No. 12889

Supreme Court of Illinois

Mills

---

vs.

Weeks et al

71641  7

SUPREME COURT.

BENJAMIN WEEKS AND CALEB D. WEEKS,
DEFENDANTS IN ERROR,
ads.
JOHN R. MILLS,
PLAINTIFF IN ERROR.

POINTS FOR
DEFENDANTS IN ERROR.

I.

There is no question in regard to the amount of the verdict and judgment in the Court below. A large portion thereof was for extra work, &c., outside of the contracts.

The contracts were fully performed and completed by the defendants in error, the plaintiffs in the Court below.

See record, pages 53, 55, 56, 68, 69, 73.

The contract price amounted to *twenty thousand and seven hundred dollars*, of which eighty-five per cent. was to be paid as the work progressed; and the balance of fifteen per cent. on the completion of the contract; provided the superintendent should certify in writing that the defendants in error were entitled thereto.

See record, pages 15, 29.

On the 29th November, 1856, the superintendent certified as follows: See record, page 53.

"I hereby certify that the within bill is in my judgment just and cor-
"rect between the parties. I have carefully estimated and taken the
"whole matter into consideration, and have given Messrs. B. & C. D.
"Weeks a written list of different deficiencies that I wished them to do
"*in order to complete the contract, and when these different items are com-*
"*pleted, the building will be acceptable.*

"Nov. 29th, 1856.

"WM. W. BOYINGTON, Superintendent."

On the 20th Nov., 1856, the superintendent gave the plaintiffs below the written list of deficiencies referred to in his certificate of Nov. 29th, as follows. See record, pages 55, 56.

"Messrs. B. & C. D. Weeks:

"Your attention is called to the following items that will be required
"to be done *to close up the contract of J. R. Mills' block of stores on corner*
"*of Lake st. and Wabash avenue*, viz: Point up about chimneys and fire
"walls on roof, and secure some loose brick; point up under all the win-
"dows in each story, the same as done in the upper story; point up
"under some of the arches under the sidewalks; clean down front stone
"work and side window caps, and cement up holes in top caps. The

"lintels over several of the windows are not wide enough to reach the "wood frame, should be pointed; fill up where the slip sills were put in "on Wabash avenue, not thick enough; point up about basement win- "dow frames.

"Chicago, Ill., Nov. 20, 1856.

"WM. W. BOYINGTON, Superintendent."

Hiland B. Weeks testified.—(See record, page 69.)—That the work called for to be done by the memorandum of deficiencies, dated Nov. 20, 1856, was done within two or three days after the date of the paper; that the work to be done was principally on the outside and could be seen. That he told Boyington two or three days after the date of the paper that the work was done; that Boyington was about the building two or three times a day, almost every day till it was completed. He further testified on cross-examination. (See record, page 73.) "My impression is that I "told Mr. Boyington that the work mentioned in the specification of de- "ficiencies was done; *I have no doubt that I told him so as soon as it was "done: I met Mr. Boyington frequently at the building after that time.*"

John Riley testified.—(See record, page 59.)—"Defendant was about "the building daily."

Both the superintendent and the defendant below *must* have known that the deficiencies were made good within two or three days after the same were pointed out, even if the superintendent had not been notified of the fact.

The superintendent certified, that, when certain specified items of work were done the building would be acceptable. That then the contract, on the part of the plaintiffs below, would be completed; that it only required those items to be done to close up the contract on the part of the plaintiffs below. The work was done within two or three days thereafter.

When the work was completed according to contract, the plaintiffs below were entitled to payment therefor. The clause in the contracts, (see record, pages 15, 29, 30,) which "provided that said superintendent shall certify in writing that they are entitled thereto," simply meant that the superintendent should certify to the completion of the contract.

It was for the superintendent to know and certify that the work was completed, but it was within the knowledge of every body that when completed the right to payment necessarily followed. The defendant below knew it. None are so ignorant as not to know it.

Every necessary ingredient, required by the contract, is substantially complied with in the certificates of the superintendent.

Even if the few little items named by the superintendent had never been completed, there is no law or equity which would allow the defendant below to have and use the labor and materials of the plaintiffs below on a contract amounting to $20,700.00, without paying for the same.

The contract was substantially completed Nov. 20, 1856, when the superintendent made out the items of deficiencies, the work of but two or three days.

The law is well settled that where there is a special agreement to do work, and the work be done, but not pursuant to such agreement, either in point of time or any other respect, the party can recover upon the

common counts. Where the terms of a special agreement are substantially performed, a duty is raised for which a general *indebitatus assumpsit* will lie.

Jewett vs. Schroeppel, 4 *Cow. R.* 566, 567.
Farron vs. Sherwood, 17 *N. Y., R.* 229, 230.

Under the contracts the balance of the money was to be paid on the completion of the work to the satisfaction of the superintendent. His final certificate was not intended to be conclusive as to the amount actually due, nor was there a necessity imposed of his determining the actual sum due; but that the work should be performed to his full and complete satisfaction, and that fact appearing by his certificate, the right of the contractors to receive the balance of the money due them, was established.

The concluding provision of the contracts, that the balance of, &c., is to be paid on the completion of the contract, "provided the superintendent shall certify in writing that they are entitled thereto," by a reasonable construction is intended to mean that the *evidence* of the fact that the contract has been performed to the satisfaction of the superintendent, *shall appear in writing*, in fact this is the only clause in the entire contract, that would require his certificate in writing, that the contract had been satisfactorily performed.

The case of the United States *vs.* Robeson referred to by attorneys of plaintiff in error in their printed points, as the case from which was drawn their first instruction asked on the part of the defendant below, sustains the general doctrine that parties must live up to their contract, and shall procure the kind of evidence required by the contract.

In that case, it appeared by the record that *payment had been made* for the services *covered by the certificate introduced*, and no *certificate, whatever*, was introduced relating to the services for which suit was brought.

How can that state of facts be applied here?

The plaintiffs below introduced in evidence the certificate of the superintendent, showing the satisfactory performance of the contract by them—provided they made good some trifling deficiencies, such as pointing up, &c. These deficiencies were particularly specified and referred to in, and *made a part of said certificate*, and, as in the nature of an award or decree, made conditional to the performance of certain requirements, which being complied with, becomes absolute.

Whether the defendant below was entitled to the benefit reserved to him by the requirements of the certificate of the superintendent does not appear; but the *fact* is established, that the deficiencies were made good, and all that the superintendent required was fulfilled to the letter.

The defendants in error claim a substantial compliance with all the provisions of the contracts, and that the evidence introduced by them in the Court below was proper and sufficient, and that the judgment of the Court below meets the demands of law and justice.

II.

There was no error in the Court in refusing the second instruction asked for by the defendant below. *There is no provision in the contracts by which the superintendent was to decide, or pass upon, any extra work or its value ;* and to do it, or to attempt to do it, was an unwarrantable assumption on his part, by which neither party could be bound. By the provisions of the contract (see Record, p. 4) it was the duty of the superintendent, amongst other things, to settle "all deductions of or additions "to the contract price which may grow out of alterations of the design, "*after the same is declared to be contract ;* also determining the amount of "damages which may accrue from any cause, and to *particularly decide* "*upon the fitness of all material used and work done.*"

By the contract, it was provided (see Record, p. 13) that the damages arising from the non-fulfilment thereof, as regards time, should be $32.00 per day for each and every day *to work* remains unfinished. There is no provision by which the superintendent may decide or pass upon the time or amount of time the work should remain unfinished. Neither was it intended that the superintendent should change, or pass upon the amount of damages, if any, agreed upon in the contract, which might arise from the non-fulfilment of the contract *as regards time.*

By what authority or right did the superintendent assume to charge the plaintiffs below with the following items of account? (See Record, p. 54, 55).

