any power to do so in vacation.

We therefore ask that said Bill of Exceptions be stricken from the records.

H. M. & J. J. Wood
Attys for Appellants.

Central M. T. Rail Road
Company -
vs Appeal from King
William Spence Rebel

No 205-

Motion & reasons

Filed Apr. 18. 1860
L. L. Linn
Clerk

Amended

The Central Military
Track Rail Road Company } In the Supreme
vs } Court To The
William Spurock } April Term 1860.
George Houston. }

Suggestions by Atty for Defendant
in support of motion to strike from
the files the Bill of Exceptions.

The Bill of Exceptions in
this case was signed and sealed
on the 4th day of November, A.D. 1859.
The Term of the Court at which the
case was tried, commenced on the
4th Monday of September A.D. 1859, and
commenced its session in Warren
County, in said Circuit on the
4th Monday of October 1859 - and
could not, therefore, at the time
the Bill of Exceptions, was signed
and sealed, have been in session
in Knox County - And this Court
will take judicial notice of
the time of holding the several
Circuit Courts in this State - and
that the time of holding the Circuit
Court in Knox County, expired on
Saturday before the 4th Monday in October,

The signing and sealing of a Bill of Exceptions is a Ministerial act and cannot be exercised in vacation unless consent be given or an order for that purpose be entered. And it seems to us that the true construction of our practice act does not contemplate the signing of a Bill of Exceptions at a time other than at the Term when the Cause is tried and determined. Such was not the practice at Common Law, and the Statute of Westminster 2. 13. Edward II. Ch. 32, of which ours is substantially similar did not authorize the judges, to sign and seal the Bill of Exceptions out of the Term. - In support of the view we take we ask your attention to 1 Bac Abr. Little Bill of Exceptions. 2 Harr (H.L.) R. 183.

Shepherd vs White. 3 Cowen 32, . If however, it should be deemed that our Statute authorizes a judge to sign a Bill of Exceptions in vacation, it seems to us that the Plaintiff should be required to give notice ^{to the defendant or appellee} of the time and place

When and where, the same will be
made up and settled, ~~In this~~
Such was the doctrine laid down
in the cases of

Shepherd vs White 3rd Brown 32

In this case neither of the Defen-
dants Attorneys had any notice of
the time and place of settling
said Bill of Exceptions: nor were
the same ever submitted to them
We therefore insist for these obvious
and sufficient reasons that
the Bill of Exceptions in this case
be stricken from the record.

N. M. & J. D. Mead

Attys for Appeller

Central N. T. R. Co

no. 205

William Spunkelab

Sequestered by
Defendant on mo-
tion to strike Bill of
Exceptions from the file.

Filed April 13. 1860

L. Leland
Clerk

STATE OF ILLINOIS, }
SUPREME COURT, } THIRD GRAND DIVISION, APRIL TERM, A. D. 1860.

CENTRAL MILITARY TRACT RAILROAD COMPANY, vs. WILLIAM
SPURCK AND GEORGE HOUSTON.

Appeal from Knox Circuit Court.

ARGUMENT FOR APPELLEE.

I. It is objected now for the *first* time, that the plaintiff's replication to defendants' *third* plea was insufficient. The plea of set-off is in the nature of a cross-action, and, like the plaintiff's declaration, contains a statement of the defendants' cause of action. The plaintiff denied the making of the contract upon which the defendants' right to recover was based. The replication was a complete answer to the plea; and a general denial of the facts upon which the plaintiff was sought to be charged was sufficient.

1 Chitty's Pleadings, 579.

But if the replication were insufficient, we find nothing in the record to show that this was made the ground for a new trial. If that be true, then it is too late to urge the objection here.

II. It is insisted that there is no evidence to support the declaration; that there was no violation of the contract by the defendant; that the plaintiffs had been paid for all the work done by them under the contract proven in this case. We may safely say that the evidence does not sustain either of these assumptions. The principal question in the court below was as to the earth taken from the borrowing-pits. It is proven that the proper quantity of *borrowed earth* was not allowed by the defendants. BRALEY (*not* Brawly, as in the abstract,) testified that he obtained his marks and figures for measuring from Hurd, and that their two measurements agreed; but in the estimates the plaintiffs were only allowed for *one-half* of the borrowed earth, less *twenty per cent*. The contract makes no distinction between earth borrowed, and that taken from the cuts. The contract says "that in all cases where borrowed earth is required, the regular cut shall first be taken out, *unless otherwise directed by the engineer*" (see last page of abstract); but the contract nowhere provides that the plaintiff shall only be allowed *half* the contract price for the borrowed earth so taken under the direction of the chief engineer. Frink testifies "that he never knew borrowed earth to be taken, only when it was staked off and directed by I. M. Berrien, who was the chief engineer; that plaintiffs never went out of cuts to borrow earth but when directed, and never for their own accommodation, and only when staked off by the engineer." (See Frink's testimony, page 4 of abstract.) The measurement of Braley establishes the

amount of *borrowed* earth for which the plaintiffs were entitled to receive pay. He makes the amount of borrowed earth at 7,973 cubic yards, which at the contract price (19 cents per cubic yard) gives us \$1,514.87: deducting the 30 per cent. paid, \$454.46, and we have the amount the plaintiffs should have recovered at \$1,060.41. But it may be insisted that the plaintiffs, on account of their abandonment of the work, *forfeited* their right to demand the *twenty per cent.* that had been retained. The answer to that objection must be that the defendants were acting fraudulently, and refused to make the estimates to which the plaintiffs were entitled. The refusal of the defendants to make the estimates to which the plaintiffs were entitled was a palpable violation of the contract by the defendants, and a fraud upon the rights of the plaintiffs; and it was for this refusal of the defendants to make and allow the estimates to which the plaintiffs were entitled under the contract, that they were *forced* to abandon the works. (See pages 4 and 5 of abstract.)

We think we may safely assume, then, that the following propositions are fairly deducible from the evidence:

1st. That in all cases where the plaintiffs used borrowed earth, *under the direction of the chief engineer*, they were to be paid for it at the same rate they were allowed by the contract for excavation.

2d. That all the borrowed earth taken and used by the plaintiffs, was taken under the express direction and at the instance of the chief engineer, or his assistants.

3d. That for the borrowed earth so taken, the plaintiffs were allowed only *one-half* of the contract price, and that from *that* amount the defendant retained *twenty per cent.*, making the sum actually paid only *thirty per cent.* of the whole amount.

4th. If the foregoing propositions be true, then it follows that the verdict of the jury was not too much, but rather that it was not enough.

III. It is said the estimates made by the chief engineer of the railroad company are conclusive against the plaintiffs, unless impeached for fraud. That is true, as an *isolated* proposition, but taken in connection with the evidence it is an unwarrantable assumption. The evidence is,—that no estimates were ever made by the chief engineer at all: that they were all made by Hurd and *reported* to him. Under the contract Hurd had no right to make the estimates, they were to be made by the chief engineer.

IV. It is assigned for error that the Circuit Court over-ruled the defendants' motion for a new trial. The reasons upon which said motion is based are, 1st, that verdict is against the instructions; 2d, the evidence is not sufficient to sustain the verdict; 3d, the verdict is against the law and evidence, and 4th, that the evi-

dence does not sustain the declaration. The instructions were all based upon an *assumed* state of facts, which the jury found to be *untrue*; and if the instructions were *not* adapted to the facts of the case, then they were improperly given, and the jury had a right to disregard them and decide the case upon the facts, with a proper regard for the rights of the parties. That the evidence fully supports the verdict we have clearly shown in our examination of the facts from which the jury arrived at their conclusions. This court will not reverse the judgment for refusal to grant a new trial, unless it should appear that the verdict is clearly against the weight of evidence.. We insist that there is nothing in the record to induce a belief that injustice has been done, and if it should seem that the rights of the parties have been properly regarded, the judgment will not be reversed.

Smith vs. Shultz, 1 Scam. R., 491.
 Gillett vs. Sweat, 1 Gilh. R., 475.
 Newkirk vs. Cone, 18 Ill. R., 454.
 Dishon vs. Shaw, 19 Ill. R., 59.
 French vs. Lowry, 19 Ill., 158.

We wish, in conclusion, to call your attention to the fact that the abstract is in no sense a fair or just presentation of the facts appearing in the record. For instance: Frink testifies that the original plan of the railroad was changed, and a bridge or trestle-work several hundred feet long was built, instead of an embankment, and that this of itself made the whole work of *grading* far more expensive. There are other material facts in the record which do not appear in the abstract, but we do not deem it necessary to call your attention to them.

We have looked in vain for any reason for reversing the judgment, and therefore insist that it should be affirmed.

H. M. WEAD & JOHN J. WEED,
Attorneys for Appellee.

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William Spurek
at the suit of
The Illinois Central
Rail Road Company

Argument

Filed May 12, 1880
L. Leland
Clerk

Page of abstract. (1)

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SUPREME COURT,

THIRD GRAND DIVISION.

WILLIAM SPURK AND
GEORGE HOUSTON
28.
CENTRAL MILITARY TRACT
RAILROAD COMPANY.

ABSTRACT OF RECORD OF COURT BELOW AND BILL OF EXCEPTIONS.

Record
page 1.

Declaration in assumpsit.

- 2 First count on special contract entered into between Plaintiffs and
2 Defendants, on 19th of February, 1853, in which plaintiffs agreed to do all
the grading, to prepare the road of defendants, for superstructure on secs.
59 and 60. (Abstract of contract hereunto attached marked Exhibit A.)
5 Count alleges, that plaintiff entered upon the performance of said contract,
procured the necessary labor and materials and commenced the work and
performed a part of it, to wit, removed 21458 yards of excavation on sec.
5 60, to the acceptance of the agent of defendant, and have always been
ready and willing to complete the whole of said work of which defend-
ants had notice, yet the said defendants did not nor would perform said
agreement, but neglected and refused to pay said plaintiffs 80 per ct. of
each monthly estimate as the work progressed; and on or about the first
of September, 1853, refused to allow the plaintiffs to proceed and finish
the said work, but hindered, prevented and discharged them from the
same. Whereby plaintiffs have been deprived of the profits they would
have made.
- 7 The said declaration contains the common counts for work and labor,
8 and another special count on the same contract, and is the same in form as
the first count, except it alleges that it was agreed in and by said con-
tract that if the said sections were not ready for working by the first of
March, a time should be allowed for completing the work, beyond the
10 time above specified equal to the time from the first of March till such

(27)

10 time as the ground is ready for work, and it was also therein provided,
11 that if the work should not be carried on as fast as above specified,
defendant might enter and take possession of said work and re-let the
same as they might think fit, and in that case plaintiffs should make no
claim for the retained percentage, but that the same should be absolutely
forfeited.

12 The breach alleged in this count is, that although the plaintiffs per-
formed part of the work, to wit, 21,000 yards of excavation, and was en-
titled to have it approved and estimated by defendant's engineer, yet
defendant did not, nor did its agent or engineer, approve, accept or esti-
mate said work, but fraudulently refused to do so at the instance of the
defendant.

Defendant also refused to pay said 80 per cent. of monthly estimates,
and on or about the 1st of April, 1853, discharged plaintiffs from said
job and refused to pay them the contract price for work done by them.
To plaintiffs, damage \$10,000. Account appended.

13	Excavation of 13671 yards earth on sec. 60, in spring and summer of 1853, at 19c pr. yd.	3,000
	Making ditches and excavating earth on 3d sec., 7987 yds, 19c pr. yd.	1527.50

25 Defendant pleads.

First general issue.

Second payment before suit brought.

26 Third, a special plea to the whole declaration, alleging and setting
up the agreement stated in declaration, that the work and labor alleged
in the declaration was done under said agreement. That the plaintiffs
entered on the performance of it. That defendant was at all times ready
to perform, and did perform all his part of said agreement, yet plaintiffs
have broken and violated the same. They did not remove the number
of cubic yards of earth they were bound by said contract to do in each
month, although the ground was ready for working on the 1st of March,
and that on the 3d day of August, 1853, the plaintiffs stopped and aban-
doned the work, and afterwards, on the 6th day of the same month, the
defendant re-let the work as they had a right to do, and that the defend-
ant, in order to secure the completion of the work on sec. 60, was com-
pelled to and did pay and advance \$5000 more than the contract price
for which plaintiffs were bound to do it, and thereby has been indemni-
fied to said sum of \$5000, which he will set off against plaintiffs damages.
27 Defendant adds account as follows:

(37)

Cash paid,	\$2598.47
“ “	1100
Damages for breach of contract,	4469.50

28 To first special plea and common counts defendants reply by general traverse.

33 For replication to second special plea, the plaintiffs say, *precludi non*,
22 because they say they did not undertake and promise as therein alleged
and put themselves upon the country, &c. Issue being thus joined,
cause was continued from time to time to the September Term, 1859,
when on the 29th of September, said cause was tried before a jury, and
verdict rendered for the said plaintiffs against said defendant for the sum
of 939.16 cents damages.

23 Whereupon the defendant entered motion in arrest of judgment and
for a new trial, which motions were then and there both overruled to
the decision of the Court overruling said motions, the defendant then
and there excepted. Judgment was then rendered upon the said verdict.
The defendant prayed an appeal to the Supreme Court, which was
allowed, upon his entering into bonds in \$2000.

26 Afterwards, on 17th November, defendant filed bond. On 11th of
25 November, defendant filed bill of exceptions, containing the following
matters.

38 On the trial of said cause, the plaintiffs introduced in evidence the
contract marked Exhibit A. Plaintiffs then introduced one N. H. Brew-
ley, who testified.

I am an engineer. Measured work done by plaintiffs on sec. 60 of
defendant's road; measured it between 1st and 20th November, 1853.
Measured all the work done on sec. cuts, ditches and borrowing pits, and
made statement (shown witness) of amount, it was 21550 yards.

39 No. of yards in ditches and borrowing pits 7973; cuts and excava-
tions 13577 yards.

This measurement was made after Bergen & Sessions (plaintiffs
successors in the job) commenced work, a few days. Spurr showed me
what they had done, and I did not include it in my measurment.

40 On cross-examination says: I measured only excavation. I meas-
ured all excavation finished or unfinished. Made no allowance for gully-
ing. Width of cut 22 feet, including ditches; slope one and a half to
one; some cuts 22 feet at base and some 25 feet; slope some of it $1\frac{1}{2}$ to
1, and some not. Can't tell how much 22 feet and how much 25 feet.

(14)

41 Can't tell amount of estimate for borrowing pits and ditches separately. Think one-third amount was ditches and borrowing.

42 Some grubbing had been done and some timber furnished for culverts; can't say how much of either.

Ditches are invariably required to preserve embankments from surface water.

Austin Fink.

42 I was clerk of plaintiffs a part of the time while they worked on the job; part of the time I was superintendent; was there all the time but four or five days at commencement and two weeks in July. I was not there when they commenced in March, and quit in August or 1st of July. They quit for want of funds. Erastus Hurd was engineer in charge of work.

A notice was given to constable to serve on company. Can't tell as it was served.

42 The difficulty was in not getting money for borrowed earth. Borrowed earth was put in at $\frac{1}{2}$ contract price, and then 20 per cent deducted. I never knew borrowed earth to be taken but it was staked off and directed by J. M. Berrien, who was chief engineer.

Borrowing pits were staked off by the engineer. Hurd and Knapp, engineers, were there most of the time.

43 Never went out of cuts to borrow earth but when directed, and never for their own accommodation, and only when staked off by the engineer. Hurd and Knapp were there most of the time.

I was there when Brewly measured, and showed him what to measure. There was one culvert; can't tell whether he measured it or not. Can't tell how much timber in the culvert. There was grubbing from 8th to 4th of a mile through a grove. Some large oak timber cut down and stumps dug out.

The notice spoken of was in July. On sec. 60, Plaintiffs expended \$4,380.

Plaintiff quit because he could not get larger monthly allowances.

43 Plaintiff received from defendant over \$2,700 on sec. 60. They commenced work in March, and worked April, May, June and a part of July. I claimed more due.

(57)

On Cross-Examination.

- 43 One borrowing pit north side, near the centre of fill; dirt hauled in-
to fill; can't tell how large or deep it was; can't say who asked to have
44 pits staked out. I don't know plaintiffs quit work 1st of July, 1853.
Can't tell size of culvert on sec; wooden bents from bottom, and planked
and covered with earth. Sec. 60 was one mile long; N. end of sec. run
through a cut N. of timber, $\frac{2}{3}$ of sec. was S. of Walnut Creek; only one
cut S. of creek. Plaintiffs commenced and took out earth from the cut
nearest to the fill. Culvert was N. of grove. The borrowing pits were
44 staked off before I came there. I found the men at work in pits, and
asked the reason, and was told the cut was too wet to work in. Did not
hear engineers direct men to work in pits. The earth was not all taken
out of cut when plaintiffs left.

Myron Prince.

- 45 I kept boarding house on the work; I was there from March to Oc-
tober. Plaintiffs had trouble with their men; they did not pay them,
and men stopped work, and then commenced again, and then plaintiffs
quit and took men in sec. 59; don't know why plaintiffs quit in sec. 60.
Hurd, engineer, said if plaintiffs didn't keep less liquor he would take
work away from them, and defendants took liquor away and paid men
10c extra; 80 rods through timber on sec. 60; heavy timber, oak, walnut,
&c. Some of it was cut and grubbed; not all. Can't say what it was
45 worth. Cut 100 feet wide; not grubbed so wide; no culvert on sec. 60;
one on 59; two borrowing pits. In April weather was wet and could
not work in cuts, and Fink went and got Knapp to lay off borrowing pits.
This is what I understood.

Plaintiff rested.

Defendant called I. S. Chambers.

- 46 I knew Silas Willard, now dead. I was in business with him in
1854, and for him in 1853. He paid plaintiffs and their men. Willard
got money, and on an order from plaintiffs he paid the men.

George I. Bergen.

- 46 I knew section 60 of defendants' R. R., and was in company with
F. P. Sessions in doing labor on that section. Commenced in August,
1853, and finished the section in one year. The first we did was to get
ready to work. The fill put in by plaintiffs was above grade. Plain-

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46 tiffs had worked both sides of the creek. Excavation by plaintiffs was that part nearest the fill. They had carried out embankment 150 to 200 feet, and some of it too wide and some too narrow, some right width, but rough, and too high. Dirt from pits was put in the fill; pit was 100 feet from the mouth of fill. Cut taken out by them was not regular—some too wide and some too narrow, and rough. Requisite width of cut at base, 22 feet. It was near a mile from N. end of fill at creek to S. end of section. That work N. of creek was short haul, and the balance of dirt was to be wasted. The work done by plaintiffs was the cheapest part of work on section; this work was better at 10 c. per yard than whole work at 19 c. If the whole worth 19 c., this was not worth more than 10 c.

None of work done by plaintiffs was finished up—it was dug out and left rough.

47 We made ditches in the cuts plaintiffs excavated. The ditch N. of road was necessary, 50–100 feet long; it was just through a bank, and could be done for 10 c. per yard. The ditch S. of road was not necessary; it was the lower side, and water would run away. [Looks at papers shown.] These are estimates of work done by Bergen & Sessions on said section in completing work. We received the money mentioned in these papers and executed receipts. We were the lowest bidders, and the work was done as cheap as it could be. Bergen & Sessions' contract was made in August.