"For 60 days delay non-compliance with contract, at $32.00 per day,		$1,920 00
"Bill of items, A. Campbell,		32 79
"Accommodation to carpenter,		5 00
"Delay caused to carpenter,		350 00
"Certificates drawn,		17,400 00
"Order to Illinois Stone Co.,		1,200 00
		$20,907 97"

The contract gave the superintendent no right or authority to decide, or pass upon a single item of the above account.

The superintendent assumed, without any authority, or color of authority, to establish prices for extra work, and to charge the defendant below therewith. See Record, p. 54.

So far as power was delegated to the superintendent by the contract, to wit: to certify to the completion of the work according to contract, his certificate was competent evidence. He was required to certify, in writing, as to the completion of the contract. But when he, on the other side of his certificate, voluntarily and officiously assumed to pass upon extra work and other matters not delegated to him by the contract, it amounted to nothing, no more than the opinion of any other man expressed on paper, not under the solemnity of an oath.

The superintendent was a witness on the trial in the Court below. Why was he not interrogated as to the correctness of his assumed

charges against both parties? His testimony in relation thereto might have been competent evidence, as much so as if testified to by others.

It is urged by the counsel for the plaintiff in error, that the statement of the superintendent in relation to extra work, &c., on the back of his certificate of the completion of the contract, should have been given to the jury because it was referred to in said certificate, &c.

"The certificate with said statement on the back thereof, made by said "Boyington, was given to the jury by the consent of counsel on both "sides." See Record, p. 85, 86.

Yet, in view of the facts in the case, the Court could not legally instruct the jury, that "the jury should consider the said matters as a part "of said certificate and as competent evidence, and proper for their con- "sideration in connection with the other testimony in this case, in "determining the rights between the parties to this suit and the amount "of the recovery therein," as asked for by the defendant below.

If *any of the items* in said statement were made by the said superintendent without authority derived from the contract, then the said second instruction asked for by the defendant below should not have been given.

In the case of Morgan *vs.* Birnie, 9 Bing. 672, 23 E. C. L. 414, cited by plaintiff in error on this point, the architect merely checked the builder's charges and sent them to the defendant. It was there held, that this did not amount to a sufficient certificate of satisfaction.

The *account* made by the plaintiff, and checked by the architect, could form no part of a proper certificate, any more than could the account between the parties made out by the superintendent in this case, and which the Court below refused to instruct the jury, should be taken as a part of his certificate.

III.

There was no error in the Court below refusing the third instruction asked by the defendant.

By said instruction the jury was required to find for the defendant, if they believe from the evidence, that at the time of making the several contracts given in evidence, the witness, Highland B. Weeks, was associated with the plaintiffs, and doing business with them under the the name of B. & C. D. Weeks, and under that name entered into the said contracts, and performed all the work in question with the plaintiffs.

The objections to such an instruction are as follows:

1st. There was *no evidence whatever* showing, or *tending* to show directly or indirectly *any* of the assumed facts submitted for the consideration of the jury in said instruction.

2d. Not even the competency of the said Highland B. Weeks as a witness, upon the ground of interest, was raised or questioned upon the trial.

3d. If the jury merely believed the facts stated in said instruction, they were required to find for the defendant, and if they so believed, the entire evidence relating to the merits of the action might have been excluded from their consideration, whereas *assuming* those facts to be true,

it was merely a matter of exception to the precedings, which, if developed in the progress of the trial, ought then to have been made the subject of objection, and if well founded, would have been ground for a non-suit.

Joseph vs. *Fisher*, 3*d Scam.* 137.

1 *Chit. p.* 20.

4th. The effect of such an instruction would be to mislead the jury, and might effectually bar a recovery by plaintiffs below upon a single question relating to the regularity of the proceedings, without requiring the jury to consider the actual liability of defendant below upon the merits.

5th. The inquiry made by the instruction was an abstract one, and under the evidence, entirely irrelevant to the issue, and was improper for the consideration of the jury, as would be any matter outside of the case, which counsel might invent and incorporate into an instruction, to divert the jury from the true points in the cause, or making some apparent ground for appeal.

IV.

There was no error in the Court below in refusing the fourth instruction asked for by the defendant below. The contracts were shown to have been fully performed on the part of the plaintiffs below, and the only certificate which the plaintiffs below were required by the contract to obtain was as to the completion of the contract; that certificate, *in writing*, was given by the superintendent.

Highland B. Weeks testified.—(See record, page 71.)—That "all the "work mentioned was done under the contract offered in evidence, except "the extra work."

The superintendent's duty amongst other things consisted, (see record, page 4,) "in settling all deductions of, or additions to the contract price, "which may grow out of alterations of the design *after the same is declared* "*to be contract.*"

There is no evidence whatever, of any alteration of the design, *after the same was declared to be contract*, neither is their any evidence of an alteration of the design at all.

But even if there had been an alteration of the design after the same was declared to be contract, there is nothing in the contract which required the certificate *in writing* of the superintendent, to enable the plaintiffs below to recover payment for work done and materials furnished occasioned by such alteration.

There was no pretence on the trial below of any alteration of the design.

V.

The cases cited by plaintiff in error, on examination, will not sustain the principles sought to be applied by him in this case.

The rule applicable to conversations is not disputed, nor in relation to accounts, &c.

The case of Winants vs. Sherman, 3, Hill 74, cited by plaintiff in error, merely decides that books of accounts could not be offered in evidence, under the *qualification* that they should not be received to prove *other matters*, to show which for *ought that appears they were equally competent.*

In case of Kelly vs. Dutch, Ch. of Schenectady, 2, Hill 105, cited by plaintiff in error; the plaintiffs offered the bills of exception in two ejectment suits, for the *sole* purpose of showing how the plaintiffs in those actions claimed title, and insisted that defendant could not use the evidence for any other purpose, held untenable on the ground that the bills of exception showed not only how the plaintiffs in those actions claimed title, but on what ground they recovered, and that the bills were in *their own nature as good evidence to prove the one fact as the other.*

In the case of Canal Trustees vs. Lynch, 5, Gil. 526, cited by plaintiff in error, the contract contained a stipulation that the chief engineer should determine the amount of the *several* kinds of work contracted to be done, and decide any question *that could or might* arise relating to the execution of the contract by the contractor, and that his estimates should be final and conclusive, and that suit was brought to recover *additional* payment after the relinquishment of the contract and settlement between the parties, on the ground that there was error in the estimates made by the engineer.

In case of McAvoy vs. Long, 13, Ill. R., 150, cited by plaintiff in error, under a contract for excavation, a particular person was selected to ascertain the *quantity* excavated.

In case of Butler vs. Tucker, 24, Wend. 446, cited by plaintiff in error. It was not averred in the pleadings, nor any attempt made to prove, that the work had been done to the satisfaction of the building committee, the arbiters designated in the contract, the suit being brought to recover the first instalment under the contract.

In case of Smith vs. Brady, 17, New York R. 174, cited by plaintiff in error, the builder had substantially *failed* to perform his contract, and no certificate whatever of the architect was introduced or attempted to be procured. But the plaintiff there sought to recover upon the ground that the owner occupied and enjoyed the improvements.

KING, SCOTT & WILLSON,
Atty's for Defendants in Error.

218.

Benjamin Weeks 2
Caleb D. Weeks
Defts. in Error.
accts.
John R. Mills
Defts. in Error.

Defts. Points &c.

Filed April 28. 1859
R. K. Leland
Clerk

King, Scott & Wilson
Attys. for Defts. in Error

Printed by Jameson & Morse, 14 La Salle St., Chicago.

SUPREME COURT.

JOHN R. MILLS,
Plaintiff in Error,
vs.
BENJAMIN WEEKS and CALEB D. WEEKS,
Defendants in Error.

POINTS FOR PLAINTIFF IN ERROR.

I.

By the decision of the Court, that plaintiff below might give in evidence the certificate of the Superintendent of the 29th November, 1856, without also including the statement on the back thereof, referred to in said certificate—and by refusing the second instruction asked by the defendant below, in that behalf, the Court in effect decided that it was competent for the plaintiff below to read in evidence a part only of a document, and that defendant should not have the benefit of the residue of the same.

1st—The rule applicable to conversations, viz: "That when a conversation is detailed by a witness, the party against whom the evidence is offered is entitled to the whole conversation which occurred at the same time"—*Hatch vs. Potter et al.* 2 *Gil.* 729—*Fenner vs. Lewis*, 10 *Johns. R.* 38—*Vibbard vs. Staats*, 3 *Hill* 144—applies to accounts, recitals, deeds, and other written evidence.

"But the whole of a recital is to be taken; and therefore, if a patent be recited to be surrendered, and one relies upon the recital as proof of the existence of the patent, it will also be proof of a surrender."

Hoyatt vs. Phifer, 4 *Dev. Rep.* 274.
Winants vs. Sherman, 3 *Hill* 74.
Kelly vs. Dutch Ch. of Schenectady, 2 *Hill.*
Phillips & Milley vs. Green, 5 *Monroe* 345.

2d—By the provisions in the Specifications, and under the head of "Superintendents and their Duties," the Superintendent was to settle all deductions from or additions to the contract price, which might grow

out of alterations of the design, after the same is declared to be contract; and to determine the amount of the damages which might accrue from any cause. Then the covenant of the defendant below, to pay for the work, is upon the express condition that the work was done *to the full and complete satisfaction of Wm. W. Boyington, or his Assistant Superintendent*, and the balance of fifteen per cent. was payable upon the completion of the contract, provided *that the said Superintendent should certify in writing that they (contractors) were entitled thereto.*

The object of this last provision was obviously to keep this balance in abeyance, subject to the decision of the Superintendent, upon every point in the job, upon which the right to the money in anywise depended.

To be entitled to a payment of money, is to have the right to demand and receive it.

To certify that they had the right to the money implies, necessarily, the power to determine and fix the amount, which would involve the finding of the amounts paid on the job, the deductions from or additions to the contract price, and any loss the owner might have sustained by reason of defective work, or the non-performance of the contract, as to time. In short, the Superintendent was made, by the contract of the parties, which must furnish the law of the case, the umpire between them, and his decision final and conclusive.

Canal Trustees vs. Lynch, 5 *Gil.* 526.
McAvoy vs. Long, 13 *Ill. R.* 150.
Butler vs. Tucker, 24 *Wend.* 446.
13 *Ohio* 79. 1 *Will. Vt.* 700. 11 *Harris.* (*Penn.*) 291.
Glenn vs. Leith, 22 *E. Law & Eq.* 489, *Notes* 1 & 2.
Wornly vs. Wood, 6 *Term R.* 710.
Smith & Brady, 17 *New York* (3*d Smith*) 174.

If we are right in the construction of the contract above given, then, aside from the rule of evidence, that if plaintiff gives part of a statement in evidence, the defendant is entitled to the residue, the statement of the Superintendent was competent evidence for the defendant, as showing the amount due between the parties.

II.

The Court erred in refusing the first instruction asked on the part of the defendant below.

1st—This instruction was drawn from and precisely embodies the rule as laid down by the Court in the case of *The United States vs. Robeson*, 9 *Peters* 319, and we submit that it is fully sustained by the authorities above cited.

2d—Instead of sustaining that rule, the Court held that the plaintiffs might prove, (against the objection of defendant,) by the witness Hiland B. Weeks, that the work mentioned in the memorandum of deficiencies made by the Superintendent, had been, in fact, performed; and therefore amended the instruction, so as to make such performance sufficient, without producing and proving the certificate of the Superintendent that they were entitled to the money; which ruling, together with the refusal to give the second instruction, was in effect deciding that if the plaintiffs proved that the Superintendent *accepted* the work, *that* was all the contract required, which, we say, is a misconception of the force and effect of the contract.

The Specifications, Rec. page 13, under the head of "Time," provide thus: "*Said work in no case shall be considered as finished unless the same is so reported to the Superintendent and accepted by him.*"

3d—The certificate of the 29th November, 1856, without the statement on the back of it, only *tended* to prove the fact of acceptance of the work by the Superintendent. Whereas the certificate in writing, that they were entitled to the money, is quite another thing. There might have been deficiencies in the work—inexcusable failure to perform within the time—over-estimates and payments; and although the work were accepted, that acceptance would not cut off the owner from recovering his damages, for either delay or deficiencies; because here the owner could not rescind the contract, or abandon the work and materials done and furnished, without abandoning his own property. In which case he may accept without losing his right to damages.

Eldredge vs. Row, 2 *Gil.* 96–7.
17 *New York*, 174.

And besides, the contract provides for acceptance by the architect, and the certificate that they were entitled, &c. also. Therefore, one cannot waive the other.

This point is substantially decided in the case of *Morgan vs. Birnie*, 9 *Bing.* 672, 23 *E. C. L.* 414. There the owner contracted to pay the balance which should be found due after deducting the two previous payments within two calendar months after receiving the architect's certificate that the whole building was completed to his satisfaction. The contractor made out his account headed "Final statement of extras and omissions of the carcass of house for George Birnie, Esq., by T. Morgan, builder." The architect checked off the items and sent them to the owner who did not object for want of a final certificate, but proposed to have the matter settled and paid. But as it did not appear that the Architect had given any certificate of his satisfaction, TINDAL, C. J., directed a nonsuit. The same Judge, in giving the opinion of the Court, on motion to set aside the nonsuit, in concluding the opinion, says: "Unless the letter and delivery of the plaintiff's account, and the checking that account by Clayton (the architect) amount to a certificate, no certificate has been given. It appears to me that the effect of a certificate would be altogether different; applying to the manner in which the work had been done, while the checking the accounts applies only to the propriety of charges."

So, here, the effect of an *acceptance* would be altogether different, from a certificate in writing that the plaintiffs were entitled to a certain sum of money; because the latter, to say the least, would necessarily involve an inquiry into past payments, and facts, which would have no connection whatever with an acceptance of the work.

III.

The Court erred in refusing the third instruction asked by the defendant to the effect, that if the jury believed from the evidence that at the time of making the several contracts set out in the first and second counts and given in evidence, the witness, Hiland B. Weeks, was associated with the plaintiffs, and doing business with them under the name of B. & C. D. Weeks, and under that name entered into the said contracts and performed all the work in question with the plaintiffs, that then he should have been joined as plaintiff, and the jury must find for the defendant.

The contracts were executed by the contractors in the name of B. & C. D. Weeks, and the evidence tended to show that Hiland B. Weeks was not only associated with the plaintiffs, but that he was the principal

man in the matter, and it is a fraud upon the administration of justice, that any man, by such adroit arrangements, should be permitted to swear money into his own pockets.

The instruction was correct in point of law—there was evidence to waraant it, and the defendant had a right to the benefit of it.

The statutes (*Cooke's Stat. page* 256, *sec.* 7) after enacting that where action is brought by partners, &c., it shall not be necessary for plaintiffs to prove partnership or to prove the christian or surnames of such partners, &c., contains the proviso that nothing therein contained shall prevent the defendant from pleading in abatement as theretofore, or *of proving on the trial either that more persons ought to have been made plaintiffs*, or that more persons have been made plaintiffs than have a legal right to sue, &c., in which event the defendant's rights sball be as at common law.

At common law, a want of proper plaintiffs in an action on contract, is an exception to the merits, and may be taken advantage of under the general issue.

Scott vs. Godwin, 1 *Bos. & Pull.* 66.
1 *Chit. Pl.* 13, 476.
Barker vs. Jewett, 6 *Mass.* 460.

It is a question for the Jury, whether a contract has been made.

Sigsworth vs. McIntyre, 18 *Ill.*, 126.
17 *id.* 389.

SCATES, McALLISTER & JEWETT,
Att'ys for Appellant.

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Mills
vs
Weeks

~~Defts~~ Briefs
for Appellt.