Cross-Examined.

The extreme haul was from S. end of section to creek. The plaintiffs did not take out most of the stumps.

48 *F. P. Sessions.*

I was one of the firm of Bergen & Sessions, who finished section 60, and was on the work most of the time prosecuting the work; no culvert on this section. Depot grounds were on section N. or E. of section 60. Extreme haul on section 60 near a mile from S. end of section to creek. Plaintiffs, in work they did, had the shortest haul on the work, and excavated in that part of cut nearest to fill; the longest haul they had may have been 400 feet, not more. From where the plaintiffs commenced to excavate, S. of creek, the cut extended S. to extreme S. end of section; on S. of creek the fill extended S. to where grade line struck bank, 300 to 400 feet S. of creek, and from there S. to end of section was heavy cut all the way, and all the cut had to be hauled North to make the fill at creek. The average depth of cut was 10 or 11 feet. At some

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places plaintiffs excavated 24 to 25 feet wide at base of cut. One of plaintiff's borrowing pits was near where grade line struck the bank, and about 400 feet S. of creek.

The fill N. of creek was too high, above grade 200 to 250 feet; it was worth 20 to \$25 to reduce it.

49 The extreme haul N. of creek was 400 feet. The excavation done
by plaintiffs N. of creek was that nearest the fill, and therefore shortest
haul. The cut N. of creek, after 50 feet, was 3 to 4 feet, and from that
49 to 5 or 6 feet, where plaintiffs quit. We did 100 feet more grubbing
than plaintiffs did. If it was worth 19 c. per yard to do the whole work,
then the work done by plaintiffs is not worth half that sum. The haul
is what makes work expensive, and their haul was the shortest on the
50 work. Bergen & Sessions got for some of the long haul, 31 c. When I
took the job, Hurd said I should have back per centage, which he said
was \$700—\$900; he said he allowed plaintiff half contract price for
borrowed earth. We were allowed 3000 yards for borrowed earth.

J. M. Green.

50 I am a practical engineer. Know Knapp is a good engineer. An
engineer who is a stranger to the work could not come on work after it
50 was done and estimate it with any certainty, owing to elevations and
depressions in the surface of bank excavated.

50 The stakes only show the distance from grade line in the center of
the creek to top of the bank immediately over. Such center and the
slope stakes show where the slope commences on the top of the bank.
These stakes gave no evidence of the elevations and depressions between
slope stakes and such center. Under these circumstances, no man could
50 say his estimate was correct. All that can be done is to calculate the
top of the excavations by straight lines from the foot of slope stakes on
each side to top of bank, as shown by cross section stakes.

51 A man who was on the work, and observed and calculated the ele-
vations and depressions on the surface before the earth was removed,
could estimate the amount correctly.

Defendant then read estimates made by engineer of said R. R. Co.,
to Bergen & Session, on section 60, at different times during the progress
of work, amounting in the aggregate to

59 Also, estimates made at different times by the engineer of said Co.,
and duly receipted by defendants, amounting in the aggregate to

69 Defendant then read in evidence the deposition of Jno. M. Berrien, as follows:

Ans. to 1st Int. I was chief engineer of defendant R. R. in 1853.

74 2d. I knew William Spurk while employed on said road in said year, but not George Houston.

74 3d. I was in charge of sections 59 and 60 of said road, in said year.

75 4th. The work on 59 and 60 was commenced by George Houston & Co., to whom contract was let. Firm was composed of George Houston, Oliver Houston, William Spurk and J. P. O'Hara. George Houston did not appear on work, as witness ever saw. William Spurk, a partner in the concern, did help to commence work grading. Section 60 was commenced in March, 1853, and 59 about same time. Names of partners were given to defendants by Oliver Houston; he made bid and signed contract for Co.

5th. The sections were ready for working about the 1st of March, and plaintiffs were not delayed on that account.

6th. Estimates were made to George Houston & Co. of work on said section, as follows:

March, 1853.	000 yards for section 59, and 4,195 yards for section 60.
April, "	9,520 " " " 3,732 " " "
May, "	5,212 includ'g 2,080 yds. borro'd 5,862 including 2,349 yds. borrowed.
June, "	4,106 " " 3,128 "
July, "	4,208 including 297 borrowed, 1,008 including 312 borro'd
August, "	3,623
Sept., "	4,390 including 1,050 borrowed.
October, "	2,948 including 2,074 borrowed.
Nov., "	1,734 including 1,478 borrowed.

78 December 31, a final estimate given for work on section 59, for 37,911 yards of excavation, including previous estimates; this was total of section 59.

7th. The work was estimated monthly as work progressed.

8th. Plaintiffs did not excavate 5,000 yards 1st month; did excavate more than 10,000 2d month; not 15,000 3d month, nor 20,000 4th month; nor the number required by contract.

9

Delay of work was not approved by defendant, but against his remonstrances.

9th. No. of yards in cut on section 59 was 26,455, and in cuts section 60, 51,212' exclusive of depot grounds at Altona.

79 10th. No. of yards in fills in sec. 59, 34,288; opening in bridge deducted; No. of fills in section 60, 52,722, deducting bridge over Walnut creek.

11th. Erastus Hurd was engineer on said work, and was assisted by Alexander Knapp, and Byrg, Carr, Rodman, all under direction of witness.

12th. Witness supervised and examined the estimates made by them, and believes them correct.

13th. Witness did not permit plaintiffs to borrow earth to greater extent than amount of filling exceeded excavations, in regular cuts, "through cuts," nor authorise engineers to give such permission.

14th. Witness did not permit plaintiffs to waste earth from regular cuts, and then borrow at expense of defendants nor allow engineers to do so.

15th. No earth wasted on regular cuts, to witness' knowledge, and none borrowed to replace earth wasted.

16th. Work on section 59 was continued from commencement until completion, 1st Dec., 1853, and section 60 plaintiffs did but small amount of work in July, '53, and in this month stopped entirely.

17th. Plaintiffs did all, or nearly all, work on section 59 by sub-contract. Silas Willard and Alex. Johnson and Curtis W. Capps were sub-contractors, may be others. Can't give date of letting.

On 5th Aug., 1853, plaintiffs assigned all money due, or to come due, to Silas Willard, and did not do any more work.

18th. There was paid to Plaintiffs in person, or to others on their written order, as follows:

(10)

80

ON SEC. 59.

	May 3d.	\$1,856.40	less 20 pr. ct., is	1,485.12	paid them.
	June 7.	818.74	" " "	654.99	"
	July 6.	800.69	" " "	640.54	"
81	July 6.	223.46	of retained percentage,	224.46	"
	Aug. 3.	792.35	less 20 pr. ct.	633.88	"
	Sept. 7.	706.48	" "	565.18	"
	Oct. 8.	512.45	no percentage retained,	512.45	"
	Nov. 8.	574.86	less 20 per cent.	459.84	"
	Dec. 8.	574.86	" "	270.50	"
	Including balance of retained percentage,			1,945.13	"
81	Total on 59,			7,392.64	"

ON SEC. 60.

1853.					
	April 5.	797.05	less 20 per cent, is	637.64	"
	May 3.	708.08	" " "	567.29	"
	June 7.	902.37	" " "	721.50	"
	July 6.	593.32	" " "	495.46	"
	July 6.	194.00	retained percentage,	194.18	"
	Aug. 3.	222.72	less 20 per cent.,	178.18	"
	Total paid on Sec. 60,			2,774.47	
	Whole amount paid on contract for grading secs.				
	59 and 60 is				\$10,167.11

Original receipts annexed and marked Exhibits H, I, K, L, M, N, O, P, Q, R, S, T and U, and order to pay Willard marked V. Signatures are genuine.

81 19th. Plaintiffs did not do the quantity of work required in contract in first month, but did enough more to make good difference in second month. After that, failed each month, and in July stopped entirely, on section 60, and defendant took possession, re-let to Bergen & Sessions 6th

82 August, who completed it. Section 59 had been let by plaintiffs to Willard. 20th. 22 feet was the extreme width of cuts. 21st. Pl'ffs did not borrow earth on either section to replace earth wasted from regular cuts, but did borrow earth to make fills before making regular cuts. Had no right to do so—could only borrow when earth from cuts exhausted.

83 Engineer might give leave to borrow earth before cuts exhausted—this power was not given; but engineer did permit them to do it, on condition that borrowed earth should be estimated half price. This was at request and for benefit of plaintiffs. The work could be more conve-

(11)

niently and cheaply done by borrowing. The condition was necessary to guard defendants against loss and the abandonment of work. Borrowed earth was not worth more than half. Balance of borrowed earth (what was necessary to make fills over cuts) was to be paid for when job done.

84 Borrowed earth was sometimes included in estimates at full price; this was regarded, and was an advance to which plaintiffs were not entitled, and was made with the understanding that the whole cost should not be increased.

84 The work done by plaintiffs on section 60 was the cheapest on section, on account of short haul; portion unfinished was worth much more; earth had to be hauled further, and in letting balance of section it had to be done at increased prices, and cost defendant \$2396.63 more than plaintiffs' contract prices, which was in consequence of plaintiffs' failure to complete contract.

That although plaintiffs were by contract to commence 1st March and finish job 1st Oct., seven months, that 1st August (five months) they had only done one-third the work. For this reason and because they then stopped work entirely, defendant re-let job.

22d. The plaintiffs were promptly paid monthly on their estimates as work progressed.

Answers to Cross-Interrogatories.

1. Witness did not measure work himself; it was measured by Hurd & Knapp and certified to witness, and examined and estimated by him in his office, and he believes correctly.
- 85 2. Witness don't know that Hurd changed Knapp's estimate. It was Knapp's duty to measure, and Hurd's to estimate.
- 86 3. The estimates of amount of work were made in witness' office from original field books and survey of the located line and grades established by witness. Witness had assistants in making them, and is satisfied of their correctness. The monthly estimates were compared with original estimates in office, which had been made before for each defendant; this enabled us to verify the measurements.
4. Knapp was employed by witness, not by Hurd; he was a leveller, and was under Hurd's direction.
5. Refused to answer to third cross-interrogatory.

(12)

87 6. Don't know of Knapp giving any instructions about borrowing earth or how or where the work should progress. Hurd gave such directions as he received from witness, which allowed no departure from contract in regard to borrowing earth, except upon condition as to pay above mentioned.

7. Witness generally gave instructions to contractors through resident engineer. Sometimes gave them himself.

8. Refers to answer to eighteenth direct interrogatory, as to payments to plaintiffs.

All payments were made to plaintiffs or on their written orders.

Payments on section 59 were made to Welland; was not notified not to pay him.

88 9. Plaintiffs were allowed and paid for 11,456 yards of borrowed earth on section 59, at full contract price. On section 60 they were allowed for 2,661 yards, at 10 cents per yard. Plaintiffs did claim that they were not paid enough for their work, but cannot say if they quit for that reason.

(Signed)

J. M. BERRIEN.

Defendant then read to Jury deposition of Alexander Knapp, as follows:

I know William Spurr, not George Houston. I was engaged in 1853 as assistant division engineer for defendant on said railroad. I worked under Erastus Hurd, division engineer.

89 Sections 59 and 60 were in Knox county. Section 59 mostly east of Altona, and 60 commences at Altona and runs southwest in Knox county. These sections were under Hurd, subject to Berrien. I think plaintiffs commenced work on sections as soon as 1st March, and I am quite sure they did some work the last of February. Think I am competent to stake out and measure work. I staked out work and made estimates of cuts and fills on the work, before work commenced.

89 The actual amount of excavation in cuts on section 60 was 51,212 cubic yards; total amount of fill on same, exclusive of bridge opening, 52,000. On section 59, excavation, 26,245; fills, exclusive of bridge opening, 34,000. The plaintiff excavated in March, 1853, on section 60, 4,195; April, 3,732; May, 3,513. In May they took borrowed earth, 2,346 yards. June estimate, 3,128, cut excavation. July 1,008 yards, borrowed earth included 312 yards. No work done on this section 60 after July, and plaintiffs quit before the 5th August. Borrowed earth is taken from side of road, and not from regular cut.

(13)

89 Borrowed earth was to be put in for one-half contract price, as I understood from Hurd.

I assisted in measuring the work of plaintiffs; Hurd and I did it together. I measured with tape line and he kept figures; then we returned to office and figured up estimate. The foregoing estimate covers all work done by plaintiffs on section 60, and, as I believe, the estimates are correct. The number of yards borrowed are truly stated. Hurd is dead.

90 States amount estimated on 59 same as Berrien. These estimates are correct. I assisted Hurd in making the estimates.

I gave the plaintiff permission to borrow earth and laid off pits. I understood from Mr. Hurd the borrowed earth was at half contract price.

91 I was never required by plaintiffs to make estimates oftener than I did.

After work has been on railroad a considerable time, cannot estimate it correctly—cannot estimate inequalities of surface in cuts.

I tested the correctness of my estimates by reference to original estimates and by cross section measurements,

92 Oliver Houston was on the work and claimed to be one of the co-contractors. I know his handwriting. Receipts are genuine. Houston and Wm. Spurk usually went together for the money. W. W. Duffield was treasurer of railroad company.

Cross-Examined, says:

93 I got estimates from books of company. They were made by Hurd from original notes. I located road, run levels and had direction of work. There was not friendly feeling between Hurd and defendant. There have been some erasures in the estimates, but I suppose them to be correct as they stand. Spurk told me after he quit work that he was not going to do any more unless the company paid him according to contract. Carr was present, I think.

When work on section 60 was commenced the ground was frozen, and they had to use axes and crowbars. Plaintiffs had twice as many men at work in April as March.

(14)

Direct Examination resumed.

94 I had nothing to do with paying contractors. Berrien gave certificates of estimate, and these were paid by treasurer on presentment. I have profile of said sections from actual measurement, which is correct. I know Hurd entered the estimates correctly in the books. My means of knowing the amount of work done each month is from these entries.

If slope stakes were standing and the figures all on them, &c., work could be pretty accurately estimated after it was done; without these it could not be. Stakes set every one hundred feet. In estimate for May the estimate of borrowed earth has been changed; can't tell when; cannot tell amount from memory, but think estimate correct as it stands.

95 Plaintiffs recalled witness Fink.

According to the best of my knowledge the profile showed 40,000 yards of borrowed earth on section 60.

Spurk had paper; I don't know who made it, or whether it was profile.

95 It was agreed before jury that nothing was claimed for work on section 59, and that it was finished and paid for.

This is all the evidence.

The following instructions were given by Court at request of defendant:

Suit is to recover value of work and labor done under special contract in evidence.

The plaintiffs can only recover on one of two grounds.

95 1. Upon contract itself. This he can only do by showing that they have performed everything to be done by them according to terms of contract. To illustrate: If jury believe from the evidence that by terms of contract the plaintiffs were to excavate 20,000 yards in June, 1853, and did not do such excavation, then defendant had right to rescind contract, take possession and re-let; and if they did so plaintiffs could not recover. If they did not rescind for this cause, the defendant waived his right to do so.

96 2. If plaintiffs are not entitled to recover on contract, they can only recover on the ground that contract has been lawfully rescinded. The

(15)

plaintiffs could only treat contract as rescinded (without consent of the defendant) on the ground that defendant had made default on its part, and that such default prevented the plaintiffs from performing on their part.

97 3. If the jury believe from evidence that defendant has substantially performed and plaintiffs have not performed on their part, plaintiffs cannot recover.

97 4. If jury believe from evidence that defendant made proper monthly estimates and paid what plaintiffs were entitled to, and defendant only permitted plaintiffs to excavate borrowed earth at half contract price, and that such percentage was paid, and defendants have in this and all respects performed their contract, and plaintiffs not performed on their part, and that work was all done under contract, plaintiffs cannot recover.

5. If there was any default on part of defendant, that default must have been of such character as to prevent plaintiffs from proceeding with work, and up to such default plaintiffs must have performed fully (or the failure been waived by defendant) in order to entitle the plaintiffs to treat contract as rescinded and recover on common counts.

Cause went to jury, and verdict on all issues for plaintiffs, and damages assessed as above stated.

Defendant moved in arrest of judgment and for a new trial, for following reasons:

He moves in arrest of judgment for the want of a sufficient declaration; and 2d, for the want of a sufficient record.

Moves for new trial, because—

1. The verdict is against the instructions.
2. The evidence is not sufficient to sustain the verdict.
3. The verdict is against the law and evidence.
4. The evidence does not support the declaration.

(16)

(EXHIBIT A.)

26 ARTICLES OF AGREEMENT, made and concluded the 19th day of February, A. D. 1853, by and between George Houston & Co. of the first part, and the Central Military Tract Rail Road Company of the second part, witnesseth:

27 In consideration of five dollars, the parties of first part bind themselves, under penalty of \$5000 to be paid by said parties of 2d part to said party of 1st part in case of default in performance of any of stipulations or agreements hereinafter contained to be performed by said first party, and which are:

27 Party of first part will do all grading to prepare road for superstructure upon sections 59 and 60—that they will make all excavations and embankments of proper form, and all ditches and slopes of such width and shape, and cuts and embankments of such width and shape, as engineer shall direct.

That they will remove all earth found in base of cuts or below grade unfit for road bed to such depth as engineer shall direct, not exceeding two feet below grade.

Will form road bed of gravel, sand, or other dry material, such as may be approved by engineer.

28 Will make top of embankment of to same depth if required of same materials. But if this material not found on sections or within distance equal to longest haul thereon, said party is not required to make road bed of such material, but may be required to take out bad materials, to deposit and preserve all stone or other material required at such convenient place for future use as engineer shall direct.

28 Shall remove all wooden material which is fast (like stumps) two feet below road bed, and loose wood as much below as engineer shall direct, and in absence of directions, eight feet below grade throughout work.

Where, in opinion of engineer, embankments are likely to settle, they shall be built above grade lines as much as engineer shall direct, not rising above grade faster than one foot in fifteen.

Will do all grading for crossings and depot grounds, all ditches and mucking, and remove any matter unsuitable to lie under embankment or road bed. Will do all grubbing and clearing above cuts and below embankments, timber to belong to company.

- 28 That engineer may change width of cut and embankments after they are established, and may also change division and length of secs. not to exceed 500 feet.

Power is reserved to engineer to alter the line of road. Should line be altered more than 200 feet and the work being thereby rendered more difficult and expensive, party of the first part may, by giving notice in three weeks after alteration, abandon section, but no damage to be claimed, but if the said party commence work after change, he cannot abandon it.

- 29 That in all cases where borrowed earth is required the regular cut shall first be taken out, unless otherwise directed by engineer.

In progress of work, the number of cubic yards to be removed each month is shown in the following table :

29	No. of sec's, 59 & 60	Months and No. of yards to be got out each month in 1853.							Assum'd No. y'ds, 100,000	No. of Y'ds ex- ce's to be got out per mo.
		March Yards,	April Yards,	May Yards,	June Yards,	July Yards,	Aug. Yards,	Sept. Yards,		
		5,000	10,000	15,000	20,000	20,000	20,000	10,000		

In this statement showing the work to be completed 1st of October, 1853, it is assumed that ground will be ready for work 1st March. If not ready, time is to be allowed for completing work beyond 1st October, equal to time from 1st March till ground shall be ready to work.

If work is not carried on as fast as contract required, company may enter and take possession, if it shall think fit, and in such case parties of first part shall loose the retained (20) percentage.