Supreme

John R Wells
Plff in Error

vs

Benjamin Wells &
Caleb D Wells

Transcript

Filed April 15. 1859
L Leland
Clerk

Fees of Transcript
Pd by Plff in Error $27.

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United States of America
State of Illinois Cook County ss

Pleas before the Honorable John M Wilson Judge of the Cook County Court of Common Pleas within and for the County & State aforesaid at a regular Term of the Cook County Court of Common Pleas begun & holden at the Court House in the City of Chicago. in the County of Cook and State of Illinois on the second Monday being the thirteenth day of September in the year of our Lord one thousand eight hundred and fifty eight and of the Independence of the United States of America the eighty third.

Present John M Wilson Judge.
Carlos Haven Prosecuting attorney
John L Wilson Sheriff.
Attest Walter Kimball Clerk.

Be it remembered that heretofore to wit on the twenty seventh day of January in the year of our Lord one thousand eight hundred and fifty eight. Benjamin & Caleb D Bucks by. King Scott & Wilson their attorneys filed in the office of the Clerk of the Cook County Court of Common Pleas their amended declaration which is in the words and figures following to wit.

State of Illinois
Cook County } ss.

The Cook County
Court of Common
Pleas of the September
Term A.D. 1857.

Benjamin Weeks & Caleb D Weeks copartners in business at the City of Chicago in the County of Cook aforesaid under the firm name and style of B & C D Weeks. Plaintiffs in this suit by King Scott & Wilson their attorneys complain of John R Mills Defendant in this suit of a plea of Trespass on the case upon promises, For that whereas the said defendant and the said Plaintiffs (under the said firm name of B & C. D. Weeks. heretofore to wit on the twenty second day of March in the year one Thousand eight hundred and fifty six at the City of Chicago in said County of Cook made and executed their certain agreement in writing in the words and figures following, to wit,

Specifications for the Masons.

Work and Materials required for the erection and completion of two Marble front five story stores with a basement on Wabash

Avenue & cellar under the walks which John R Willis is about to have built on the corner of Wabash Avenue and Lake Streets.

Special Reference will be had by the contractor to the following Specifications and the accompanying Design as made by Wm B Boyington, Architect and which consists of the following drawings viz

Plan of Basement & foundation,
" " First floor above Basement.
" " Second "
" " Third "
Front Elevation
Side Elevation.
Sectional portions &c.

Duties of Contractor He shall be strictly held to make such Work and to use such Materials as hereinafter described, and to work up the Building to the given Design and in all cases where the drawings are figured, the figures must be taken by him as the given dimensions, without reference to what the drawing may measure on its scale He will be further held to submit as to the character of the Materials used and the Work done to the Judgment of the Superintendent, and to procure from them all necessary interpretations of the Design and all necessary certificates regarding his payments.

Superintendents and their Duties Wm B Boyington

or his assistant Architects are declard to be the Superintendents of the Work for the owner their duties will consist in giving on Demand such interpretations either in language writing or drawing as in their judgment the nature of the Work may require having particular care that any and all Work done, and Material used for the Work be such as is hereinafter described and in giving on demand any certificates that the Contractor may be entitled to and in settling all deductions of or additions to the Contract Price, which may grow out of alterations of the Design after the same is declared to be Contract also determining the amount of damages which may accrue from any cause and to particularly decide upon the fitness of all Material used and Work done.

The Contractor being bound in all cases to remove all improper Work or Materials when being directed so to do by the Superintendents.

But the Contractor if after having been directed as above to remove the same, should refuse or neglect so to do, shall not only suffer a deduction from the Contract Price, of the Difference in value of proper and improper Work and Materials but shall also be Liable for all Damages of whatsoever nature or Kind that may result from such cause. The above provisions to apply in the same way to all Materials or Work, Used, Made, or Fixed without the Knowledge

5

of the Superintendent,

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

The owner reserves the right to alter or modify the Design and to add to or diminish from the contract price, the difference to be adjusted as provided above.

The owner being bound in all cases to recognise the acts of his Superintendent not only as regards extra work but also to the sufficiency of the Design the Contractor being in no case responsible for any accident resulting to the work from any Defective Design which fact must be determined by an arbitration of Three disinterested men chosen indifferently, and if found that the damages resulting from a want of proper care on the part of the Contractor then and in such cases the damages and loss shall be paid for and made good by him, but if found that the accident or damage resulting from an improper Design then and in such case all Damages shall be sustained by owner; which in all cases must be Real and in no case Constructive Damages to

be allowed,

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

Demensions of the Building as represented by and figured on the drawings.

Heights - Basement Story (Cellar) to be 8' 6"

Principal	do	do 14 feet.
Second	do	do 13 "
Third	do	do 12 "
Fourth	do	do 11 "
Fifth	do	do to the roof

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

Grade of Building

Top of first floor of joist to be fixed twenty inches above the new grade of the Side walk.

7

Excavations.

The entire Area of the proposed building as required by Plans, to be dug out, deep below
Excavations for footings of walls to be dug 12 inches below the first named excavation,
All other excavations for drains and cisterns and for foundation of Piers and for Vaults of Water Closets as required by Plans.

All the excavated earth must be distributed in the alley and Street sufficient to fill the new Grade & contractor to properly level off the earth about the Street and building and refill the excavations for Drains, after the same is put in and properly fixed and cart away all surplus earth and all rubbish and keep the Streets in passable order

Rubble Stone Work.

All Walls shaded blue to be of stone of dimensions and hights figured in the Drawings and composed of good quarry stone laid in the best manner, with mortar mixed of proper proportions of best lime, and clean coarse sand the whole to be well Bedded and Bonded together and well faced on both sides.

Dwarf Walls to have Stone foundations same kind of work as above described and the same to be

feet deep and average 18 inches inches thick sections and higths are given on plans for Basement

and foundation. The piers in the cellar under the walk will be same as below specified for main cellars.
Footing of party wall to be composed of large stone the first course or layer must not be less than 10 inches thick by ten feet square surface and must be well settled in the earth with a heavy instrument of wood and laid in a mortar made of two parts sand and one of best hydraulic cement.
Piers in the cellar 2'6" square and two feet deep built of good square stones, and the top of each to be covered with a stone 16 inches square 6" thick.
Bearing walls for the purpose of the partitions in the Basement will be composed of good stone and built two feet deep.

See this omission

The partition walls in Basement to be omitted
Foundations for Iron columns as shown by Plans and sections thru thicknesses at least 12 inches thick each and all well fitted together and thoroughly bedded in cement mortar and all possible means taken to have a perfect bearing to each stone and the tops surfaced to a level and the outside ones bush hammered & square edged
Walls of Areas of the cellar windows to be of stone height and thickness as plans & sections The fall of the area wall on Wabash Avenue will be faced with good stone bush hammered and laid in courses and all the stone work that shows in this area will be cut in the same way

9

All proper holes left for drains, and gas pipes as directed or shown by Plans.

Cut Stone.

For the quality and kind, reference will be had to the accompanying bills and drawings where the same is plainly described and shown and must be properly set: and after the walls are finished, to be properly cleaned off and pointed up. All the cut stone work above the foundation will be made a separate contract, and all delivered on the ground Levised and drilled for anchors ready to set after the same are thus delivered the contractor must take charge of the same and become responsible for the protection and sustain all damages in case any should occur for want of proper care All cut stone for Piers and stone foundations will be furnished by the contractor for the Masonry the Piers under the iron columns in front and rear of stores will be brush hammed well fitted ~~together~~ with one stone to each course.

Brick Work.

All Walls shaded red on the Plans are to be of bricks of the thickness and size marked on Plans laid in the best manner with solid head and bed joints and flushed solid every second course. the face of the wall on Wabash Avenue will be Milwaukee press brick laid with close joints well & neatly struck

all bricks used for facing the Outside Walls.

must be hard burned all soft bricks to be rejected from the work Pitch of the roof will be six feet. Fire walls to extend 6 inches above the roof, and caped with tin thoroughly secured by the roofer Owners will furnish at the time they are wanted in all cases where the roof is to be of Felt and Composition as sufficient amount of 2x4 inch scantling to surround the whole roof of building and which must be built in the fire walls by Contractor in such a manner as the lower side of the fire will be flush with the top of the roofboards

All chimneys to be built as shown by drawings and at every flooring the brick work must be increased in thickness four inches so that in no instance there shall be less than 8 inches between the smoke flue and the timbers all flues to be smoothly plastered on the inside and have stone pipe thimbles with tin stoppers as directed and be finished above the roof two feet over the highest point.

Seasoned Lath to be worked in the joist of the brick of the outside walls of the stories one to each 12th course also for the inside walls first and second stories all other stories will be struck joints.

Contractor to execute all the masonry and furnish the materials necessary.

Iron rods for shutters to be worked in the joints of all openings on the rear of Building the rear

walls will be carried round from the Wabash one 24 feet on a level and raked off in connection with the middle partition wall similar to "Mathew Laflins"

Iron Anchors.

For each of the Piers and for at least every ten feet of the dead walls to be carefully worked in the masonry and secured to the timbers of each of the floors and roof all of which must reach to the third joist from the wall Straps to be 3/8 by 1½ inch The stone front will be anchored with two to each stone 7/8 x 7/8 turned at each end First named Anchors will be all Pin Anchors made to suit Pin 8 inches long of 7/8 in round iron the Shank to be 20 inches long properly welded around the Pin, and will be fastened to the timber with two spikes and end turned down 3/4 inch.

Those for the Stone Lentil of Fronts to be extra heavy and must be long enough to reach the third joist from the stone to be anchored Straps of 3/8 x 1½ Iron to be placed on the Timbers of each floor and roof where the same lie upon and rest on division walls. These Straps must be 20 inches long American Iron and have 4 spikes each with each end turned down 3/4 inch and well fitted to the timber.

Plastering.

All throughout the building to be of best quality. Plaster of Paris finish two coats.

The face of the chimney fence in the first and second Story will be plastered and the sides and ceiling of the front main this way.

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

Time.

Owner to give possession of the ground on or before the fifteenth day of March AD 1856 Contractor must agree to build the Walls and chimneys ready for roof on or before July 15th 1856 and fully complete the plastering of the building within 15 days after the same is declared by the Superintendent ready for latthing

The coal vaults and cellars under the walls may be put in after the walls of the building are laid up. and must complete the whole job of masonry within 150 days after the above mentioned time Said Work in no case shall be considered as finished unless the same is so reported to the Superintendent and accepted by him. The owner hereby

agreeing to have in readiness all necessary timber and Carpenters work as they may be wanted so that in no case the masonry shall be hindered for the want of the same and will put on each floor of joist on all the Building within four days after the walls are made ready to receive the same and in case he shall fail to do so then and in such case he hereby agrees to extend the time for finishing said work in a Pro Rata Proportion for such delay and will also pay all damages resulting to the Contractor from such cause of delay. Provided the Contractor shall at the time of such delay notify the Superintendent in writing of the extent thereof, and the damages to him arising therefrom and if required by owner must prove the same.

Damages.

And in order to secure the execution of the work in the manner and at the times specified it is hereby distinctly declared that the Damages arising from the non fulfillment of the contract as regards time shall be Thirty two dollars per day which is a fair Rent of the Premises for each and every day the work remains unfinished and which sum of Damages shall be deducted from the Contract price as liquidated damages.

Payments.

To be made on the Work as may be hereafter agreed.

These Articles of Agreement made and entered into this twenty second day of March A.D. 1856 Between B & le D Weeks of the first part Building masons of the City of Chicago and Jno B Mills of the same place of the second part.

Witnesseth That the said B & le D Weeks or their executors administrators and assigns for and in consideration of the payment hereinafter to be made to them by the said Jno B Mills or his executors do on their part Contract and agree to Build, Finish and complete in a careful, skillful and workmanlike manner to the full and complete satisfaction of Wm le Baysington or his assistant Superintendent and by and at the times mentioned in the foregoing Specifications The masons work of two Marble front five story stores erected on the corner of Wabash Ave & Lake St as aforesaid so as fully to carry out the design of said work as it is set forth in the foregoing Specifications and the Plans and drawings therein especially referred to. Said Specifications plans and drawings being hereby declared part and parcel

of this Contract.

And the said Jno R Mills or his executors administrators or assigns for and in consideration of the said B & L D Works furnishing material and fully and faithfully executing the aforesaid work so as fully to carry out the design for the same as set forth by the specifications, and according to the true spirit meaning & intent there of and to the full and complete satisfaction of Wm L Boyington or his assistant Superintendent as aforesaid, and at the times mentioned in the foregoing specifications doth hereby agree to pay the said B & L D Works. the sum of Fifteen Thousand six hundred $15600 - dollars in the following manner, as the work progresses the Superintendent is to make out Estimates of the work and materials furnished and inwrought into the building and upon the presentation of a certificate of Eighty five per cent on said estimate the said Jno R Mills is to pay the amount and the balance fifteen per cent is to be paid on the completion of the contract

Provided said Superintendent shall certify in writing that they are entitled thereto

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

B & L D Works.

John R Mills.

as by the said agreement under the hands of the said Parties will on reference thereto appear.

And the said Plaintiffs aver that they commenced said work immediately thereafter and that the time for completing said work was extended by the acts of the said Defendant and that the said Plaintiffs procuded until said work and completed the same and furnished the materials therefor according to the provisions of said contract

And the said Plaintiffs further aver that after the commencement of the said work by them the said Defendant made material alterations in the construction of the foundation walls of said building which said alterations as aforesaid delayed the time for the completion of the said buildings.

And the said Plaintiffs further aver that after they commenced laying the brick walls of said buildings the said Defendant made alterations in the same which said alterations as aforesaid caused great delay in the erection and completion of said buildings

And the said Plaintiffs further aver that during the progress of said work the same was at divers times delayed by the acts of the said Defendant and of his employes in and about said buildings and the performance and completion of the said work at the said time specified in said agreement was extended and delayed

by the said acts of the said ~~Plaintiffs~~, Defendant

And the said plaintiffs further aver that after the said work had been commenced by them under the said agreement and while the said Plaintiffs were excavating for the foundation of the said buildings as contracted to be built The said Defendant entered into an arangement and agreement with one Charles Follansbee the owner of the property adjoining that of the said defendant that a party wall should be erected on the east side of the intended building of the said Defendant and between the property of the said defendant and that of the said Charles Follansbee which said arangment and agreement was carried into execution by and between the said Follansbee and the said defendant and said party wall was erected as aforesaid under and in pursuance of said arangment & agreement necessarily delayed the said plaintiffs in the prosecution of the said work under the said agreement. from the first day of April A.D. 1856 till the 17th day of May A.D. 1856 owing to and in consequence of there being on the lot of the said Follansbee on a portion which the said party wall was to be erected a brick dwelling house the west wall of which laid on the line between said Defendant and said Follansbee and which building it became & was necessary to have vacated

by the tenants then occupying the same and have removed before the said party wall could be erected.

and the said plaintiffs further aver that after they had commenced laying up the brick wall of the said buildings fronting on Wabash Avenue in said City of Chicago to wit about the fifteenth day of July A.D. 1856 and had advanced considerably in building said wall and had used in the construction thereof good and sufficient brick and materials according to the provisions of the said agreement, that the said defendant not being pleased with the color of the said brick (although the same were good and sufficient and in every respect answered the requirements of the said contract) requested the said Plaintiffs to take down the portion of said wall which had been then built and to rebuild the same with other brick of a different color which the said Plaintiffs then & there did and by so doing at the special instance and request of the said Defendant were necessarily and unavoidably delayed for fourteen days in the completion of the said work and the plaintiffs aver that by reason of the last mentioned premises the said Plaintiffs were delayed in the erection and completion of the said buildings for the space of fourteen days.