- 30 Parties of the first part will do all the work expressed in contract under direction and to the approval and acceptance of engineer of company, who is to measure work, and upon whose measurement the work is to be paid for by the cubic yard, measured in excavation only.

- 30 Party of the second part agrees to pay for said work as follows : Eighty per cent. of the amount of each monthly estimate, as the work progresses, and the balance when the work is completed in accordance with agreement.

In Witness, &c.

(Signed.)

GEO. HOUSTON & CO.,
Per O. HOUSTON,

J. W. BROOKS, Pres't,
By Jno. M. BERRIEN, Eng.

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Spanch & al

vs

Cent. Mfg. Tract

R.R. Co

Abstract

Filed May 17, 1860

L. Deland

Clerk

State of Illinois }
Knox County }

Pleas before the Honorable John S. Thompson
Judge of the Fifth Judicial Circuit in the State of
Illinois, at a Court begun and held at the Court House
in the City of Knoxville, on the Fourth Monday of
April, in the year of our Lord One thousand Eight
Hundred and Fifty Six, it being the Twenty-Eighth
day of said month.

Present. Hon. John S. Thompson, Judge
A. M. Craig, State Attorney
C. Runkle, Sheriff
H. F. Mory, Clerk.

William Spruck and George Houston

vs

Central Military Tract Railroad Co

Appraisers

Be it remembered that on this 20th
day of March, A.D. 1836, comes the plaintiffs by
their Attornies, Messrs Harding & Quincy, and file
their declaration herein, ^{to the effect, term of said Court} in substance, manner and
form following, to-wit:

State of Illinois }

Knox County }

Knox Circuit Court

April Term A.D. 1836

George Houston and William Spruck, late partners
in the firm and under the style of George Houston
& Co. Complain of the Central Military Tract Railroad
Company, defendants in this case, in a plea of res-
pasp on the case on promises.

For that whereas on the nineteenth day
of February, A.D. 1833, to-wit; at the County of Knox

And State of Illinois, by a certain agreement
then and there made, between the said plaintiffs
and the said defendants, the said plaintiff under
the name and style of George Houston & Co, agreed
to do all the grading, to prepare the road of the
said Company for the superstructure, upon sections
Fifty-nine (59) and Sixty (60) of said road, which
said railroad plaintiff Ave is located through said
County; And to make all the excavations and
embankments of the proper form, and to make the
ditches and slopes of such form and shape and
the cuts and embankments of such width, as should
be directed by the Engineer in charge of the work;
And that when earth or other material occurred
in the base of the cuts, at or below grade, which in
the judgment of said Engineer should be unsuitable
for the said road bed, the said plaintiff would
remove such earth, or other material, to such a depth
as might be directed, not exceeding two feet below
grade; And form the road bed of gravel, sand or
other dry material such as may be approved or di-
rected by the Engineer; And that they, said plaintiff,
would also make the top of all the embankments
to the same depth, if required by the Engineer, of
the same approved material; And that should said ap-
proved material not be found upon the section, or
within a distance (which may be lateral or otherwise)
not greater than the extreme haul of earth upon
the section, where the said dry material is required,
then said plaintiff should not be required to form
the road bed of such material, but should nevertheless

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take out the bad material, if required by the Engineer in charge of the work; and that where stone or other material, might occur in the cut, which the said Company might desire to preserve, the said plaintiffs should deposit such material at the end or the mouth of the cut where it should occur, in such convenient place to be reached for future use, as the Engineer might direct; that said plaintiff would remove all wooden material two feet below grade, where the wood was fast (as in stumps) and remove all loose wood, as much below grade as the Engineer might direct, and where special directions should not be given, to remove the said loose wood eight feet below grade throughout the work; and that where in the judgment of the Engineer the embankments are likely to settle, the said plaintiffs should build said embankments above the grade line of the road, as much as the Engineer might direct, not rising above grade faster than one foot in fifteen, and that said plaintiff would do all the grading for public or private crossings, depot grounds whenever they might occur, and all the ditches and trucking, and removing any matters which might be unsuitable to lie under the embankment or road bed, all under the direction of the Engineer in charge of the work, and wherever he might direct; that in all cases where borrowed earth should be required the said plaintiffs should take out the regular cut unless otherwise directed by the Engineer in charge of the work; and that said plaintiffs should remove five thousand yards of earth in March A.D. 1853, ten thousand yards of earth in April of said year; fifteen thousand yards

of Earth in May of said year, And twenty thousand
yards of Earth in each of the months of June, July
And August of said year; and ten thousand yards
of Earth in September of said year; the said plain-
tiffs further agreed to do the whole of said work so
as fully to complete the same in a workmanlike manner
to the approval and acceptance of the Agent of said
Railroad Company, and under the direction of the
Engineer in charge of the work, whose duty was to
measure the said work, and upon whose measurement
the said work was to be paid for by the Cubic yards
measured in the Excavations only; And by said
agreement the said defendants agreed to pay for
said work as follows: For Section fifty nine (59) nine-
teen And One-half ^(19½) Cents per Cubic yard of Excavation
And for Section Sixty (60) nineteen (19) Cents per
Cubic yard of Excavation all measured in the Exc-
avation, which sum should be in full of all ac-
counts for said work; And it was further agreed by
said agreement between the said parties that the
manner of payment should be as follows, to-wit: Eighty
(80) per cent. of the amount of each monthly Estimate
should be paid as the work progresses, And the balance
when the work should be completed in accordance
with said Contract ^{and} Agreement; And the said agreement
being so made, afterwards, to-wit: On the day and year
aforesaid at the place aforesaid, in consideration thereof,
and that the said plaintiff, at the special instance
and request of the said defendants, had then
and there undertaken and faithfully promised
the said defendants to perform and fulfill the

Said agreement in all things on the said plaintiffs
 part and behalf to be performed and fulfilled; the
 said defendants undertook, and then and there
 faithfully promised the said plaintiffs to perform
 and fulfill the said agreement in all things on
 the said defendants part to be performed and
 fulfilled; And although the said plaintiffs have
 always from the time of making said agreement
 performed and fulfilled all things on their part
 and behalf in the said agreement to be performed
 and fulfilled, and did afterwards, to-wit: On the
 day and year first aforesaid, at the place aforesaid
 enter upon and commenced the said work, and for that
 purpose did procure and find all materials and
 labor necessary for performing the same, and did the
 same in part, to-wit: did remove Twenty-one thousand
 and six hundred and fifty eight (21658) Cubic yards
 of excavation on said Section sixty, of said work
 to the approval and acceptance of the Agent of said
 Railroad Company, and under the direction of the
 Engineers of said Railroad Company, said defendants,
 in charge of the work and have always been ready
 and willing to perform and complete all whole of
 said work in pursuance of the said agreement,
 of all which said premises the said defendants
 hath had notice, to-wit: at the County aforesaid.
 Yet the said plaintiffs in fact say that the said
 defendants contriving and wrongfully intending
 to injure the plaintiffs did not, nor would per-
 form the said agreement, nor their said promises
 and undertakings, but thereby craftily and suttley
 deceived the said plaintiffs in this, to-wit: that

The said defendants did not nor would pay said plaintiffs Eighty per cent of the Amount of Each monthly Estimate as the said work progressed, and did not nor would pay the said plaintiffs Eighty per cent of the Amount of money due plaintiffs for work done by them said plaintiffs during each month under said contract, but on the contrary thereof, have hitherto wholly neglected and refused so to do, to-wit: at the County aforesaid; And the said defendants further disregarding the said agreement and their said promise and undertaking, afterwards, to-wit: On or about the 1st day of September A.D. 1853, to-wit: at the place aforesaid, did not nor would permit or suffer the said plaintiffs to proceed to complete the said work, and then and there wholly hindered and prevented them from so doing, and then and there wrongfully discharged the said plaintiffs from any further performance or completion of their said agreement, and promise and undertaking, whereby the said plaintiffs have lost and been deprived of the profits and advantages which they otherwise might and would have derived and acquired from the completion of the said work, to-wit: at the County aforesaid. And whereas, also, the said defendants afterwards, to-wit: on the first day of May, in the year of our Lord One Thousand Eight Hundred and Fifty-four, at the County aforesaid was indebted to the said plaintiffs in the further sum of Ten Thousand Dollars of lawful money for the work, labor, care and diligence of the said plaintiffs, by the said plaintiffs before that time done, performed and bestowed as partners under the firm and style of George Houston & Co

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as aforesaid, in and about the business of the said defendants and upon the railroad of the said defendants, and for said defendants, and at the special instance and request of said defendants, and being so indebted the said defendants in consideration thereof, afterwards, to-wit: On the day and year last aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said last mentioned sum of money, when the said defendants should be thereto afterwards requested.

And whereas, also afterwards, to-wit. on the day and year last aforesaid, at the County aforesaid, in consideration that the said plaintiffs, partners as aforesaid, at the like special instance and request of the said defendants, had before that time, done performed and bestowed their work, labor, care and diligence, with their horses, carts, carriages and hands, goods and chattels, in and about the business of the said defendants, and for the said defendants, and in and about the construction of the Railroad of said defendants, and at their special instance and request, and being so indebted the said defendants in consideration thereof afterwards, to-wit: On the day and year last aforesaid undertook, and then and there faithfully promised the said plaintiffs, partners as aforesaid, to pay them so much money as they then for reasonably deserved to have of the said defendants, when the said defendants should be thereto afterwards requested. And the said plaintiffs aver that they therefore reasonably deserved to have of the said defendants

the further sum of Ten Thousand Dollars of lawful money, to-wit, at the County aforesaid, whereof the said defendants, afterwards, to-wit: on the day and year last aforesaid then had notice.

And for that whereas the said plaintiffs under the name and style of George Weston & Co, heretofore to-wit: on the nineteenth day of February, in the year of our Lord One Thousand Eight Hundred and fifty-three, at the County of Knox and State of Illinois, by a certain agreement then and there made between the said plaintiffs, and under the name and style of George Weston & Co, and the said defendants, agreed to do all the grading to prepare the Railroad of said defendants for the Superstructure upon sections fifty-nine (59) and Sixty (60) thereof, removing during the month of March, then next, 5,000 cubic yards of Earth, in April 10,000, in May 15,000, in June 20,000 in July and August each 20,000, and in September 10,000 Cubic yards of Earth all in said year, the whole work to be completed by the first day of October A.D. 1853, and to be done in a workmanlike manner to the approval and acceptance of the Agent of said Railroad Company, and under the direction of the Engineers of said Railroad Company, said defendants, whose duty among other things was to measure the said work and upon whose measurement the work was to be paid for by the Cubic yard measured in the Excavation only. And by said agreement, it was further agreed that if said ground on said sections was not ready for working by the first day of March of said year, a time should be allowed for completing the work beyond the time above

Specified, Equal to the time from said first day of
 March till such time as the ground is ready for
 Commencement of the work. And it was by said
 agreement further between said parties agreed that
 if the said work should not be carried on by the
 said plaintiffs as fast as above specified, the said
 defendants might enter upon said work and take
 possession of, or re-let the work, as the Company might
 think fit, And that said plaintiffs should surrender
 the work peaceably and without let or hindrance from
 them; and in that case the said plaintiff should
 make no claim for the retained percentage, but the
 same should be absolutely forfeited by them to said
 defendants; And it was also then and there agreed
 between the said plaintiff and the said defendants
 that the said defendants for the consideration above
 set forth should pay for the said work as follows:
 for Section Fifty-nine (59) Nineteen and one-half (19 1/2)
 Cents per cubic yards of Excavation, and for Section
 Sixty (60) Nineteen (19) Cents per cubic yard of Ex-
 cavation, All measured in the Excavation and the
 said sum to be in full of all accounts for said
 work, And that the manner of said payments
 should be as follows: Eighty per cent. of the amount
 of each monthly Estimate will be paid as the work
 progresses, And the balance when the work should
 be completed in accordance with the said agreement
 or Contract. And the said agreement being so
 made, afterwards, to-wit: On the day and year
 aforesaid, And at the place aforesaid, in Consider-
 ation thereof, And that the said plaintiffs, at the
 special instance and request of the said defendants

had then and there undertaken and faithfully promised the said defendants to perform and fulfill the said agreements in all things on the said plaintiffs part, and behalf to be performed and fulfilled, the said defendants undertook and then and there faithfully promised the said plaintiffs to perform and fulfill the said agreement in all things on the part and behalf of the said defendants to be performed and fulfilled; And although the said plaintiffs have always from the time of making the said agreement, performed and fulfilled all things on this part and behalf in the said agreements to be performed and fulfilled, and did afterwards, to-wit: on the day and year first aforesaid, at the County aforesaid, Enter upon and Commence the said work, and for that purpose did procure and find all materials and labor necessary for performing the same, and did the same in part, to-wit: did remove Twenty-one thousand six hundred and fifty eight Cubic yards of Earth thereof under the directions of the Engineers of said defendants in charge of said work, and in good and workmanlike manner, such as to deserve the approval and acceptance of the Agent of said defendants, and hath always been ready and willing to perform and complete the whole of the said work in pursuance of the said agreement, of all which said premises the said defendants had notice, to-wit: at the County aforesaid; Yet the said plaintiffs in fact say, that said defendants contriving, and wrongfully intending to injure the said plaintiffs did not, nor would perform the said agreement, nor their promise and undertaking of said defendants, but cheitly craftily and subtly deceived

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the said plaintiffs in this, to wit: that although the said work was done by said plaintiffs under the direction of the said defendants in charge of the work, And although it was worth, And deserved to be approved And accepted by the Agent of said Company, yet the said defendants, nor the agents, nor the Engineer of said defendants did not approve And accept said work, And did not make a monthly Estimate of the same, nor any Estimate of the same, And the said agents And Engineers fraudulently refused so to do, at the instance of said defendants, And said defendants did not, nor would pay the said plaintiffs the said sums of Eighty per Cent. of the Amount of work done during Each month on said Road at the rate of Nineteen And One half Cents per Cubic yard for all work done on Section Fifty-Nine (59) And at the rate of Nineteen Cents per Cubic yard of Excavation done on Section Sixty (60) of said Railroad, but on the contrary thereof, hath hitherto wholly neglected And refused so to do; And the said defendants further disregarding the said Agreement And their said promise And undertaking Afterwards, to wit: On or about the first day of August, A.D. 1833, to wit, at the County aforesaid, did not, nor would permit or suffer the said plaintiffs to proceed to complete the said work, And then And there wholly hindered And prevented them from so doing, And then And there wrongfully discharged the said plaintiffs from any further performance or completion of their said Agreement And promise And undertaking whereby the said plaintiffs were deprived of the benefits And advantages to be derived from the completion of the

said works, And the said defendants further disre-
garding said agreement did not perform said agree-
ment in this, to-wit: the said defendants did not nor
would on the day and year last aforementioned at the
County aforesaid pay the said plaintiffs the whole amount
due to them, said plaintiffs, for the work done by them
under said agreement, to-wit: the said Twenty-one thousand
and Six Hundred and Fifty-Eight Cubic yards of Ex-
cavation; And the plaintiffs here aver that the said
work was by them done upon Section Sixty of said Rail-
road, And that they were at said time, And now are
entitled to be paid for said work at the rate and
price stipulated in said agreement, to-wit: at the
rate and price of nineteen cents per cubic yard of
Excavation. Yet the said defendants, not regarding
their said promise and undertaking, but contriving
And intending to deceive and defraud the said plain-
tiffs in this behalf did not nor would pay to said
plaintiffs any of the said sums of money so due as aforesaid,
although often requested so to do, but have altogether
neglected and refused so to do, And still neglect and
refuse so to do. And therefore the said plaintiffs say
that they are injured and have sustained damage
to the amount of Ten Thousand Dollars (\$10,000)

Harding & Quinby
Attorneys for Plaintiffs

Copy of Account Sued on

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The Central Military Tract Railroad Company
 Vs William Spunch & George Houston,
 late partners under the firm of
 George Houston & Co

To Excavation of Thirteen Thousand Six hundred and
 Seventy-One Cubic Yards of Earth, on Section Sixty
 of said road, in Knox County, Illinois, in the Spring
 and Summer of 1853, at 19 cents per cubic
 yard \$3.000-

To Making ditches and Excavating Earth
 upon said Section Sixty, to the amount
 of Seven thousand Nine hundred and
 Eighty Seven Cubic yards of Excavation
 at 19 cts per cubic yard, during the
 Spring & Summer of 1853 \$1,537.50

Harding & Dumbley
 Attorneys for Plaintiffs

State of Illinois } Knox Circuit Court
 Knox County } Term A.D. 1853
 William Spunch & George Houston,
 late partners in the firm of
 George Houston & Co
 Vs

The Central Military Tract Railroad Company

Copy of Articles of Agreement sued on in this
 case.