And the said plaintiffs further aver that in the course of the erection of the

said buildings they were from time to time delayed and hindered in the prosecution of the said work by the default of the said defendant in not having in readiness the necessary timber and carpenters work as the same were wanted and that by and through such neglect and default of the said Defendant in not putting on each floor of joists on all the said buildings within the time specified in said contract the said plaintiffs were necessarily delayed in the prosecution of their said work for the period of thirty two days.

And the said Plaintiffs allege that they have performed and completed all of the said work and furnished all the materials as required by the said agreement that since the completion of the said work the said defendant has been in the use and possession of the said buildings and that the Superintendent of said work William Mc Bayington, named in the said agreement afterwards to wit on the twenty ninth day of November A.D. 1856 certified under his hand that he had pointed out to the said plaintiffs in writing certain deficiencies which he the said William Mc Bayington desired the said Plaintiffs to make good in order to complete the said contract and that when these deficiencies were completed the building would be acceptable. and the said Plaintiffs

ance that they made said deficiencies as pointed out by said Barrington good as required by him in every respect and notified him to that effect and that the same having been done by said plaintiffs as required by the said Barrington the said Barrington certificate of the completion of said building was thereby made and became absolute final and binding.

and the said Plaintiffs further allege that the said Defendant has not performed the said agreement on his part and has not paid the said Plaintiffs in full therefor. But that a large sum of money to wit the sum of Eight thousand dollars is still due the said Plaintiffs from the said Defendant, upon the said agreement to wit at the place aforesaid and is still in arrear and remains unpaid to the said Plaintiffs By means whereof the said Defendant became liable to pay the said Plaintiffs the said sum of money remaining due and unpaid as aforesaid upon said agreement and being so liable He the said Defendant in consideration thereof afterwards to wit on the same day and year and at the place aforesaid undertook and then and there faithfully promised the said Plaintiffs to pay the said Plaintiffs the said sum of money remaining due and unpaid as aforesaid upon said agreement according to the tenor and effect thereof

21 And whereas also the said defendant and the said plaintiffs (under their firm name of B & L & D Meeks) on the twenty second day of March in the year one thousand eight hundred and fifty six at the place aforesaid made and executed their certain other agreement in writing in the words and figures following to wit.

Specifications for the Masons, Marble.

Work and Materials required for the Erection and Completion of two Marble front five Story wholesale stores that John R Mills is about to have erected on the corner of Wabash Avenue & Lake Sts.

Special reference will be had by the contractor to the following Specifications and the accompanying design as made by Lumbe Boyington Architect and which consists of the following drawings viz.

Plan of Foundation & Basement.
" " First Floor.
" " Second "
" " Third "
Front Elevation
Side Elevation

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

Superintendents and their Duties Mr Mc Boyington Architect Architects are declared to be the Superintendents of the Work for the owner: their duties will consist in giving on Demand such interpretations either in language writing or drawing as in their judgment the nature of the work may require having particular care that any and all work done, and Material used for the Work be such as is hereinafter described; in giving on demand, any certificates that the Contractor may be entitled to, and in settling all deductions of or additions to the contract price which may grow out of

alterations of the Design after the same is declared to be a contract also determining the amount of damages which may accrue from any cause and to particularly decide upon the fitness of all Material used and work done,

The contractor being bound in all cases to remove all improper Work or Materials upon being directed so to do by the Superintendent.

But the Contractor, if after having been directed as above to remove the same should refuse or neglect so to do shall not only suffer a deduction from the Contract Price of the Difference in value of proper and improper Work and Materials but shall also be Liable for all Damages of what-soever nature or Kind that may result from such cause, The above provisions to apply in the same way to all Materials or Work used Made or Fixed without the Knowledge of the Superintendent.

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

The owner reserves the right to alter or modify the Design and to add to or diminish from the contract price the difference to be adjusted as provided above.

The owner being bound in all cases to recognize the acts of his Superintendent not only as regards extra work but also to the sufficiency of the Design the contractor being in no case responsible for any accident resulting to the work from a Defective Design which fact must be determined by an arbitration of three disinterested men, chosen indifferently, and if found that the damages resulted from a want of proper care on the part of Contractor then and in such case the damages and loss shall be paid for and made good by him but if found that the accident or damage resulted from an improper design then and in such case all damages shall be sustained by owners; which in all cases must be Real, and in no case Constructive Damages to be allowed.

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

25- Dimensions of the Building as represented by and figured on the Drawings.

Heights - Basement Story (cellar) to be as shown on elevation
Principal do do " " " do
Second do do " " " do
Third do do " " " do
Fourth do do " " " do
Fifth do do " " " do.

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

The front above the cornice of the store fronts including the two main piers and all the window caps and sills and the door caps on Wabash avenue will be Athens Marble.

The front on Lake St. including the return quoins on Wabash Avenue will be fine rubbed face with fine carved relief work as shown on elevation.

The caps and sills on Wabash Avenue will be fine droove work The rear caps and sills and Linted course over the store fronts 12X24 inches wide

will be brush hammered and the Lintel rebated to receive shutters The two main piers in front on Lake St. will be frosted with border and rustic joint.

All the different work must be wrought and fitted according to diagrams and dimensions furnished by the architect with Leinsing and anchor drilling and deli= vered on the ground near the place of buil= ding.

The Marble work may be commenced and advanced as fast as the contractor may choose with reference to the progress of the other portions of the building The object is to progress the Stone work so as not to delay, the other mechanical work and have the stone that will be wanted first at the building for use delivered first and such a supply delivered ready to set so that the masons may in no case be hindred.

Finally the whole job to be fully completed in a carefull skilfull and workmanlike manner and every material to be furnished therefor and everything shown by the Plans relating to or is necessary to complete the Marble work of the building and not herein before particularly reserved or described is to be done at the least of the contractor not= withstanding such omission

Time.

27 Owner to give possession of the ground on or before the first day of March A.D. 1856.

and must complete the whole job of Marble work within 125 days after the above mentioned time. Said work in no case shall be considered as finished unless the same is so reported to the Superintendent and accepted by him.

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

Damages

And in order to secure the execution of the work in the manner and at the time

specified it is herby distinctly declared that the damages arising from the non fulfillment of the contract as regards time shall be a fair rent of the premises for each and every day to work remains unfinished and which sum of Damages shall be deducted from the contract price

Payments,

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

These Articles of Agreement Made and entered into this twenty second day of March A.D. 1856 Between B. & le D Weeks of the first part Building Contractors of the City of Chicago and John R Mills of the same place of the second part.

Witnesseth That the said B & le D Weeks or their executors administrators and assigns for and in consideration of the payment hereinafter to be made to them by the said John R Mills or his executors do on their part, Contract and agree to finish and complete in a careful skillful and workmanlike manner to the full and complete satisfaction of Hon le Borgington or his assistant Superintendent and by and at the times mentioned in the foregoing specifications The Stone cutting work of two marble front five story Stores to be erected on the corner Wabash avenue

29

and Lake St. as aforesaid so as fully to carry out the design of said work, as it is set forth in the foregoing specifications, and the plans and drawings therein especially referred to. Said specifications plans and drawings being hereby declard part and parcel of this contract,

And the said John R Mills or his executors administrators or assigns for and in consideration of the said B & L. D Blocks furnishing all materials and fully and faithfully executing the aforesaid work so as fully to carry out the design for the same as set forth by the ~~Speci~~ Specifications and according to the true spirit meaning and intent thereof and to the full and complete satisfaction of Wm H Boyington or his assistant Superintendent as aforesaid and at the times mentioned in the foregoing specifications, doth hereby agree to pay the said B & L. D. Blocks. the sum of Five thousand one Hundred $ 5100. Dollars in the following manner.