Articles of Agreement made and Concluded
this nineteenth day of February A.D. 1833, by and between
George Weston & Co of the first part, and the Central
Military Tract Railroad Company of the party of the
second part, witnesses: That the said party of the
first part for the consideration of Five Dollars the receipt
of which is hereby acknowledged do hereby bind them-
selves in the sum of Five Thousand Dollars,
to be paid to the party of the second part in case
default be made in the performance of any of the
stipulations or agreements herein contained, to be per-
formed by the party of the first part, which are:
That the party of the first part will do all the grad-
ing to prepare the road for the superstructure upon
Sections Fifty-nine (59) and Sixty (60). That they
will make all the Excavations and Embankments
of the proper form, make the ditches and slopes
of such form and shape, and the Cuts and Em-
bankments of such width as shall be directed by
the Engineer in Charge of the work; that where Earth
or other material occurs on the base of the Cuts at
or below grade which in the judgment of the Engineer
is unsuitable for the road bed, they will remove
such Earth or other material to such a depth as
may be directed, not exceeding two feet below
Grade; And form the road bed of gravel, sand or
other dry material such as may be approved or di-
rected by the Engineer; that they will also make the
top of all the Embankments to the same depth if required
by the Engineer of the same approved material, but should
this approved material be not found upon the section

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or within a distance (which may be lateral or otherwise)
not greater than the extreme haul of earth upon the
section where the said dry material is required, then
said party of the first part shall not be required to
form the road bed of such material, but shall never-
theless take out the bad material if required by the
Engineer in charge of the work. That when stone
or other material occurs in the cuts which the
Company desire to preserve said party of the first
part will deposit such material at the end or
mouth of the cut where it occurs, in such con-
venient place to be reached for future use as the
Engineer may direct; That they will remove all
wooden material two feet below grade where the
wood is fast (as in stumps) and remove all loose
wood as much below grade as the Engineer may
direct; And when special directions are not given
they are to be removed eight feet below grade through-
out the work. That when in the judgment of the
Engineer the Embankments are likely to settle they
shall be built above the grade line of the road
as much as the Engineer may direct, not rising
above grade faster than one foot in fifteen. That
the party of the first part will do all the grading
for public or private crossings, depot grounds wherever
they may occur, all the ditches and mucking and
remove any matter which may be unsuitable to lie
under the Embankment or road bed, all under the
direction of the Engineer in charge of the work, and
wherever he may direct. That they will do all the
grubbing and all the clearing above the cuts and
below the Embankments, but the timber so cleared

shall be the property of the Company, That though the width of Cuts or Embankments may be established, the Engineer may change such width as circumstances in his judgment may require, and the work shall be done according to the new width. That though sections stakes or divisions between sections may have been established power is hereby reserved to the Engineer to change the locations of such divisions, the change not to exceed five hundred feet. Power is also reserved to alter the line of the Road wherever the Engineer deems it expedient; but should the line be moved in any place laterally more than two hundred feet, and thereby make the work more difficult or expensive to perform said party of the first part may by giving notice to the Engineer within three weeks after such change abandon the section upon which such change is made, but no claim for damages upon the Company shall be claimed in consequence, but if they commence the work after such change they cannot afterwards abandon it, and no allowance will be made beyond the contract price. That in all cases where borrowed earth is required the regular cut shall first be taken out, unless otherwise directed by the Engineer in charge of the work. In the progress of the work the number of cubic yards shall be removed each month as shown in the following table:

No of Sections	Months and No. of yards to get out each Month							No of yards of
	March	April	May	June	July	Aug.	Sept.	
59860	Yards	Yards	Yards	Yards	Yards	Yards	Yards	Yards
	5000	10,000	15,000	20,000	20,000	20,000	10,000	100,000
								Except to be got out per month in case there is any Excess

In this tabular Statement, showing the progress of the work,
 And that it is to be completed as follows: Section fifty-nine
 And sixty by the first day of October 1853; it is assumed
 that the ground will be ready for working by the first day
 of March, but should it not be, a time is allowed beyond
 the time specified in the table, Equal to the time from said
 1st day of March till such time as the ground is ready for
 the commencement of the work. Should the work not be car-
 ried on as fast as the above table prescribes, the party of the
 Second part may enter upon it, take possession, or re-let it,
 as they may think fit; And the party of the first part will
 surrender it peaceably and without let or hindrance
 from said party of the first part. In this case no claim
 shall be made for the retained per centage, but it shall
 be absolutely forfeited by the party of the first part to the
 party of the second part. That the party of the first part
 will do the whole work for the aforesaid grading including
 hauling, grubbing, mucking, And every item in the said
 work, so as fully to complete the work in a workmanlike
 manner, to the approval and acceptance of the Agent of
 said Railroad Company, And under the directions of the
 Engineers in charge of the work, whose duty among other
 things is to measure the said work, And upon whose meas-
 urement the work is to be paid for by the cubic yard, meas-
 ured in the Excavation only. That the party of the second
 part for the consideration herein above set forth, hereby
 agrees to pay for the above work as follows: For Section
 fifty-nine, nineteen And One half ($19\frac{1}{2}$) cents per cubic
 yard of Excavation, And for Section sixty, Nineteen (19)
 cents per cubic yard of Excavation, all measured in the
 Excavation, which sum shall be in full of all accounts
 for the said work. The manner of payments shall be

as follows: Eighty per cent. of the Amount of Each Monthly Estimate will be paid as the work progresses, and the balance when the work is completed in accordance with this Agreement or Contract.

In Witness whereof we have hereunto set our hands and seals on the day and year first above written

Agreement for Excavating
Rock 100 cents
Hard pan 45 cts
Slate & Shells 40 cts

George Houston & Co
per O Houston
J W Brooks, President
by Jno W Berrian, Eng.

Harding & Quinby
Attorneys for Plffs

And now on the first day of said April Term of court the following order was entered herein

William Spunk vs George Houston }
Central Military Tract Railroad Co } Assigns

On motion and by agreement it is ordered by the Court, that this suit be continued until the next term of this Court at the Plaintiffs costs; therefore it is considered by the Court, that the defendants have and recover of the said plaintiffs their costs by them at this term of this Court expended, and may have execution therefor.

At the September Term of said Court, in the year 1856. The following order was made herein.

William Spurch and George Houston }
 vs } Assumpsit
 The Central Military Tract Railroad Co }

On Motion, and by Agreement it is Ordered by the Court, that this Cause be continued until the next term of this Court

At the April Term AHD 1857 of said Circuit Court the following Order was Entered

William Spurch et al }
 vs } Assumpsit
 Central Military Tract RR Co }

On motion, and by Agreement, it is Ordered by the Court, that this Cause be continued until the next Term of this Court

At the October Term AHD 1857, of said Court the following order was made. Oct 19th 1857:

William Spurch et al }
 vs } Assumpsit
 Central Military Tract RR Co }

On Motion, and by Agreement, it is Ordered by the Court, that this Cause be continued until the next Term of this Court:

At the April Term AHD 1858, on the 19th day of said Month in said Court, the following Order was Entered:

William Spurch et al
vs
Central Military Tract RR Co } *Appumpsit*

Ordered by the Court that this suit
be be continued until the next term of this Court.

At the October Term 1838, on the 18th day of October, the
following order was made. Herein.

William Spurch et al
vs
Central Military Tract RR Co } *Appumpsit*

On motion and by agreement, it is
Ordered by the Court that this suit be continued until
the next term of this Court at the defendants costs; therefore
it is considered by the Court that the plaintiffs recover of
the defendants their costs by them in this suit at this term
of this Court expended, and may have execution therefor.

And at the June Term 1839, of said Court, on the first
day thereof, the following order was entered:

William Spurch & George Houston
vs
Central Military Tract RR Co. } *Appumpsit*

This day came the plaintiff and on
their motion, it is Ordered by the Court, that this suit
be continued until the next term of this Court at the
plaintiffs costs. Therefore it is considered by the Court
that the defendants recover of the plaintiff their costs
by them in this suit at this term of this Court expended,

and may have execution therefor.

21.

At the September Term AD 1859, the following action was had herein:

State of Illinois }
Knox County } p

Pleas before the Honorable John S. Thompson, Judge of the Fifth Judicial Circuit of the State of Illinois, at a Court begun and held at the Court House in the City of Knoxville, on the fourth Monday of September, in the year of our Lord One Thousand Eight Hundred and Fifty-nine, it being the twenty-fifth day of September in the year aforesaid.

Present. Hon. John S. Thompson Judge

James H. Stewart States Attorney

Cephas Arms, Clerk

Andrew Thomson Sheriff

September 27th 1859

William Spruck et al

vs

Central Military Tract R.R. Co

} Appraisers

This day came the plaintiff by their Attornies, and moves the Court for a default against the said defendants; And after hearing the same it is ordered by the Court, that the motion be overruled.

September 28th 1859

George Houston vs William Spruck

vs

Central Military Tract Railroad Co.

} Appraisers

This day came the parties, and

October 21st 1859.

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William Spurch & George Houston
vs
Central Military Tract Railroad Co } Appumpsit.

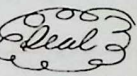
This day again came on this cause for hearing on plaintiffs motion for a new trial herein and in arrest of judgment, and after hearing the same, it is ordered by the Court, that the motions be overruled. Therefore it is considered by the Court that the plaintiff recover of the defendants the sum of Nine Hundred and Thirty-nine Dollars and Sixteen Cents, together with their costs by them in this suit expended, and may have execution therefor. Thereupon the defendants excepted, and pray an appeal to the Supreme Court, which is allowed upon the defendants entering into bonds in the sum of Two Thousand Dollars (\$2000.) with C. S. Colton and H. Hitchcock as securities. And a bill of exceptions to be filed within 30 days from the date hereof.

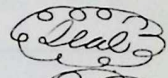
And afterwards, to-wit: on the Seventeenth day of November 1859, came the defendants and filed their bond in accordance with the requirements of the Court which is in words and figures as follows:

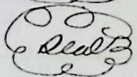
"Know all men by these presents, that we the Central Military Tract Rail Road Company as principals, and the Chicago, Burlington & Quincy RR Co. H. Hitchcock and C. S. Colton, as security are hereinafter jointly bound unto William Spurch and George Houston

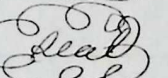
in the penal sum of Two Thousand Dollars, for the
payment of which payment well and truly to be
made we bind ourselves, our heirs, Executors, ad-
ministrators and assigns, jointly, severally and
firmly by these presents. Dated, and sealed with
our seals this 5th day of November A.D. 1839.

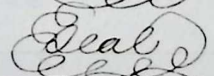
The Condition of this obligation is such that
whereas the said William Spruck and George Houston
lately recovered a judgment against the Central Military
Tract Railroad Company, in the Circuit Court in
and for the County of Knox and State of Illinois,
and whereas the said Railroad Company has prayed
and obtained an appeal from said judgment to the
Supreme Court of said State. Now if the said Cen-
tral Military Tract Railroad Company shall pay
said judgment, costs, interest and all damages in
case said judgment shall be affirmed, and shall
duly and diligently prosecute said appeal, then
this obligation shall be void, but otherwise shall
be and remain of full force and virtue

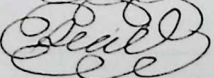
Central Military Tract Railroad Co; 

By Amos T Hall, Secretary 

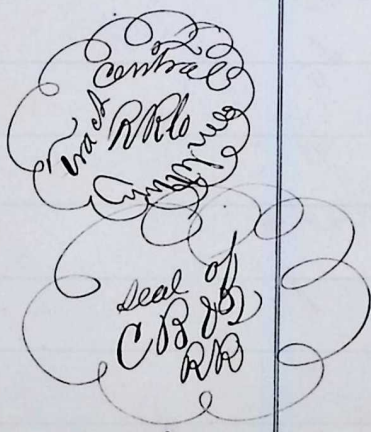
Chicago Burlington & Quincy Railroad Co; 

By Amos T Hall, Secretary 

W Hitchcock 

C S Cotton 

And said defendants also on the 11th day of
November A.D. 1839, filed their bill of exceptions
herein, which is in words and figures as
follows - to-wit:



State of Illinois }
 Knox County } Knox Circuit Court
 September Term A.D. 1859
 George Houston & William Spurch }
 vs }
 Central Military Tract Railroad Company }

Be it remembered that at the September Term of this Court, A.D. 1859, held at the Court House, in and for the County and State aforesaid, this cause came on to be tried before the Court, and a jury duly empaneled. The pleadings in said cause are as follows:

State of Illinois }
 Knox County } Knox Circuit Court
 Sept Term A.D. 1859
 George Houston and William Spurch)
 vs)
 Central Military Tract Railroad Company)

And now comes the defendant and defends the wrong and injury whence, &c., And says it did not undertake and promise in manner and form, or in any manner as the plaintiffs above, in declaring have alleged, and of this it puts itself upon the Country &c.

M. D. & Craig

Attys for Deft

And plaintiffs doth the like by

Wm. H. City.

And the said defendant for a further plea herein, leave of the Court being first had and obtained, says actis non, because he says that heretofore

And before the Commencement of this Suit, the said several Causes of Action in the Plaintiffs Declaration mentioned were fully paid, And this it is ready to verify, wherefore it prays judgment of said Declaration &c

M. D. Craig

Att'y for Deft

And the said defendants for a further plea herein, says actio non, because it says, that heretofore before the Commencement of this Suit, to-wit: on the 19th day of February AD 1853, the said Plaintiff Entered into a written Contract with the Defendant of like tenor and Effect of the Contract declared upon in this action, which Contract in writing is in the following words and figures

"Articles of Agreement, Made and concluded this nineteenth day of February AD 1853, by and between George Houston & Co, ^{party} of the first part, and the Central Military Tract Railroad Company party of the second part, witnesseth, That the said party of the first part for the Consideration of Five dollars, the receipt of which is hereby acknowledged, do hereby bind themselves in the penal sum of Five Thousand Dollars to be paid to the party of the second part in case default be made in the performance of any of the stipulations or agreements herein contained, to be performed by the party of the first part, which are -

That the party of the first part will do all the Grading to prepare the Road for the superstructure upon sections fifty-nine (59) and sixty (60). That they will make all the Excavations and Embankments

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of such width, as shall be directed by the Engineer in charge of the work; that where Earth or other material occurs in the base of the cut, at or below grade, which, in the judgment of the Engineer, is unsuitable for the road bed they will remove such Earth or material to such a depth as may be directed, not exceeding two feet below grade; And from the road bed of gravel, sand, or other dry material, such as may be approved or directed by the Engineer, that they will also make the top of all the Embankments to the same depth, if required by the Engineer, of the same approved material. But should this approved material not be found upon the section, or within a distance, (which may be lateral or otherwise) not greater than the extreme haul of Earth upon the section where the said dry material is required, then said party of the first part shall not be required to form the road bed of such material, but shall nevertheless take out the bad material, if required by the Engineer in charge of the work.

That where stone or other material occurs in the cut, which the Company desires to preserve, said party of the first part will deposit such material at the end or mouth of the cut where it occurs, in such convenient place to be reached for future use, as the Engineer may direct; that they will remove all wooden material two feet below grade, where the wood is fast, (as in stumps,) and remove all loose wood as much below grade as the Engineer may direct, and where special directions are not given, they are to be removed eight feet below grade throughout the work. That where in the judgment of the Engineer, the embankments are likely to settle, they shall be built above

the grade line of the road as much as the Engineer may direct, not rising above grade faster than one foot in fifteen.

That the party of the first part will do all the grading for public and private crossings, depot grounds, wherever they may occur, all the ditches and mucking, and remove any matter which may be unsuitable to lie under the embankment or road bed, all under the direction of the Engineer in charge of the work, and wherever he may direct. That they will do all the grubbing and all the clearing above the cuts and below the embankments, but the timber so cleared shall be the property of the Company. That, though the width of cuts or embankments may be established, the Engineer may change such width as circumstances in his judgment may require, and the work shall be done according to the new width. That though section stakes or divisions between sections may have been established, power is hereby reserved to the Engineer to change the location of divisions, the change not to exceed five hundred feet. Power is also reserved to alter the line of the road wherever the Engineer deems it expedient; but should the line be moved in any place laterally more than two hundred feet, and thereby make the work more difficult or expensive to perform, said party of the first part may, by giving notice to the Engineer within three weeks after such change, abandon the section upon which such change is made, but no claim for damages upon the Company shall be claimed in consequence; but if they commence the work after such change they cannot afterward

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Abandon it, And no allowance will be made beyond the Contract price. That in all cases where borrowed Earth is required, the regular Cut shall be first taken out, unless otherwise directed by the Engineer in Charge of the work.

In the progress of the work, the number of cubic yards shall be removed Each month as shown in the following Table:

No of Sections	Months	Number of Yards to be got out Each month in 1853							Assumed No of Yards	No. of yards
	March	April	May	June	July	Aug.	Sep.	No of Yards		Except to be got
59 & 60	Yards	Yards	Yards	Yards	Yards	Yards	Yards	Yards		out per month
	5,000	10,000	15,000	20,000	20,000	20,000	10,000	100,000		in case there
										is any Exc

In this Tabular Statement, showing the progress of the work, and that it is to be completed as follows: Sections fifty-nine and sixty, by the first day of October, 1853, it is assumed that the ground will be ready for working by the first day of March, but should it not be, a time is allowed beyond the time specified in the table, Equal to the time from the 1st day of March till such time as the ground is ready for the commencement of the work.

Should the work not be carried on as fast as the above table prescribes, the party of the second part may enter upon it and take possession, or reject it, as they may think fit; and the party of the first part will surrender it peaceably, and without let or hindrance from said party of the first part. In this case, no claim shall be made for the retained percentage, but it shall be absolutely forfeited by the party of the first part, to the party of the second part.

That the party of the first part will do the whole work for the aforesaid grading, including

hauling, grubbing, mucking, And every item in the said work, so as fully to complete the work in a workmanlike manner, to the approval and acceptance of the Agent of said Railroad Company, And under the direction of the Engineers in charge of the work, whose duty, among other things, is to measure the said work, and upon whose measurement the work is to be paid for by the Cubic yard, measured in the Excavation only.

That the party of the second, for the consideration herein before set forth, hereby agrees to pay for the above work as follows:

For Section fifty-nine, Nineteen and One-half (19½) Cents per cubic yard of Excavation, and for Section sixty, Nineteen (19) Cents per cubic yard of Excavation, all measured in the excavations, which sum shall be in full of all accounts for the said work. The manner of payment shall be as follows:

Eighty per Cent. of the Amount of Each monthly Estimate will be paid as the work progresses, And the balance when the work is completed in accordance with this agreement or Contract.

In witness whereof, We have hereunto set our hands and seals on the day and year written first above.

Agreement for excavating	}	Geo Houston & Co
Rock 100 cents		per C Houston
Hard pan 45 cts		J. W. Brooks, President
Slate & Shell 40 cts		by Jno M Berrien
		Eng

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And in Consideration, that the defendant had agreed to well and faithfully perform, observe and keep all of the said agreement by it to be observed and kept, the said plaintiff undertook and promised well and faith on their part to observe and keep all and singular the provisions and undertakings on their part to be observed and kept. And the said agreement being so made, afterwards, to-wit: On the 1st day of March A.D. 1853, to-wit, at said County, the said plaintiff entered upon the performance of said contract, and commenced the said work mentioned in said contract, and although the said defendant hath always been ready and willing to perform and complete and keep, all the agreements therein on its part to be performed, observed and kept, of all which said premises the plaintiff, to-wit, at the date and place aforesaid had notice, yet the said defendant saith that the plaintiffs, contriving and wrongfully intending to injure the said defendant did not, nor would perform the said agreement, nor their said promises and undertakings in that behalf to be performed, observed and kept, in this, to-wit: That the said plaintiff did not, on said work remove the number of Cubic yards of Earth in Each following month. As follows: in March 5,000 yards, in April 10,000 yards, in May 15,000 yards, in June 20,000 yards, in July 20,000 yards, in August 20,000 yards, in September 10,000 yards, and did not complete the work in said contract mentioned by the 1st day of October, A.D. 1853, although as defendant avers the ground

was ready for working on the 1st day of March, A.D. 1853. But on the contrary, the said plaintiffs afterwards, to-wit: On the 3^d day of August A.D. 1853, wholly stopped and abandoned the work on said Section Sixty. And afterwards thereupon the said defendant, to-wit: On the 18th day of August, A.D. 1853, at said County, as they lawfully might do, retaken said work, to-wit: Section Sixty, to George J. Bergen and Frederick Sisson; and that the defendant was compelled in order to secure the completion of said work, on Section Sixty, to pay and advance a much larger sum of money, to-wit: \$5,000 more money than the sum contracted to be paid to the said plaintiffs; so the defendant says it has by reason of the breach of said contract on the part and behalf of said plaintiffs sustained damages to the amount of Five Thousand Dollars, which said sum of money exceeds the damages sustained by the said plaintiffs by reason of the non performance by the said defendant of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sum of money the said defendant is ready and willing, and hereby offers to set off and allow to the said plaintiffs the full amount of said damages according to the form of the Statute in such case made and provided, and this he is ready to verify. Wherefore it claims judgment &c.

M. D. Craig
Atty for
Def

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Account to be set off in this action:

Pkgs to Dept	Dr
To Cash paid	\$2595.47
" " "	1000.00
To Damages for non performance of Contract sued upon	4469.50

For Copy, Contract on which Damages are sought to be
set off, see Copy filed with Declaration

George Houston et al

vs

Central Military Tract
Railroad Co.

For replication to defendants
2^d plea above, plaintiffs say that the defendant
has not paid the plaintiffs demands as therein
alleged, and this he prays may be Enquired of by
the Country, by
Wm. H. City.

Lefts do like

M. D. & Craig, for depts.

For replication to defendants 3^d plea above,
Pkgs say, precludi non, because they say that they did
not undertake and promise, as is alleged, in said plea,
and this they pray may be Enquired of by the Country
by Wm. H. City

Lefts do like

M. D. & Craig
for depts

And the Plaintiffs to maintain the issue on their part, offered in Evidence and read to the jury, a Contract in the following words and figures

Articles of Agreement, made and concluded this nineteenth day of February, A.D. 1853, by and between George Houston & Co, party of the first part, and the Central Military Tract Railroad Company, party of the second part, Witnesseth: That the said party of the first part, for the Consideration of Five dollars the receipt of which is hereby acknowledged, do hereby bind themselves in the penal sum of Five Thousand Dollars, to be paid to the party of the second part in Case default be made in performance of any of the stipulations or agreements herein contained, to be performed by the party of the first part, which are—

That the party of the first part will do all the grading to prepare the Road for the superstructure upon Sections Fifty nine (59) and Sixty (60) That they will make all the Excavations and Embankments of the proper form, make ditches and slopes of such form and shape, and the Cuts and Embankments of such width, as shall be directed by the Engineer in charge of the work; That where Earth or other material occurs in the base of the Cuts, at or below grade, which, in the judgment of the Engineer is unsuitable for the road bed, they will remove such Earth or other material to such a depth as may be directed, not exceeding two feet below grade; and form the road bed of gravel, sand, or other dry

Material, such as may be approved or directed by the Engineer; that they will also make top of all the Embankments to the same depth, if required by the Engineer, of the same approved material. But should this approved material not be found upon the section, or within a distance (which may be lateral or otherwise) not greater than the extreme haul of Earth upon the section where the said dry material is required, then said party of the first part shall not be required to form the roadbed of such material, but shall nevertheless take out the bad material, if required by the Engineer in Charge of the work.

That where stone or other material occurs in the Cut, which the Company desire to preserve, said party of the first part will deposit such material at the End or mouth of the Cut where it occurs, in such convenient place to be reached for future use, as the Engineer may direct; that they will remove all wooden material two feet below grade, when the wood is fast, (as in Stumps). And remove all loose wood as much below grade as the Engineer may direct, And where special directions are not given, they are to be removed eight feet below grade throughout the work. That where, in the judgment of the Engineer, the Embankments are likely to settle, they shall be built above the grade line of the road as much as the Engineer may direct, not rising above grade faster than one foot in fifteen.

That the party of the first part will do all the grading for public or private crossings, depot grounds wherever they may occur, all the ditches and mucking, and remove any matter which may be

unsuitable to lie under the Embankment or road bed,
all under the direction of the Engineer in charge of
the work, and wherever he may direct. That they
will do all the grubbing and all the clearing above
the Cuts and below the Embankments, but the timber
so cleared shall be the property of the Company. That
though the width of cuts or Embankments may be
Established, the Engineer may change such width
as circumstances in his judgment may require, and
the work shall be done according to the new width.
That though section stakes or divisions between sec-
tions may have been established, power is hereby reserved
to the Engineer to change the locations of such divisions,
the change not to exceed five hundred feet. Power is
also reserved to alter the line of the road wherever
the Engineer deems it expedient; but should the line
be moved in any place laterally more than two hundred
feet, and thereby make the work more difficult or expen-
sive to perform, said part of the first part may, by
giving notice to the Engineer within three weeks after
such change, abandon the section upon which such
change is made, but no claim for damages upon the
Company shall be claimed in consequence; but if
they commence the work after such change, they cannot
afterwards abandon it, and no allowance will be made
beyond the contract price. That in all cases where bor-
rowed earth is required, the regular cut shall first be
taken out, unless otherwise directed by the Engineer
in charge of the work.

In the progress of the work, the number of cubic
yards shall be removed each month as shown in the

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all under the direction of the Engineer in charge of
the work, and wherever he may direct. That they
will do all the grubbing and all the clearing above
the Cuts and below the Embankments, but the timber
so cleared shall be the property of the Company. That
though the width of cuts or Embankments may be
Established, the Engineer may change such width
as circumstances in his judgment may require, and
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the Engineer deems it expedient; but should the line
be moved in any place laterally more than two hundred
feet, and thereby make the work more difficult or expen-
sive to perform, said part of the first part may, by
giving notice to the Engineer within three weeks after
such change, abandon the section upon which such
change is made, but no claim for damages upon the
Company shall be claimed in consequence; but if
they commence the work after such change, they cannot
afterwards abandon it, and no allowance will be made
beyond the contract price. That in all cases where bor-
rowed earth is required, the regular cut shall first be
taken out, unless otherwise directed by the Engineer
in charge of the work.

In the progress of the work, the number of cubic
yards shall be removed each month as shown in the

Following Table:

No. of Sections	Months & Number of yards to get out each month in 1853							Assumed number of yards	No. of yards except to be got out per month in case there is any excess
	March	April	May	June	July	Aug.	Sept		
59 & 60	Yards	Yards	Yards	Yards	Yards	Yards	Yards	100,000	
	5,000	10,000	15,000	20,000	20,000	20,000	10,000		

In this tabular statement, showing the progress of the work, and that it is to be completed as follows: Section Fifty-nine and sixty by the first day of October, 1853, it is assumed that the ground will be ready for working by the first day of March, but should it not be, a time is allowed beyond the time specified in the table, equal to the time from said 1st day of March till such time as the ground is ready for the commencement of the work.

Should the work not be carried on as fast as the above table prescribes, the party of the second part may enter upon it and take possession, or let it, as they may think fit; and the party of the first part will surrender it peaceably, and without let or hindrance from said party of the first part. In this case, no claim will be made for the retained per centage, but it shall be absolutely forfeited by the party of the first part, to the party of the second part.

That the party of the first part will do the whole work for the aforesaid grading, including hauling, grubbing, mucking, and every item in the said work, so as fully to complete the work in a workmanlike manner, to the approval and acceptance of the Agents of said Railroad Company, and under the direction of the Engineers in charge of the work, whose duty, among other things, is to measure the said work, and upon whose measurement the work is to be paid for by the cubic yard, measured in the excavation only.

That the party of the second, for the considerations herein before set forth, hereby agrees to pay for the above work as follows: For Section Fifty-nine, Nineteen and One-half (19½) Cents per Cubic Yard of Excavation, and for Section Sixty, Nineteen (19) Cents per Cubic yard of Excavation, All measured in the Excavation, which sum shall be in full of all accounts for the said work. The manner of payment shall be as follows: Eighty per cent of the amount of Each monthly Estimate will be paid as the work progresses, and the balance when the work is completed in accordance with this Agreement or Contract.

In Witness Whereof, we have hereunto set our hands and seals on the day and year written first above Agreement for }
 Excavating } Gen. Houston & Co
 Rocks 100 cts } per A. Houston
 Sandpan 45 cts } J. W. Brooks, President
 Slate & Shell 40 cts } by Jno M. Berrien
 Eng.

The Plaintiff called A. M. Breuley, as a witness, who testified that he was an Engineer and Surveyor, commenced that kind of work in this State in 1837, and is my general business since. The principal work done by me has been on the railroad, and know how to measure work done on railroads. I measured work on what was said to be Section Sixty on the railroad, between 1st and 20th November 1853. Bergen & Sisson commenced work on this Section two or three days before I measured. Will tell how long Bergen & Sisson had been to work. Bergen showed me where they had commenced work. Bergen & Sisson had not taken out much earth, I measured

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all the work done on that section, cuts, ditches and borrowing pits; did not measure what Bergen had done; My measurement was made between the 1st & 20th November 1833. William Spence, the witness Feint and one or two other hands were along; when I did the measuring I found that plaintiff had taken out 21,550 yards in all, including Cut, Excavation, ditches and borrowing pits. This statement is in my hand writing and the figures are mine. (this statement was simply the number of yards in figures in the pits and ditches and the number of yards in the Cut Excavation, making a total of 21,550 yards) The number of yards of yards in the ditches and borrowing pits was 7973. The number of yards in the Cut Excavation was 13577.

Feint showed me the work done by the plaintiff. He was Superintendent for them as I understood; he is here. The stakes for the borrowing pits, fills and cuts were there, and the stakes at cuts and fills and cuts were set out to the side of crop section stakes, I measured the work twice, once by the stakes and once by actual measurement of the work; in some places the cuts were wider than the stakes indicated. I think my measurement was correct. When I measured on Section 20th the plaintiff was not to work on it; After I measured the work I had a conversation with Hurd the Resident Engineer, this was at Galesburg. Plaintiff then offered to prove what Hurd said as to the work and the measurement, and defendant objected, and the objection was sustained. I never was upon the work until I went there to take the measurement.

On Crop Examination, this witness said:

On 1838 & 1839 And part of 1840 I worked on the Illinois Central Railroad in this State, under the State, I was then practical Engineer on that road, made Estimates. Commenced June 1838 and quit January 1840. Since then have not been employed on any railroad as practical Engineer. In 1841 I was employed by the Governor, and next in 1853 measured some for Wheaton on the Bureau Valley Railroad, on the Peoria & Aquawake Railroad I measured some from stakes and profile, and on the Bureau Valley in the same way, and I measured some work done on the Eastern Extension since 1853. On Section Sixty I measured only the Excavation. I measured once by stakes and once by actual measurement, there was a little difference in the two measurements; marks of the shovel in the banks were mostly discoverable, there had not been much rain to alter the work. Soil was gravel and sand. The borrowing was in gravel points. I don't know as I threw out anything for gullying; width of cut was 22 feet at base including ditches, slope one and a half to one. Some of the cuts was excavated 22 feet at base, and some of it 25 feet at base, I estimated all the Excavation whether completed or not. Slope in some places was one and a half to one, and some of it was not. I measured all that was taken out if base was 22 feet or 25 I measured all that was taken out. Can't tell how much of the cut was 22 feet at base, or how much was 25 feet at base. I can't tell the amount of Earth I estimated for borrowing pits or ditches separately, The ditches I measured were

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from the cuts on each side to carry off water from the
 fells that accumulated on the surface of the Earth.
 Think One-Third of whole Amount was ditches and bor-
 rowing. All the Cut Excavation was not then taken
 out on said Section, I think I could measure it as
 correctly then as though I had been on the work all the
 time. If an Engineer is on the work and has his measure-
 ments, he can then make correct estimates of work, I
 can't tell how many borrowing pits I measured, I don't
 know who put the figures and characters on the stakes,
 I tested them and found no difficulty in that way in
 making my own measurements, I made not much use
 of stakes, I made four or five copies of data of meas-
 urements for the purpose of getting others to assist me
 in carrying out the amount. I figured one myself,
 and got others to figure, and then compared mine with
 figures made by others and found them the same,
 I cannot give the location of the borrowing pits, The
 biggest one was in the centre of the fill on the north
 side. I went first to measure 12th November, then
 measured a part, can't tell what part, can't say whether
 Bergen was there then; I then staid a few days, can't
 say how long; then went away; then came back, can't
 say when, and finished by the 20th November, the meas-
 urement, can't tell how many cuts there were in that
 section. If I took a measurement of a bank before
 the work commenced and then measured after the
 work was done and they agreed that would be
 a good test of the correctness of a final estimate.
 In making the estimates I had minutes of hours
 and thereby had the key to the figures and marks
 on the stakes and without explanation these could

not tell the amount of Excavation by figures & marks, but only by measurement. I have not included timber for Culverts, or grubbing done by Plaintiffs, grubbing had been done, I can't say how or how far the timber extracted. I saw timber on one side of the road for Culvert. Invariably ditch are required to preserve Embankments from surface water. The big ditch was south side and varied from 6 inches to 6 feet deep. Can't tell how long it was; when shallow it was three feet wide and two when deep and sloped. No water in it. There was a pit for the foundation of a Culvert, ten feet wide, four feet deep, and fifty feet long, was nearly full of water. I measured down to the mud

The Plaintiff introduced as a witness Austin Funk who testifies: He was in the employ of Plaintiffs when they worked on this contract. I was their clerk a part of the time, and a part of the time their Superintendent, was there all the time but four or five days at commencement. And two weeks in July; I was not there when they commenced work in March and quit in August or first of July; they quit for want of funds, Erastus Ward was the Engineer in charge of the work. A notice was got out to serve serve on the Company and given to Constable but don't know as it was served. The difficulty was in not getting money for borrowed earth, borrowed earth was put in at half contract price and then deducted twenty per cent off, I never knew borrowed earth to be taken but it was stacked off and di-

noted by the Engineer. James M. Berrien was Chief Engineer, Hurd was Chief resident Engineer and Alexander Knapp under him. Never saw Berrien on the work. Knapp attended more than Hurd as he was on the work all the time; borrowing pits were staked off by the Engineer; Hurd and Knapp were there the most of the time, Hurd not so frequent as Knapp; directions were given more by Knapp than Hurd; Never went out of cuts to borrow earth but when directed by Engineers and not for their own accommodation, and then only when staked off and directed. I was there when Bailey measured and showed him what to measure, and he measured none but what was done by the plaintiffs; there was one Culvert and can't tell whether measured. Can't tell how much timber was in the Culvert. There was grubbing from 8th to 4th mile through a grove, some large oak timber cut down and stumps dug out. Can't say how many; Notice spoken of was given in July. On Section Sixty plaintiffs expended \$4340. Plaintiffs quit because they could not get larger monthly allowance. Plaintiffs received from defendants over \$2700 on Section Sixty. They commenced work on Section 60 in March and worked April, May, June and for part of July, I claimed more due.

The said Witness, on cross examination said: There was one borrowing pit north side near the center of the fill, dirt was hauled into fill, Can't tell how large or deep it was, Can't say who asked to have the pits staked out. I don't know plaintiffs

quit work on this section the first of July 1853—
there was One Culvert on this section, Can't tell
the size of it, woaden beams from bottom and planked
and covered over with earth, North end of this section
was north of the timber and ran through a cut
north of timber, this section was a mile long or about
that, two-thirds of the section was south of Walnut
Creek. Can't tell the length of the cut south of the
Creek. this section runs south through the cut, only
one cut south of Creek on this section. Can't say
how far this section runs south of the Creek, heaviest
part of the cut was farthest from the Creek. Can't
say how deep the cut was north of the Creek; in
timber plaintiffs took out earth north of Creek and
commenced and took out that was the nearest to the
fill. Culvert was north of the grove. The bor-
rowing pits were stated off before I came upon
the work. I found the men to work in the pits;
the first time I asked the reason they were to work
there and was told that the cut where the men
were put was wet and they could work to better
advantage in the pits; I never heard the engineers
direct the men to work in the pits, I did not
hear any one direct them to do so, before ^{that} the
men had been put to work in the cuts. The
earth was not all taken out of the cuts when
plaintiffs quit work; the work north of the timber
was completed

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Direct Examination resumed. It is hard for me to state the value of grubbing. from the road south to timber grading was done, Cant say whether all was done north of the Creek or not.

Plaintiff Called Myron Prince as a witness, who testified, that he kept a boarding house on the work for Plaintiff. I was there from March to October. Plaintiff worked on Section Sixty till July and quit. Plaintiff had trouble with their men, they did not pay them and the men stopped work, and then commenced again, and then Plaintiff quit and took the men onto Section 59. I dont know why the Plaintiff quit on section 60. Heard said if Plaintiff did not keep up liquor he would take the work away from them, and Plaintiff took the liquor away from the men and paid them ten cents a day extra. It was 80 rods through the timber on section 60. Heavy timber, Oak, Walnut &c. think a portion of it was cut and grubbed; Cant say how much, but not all. Cant tell what it was worth. Cut out 100 feet wide, but not grubbed so wide. There was no Culvert on that section but was one on 59. There were two borrowing pits. In April the weather was wet and could not work in the cuts, and Funk went and got Knapp to lay off borrowing pits because the men could work to better advantage in the pits, this is what I understood at the time.

Plaintiffs here rested their case, and the defendants to maintain the issue on their part, introduced the following Evidence:

J. S. Chambers testified, that he knew Elias Millard, who is now dead; was in business with him in 1854, and did business for him in 1853. He paid these Contractors and paid their men. Millard got money and an order from the plaintiffs through me paid their men.

Defendants called George I. Bergen as a witness who testified, that he knew Section Sixty of the defendants railroad. I was in company with Fr. P. Sisson in doing work on that section. We commenced work on that section the last of August, 1853, and finished the section in one year to a day. The first work we did was to get ready to work. The fill put in by the plaintiffs was above grade. Plaintiffs had worked both sides of the creek. The excavation done by the plaintiffs was that part nearest the fill; they had carried out an Embankment from 150 to 200 feet, and some of the Embankment was too wide, and some too narrow, and some wide enough but rough and too high. The dirt from the pits was put in the fill; pit was 100 feet from the mouth of the cut. The cut taken out by them was not regular, some of it was too wide, and some too narrow and rough. The established and required width of the cut at the base was 32 feet. It was

near a mile from the north end of the fill at
 the creek to the south end of that section. That
 part of the work north of the creek was short
 haul, and the balance of the dirt was to be
 wasted. The work done by the plaintiff was
 the cheapest part of the work on the section.
 What was done by the plaintiff on this section
 was better at 10 cents per yard, than the whole work
 at 19 cents per yard. If the whole work was worth
 19 cents per yard, then the part performed by
 plaintiff was not worth more than 10 cents -
 None of the work done by plaintiff was finished
 up; was dug out and left rough; he made
 ditches in the cuts where the plaintiff excavated.
 The ditch north of the road was necessary, it
 was 50 to 100 feet long; 'cant say how deep and
 wide, say at top 6 or 8 feet, it was just through
 a knoll and could be thrown out for 10 cents
 per yard. The ditch south of the road was
 nearly covered by Embankment and was not
 necessary for the road; this was the lower side,
 and the water would run away from the
 Embankment. These papers signed by Bergen
 & Sisson, and shown to witness, the said were
 the estimates of work done by Bergen & Sisson
 on that section in completing the work. We
 received the money mentioned in those papers
 and signed the estimates and receipts. We were
 the lowest bidders, and did the work as cheap
 as it could be done. Bergen & Sisson had a
 contract for the work, made in August

Crop Examined, said;

The creek on the section is nearer the North than the South End of the section, is One-fourth mile south of the north end of the section. I think the section is One and one-third mile long. From the Creek Bank South to the Commencement of the cut excavation is about 800 feet, and from that point and South to top of hill is 200 to 300 feet to top of hill, and from there to South End of section is about 2000 feet; from where the cut commenced it extended to the South End of the section and the Extreme Haul was from the South End of section to the creek. It was timber part of the way north of the creek, The plaintiffs did not take out most of the stumps. They did not go into the cut much.