As the work progresses the Superintendent is to make out estimates of the work and materials that are inwrought into the building and upon the presentation of a certificate of eighty five per cent on said estimates the said John R Mills is to pay the amount the balance fifteen per cent to be paid on the completion of the contract,

Provided the said Superintendent shall

certifys in writing that they are entitled thereto

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

Signed { B. & C. D. Weeks,
John R. Mills.

as by said agreement under the hands of the said parties will on reference thereto appear,

And the said Plaintiffs aver that the time for the completion of the said work was extended by the acts of the said Defendant and his employees in and about said building and that said Plaintiffs proceeded with said work and completed the same as required by the said last named agreement.

And the said Plaintiffs further aver that after the said work had been commenced by them under the said last named agreement and while the said Plaintiffs were Excavating for the foundation of the said building so contracted to be built, the said Defendant and one Charles Follansbee the owner of Property adjoining that of the said Defendant entered into an arrangement and agreement to build a party wall on the east side of the intended building of the said Defendant and between the property of the said defendant and that of the said Charles Follansbee which said arrangement and agreement was carried into execution by the said Charles Follansbee and the said Defendant and the said party wall was thereupon erected, and that the erection of the said party wall as aforesaid necessarily delayed the said plaintiffs in the

prosecution of their said work under the said agreement from the first day of April A.D. 1856 till the 17th day of May 1856 owing to and in consequence of there being on the lot of said Follansbee on a portion which the said party wall was to be erected a brick dwelling house the west wall of which laid on the line between said Defendant and said Follansbee and which building it became and was necessary to have vacated by the tenants then occupying the same - and have removed before the said party wall could be erected.

And the said Plaintiffs further aver that after they had commenced laying up the brick wall of the said buildings fronting on Wabash avenue in said City of Chicago - to wit about the fifteenth day of July A.D. 1856 and had advanced considerably in building said walls and had used in the construction thereof good and sufficient brick and material according to the provisions of said agreement and the agreement named in the first count herein. that the said defendant not being pleased with the color of the said brick (although the same were good and sufficient and in every respect answered the requirements of the said contracts) requested the said plaintiffs to take down the portion of said wall which had been then built and to rebuild the same with other bricks of a different color which the said Plaintiffs then and there did, and by so doing at the special instance and request of the said

Defendant were necessarily and unavoidably delayed for fourteen days in the completion of the said work and the plaintiffs aver that by reason of the last mentioned premises the said plaintiffs were delayed in the erection and completion of said building for the space of fourteen days.

And the said plaintiffs further aver that in the course of the erection of the said buildings they were from time to time delayed and hindered in the prosecution of the said work by the default of the said Defendant in not having in readiness the necessary timber and carpenters work as the same was wanted and that by and through such neglect and default of the said defendant in not putting on each floor of joist on all the said buildings within the time specified in said last named contract the said Plaintiffs were necessarily delayed in the prosecution of the said work for the period of thirty two days.

And the said plaintiffs allege that they have performed and completed all of the said work and furnished all of the materials as required by the said last named agreement and that since the completion of the same the said defendant has been in the possession and in the use of the said buildings and that the Superintendent of the work named in said last named agreement the said William M Barrington afterwards to wit on the twenty ninth day of November A D 1856 certified

33

under his hand that he had pointed out to the said plaintiffs in writing certain deficiencies which he the said William Le Bayington desired the said Plaintiffs to make good in order to complete the said contract and that when those deficiencies were completed the building would be acceptable.

And the said Plaintiffs aver that they made said deficiencies so pointed out by the said Bayington good as required by him in every respect and notified him to that effect, and that the same having been done by the said plaintiffs as required by the said Bayington the said Bayington certified of the completion of said buildings was thereby made and became absolute final and binding.

And the said plaintiffs further allege that the said Defendant has not performed the said last named agreement on his part and has not paid the said plaintiffs in full thereof But that a large sum of money to wit the sum of Five thousand dollars is still due the said Plaintiffs from the said Defendant upon the said last named agreement to wit at the place aforesaid, and is still in arrear and remains unpaid to the said Plaintiffs. By means whereof the said Defendant became liable to pay the said plaintiffs the said sum of money remaining due and unpaid as aforesaid upon the said last named agreement and being so liable He the said Defendant in consideration thereof afterwards to wit on the same day and year and at the place

aforesaid undertook and then and there faithfully promised the said plaintiffs to pay the said plaintiffs the said sum of money remaining due and unpaid as aforesaid upon said last named agreement according to the tenor and effect thereof.

And whereas also the said Defendant afterwards to wit on the first day of May one thousand Eight hundred and fifty seven to wit at the place aforesaid became and was indebted to the said plaintiffs in a large sum of money to wit the sum of Eight Thousand dollars of lawful money. for the work and labor, care and diligence, attention and attendance of the said plaintiffs by the said Plaintiffs before that time done performed and bestowed in and about the property, premises, possessions and business of the said Defendant and for the said Defendant and at the special instance and request of the said Defendant, and also for divers materials and other necessary things by the said plaintiffs before that time found furnished provided used and applied in and about that work and labor for the said Defendant, at the like special instance and request of the said defendant and being so indebted to the said plaintiffs the said defendant in consideration thereof afterwards to wit on the same day and year and at the place aforesaid undertook and then and there faithfully promised the said

Plaintiffs well and truly to pay, to the said plaintiffs the said sum of money, last mentiand, when the said Defendant should be thereunto afterwards requested.

And whereas also afterwards to wit on the same day and year and at the place aforesaid in consideration that the said plaintiffs had before that time done performed and bestowed other work and labor care and diligence attention and attendance of the said Plaintiffs in and about the business property premises and possessions of the said Defendant and for the said Defendant and at the request of the said Defendant and had also at the like special instance and request of the said Defendant before that time found, furnished, provided and applied divers other materials and other necessary things in and about that business the said defendant undertook & then & there faithfully promised the said plaintiffs that he the said defendant would well and truly pay the said plaintiffs so much money as they the said plaintiffs reasonably desired to have of the said Defendant for the same when he the said Defendant should be thereunto afterwards requested and the said plaintiffs aver that they reasonably deserved to have of the said Defendant for the same the further sum of Eight Thousand dollars of like lawful money as aforesaid to wit at the place

aforesaid, whereof the said Defendant to wit on the same day and year last aforesaid and at the place aforesaid had notice,

Nevertheless the said Defendant although often requested so to do has not as yet paid the said several sums of money above mentioned or any or either or any part thereof To the said Plaintiffs but to pay the same or any part thereof to the said Plaintiffs the said Defendant has hitherto altogether refused and still does refuse to the damage of the said Plaintiffs of Eight thousand dollars and therefore the said Plaintiffs bring suit &c.

King Scott & Wilson.
Plaintiffs attys.

Copy of Account sued on.

Chicago Nov 1st 1856

Mr John R Mills.

P B & Co. D. Marks Dr.

To work labor & services & materials furnished & goods &c.

To 2,500 yards digging.	30¢	$750.00
" 3640 feet base course.	40 "	1456.00
" 34 days Foreman.	$4	136.00
" 133 " Labour.	12/-	199.50
" use of Derick.		25.00
" 213 days Stone Mason,	20/-	532.50
" 207 " Labour,	12/-	310.50
" 62 load Sand.	8/-	62.00
" 98 bbls Lime,	"	98.00
" 93 cord Stone,	$8	744.00
" Dockage on 93 cord stone.	4/-	46.50
" carting loading, &c.		186.00
" cut stone piers.		600.00
" " " Front &c.		5100.00
" 815,000 Rough Brick.	$7.25	5908.75
" 815 days Mason.	18/-	1833.75
" 48,000 Smooth Brick,	$25	1200.00
" 48 days Mason.	18/-	108.00
" 1323 " Labour.	12/-	1984.50
" 588 load Sand.	8/-	588.00
" 882 bbls Lime.	"	882.00
" 2100 feet tuck pointing,	5¢	105.00
" Anchors & eyes.		300.00
" Setting cut Stone.		700.00

To plastering		60.00
" setting Curb centers, Columbs &c		200.00
" 80 days Foreman	@4	320.00
" Setting Iron lintths &c.		60.00
To Balance due on contracts	$8000.00	

Chicago Nov 1st 1856

Mr John R. Mills;

To B. & L. D. Blocks, Dr.