Defendants also introduced H. P. Sisson as a witness, who testified, That he was one of the firm of Bergen & Sisson, who finished section sixty, and he was on the work most of the time prosecuting the work. There was no culvert on this section. Depot grounds was on section fifty-nine, the next section north or east of section sixty. The Extreme Haul on section sixty was nearly a mile, from South End of section to the creek. The plaintiff in what they did had the shortest haul on the work, and excavated in that part the cut nearest the fall, their longest haul in what they did might have been

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400 feet, not more. From where the plaintiff commenced to excavate in the cut south of the creek the cut extended south to the extreme end of the section. On the south of the creek the fill extended south until the grade line struck the bank and that was 300 to 400 feet south of creek, and from there south to end of section was heavy cut all the way, and all the cut had to be hauled north to make the fill up to the creek. The average depth of the cut was 10 to 11 feet, the deepest cut was $13\frac{1}{2}$ feet. In places the plaintiff excavated 24 to 25 feet wide at the base of the cut; the established width was 22 feet. One of plaintiff's borrowing pits was near where the grade line struck the bank, one was about 400 feet from south of creek, and the other little further, the dirt from the pits was put in the fill opposite the pits. The fill north of the creek put in by plaintiff was too high above grade a distance of 200 to 250 feet laterally. It was worth to reduce it \$20 to \$25. Extreme haul north of creek was 400 feet. The excavation done by plaintiff north of the creek was that nearest the fill and therefore the shortest haul. The cut north of creek after 50 feet was from 3 to 4 feet and from that up to 5 or 6 feet, where the plaintiff quit. We did 100 feet more grubbing than plaintiff did. If it was worth 19 cents per yard to do the whole work on section sixty, then the work done by plaintiff was not worth more than half that sum. The haul is what makes work expensive and this haul was the shortest on the work. Bergen & Sisson got for some of the long

haul 31 cents. When I took the job Ward said if I took it we should have the back per Centage from George Houston & Co, which he said was \$700 to \$900. He said he allowed plaintiff half Contract price for borrowed Earth. We were allowed for 3000 yards for ~~mineral~~^{Common} Earth

Defendants introduced J. M. Gilman as a witness, who said: That he was a practical Engineer and had been for five years, and that he knew Alexander Knapp who was considered a good Engineer, and that an Engineer who was a stranger to the work could not after the work was done come upon it and estimate the same with any degree of certainty, owing to Elevations and depressions in the surface of the bank excavated, That the cross section stakes only showed the distance from the grade line in the center of the track to the top of the bank immediately over such center, and the slope stakes showed where the slope commenced on top of the bank, and these stakes gave no evidence of the Elevations or depressions between the slope stakes and such center, and after such estimate was taken owing to these causes, no man could say that his measurement was correct; all he could do in measuring would be to calculate the tops of the excavations by straight lines from the foot of the slope stakes each side, to the top of the bank as shown by cross section stakes, and for these reasons in

measuring by stakes or actual measurement of the cut, there would be no certainty that the measurement would be right. By a man being on the work and measuring the Excavation before the Earth was removed, and calculating for the Elevations and depressions, and then measuring after the Earth was removed he would know the quantity of Earth Excavated

Defendants offered in Evidence, And read to the jury, with objections, overruled, the following statement, Estimates and receipts, signed Bergen & Sisson, in the following words and figures:

31st Oct 185
 The Central Military Tract Railroad Co
 To Bergen & Sisson Dr
 Grading Sect Co
 For 334 Yards Excavation Waste Earth on Depot Ground, at 20 cts per yd \$66.80
 Correct, Jm M Bernier
 Eng.

Erastus Hurd
 Receipt of the Central Military Tract Railroad Co., by the hands of W. H. Duffield, Treasurer
 Dollars in full of the above, and all other accounts. Bergen & Sisson
 Dated Galesburg, 25 Nov. 1854

The Central Military Tract Railroad Co
 To Bergen & Sisson Dr
 1854 To Grading Sect Co
 Aug 11 For this amount in amount of

Retained per Centages

\$500.00

Correct

Ans M Berrien, Eng.

Received of the Central Military
Tract Railroad Co., by the hands of W Muffles,
Treasurer, Five hundred Dollars, in full of the
above and all other accounts

Bergen & Sison

Dated Aug 11, 1854

The Central Military Tract Railroad Co
To Bergen & Sison Dr
1854 Grading Section Co

31st July

Section Co

To 911 yards Excavation at 31 cts per yd \$283.41

" 1506 " " " 32 " " " 481.92

" 1318 " " " 33 " " " 434.94

" 185 " " " 34 " " " 62.90

" 73 " " " 35 " " " 22.55

" 337 " " " 36 " " " 121.32

" 334 " " " 37 " " " 129.13

Total

4699 yds

\$1545.17

Deduct 20 per ct

309.03

Amount at 80 per ct

\$1236.04

Erastus Hurd

Received of the Central Military Tract
Railroad Co., by the hands of James Pearson,
Treasurer, Twelve hundred, thirty six and 14/100
Dollars, in full of the above and all other accounts

Bergen & Sison

Dated August 11 1854

Correct
Ans M Berrien
Eng

The Central Military Tract Railroad Co
 Dr Bergen & Sipes Dr
 Grading Section Co

5-3
 31st June 1854

Section Co To 796 yards Excavation @ 30 cts per yd \$238.80

" 1732 " " " 31 " " 536.92

" 782 " " " 32 " " 230.24 = \$1005.96

Deduct 20 per ct 205.19

Amount at 80 per ct \$820.77

Correct, Jno W Perrien, Eng

Erastus Hurd

Received of the Central Military Tract Railroad Co, by the hands of W. W. Duffield, Treasurer, Eight hundred and twenty two Dollars, in full of the above and all other accounts. Bergen & Sipes
 Dated, Galveston, 18 July 1854

The Central Military Tract Railroad Co.
 Dr Bergen & Sipes Dr
 Grading Section Co

1854
 31st May
 Section Co

To 1674 yards at 20 cts \$334.80

" 680 " " 28 " 190.40

" 1748 " " 29 " 506.92

" 926 " " 30 " 277.80 = \$1309.92

Deduct 20 per Cent 261.98

Amount at 80 per ct \$1047.94

Correct for W Perrien, Eng

Erastus Hurd

Received of the Central Military Tract Railroad Co, by James Pearson, Treasurer, One thousand and forty seven ⁹⁴/₁₀₀ Dollars, in full of the above, and all other accounts. Bergen & Sipes
 Dated June 7 1854 by J. P. Sipes

The Central Military Tract Railroad Co
To Bergen & Sipsco Dr
Grading Section Co

1854

29th April

Section Co

To 2428 yards Excavation at 20 cts \$485.60
" 1783 " " " 27 " 481.41
" 1111 " " " 28 " 311.08 \$1278.09
Deduct 20 per ct 255.62
Amount at 80 per ct \$1022.47

Correct, Jno M Berrien, Eng

Erastus Hurd

Received of the Central Military Tract Railroad Co,
by the hands of James Pearson, One Thousand and Twenty Two
47/100 Dollars, in full of the above, and all other
accounts.

Bergen & Sipsco

Dated May 10th 1854

The Central Military Tract Railroad Co.
To Bergen & Sipsco Dr
Grading Section Co

1854

3rd March

Section Co

To 320 yards Excavation (waste) at 20 cts \$64.00
" 1489 " " " 25 372.25
" 1810 " " " 26 470.60 \$906.85
Deduct 20 per cent 181.37
Amount at 80 per ct \$725.48

Correct

Jno M Berrien, Eng

Erastus Hurd

Received of the Central Military Tract Railroad
Co, by the hands of James Pearson Seven Hundred &

55-
Twenty five 48/100 Dollars in full of the above, and
all other accounts. Bergen & Sison
Dated April 11th 1854 by J. P. Sison

The Central Military Tract Railroad Co.
To Bergen & Sison Dr

1854
March 9 Grading Sec Co
For this amount on account of \$300.00
retained per Centages
Correct Jno W Perrin Eng

Received of the Central Military Tract
Railroad Co., by the hands of W. H. Duffield, Treas-
urer, Three Hundred Dollars, in full of the above
And all other accounts Bergen & Sison.
Dated March 9, 1854

The Central Military Tract Railroad Co.
To Bergen & Sison Dr
Grading Section Co.

1854
28th Feb'y
Section Co
To 1893 yards Excavating at 23 cts \$435.39
" 373 " " " 24 " 89.53 = \$524.91
Deduct 20 per ct 104.98
Amount at 80 per ct \$419.93
Correct Jno W Perrin, Eng

Erastus Howard
Received of the Central Military Tract Railroad Co
by the hands of W. H. Duffield, Treasurer, Four hundred
and Ninety 9/100 Dollars, in full of the above,
And all other accounts
Bergen & Sison
Dated March 8th 1854 by Erastus Howard

The Central Military Tract Railroad Co.
To Bergen & Sisson Dr
Grading Section Co

1834
31st Jan'y
Section Co

To 1730 yards Excavation at 20 cts per yard \$346.00
Deduct 20 per ct 69.20
Amount at 20 per ct \$276.80
Correct Jno W Perriam Eng

Erastus Hurd

Received of the Central Military Tract Railroad Co, by
H. W. Duffield, Treasurer, Two Hundred and Seventy Six
Dollars, in full of the Above, and all other
accounts Bergen & Sisson
Dated February 8th 1854

The Central Military Tract Railroad Co.
To Bergen & Sisson Dr

1834
Feb 8

Grading Section Co
To this Amount on acct of
Retained per Centages \$300.00
Correct Jno W Perriam Eng

Received of the Central Military Tract
Railroad Co, by the hands of H. W. Duffield Treas-
urer, Three Hundred Dollars, in full of the above,
and all other accounts Bergen & Sisson
Dated 185

The Central Military Tract Railroad Co.
To Bergen & Sisson Dr
Grading Section Co

1853
31st Dec 1853

Section Co To 2427 yards Excavation at 20 cts per yd \$494.40
" 2226 " waste " " 445.20
" 1689 " Borrowed " " 337.80 = \$1277.40
Deduct 20 per ct 255.48
Amount at 80 per ct \$1021.92
Correct, Jno W Perriew, Eng

Erastus Hurd

Received of the Central Military Tract Railroad Co.,
by the hands of W H Duffield, Treasurer One thousand
and twenty-one 9/100 dollars, in full of the above
and all other accounts. Bergen & Sisson
Dated January 11, 1854 by T. P. Sisson

The Central Military Tract Railroad Co
To Bergen & Sisson On
Grading Section Co

1853

30th Nov.

Section Co To 5596 yards Excavation at 20 cts \$1119.20
" 1658 " Borrowed " 20 " 331.60 \$1450.80
Deduct 20 per ct 290.16
Amount at 80 per ct \$1160.64
Correct, Jno W Perriew, Eng

Erastus Hurd

Received of the Central Military ^{Tract} Railroad Co., by
the hands of W H Duffield, Treasurer, Eleven
hundred and sixty 64/100 dollars, in full of
the above, and all other accounts
Bergen & Sisson
by T. P. Sisson

Dated Dec 7, 1853

The Central Military Tract Railroad Co
To Bergen & Spon On
Grading Section Co

1853

31st October

Section Co

To 3367 yards excavation at 20 cts

\$673.40

Deduct 20 per cent

\$134.68

Amount at 80 per ct

\$538.72

Correct Jno W Perrien Eng

Erastus Hurd

Received of the Central Military Tract Railroad Co,
by the hands of W H Duffield, Treasurer, Five
Hundred and Thirty Eight ⁷²/₁₀₀ Dollars, in full
of the above, And all other accounts

Bergen & Spon

Dated November 15, 1853

by J. P. Spon

The Central Military Tract Railroad Co
To Bergen & Spon On
Grading Section Co

1853

31st August

Section Co

To 300 yards excavation at 20 cts

\$60.00

Deduct 20 per cent

12.00

\$48.00

Erastus Hurd

Received of the Central Military Tract Railroad Co
by the hands of W. H. Duffield, Treasurer, Forty-
Eight Dollars, in full of the above, And all other
accounts

Bergen & Spon

Dated Galveston 31st Aug; 1853

39
1833
The Central Military Tract Railroad Co.
To Bergen & Sisson Dr
Grading Section Co

September 30

Section Co To 1449 yards Excavation at 20 cts \$289.80

deduct 20 per ct.

57.96 \$231.84

Correct Jns M Perrin, Eng

Erastus Kourd

Receipt of the Central Military Tract Railroad Co, by
the hands of W H Ruffield, Treasurer, Two Hundred
And thirty One $84/100$ Dollars, in full of the above, and
All other Accounts Bergen & Sisson
Dated — 1835

1854
The Central Military Tract Railroad Co
To Bergen & Sisson Dr
Grading Section Co (Final Estimate)

31st August

Section Co To 2467 yards on depot grounds at 20 cts \$493.40

" 21.732 " " 4346.40

" 1815 " 23 cts 417.45

" 1881 " 24 " 451.44

" 1828 " 25 " 457.00

" 1802 " 26 " 468.52

" 1809 " 27 " 488.43

" 1767 " 28 " 494.76

" 1740 " 29 " 504.60

" 1751 " 30 " 525.30

" 1711 " 31 " 530.41

" 1525 " 32 " 488.00

" 1336 " 33 " 440.88

To 1274 yds

@ 34^{cts} \$ 433.16

" 1100 "

" 35 " 385.00

" 459 "

" 36 " 165.24

" 393 "

" 37 " 145.41

46.390

\$ 11,235.40

Back per Centago Retained from Estimated
work done by George Houston & Co

451.20

Amount \$ 11,686.60

Deduct previous payments

9,650.65

Correct

\$ 2,035.95

Jos M Berrien, Eng

Christus Hurd

Receipts of the Central Military Tract Railroad Co
by the hands of James Pearson, Treasurer, Two Thousands
And thirty five \$1000 Collars, in full of the above
And all other accounts.

Erigen & Sison
for J. P. Sison

Dated Sept 6, 1854

The defendant offered and read in Evidence to the
Jury, without objection the following Estimates And
Receipts signed by Plaintiff, And Orders, ^{and correct} These being
the Exhibits mentioned And referred to in the deposition
of John M Berrien:

The Central Military Tract Railroad Co

To George Houston & Co

Grading Section Co

For 4195 yards Excavation at 19 cts

\$ 797.05

Deduct 20 pr ct

159.41

1853

March 31st

61

Due \$687.64

Correct Jno M Berrian, Eng.

Received of the Central Military Tract
 Railroad Co. by the hands of W H Duffield, Treas-
 urer, Six hundred and thirty-seven ⁶⁴/₁₀₀ Dollars, in
 full of the above, and all other accounts

Geo Houston & Co

Dated Princeton April 5. 1853

The Central Military Tract Railroad Co

To George Houston & Co & Or

1853
April 30th

Accts. For 3732 yards excavation at 19¢ per yd \$709.08
 " 59 " 9520 yards Excavation at 19 1/2 ¢ per yd 1836.40
 " " " 527 Cubic feet timber for Culvert at 20¢ per M. B M 126.48
 \$2691.96

Deduct 20 per cent,

538.39

Correct

\$2153.57

Jno M Berrian, Eng.

Received of the Central Military Tract Railroad
 Co. by the hands of W H Duffield, Treasurer, Two
 thousand One hundred and fifty-seven ⁵⁷/₁₀₀ Dollars
 in full of the above and all other accounts

Geo. Houston & Co

Dated — 185

per C.H.

W H Duffield

Please pay C. H. Duffield or order
 for 261 yd excavation at 19 1/2 ¢ per cubic yard
 June 7th 1853

Geo. Houston & Co

261 yd at 19 1/2 ¢ is \$50.89

Mr W H Duffield, Please pay to Silas Inland
the amt due us for our Estimate in May. Estimate
bearing date June 7th 1853
Walnut Grove June 8th 1853
Geo Houston & Co
for Cash

1853
June 7th
Section Co

The Central Military Tract Railroad Co
To George Houston & Co & Co

Grading Section Co

3513 yards at 19 cts \$667.47

2349 " Borrowed 10 cts 234.90

X 4680 feet timber BM in Culvert @ 20th M. 93.60 \$995.97

Deduct 20 per Cent 199.19

Amount at 80 per ct \$796.78

Deduct amt paid O Houston (for Culvert timber) June 4/53 74.88

Correct \$721.90

Jas M Perrin Eng

Erastus Muro

Receipt of the Central Military Tract Railroad Co,
by the hands of W H Duffield, Treasurer, Seven
Hundred and Twenty one 90/100 Dollars in full of
the above, And all other accounts.

Geo. Houston & Co

Attest Princeton 7th June 1853

for Cash

The Central Military Tract Railroad Co.

To George Houston & Co & Co

1853

Grading Sections 59 & 60

June 30. Section 59 = 4106 yards at 19 1/2 cts \$800.67

" " " 60 = 3128 " " 19 " 594.33 \$1394.99

Deduct 20 per ct 279.00

63

Amount at 80 per ct

\$1115.99

Correct

Erastus Kourd

Jno M Perrin Eng

Paid July 6th

Receipt of the Central Military Tract Railroad Co., by the hands of W H Duffield, Treasurer, Eleven Hundred fifteen ⁹⁹/₁₀₀ Dollars, in full of the above, And all other accounts

Geo. Houston & Co

Dated Galveston 30 June 1853

pr O.K.

The Central Military Tract Railroad Co

To George Houston & Co Dr

Grading Sec. 54 & Co

1853

July 6

For this amount on account of

retained per centage

\$418.46

Correct Jno M Perrin Eng

Receipt of the Central Military Tract Railroad Co., by the hands of W H Duffield, Treasurer, Four Hundred and Eighteen ⁴⁶/₁₀₀ Dollars, in full of the above And all other accounts

Geo. Houston & Co

Dated Princeton July 6, 1853

Galveston 6th Sept 1853

W H Duffield.

You will please forward by Mr Erastus Kourd the amount of Houston, Spruck & Chas., And George Houston & Co. Estimate for the month of August and oblige, Yours &c

Silas Millard

The Central Military Tract Railroad Co
To George Houston & Co
Grading Section Co

1853

30th July 1853

Section Co

To 1008 yards Excavation at 19¢ $\$191.52$

" " " 312 " Borrowed " 10 $31.20 = \$222.72$

Deduct 20 for ch

$\$44.54$

Amount at 80 per Cent.

$\$178.18$

Correct. Jm W Bernier, Eng

Paid Aug 3^d

Erastus Howard

Receipt of the Central Military Tract Railroad Co, by the hands W W Duffield, Treasurer, One Thousand Twenty Eight \$100 Dollars in full of the above and all other accounts

Geo. Houston & Co

Dated Galveston 30th July 1853

for O.H.

Articles of Agreement, made and concluded the nineteenth day of February A.D. 1853, by and between George Houston & Co., party of the first part, and the Central Military Tract Railroad Company, party of the second part, intendeth: That the said party of the first part, for the consideration of Five dollars, the receipt of which is hereby acknowledged, do hereby bind themselves, their Executors and assigns in the penal sum of Five Thousand dollars, to be paid to the party of the second part, in case default be made in the performance of any of the stipulations or agreements herein contained, to be performed by the party of the first part, which are

That the party of the first part will do all the

67-

Grading to prepare the Road for the Superstructure upon Sections Fifty-nine (59) and Sixty (60). That they will make all the Excavations and Embankments of the proper form, make the ditches and Slopes of such form and Shape, and the Cuts and Embankments of such width, as shall be directed by the Engineer in Charge of the work; that where Earth or other Material occurs in the base of the Cuts, at or below Grade, which, in the judgment of the Engineer, is unsuitable for the road bed, they will remove such Earth or other Material to such a depth as may be directed, not Exceeding two feet below grade; and form the road bed of Gravel, Sand, or other any Material, such as may be approved or directed by the Engineer; that they will also make the top of all the Embankments to the same depth, if required by the Engineer, of the same approved material. But should this approved material not be found upon the section, or within a distance (which may be lateral or otherwise) not greater than the Extreme Haul of Earth upon the section where the said any material is required, then said party of the first part shall not be required to form the road bed of such material, but shall nevertheless take out the bad material, if required by the Engineer in Charge of the work.

That where Stone or other material occurs in the Cuts, which the Company desire to preserve, said party of the first part will deposit such material at the end or mouth of the Cut where it occurs, in such convenient place to be reached for future use, as the Engineer may direct; that they will remove all wooden material two feet below grade, where the wood is

fast, (as in Stumps) And remove all loose wood as much below grade as the Engineer may direct, and where special directions are not given, they are to be removed eight feet below grade throughout the work. That when in the judgment of the Engineer, the embankments are likely to settle, they shall be built above the grade line of the road as much as the Engineer may direct, not rising above grade faster than one foot in fifteen.

That the party of the first part will do all the grading for public or private crossings, depot grounds wherever they may occur, all the ditches and mucking, and remove any matters that may be unsuitable to lie under the embankment or road bed, all under the direction of the Engineer in charge of the work, and wherever he may direct. That they will do all the grubbing and all the clearing above the cuts and below the embankments, but the timber so cleared shall be the property of the company. That though the width of cuts or embankments may be established, the Engineer may change such width as circumstances in his judgment may require, and the work shall be done according to the new width. That although section stakes or divisions between sections may have been established, power is hereby reserved to the Engineer to change the locations of divisions, the change not to exceed five hundred feet. Power is also reserved to alter the line of the road wherever the Engineer deems it expedient; but should the line be moved in any place laterally more than two hundred feet, and thereby make the work

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 more difficult or expensive to perform, said party of the first part may, by giving notice to the Engineer within three weeks after such change, abandon the section upon which such change is made, but no claim for damages upon the Company shall be claimed in consequence; but if they commence the work after such change, they cannot afterward abandon it, and no allowance will be made beyond the contract price. That in all cases where borrowed earth is required, the regular cut shall first be taken out, unless otherwise directed by the Engineer in charge of the work.

In the progress of the work, the number of cubic yards shall be removed each month as shown in the following table;

No of Section	Month And Number of yards to get out each month in 1853							Total Number of Cubic Yards	No of yards of the Excavation to be got out each month of them at any one place
	March	April	May	June	July	Aug.	Sept.		
59	Yards	yards	yards	Yards	yards	Yards	Yards		
60	5,000	10,000	15,000	20,000	20,000	20,000	10,000	100,000	

In this tabular statement, showing the progress of the work, and that it is to be completed as follows: Sections Fifty Nine and Sixty by the first day of October, 1853, it is assumed that the ground will be ready for working by the first day of March, but should it not be, a time is allowed beyond the time specified in the table, equal to the time from said first day of March, till such time as the ground is ready for the commencement of the work.

Should the work not be carried on as fast as the above table prescribes, the party of the second part may enter upon it and take possession, or reject

it, as they may think fit; And the party of the first part will surrender it peaceably, and without let or hindrance from said party of the first part. In ^{this} case, no claim shall be made for the retained percentage, but it shall be absolutely forfeited by the party of the first part, to the party of the second part.

That the party of the first part will do the whole work for the aforesaid grading, including hauling, grubbing, mucking, and every item in the said work, so as fully to complete the work in a workmanlike manner, to the approval and acceptance of the agent of said Railroad Company, and under the direction of the Engineer in charge of the work, whose duty, among other things, is to measure the said work, and upon whose measurement the work is to be paid for by the Cubic Yard, measured in the Excavation only.

That the party of the second, for the consideration herein before set forth, hereby agrees to pay for the above work as follows: for Section Fifty-nine, Nineteen and one half ($19\frac{1}{2}$) Cents per Cubic yard of Excavation, and for Section Sixty, Nineteen (19) Cents per Cubic yard of Excavation, all measured in the Excavation which shall be in full of all accounts for the said work. The manner of payment shall be as follows: Eighty per Cent. of the Amount of Each Monthly Estimate will be paid as the work progresses, and the balance when the work is completed in accordance with this Agreement or Contract.

In Witness Whereof, we have hereunto set our hands and seals on the day

And read written first above

Geo Houston & Co
per O Houston
J. M. Brooks, President
by Jno M Berrien

Eng
The defendants read in Evidence to the jury the deposition of John M. Berrien, on file in this cause, which was in the following words and figures:

Interrogations to be propounded to John M Berrien a witness for defendant.

Interrogatory 1st

State whether you was Chief Engineer upon the Central Military tract Railroad in 1833?

Interrogatory 2^d

Do you know the plaintiff in the above entitled cause, and if so, when and where did you know them?

Interrogatory 3^d

Was you Chief Engineer in charge of the work upon sections 59 & section 60 of Railroad in Knox County Illinois in 1833.

Interrogatory 4th

Did the plaintiff commence the grading on sections 59 & 60, or either of them? and if so, which section, and when, and if both, give the time when the work was commenced on each?

Interrogatory 5th

State whether said sections were ready for the plaintiff to commence work on them on the first day of March. AD 1833, if not, when was it ready?

Interrogatory 6th

If you can - State how much Earth was excavated

by Plaintiff on said sections in the first month succeeding the time when the Plaintiff commenced the work, and how much in each succeeding month thereafter during the time the plaintiffs worked on the same. Give the number of yards on each section in each month.

Interrogatory 7th

State whether the work was estimated monthly as the work progressed?

Interrogatory 8th

State whether the plaintiffs excavated on said work as fast as the following tabular statement, to wit: 1st Month 5000 yards, 2^d Month 10,000 yards, 3^d Month 15,000, 4th Month 20,000 yards, 5th Month 20,000 yards, 6th Month 20,000 yards 7th Month 10,000 yards. If you say they did not, then state whether the delay of the work was with the approval of the defendant, or the Engineers of the defendant.

Interrogatory 9th

State the number of yards of Excavation in through cuts on each of said sections.

Interrogatory 10

State number of yards of fill on each of said sections.

Interrogatory 11

State names of the Engineers that were under you on said work, and state whether they were under you and subject to your direction?

Interrogatory 12

State whether you supervised and examined into estimates made by them, and if so, ^{state} whether they were correct.

Interrogatory 13

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State whether you permitted said Contractors, the plaintiffs, to borrow Earth to greater extent than to the amount the fill should exceed the number of yards in the through cuts, or did you authorize the Engineers under you to give such permission?

Interrogatory 14

State whether you permitted the plaintiffs to waste Earth taken from the through cuts on said work, and then borrow Earth at the expense of the Defendants to put in the fill in place of the Earth so wasted -- or did you give the Engineers under you leave to give such permission?

Interrogatory 15

If the plaintiffs wasted Earth taken from the through cuts and then borrowed Earth for the fill, to replace the Earth so wasted. State whether it was, or was not done for the convenience of the Contractor, because it was thought by them to be cheaper to waste and borrow to replace it than it was to haul the Earth so wasted to the fill?

Interrogatory 16

State as near as you can the time when the plaintiffs gave work on each of said sections?

Interrogatory 17th

Do you know whether the plaintiffs let the work on Section fifty nine, if yes, to whom and where was it done, and when did the plaintiffs stop work?

Interrogatory 18th

If you know, State how much money was paid plaintiffs for work on Section 59, and how much for work on Section 60, and the date of payment.

Interrogatory 19th

State whether you know of Section sixty being taken

from the plaintiff by the defendant, if so, when was it, and state whether the Plaintiff had up to the time the work was taken from them, taken out Earth as fast as required by the Contract, on the supposition that the 8th interrogatory contains the tabular statement embraced in said Contract, and state whether plaintiff had stopped work on this section before defendant took possession of it.

Interrogatory 20,

State the width required for the road in the Cuts on said sections; that is the width of the cut at its base, give the extreme width necessary

Interrogatory 21

Do you know any other matter or thing touching the matter in controversy, if so, state the same fully and at large, as though particularly interrogated in relation thereto

Interrogatory 22

State whether the plaintiff were not paid promptly monthly upon their Estimates, as the work progressed?

We accept service on us this day of a true copy of the above notice and interrogatories

March 15, 1857.

H. M. Mead, for plff

Cross Interrogations by Plaintiff

1 In answering defendant's sixth interrogatory, state if you have any personal knowledge of the amount of work done by plaintiff on said sections. State who actually measured the work

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- 20 State whether the work was not measured by one Knapp? And whether he did not make report to one Hurd, And he to you? And whether or not Hurd did not change the estimates after the report was made to him?
- 30 In Answering Defendants 9th interrogatory, state whether you measured the work yourself, or whether you know how many Cubic yards were excavated only from the report of others, And if your information came from others, state who?
- 4 State if you know whether Knapp was not Employed by Hurd as Engineer on said work, And whether Hurd did not direct the plaintiffs to follow Knapp's instruction?
- 5 In Answering Defendants 12th interrogatory, if you say you supervised And Examined the Estimates, state how you did it, And whether you remeasured the work?
- 6 Do you know what instructions were given by Hurd or by Knapp to the Contractors about borrowing Earth, or how or where they should work?
- 7 Did you ever give the Contractors in Sections 59 & 60 any instructions about borrowing Earth, or were your instructions always given to an Engineer under you?
- 8 In Answering the 18th interrogatory, state to whom the payments were made, And whether the last one

was not made to Millard, after you was notified by William Spunch not to pay him the money?

9 State how much you allowed Plaintiff for borrowed Earth on said sections, and whether they did not quit work thereon because as they alleged that they were not allowed for all the work done by them?

To the first interrogatory the witness saith, that he was the Chief Engineer on the Central Military Tract Rail Road in 1853.

To the second interrogatory the witness saith, that he knew William Spunch while employed on the Central Military Tract Road in Illinois in 1853, but that he never saw George Monston to his knowledge.

To the third interrogatory the witness saith, that he was Chief Engineer in charge of the work upon Section 59 and Section 60 of the Railroad in Union County, Illinois, in 1853.

To the fourth interrogatory the witness saith, that the Plaintiff named in the suit did not commence the work in either 59 or 60. The work on both these sections was commenced by George Monston Company to whom the contract was let. The firm of George Monston & Co. was composed of George Monston, Oliver Monston, William Spunch and J. P. Hara. George Monston did not appear on the work, or having anything to do with it on either Section 59 or 60, that the witness ever saw or heard of. William Spunch as a partner in the

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Concern did help to Commence and carry on the work. The grading of section 60 was commenced in March 1853, and section 59 about the same time, but might have been a few days later. The names of George Houston, Oliver Houston, William Spence and J P O'Hara were given to witness by Oliver Houston as composing the firm of George Houston & Co. Oliver Houston made the bid for George Houston & Co, and he signed the contract for George Houston & Co, in presence of witness. the Contract is hereto annexed marked Exhibit A.

To the Fifth interrogatory the witness saith, that both sections were ready for working on or about the first day of March 1853, and that the plaintiffs suffered no delay on this account.

When witness says plaintiffs here or hereafter he means George Houston & Co.

To the Sixth interrogatory the witness saith, that the plaintiffs George Houston & Co. were estimated for work done on sections 59 & 60 as follows:

In March 1853	0000 yds for section 59 and 4,195 yards for section 60
April "	9,520 " " " 3,732 " " "
May "	5,212 " including 2080 yds borrowed 5,862 " including 2,349 yds borrowed
June "	4,106 " 3,128 "
July "	4,208 " including 297 " borrowed 1,078 " including 312 " borrowed
August	3,623
September	4,390 " including 1,050 " borrowed
October	2,948 " including 2,074 " borrowed
November	1,734 " including 1,478 " borrowed
December 31st 1853	a final Estimate was given

for the work done on Section 59, being for 37,911 yards, of Excavation which included the quantities previously estimated on this section and was the total number of yards paid for on said section 59.

To the Seventh interrogatory the witness saith, that the work was estimated monthly as the work progressed.

To the Eighth interrogatory the witness saith, that plaintiffs did not excavate 5,000 yards in the first month. They excavated more than 10,000 yards in the second month. They did not excavate 15,000 yards the third month. They did not excavate 20,000 yards the fourth month. Nor did they excavate the number of yards required of them by the Contract in any one month after the second month, or month of April. That the delay in prosecuting the work was not with the approval of the defendants, or of the Engineers of the defendants, but against their repeated remonstrances.

To the Ninth interrogatory the witness saith, that the number of yards in the cuts on Section 59 was 26,455 yards. That the number of yards in the cuts in Section 60, was 51,212, Exclusive of deposit grounds at Altona.

To the Tenth interrogatory, the witness saith, that the number of yards in the fills on Section 59, was 34,288 yards, opening for bridge being deducted. That the number of yards in the fills on Section 60, was 52,722 yds. after deducting for the bridge over Walnut Creek.

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To the Eleventh interrogatory the witness saith, that Erastus Hurd was the Engineer on said work, he was assisted by a Surveyor named Alexander Knapp, and a Rodman named Byron O. Carr. All three were employed by witness and subject to his direction.

To the Twelfth interrogatory the witness saith, that he did supervise and examine the Estimates made by them, and that he believes their Estimates to be correct.

To the Thirteenth interrogatory the witness saith, that he did not permit the Plaintiffs to borrow Earth to a greater extent than to the amount the filling should exceed the number of yards in the regular cuts, called "through cuts" in the question, and that he did not authorize the Engineers under him to give such permission.

To the Fourteenth interrogatory the witness saith, that he did not permit the Plaintiffs to waste Earth taken from the regular or through cuts on said work, and then borrow Earth at the expense of the defendants to put in the fill in place of the Earth so wasted, and that he did not give the Engineers under him leave to give such permission.

To the Fifteenth interrogatory the witness saith that wasting Earth from the regular or through cuts was not done on either of these sections by the Plaintiffs to his knowledge, and that no Earth was borrowed by them to replace any Earth wasted.

To the Sixteenth interrogatory the witness saith, that

the work on Section 59 was continued from its commencement until the completion of the Section about the 1st December 1853. On Section 60 the plaintiffs did but a small amount of work in the month of July 1853, and during this month they stopped working on this Section entirely.

To the seventeenth interrogatory the witness saith, that the plaintiffs did very nearly all and perhaps the whole of the work on Section 59 by sub-contract, Silas Mellard, Olof Johnson and Curtis H. Capps. were sub-contractors on this Section. Witness says he cannot give the dates of re-letting by the plaintiffs, and that there might have been other sub-contractors besides those named, who did not hold orders from the plaintiffs to draw their money directly from the defendants, and of whom he had no knowledge. That the plaintiffs on the 5th day of August 1853 assigned all the money due or to become due to Silas Mellard, and did not themselves do any more work after that time that witness knows of.

To the eighteenth interrogatory the witness saith, that there was paid to the plaintiffs in person or to others on their written orders as follows:

On Section 59,

1853	May 3	\$1856.40	lep 20 per cent	is \$1.4485,12	paid them
	June 7	818.74	" "	" 654.99	" "
	July 6	800.67	" "	" 640.54	" "
	July 6	223.46	of retained percentages	224.46	
	Aug 3	793.35	lep 20 per cent	is 633.88	

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Sept 7 706.48 " " " is 565.18 " "
 Oct 8 573.45 no per centage retained 573.45 " "
 Nov 8 574.86 less 20 per cent is 459.89 " "
 Dec 8 338.13 " " " is 270.50 " "
 1832 Jan 7 " Amount due on final Estimate }
 including balance of retained percentages } 1,945.63 " "
 Total paid on Sect 59 \$7392.64

On Section 60

1832 April 5th \$797.05 less 20 per cent is \$637.64 paid then
 May 3 709.08 " " " is 567.29 " "
 June 7 902.37 " " " is 721.90 " "
 July 6 594.32 " " " is 475.46 " "
 July 6 194.00 of retained per centages 194.00 " "
 Aug 3 222.72 less 20 per cent is 178.18 " "
 Total paid on Section 60 \$2,774.47

The whole sum paid on account of Contract with plaintiff
 for grading the two sections 59 and 60 is \$10,167.11
 The original receipts for these payments are hereto
 annexed, marked Exhibits H, I, K, L, M, N, O, P, Q, R, S, T
 and V, and the order to pay Gilliland also annexed
 hereto and marked exhibit V. The signatures to all
 of which Exhibits witness knows to be genuine having
 seen the parties write and being well acquainted
 with their signatures

To the Seventeenth interrogatory the witness saith, That
 the Contract required the Plaintiff to excavate five
 thousand yards in March, Ten thousand yards in
 April, fifteen thousand yards in May, twenty thousand
 yards in ~~June~~ June, twenty thousand yards in July
 and so on, as stated in the 8th interrogatory. These
 amounts being for the two sections together. The

Plaintiffs did not do the stipulated quantity of work the first month, but the second month did enough more than the quantity required of them to make good the deficiency of the first month. After the second month they failed each month to do the quantity of work stipulated in the contract. Finally in the month of July the plaintiffs stopped working ^{entirely} on section Cc. After Plaintiff stopped working on section Cc Defendants took possession of the section and relet it to Bergen & Soper August 6th 1853, who completed the grading of the section. Defendants did not take possession of and relet it because plaintiff had arranged with Silas Millard to carry on the work on this section and said Millard guaranteed its completion to defendants, and did complete the section.

On the Twentieth interrogatory the witness saith, That the width of cuts was 22 feet at the bottom of the cut, this was the extreme width necessary.

On the Twenty-first interrogatory the witness saith, that on section 59 & Cc plaintiffs did not borrow any earth to replace earth wasted from the regular cuts. But they did borrow earth on both sections to make the fills before taking out and using the earth from the regular cuts. They had no right to do this, but were required by the contract to make the regular cuts and put the earth from them into the fills, and then if more earth were required to complete the fills, they were to borrow it.

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The Contract gave the Engineer power over this matter and he could if he saw fit, direct plaintiffs to borrow earth without waiting for the completion of the cuts. This power was not used by the Engineer, and he did not direct plaintiffs to borrow earth before completing their cuts. But he did permit them to do it upon the condition that earth so borrowed was to be included in the monthly estimates at half the contract price until the regular cuts were completed and the earth taken from them used up in the fills. This permission was granted for the convenience and benefit of the plaintiff in carrying on the work. It was for their benefit and convenience so to borrow, because earth taken from the sides could be most conveniently and cheaply deposited in the bottoms of the fills, and by so borrowing they were enabled more easily to do the monthly number of yards required of them. And the condition named was necessary to protect the defendants from damage or loss, and to guard against the abandonment of the work by the plaintiff, the borrowed earth not being worth more than half as much per yard as the regular cutting which had to be hauled a long distance.

The balance of the contract price for borrowed earth was to be paid when the cuts were finished, if the borrowed earth were necessary in making the fills.

The defendants did sometimes include borrowed earth in monthly estimates at full price, viz: 4,600 yards in section 39, but they were under no obligation to do so, and it was an advance of money to the plaintiff beyond what they were entitled to at the time, and only entitled to receive on completion of the contract, and then

only in case the borrowed Earth was found necessary to complete the fills over and above the Earth from the regular cuts, but the cost of the work to the defendants was not to be increased by such borrowing.

Witness further says, that the portion of the work done by the plaintiffs in section 60 was the cheapest portion of the work, on account of the short distance the Earth had to be hauled, and was worth considerably less per yard than the portion left unfinished, on which the Earth had to be hauled a much greater distance, and that in re-letting the balance of the section it had to be done at a higher price in consequence, and ^{the} cost ^{to} the defendants was increased the sum of \$2396.63 beyond what the work would have come to at plaintiff prices, and that this additional sum was paid by the defendants in consequence of plaintiff failure to complete the section according to their contract.

Witness further says, that Plaintiff contracted to begin this section in March 1853 and complete it by the first day of October following, or in seven months time. That on the first day of August, or in five months time they had done only about $\frac{1}{3}$ of the quantity of work required of them by the contract, for which reason and the further reason that they had stopped work entirely on the section, it was let to other parties.

In the Twenty-second interrogatory witness said, that the Plaintiffs were promptly paid monthly upon their estimates as the work progressed.

To the First Cross Interrogatory the witness saith,
That he did not measure the work on said sections
himself, that it was measured by Erastus Neund
assisted by Alexander Knapp and others, that the
quantities were certified by Neund to witness.
That the quantities reported by Neund were examined
by witness and compared with the original estimates
in his office so as to satisfy him of their correctness.

To the Second Cross Interrogatory, witness saith, that
the work was measured and reported as stated in
his answer to first interrogatory.

Witness does not know that Neund changed any
of Knapp's estimates. It was the duty of Mr. Neund
to make estimates, and not the duty of Mr. Knapp,
It was the duty of Mr. Knapp to obey Neund's orders
and assist him as required. And it was the duty of
Mr. Neund to correct Knapp's errors if he discovered
any.

To the Third Cross Interrogatory, witness saith, that he
did not measure any work himself on the ground.
The original calculations of quantities were made in
his office from the original field books, and surveys
of the located line and the grades established by
witness. These calculations were made in part by
witness and partly by others, but all under the im-
mediate direction and supervision of witness, and he
was fully satisfied with their correctness. E. Neund,
H. S. Thelmer, H. J. Hilbert, F. Hilbert assisted

in these calculations

The measurements for the Monthly Estimates were made by Hurd assisted by Knapp and others. The quantities reported were compared by witness with the original calculations in my office, which showed the quantity of work to be done whether of cutting or felling upon each 100 feet station upon the road, and witness was fully satisfied of the correctness of the measurements and estimates reported by Hurd.

To the Fourth Cross interrogatory witness saith, that Knapp was not employed by Hurd. That Knapp was employed by himself as a Seller under Hurd, and that he does not know that Hurd directed Plaintiff to follow Knapp's instructions.

To the Fifth Cross interrogatory witness saith, that his answer to the third Cross interrogatory is also his answer to this one.

To the Sixth Cross interrogatory witness saith, that he does not know of Knapp's giving any instructions whatever to Contractors about borrowing Earth, or how or where they should work. Hurd's instructions were given in conformity with instructions from witness to Hurd, which allowed no departure from the letter of the Contract in regard to borrowing Earth except upon the conditions as to pay mentioned in his answer to the twenty first direct interrogatory. Witness knows this from the

87 frequent statements of Hurd to him, and he fully believes the statements were true

To the Seventh Cross interrogatory, witness saith, that he generally gave his instructions to Contractors through the Resident Engineer, also sometimes gave them instructions himself

To the Eighth Cross interrogatory, witness saith, that his answers to the 18th direct interrogatory gives the several sums paid the plaintiff by defendants for work on sections 59 & 60. All these payments were made to George Moniston Ho, or to others on their written orders annexed, and referred to, in the answers to that interrogatory. The last payment on Section 59 was made to Silas Millard. Witness has no recollection of ever having been notified by William Spruck or any one else not to pay the money to Millard.

To the Ninth Cross interrogatory the witness saith, that plaintiff were allowed and paid for 11.456 yards of borrowed earth on Section 59, at the full contract price. That upon Section 60 they were allowed for 2.661 yds, at 10 cents per yard, the contract price on Section 60 being 19 1/2 cents per yard.

Plaintiffs did claim that they were not paid enough for their work, but witness cannot say if they gave that as the reason for their quitting work

Jos M. Denison.

The defendants read to the jury the deposition of Alexander Knapp, on file in this cause, which is in the following words and figures:

I am acquainted with Wm Spruck, I am not with Geo. Houston. I was engaged in the years 1853 & 4 in the service of the defendants on the C. M. & P. Railroad, I worked in the capacity of 2^d Assistant or division engineer. Col. J. M. Berrien was the Chief Engineer on that road. Erastus Howard was the resident Engineer, I was at work directly under Mr Howard and subject to his direction. Sections 59 & 60 of said road are located in Knox County. Section 59 is mostly East of Altona, and Sec. 60, commences at Altona and extends South-westerly in Knox County. These sections were under the direction of Mr. Howard, subject to Mr. Berrien's control. I think they commenced work on these sections as soon as the first of March, and I am quite sure they commenced work on the last day of February 1853.

I was employed by J. M. Berrien Chief Engineer of the C. M. & P. RR Company. I think I am competent to stake out, measure and make estimates of work done on railroads. I have had experience enough to understand it. I staked out the work on these sections myself, and I made out the estimate of the cuts and fills on those sections before the work was commenced. The actual amount of excavation in the cuts on Section 60 was 51,212 cubic yards. The total amount of fill on same section was (exclusive of Bridge opening about 52,000 cubic yards. On Section 59 the

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Amount of Cut Excavations was 36,245 cubic yards.
The total Amount of fill on Section 59, Exclusive
of bridge openings was 34,000 cubic yards. All
The measurements And Estimates were made before
the work was commenced on said sections.

The Plaintiffs on Section 60, in the month of
March 1853 excavated 4195 cubic yards, in the month of
April 1853 " 3732 yards. May Estimate 1853
3573 yards in May, they took out of borrowed
Earth 2349 yards. June Estimate 3128 yds cut
Excavation. July Estimate 1853, 1008 yds., They
borrowed same month 312 yards. I think there
was no work done on this section after July by
plaintiffs. They quit working on this section before
the fifth of August.

By borrowed Earth, I mean Earth that is taken
from the side of the road And not taken out of
the regular cut. Borrowed Earth was to be
put in at half Contract price (As I understood
from Mr Hurd) until the section was completed.
I assisted in measuring the work on this section,
done by plaintiffs. In taking the Estimates each
month Hurd and I went over the work together.
I took the measure with a tape line, And Mr
Hurd kept the figures as I gave them to him.
After returning to the office we figured up the
Estimates And Entered Them on the books.

The foregoing Estimates of work covers all
the work done by plaintiffs on Section 60, so far
as I know, And so far as I know, I believe the
Estimates are correct, And that the number of
yards of excavation and borrowing are correct.

stated. Mr Hurd is now dead,

The monthly Estimates of work done on Section 59, were as follows:

For April, Amt of Excavations	9520	Cubic yards		
" May, " " "	3132	" "		
" " Borrowed Earth	2080	" "		
" June, Amt of Excavation.	4106	" "		
" July, " " "	3911	" "		
" " Borrowed Earth	297	" "		
" August, Amt Excavations	3623	" "		
" September " " "	3239	" "		
" " Borrowed Earth	1030	" "		
" October Amt Excavations	874	" "		
" " Borrowed Earth	2074	" "		
" November Amt Excavations	236	" "		
" " Borrowed Earth	1478	" "		
" December, Amt. Excavations	2271	" "		

I am very confident that all the above Estimates of Excavation and borrowed Earth ~~are~~ on Section 59 are correct, because it overruns the crop section Estimates which covered the whole work.

I assisted Mr Hurd in making the above Estimates, I did the measuring and he kept the figures as I gave them to him. I gave the plaintiff leave through the orders of Mr Hurd to borrow dirt on Section 59. before the through cuts were excavated. I don't know that I ever told them what the price was to be for borrowed Earth, but I understood from Mr Hurd it was to be half contract price until the excavation was taken out. I laid off a borrowing pit for them. All the above measurements

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And Estimates were made by me with care, and by the order of Mr. Bernier, were gone over the second time by me and found correct when the road was completed. The Cars came from the East for the first time. The Estimates were taken Every month, and I was never required by the plaintiffs to take them oftener than that, or at any earlier day than they were. I am not now in the Employ of the Defendants.

After the work has been done on a railroad some considerable time I don't think correct Estimates of the work could be made. A correct Estimate of an Excavation could not be made after the work was done, unless the Engineer knew the depressions and Elevations of the surface. When it was excavated I tested the correctness of the above Estimates by leveling and cross section measurements, and by going over the work the second time, and comparing the results with my former work.

I am acquainted with Oliver Houston. He was on this work at the time plaintiffs were carrying on the work, and acted for them while carrying on the work, and claimed to be one of the firm of Geo Houston & Co. and worked on these sections, and in part directed the work on them. I am acquainted with Oliver Houston's hand writing, have seen him write. I have seen papers marked Exhibit "A" "B" "C" "D" "E" "F" "G" "H" "I" "J" "K" "L" "M" "N" "O" "P" "Q" "R" "S" "T" "U" "V" "W" "X" "Y" "Z" attached to deposition of John M. Bernier on file in this cause in the office of the Clerk of the Circuit Court of Knox County, Illinois, and said Exhibits are now before me, and from my knowledge of his hand writing, I believe that Oliver Houston wrote the signatures to said Exhibits. Oliver

91
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Houston and William Spurch usually went together to Princeton to draw the money for their work. Mr. W. Duffela was at that time (1853) the Treasurer of the C. M. P. R. Co. and kept his office at Princeton.

Adjourned until 6 o'clock to-morrow morning.

May 3^d

Crop Examined by Plaintiff.

I got the monthly Estimates given above from the books kept in the office of the C. M. P. Co. by Mr. Hurd, which books was before me, and from which I read the Estimates, entered there by Mr. Hurd. The original notes, taken at the time of measurement of the work, and from which Mr. Hurd made up the above monthly Estimates, are not in my possession, and I have not seen them since the Fall of 1854.

I located the road, run the levels and had the whole direction of the work on these 2 Sections, during the construction of the road, subject to the orders of Mr. Hurd, who, once or twice a month, rode over the road.

There was not a friendly feeling existing between Mr. Hurd and the Plaintiffs, and particularly in regard to Mr. Spurch. I don't know that Mr. Hurd had any ill feeling towards George Houston as he was not there.

In the figures showing the monthly Estimates of work done by Plaintiffs, as kept by Mr. Hurd in the book from which I got the Estimates above given, there has been no measure

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There was not a friendly feeling existing between Mr. Hurd and the Plaintiffs, and particularly in regard to Mr. Spurch. I don't know that Mr. Hurd had any ill feeling towards George Houston as he was not there.

In the figures showing the monthly Estimates of work done by Plaintiffs, as kept by Mr. Hurd in the book from which I got the Estimates above given, there has been no measure

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made, as is seen in the Estimates for May; though I suppose, the figures as they now stand on the book, to be correct. After the Plaintiffs had stopped work on section 60, I met Mr Spurch one day, on the Rail Road, and he told me, that he was not going to do any more work on the Sec, unless the Company paid him according to Contract. I think Mr Carr, my Bow-man, was present at the time when the work was first commenced on Section 60. The ground was frozen, and the workmen had to use axes and snowbars, to remove the frozen earth. The Plaintiffs had double the number of men in their employ, and at work, on Sec. 60 in April, than they did in March.

Examination Direct resumed by Defts Counsel.

I had nothing to do with paying Contractors, neither had Carr. It was Duffield, the Treasurer, paid the Contractors. Mr Demers would give the Contractors a Certificate of their monthly Estimates, and they would take them to Mr Duffield to get their pay. The Contractors went to Mr Demers Chief Engineer, at Princeton, and from him got a Certificate of their monthly Estimates, and then presented these to W. W. Duffield Treasurer of the Co, also at Princeton, and drew their money on him, this was their manner of doing business.

I have got a profile of these sections in my possession. it is correct. I have before me the Out and In book, made up by me

from Actual Measurement of these Sections, and
from this I ascertain the quantity of Excavation
and fill on these Sections. I think the Mainiff
had more men in their Employ on Section 59,
in the month of April, than they did on Section
60. At the time Mr Hurd and I made
the Estimates up in the Office, I knew that at
that time, Mr Hurd entered the Estimates Correctly
in the Books from which I have read them.

Crop Examination resumed.

I have no means of knowing the
Amount of work done in each month, only from
the Entries made in the Book kept by Mr Hurd,
and the one I read from.

If the Slope Stakes were standing in
their proper places, and the Centre Stakes standing
by the Slope Stakes, with the original Figures upon
them, work could be very nearly accurately
measured, even after it was done on Section 60.

Excavation and fill resumed.

Without these Stakes and Figures the work
could not be measured accurately, without the
original notes, Centre Stakes and Slope Stakes
set 100 feet apart. In the Estimate of
Borrowed Earth for the month of May, the
Estimate appears to have been changed.

I cannot tell whether it has been changed
since the original Entry or not, I cannot from
my recollection tell the Amount of Borrowed Earth
of that month, but my impression is, that
the Entry is correct as it now stands.

Alex Knapp

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 Plaintiff recalled witness Fink, who said, according to his best recollection knowledge the profile showed 40,000 yards borrowed Earth for Section Co. Spruck had the paper, I do not know who made it, or where it came from or whether it was a profile

It was agreed before the jury, that nothing was claimed for work on Section 39. That it was completed and paid for

The foregoing is all the Evidence introduced on the trial of said Cause. The following instructions were given by the Court to the jury, to wit: At
 Dyfts, p. 21

Given
 1st This Suit is brought to recover the value of work and labor done under a special contract, which has been introduced in Evidence
 2d The plaintiff can only recover upon one of two grounds:

Given
 1st. Upon the Contract itself. The plaintiff can only recover upon the contract itself by showing that they have done and performed Everything to be done and performed by the plaintiff by the terms of the Contract. To illustrate: If the jury believe from the Evidence that the plaintiff by the terms of their Contract were bound to Excavate twenty thousand yards of Earth in the month of June A.D. 1833, and that the plaintiff did not do such Excavation, but only a small part thereof, then the defendant had the right to rescind the Contract, to take possession of the work, or to let it, if they saw fit to

do so, if they did do so, then the plaintiffs could not recover on the Contract; but if defendants did not rescind the Contract for such cause, then they waived their rights under ~~the~~ Contract that part of the Contract for such non-compliance.

2d If the plaintiffs are not entitled to recover on the Contract itself, then they can only recover on the ground that the Contract has been lawfully rescinded. The plaintiffs could only treat the Contract as rescinded (without the consent of the defendants) on the ground that the defendants had made default in the performance of the Contract on its part, and that such default of the defendants prevented the plaintiffs from performing the Contract on their part.

3d If the jury believe from the Evidence that the defendants has substantially performed the Contract on its part, and that the plaintiffs have not complied with the Contract on their part, then the defendants cannot recover anything in this suit

4th If the jury believe from the Evidence that the defendants made the proper monthly Estimates, and paid the plaintiffs promptly the amount which the plaintiffs were entitled to receive upon such Estimates, according to the Contract; that the defendant only permitted the plaintiffs to excavate borrowed Earth upon the further agreement that the plaintiffs were to be paid only fifty per cent. upon the Estimates of such borrowed Earth, and that such percentage was promptly paid to the plaintiffs by the defendants

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And that in all other respects the defendant
Complied with its Contract And Agreement, and
That the plaintiffs have not complied with the
Terms of their Contract And Agreement, And that
All the work And labor sued for in this case
was done under Such Contract And Agreement
Only, then the jury will find for the defendant's

5 If there was any default on the part of the de-
fendant in the performance of the Contract, that default
must have been of such a character as to prevent the
plaintiffs from proceeding with the performance of the
Contract on their part; And further up to the time of
Such default the plaintiffs must have performed the
Contract on their part (or their failure in that respect
waived by the defendant's) in order to Entitle the plain-
tiffs to treat the Contract as rescinded, And recover for
their work And labor, independently of proving that
they have substantially performed the Entire Contract

Thereupon the Cause went to the jury, And the
jury found a verdict for the plaintiff for \$
damages. And thereupon the defendant then and
there Entered his motion in arrest of judgment And
the reasons therefor, which is in the following words.

Mr. Spence & George Houston

vs
Central Military Tract RR Co

Third Circuit Court

Sept Term 1889

And now comes the defendant, and moves

in arrest of judgment in this cause for the following ^{reasons}

1st For the want of a sufficient declaration.

2^d For the want of a sufficient record.
Manning, Douglass & Craig
Attys for defts.

And then and there came the defendant and made his motion for a new trial in said cause, which motion and the reasons therefor, is in the following words

Mr Spence & George Houston)
vs

Central Military Tract W Co

Know Circuit Court

September Term A.D. 1839.

And now comes the defendant and moves the Court to grant a new trial in this cause for the reasons following:

1st The verdict is against the instructions

2^d The Evidence is not sufficient to sustain the
verdict

3^d The verdict is against the law and the evidence.

4th The Evidence does not support the declaration

Manning Douglass & Craig
Attys for defts

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And thereupon, then and there the said Court overruled the said motions for a new trial and arrest of judgment, and the defendant then and there at the time of overruling said motions, to the respective decisions of the Court in overruling said motions excepted and objected, And thereupon judgment was rendered upon said verdict, to which the defendant then and there excepted

That the matters aforesaid might be made a matter of record, I have caused to be signed and sealed this bill of Exceptions

Given under my hand and seal this 4th day of November, 1859

John S. Thompson (Seal)

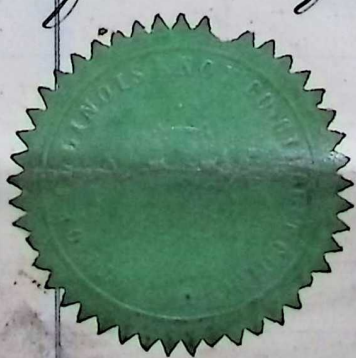
State of Illinois }
Union County } J

I Cephas Arms, Clerk of the Circuit Court within and for said County, do hereby certify that the above and foregoing is a true copy of the Record in said Cause and of the bill of Exceptions filed therein in said Cause, as the same appears of Record and on file in my office

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of St. Louis, this 5th day of April, A.D. 1860

Cephas Arms

Clerk



The Central Military Tract
 Rail Road Company
 vs. Appellant
 William Spunk & George
 Huston Appellees

The said
 Ref in Error the Central Military Tract
 R Road Co. by Walter Vanaman & Dexter
~~that~~ attorneys. comes & says that there is
 manifest error in the record in said
 cause for which the said judgment ought
 to be reversed and for error in the said
 record the said Ref says. That the
 Court erred in overruling & denying
 the motion made by the def in the
 Court below to set aside the ver-
 dict and grant a new trial in
 said for the reasons stated in said
 motion

The said Court tried in rendering
judgment for the said Plff in the
Court below instead of the Deft
Walter Vanaman & Dexter
Atty's for Appellant

Whereupon come the said William Spurek &
George Houston, by H. M. & L. Meed their At-
torneys, and say that there is no error ~~in~~
either in the record & proceedings aforesaid
or in the rendition of the judgment aforesaid,
and pray that the said Supreme
Court here, may proceed to examine as
well the record and proceedings aforesaid
as the matters above assigned
for error, and that the said judgment
aforesaid, in manner and form aforesaid
may be in all things affirmed

H. M. & L. Meed

Atty's for Appellee

205 - 90
Wm Spunk et al
✓

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Contract Military M.R. Co.

Filed Apr. 17. 1868
L. Seland
Clk.

Fest \$35.00