Extra base on party wall 210 ft @ 40¢		84.00
" " Rubble " " " 595 " " 18¢		107.00
" " height " basement Story 39 ft "		70.38
" 70 lbs anchors for iron lintths @ 8¢		5.60
" setting 120 ft Iron lintths " 50¢		60.00
" 2 days Stone cutter at fitting iron anchors in front and rear fwls 20/-		5.00
" 1 Stone hew in cellar.		24.50
" extra height to vault 450 ft Rubble Stone @ 18¢		81.08
" " thickness " " 566 " " " " " "		101.88
" 5,400 Brick in Follansbees chimneys.	" $15-	81.00
" Setting curb.		57.50
" 45,675 Brick.	" $13.	593.77
" 4,500 " in jog in wall.	" "	58.50
" 60 ft door sills.	10/-	75.00
" 60 " window "	7/-	52.00
" 33 " " " in vault "		28.88
" Setting 36 Iron columbs in vault 4/-		18.00
" extra turning anchors on first Story		40.00
" 60 yds extra plastering	2/-	15.00
" 230 ft Stone work under door & Winsdow sills @ .18¢		41.40

To 68 Window Caps.	10¢	6.80
" 3 days mason setting sills.	20/-	7.00
" 1 " Stone cutter.	"	2.00
" 2 " Laborers.	12/-	3.00
" 1 keask mortar.	8/-	1.00
" 2810 ft truck painting	5¢	115.50
" Laborers mortar acids &c.		15.00
" Repairing vaults.		100.00
" Setting centres for vaults. all around.		100.00
" extra height on Roof 2000 Brick @ $14		28.00
" additional on front Stone Rear		20.00

And thereupon comes the said defendant by Scates Mc Allester. Jewett & Peabody. his attorneys and files herein his Pleas to the 3rd and 4th counts of said plaintiffs declaration, which said Pleas are in the words and figures following To wit

State of Illinois County of Cook Ss.
In the Cook County Court of Common Pleas
Of the January Term A.D. 1858

John R. Mills.
ads.
Benjamin Weeks.
et al

and the said defendant by Scates Mc Allister Jewett & Peabody his attorneys comes and defends the wrong and injury when &c And as to the third and fourth counts of the said

Plaintiffs Declaration says that he did not undertake and promise in manner and form as the said Plaintiffs have in said third & fourth counts above thereof complained against him & of this he the said defendant puts himself upon the country &c.

And for a further plea in this behalf the said Defendant by leave of the court &c says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him because he says that before & at the time of the commencement of this suit to wit at the county aforesaid the said Plaintiffs were and still are indebted to the said Defendant in a large sum of money to wit the sum Three hundred and thirty eight 04/100 Dollars on a certain Promissory note made and executed by the said Defendants by their firm name & style of B & le D. Clerks. bearing date the 22d Day of May 1857 whereby the said Plaintiffs Promised to pay one day after the date thereof to the order of C & Lb. G. Sherman at their office the said sum of Three hundred & thirty eight & 04/100 Dollars value received and then & there delivered the said promissory note to the said C & Lb. G. Sherman which said promissory note the said C & Lb. G. Sherman afterwards & before the payment of the said sum of money therein specified to wit on the same day and year aforesaid endorsed & under their hand assigned to the said defendant & then & there delivered the same so endorsed to the said.

Defendant.

By means whereof the said Plaintiffs became liable to pay to the said Defendant the said sum of money in the said Promissory note specified according to the tenor and effect of the said Promissory note - and being so liable the said Plaintiffs in consideration thereof afterwards to wit and on the day and year aforesaid undertook & promised the said Defendant to pay him the said sum of money in the said Promissory note specified according to the tenor and effect of the said note - and also in the further sum of One hundred & ninety four dollars for money paid by the said Defendant to one Theodoras Doty for the use & benefit and on the order of the said Plaintiffs and also in the further sum of One Thousand Dollars for goods wares and merchandise by the said Defendant before that time sold & delivered to the said Plaintiffs at their special instance & request, and also in the further sum of One thousand Dollars for the work. & Labor, care & diligence of the said Defendant before that time done performed & bestowed by the said Defendant in & about the business of the said Plaintiffs & for the said Plaintiffs and at their request, and for divers materials & other necessary things by the said Defendant before that time found & provided & used & applied in and about said work & Labor

for the said Plaintiffs and at their request and also in the further sum of Two Thousand Dollars for other money by the said Defendant before that time lent & advanced to & paid laid out & expended for the said Plaintiffs and at their special request—and in the further sum of Two thousand Dollars for money by the said Plaintiffs before that time had and received to & for the use of the said Defendant and in the further sum of Two thousand Dollars for money before that time due and owing from the said Plaintiffs to the said Defendant on an account stated between them, which said several sums of money so due & owing from the said Plaintiffs to the said Defendant as aforesaid exceed 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 third & fourth counts of said Declaration mentioned and out of which said sums of money so due & owing from the said Plaintiffs to the said Defendant the said defendant is ready & willing & hereby offers to set off. and allow. to the said Plaintiffs the full amount of the said Damages according to the form of the Statute in such case made and provided, And this the said Defendant is ready to verify wherefore he prays judgment of the said Plaintiffs ought by reason of any thing in the said third & fourth counts of their

48

said Declaration contained to have or maintain the aforesaid action thereof against him &c.

Deaths McAllister Jewett and Peabody. attys for Defts.

Copy of Instruments & a/c described in the foregoing plea of set off.

Chicago May 22d 1884

$338.14

One day after date we promise to pay to the order of C & W. G. Sherman at their office Three Hundred Thirty four eight & 04/100 Dollars Value recived B & L. D. Meeks.

endorsed Pay J. R. Mills or order without recourse to us.

C & W G Sherman.

194-

Mr Jno R Mills will pay Three Hundred Thirty four Dollars and 14 cts. Amount of Draft. Recd the Draft. By Cashier. charge same to account of

Chicago Ills. B & L. D. Meeks.

May 21st 1884,

44

B & L. D. Meeks.

1857 To John R Mills. Dr.

July 1	To Goods wares & merchandise sold & delivd	$ 1000.00	
"	" Work & labor care & diligence,		
"	materials furnished for same,	$1000.00	
"	" money paid laid out & expended for		
"	& lent and advanced to them	$2000.00	
"	" Money had & received,	$2000.00	
"	" " due on a/c stated.	$2000.00	

In the Cook County Court of Common Pleas
Of the January Term A.D. 1858.

John R. Mills,
ads
Benjamin Meeks
et al

State of Illinois Cook County ss.

John R. Mills, being first duly sworn on his oath deposes and says that he is the defendant in the above entitled cause and that he has a good and substantial defence to said action upon the merits as he verily believes & further saith not John R Mills.

Subscribed & sworn to before me this 6th day of January A.D. 1858

John Forsyth.
Notary Public

(Seal.)

45

And afterwards to wit on the Fourth day of February in the year of our Lord one thousand eight hundred and fifty eight the Defendant by Scates McAllister Jewett & Peabody filed in the office of the Clerk of said Court his Plea to the 1st & 2d counts to the Plaintiffs Declaration, which is in the words & figures following to wit.

State of Illinois County of Cook ss.
In the Cook County Court of Common Pleas
Of the February Term A.D. 1858

John R. Mills.
ads
Benjamin Weeks.
Caleb D Weeks.

And the said Defendant by Scates McAllister, Jewett & Peabody his attorneys comes & defends the wrong & injury when &c and as to the first and second counts of the said Plaintiffs declaration says that he did not undertake or promise in manner and form as the said Plaintiffs hath in and by said first & second counts above thereof complained against him, and of this he the said Defendant puts himself upon the Country &c.

Scates McAllister Jewett & Peabody,
Attys for Deft.

and the said Plaintiffs do the like.

King Scott Allison.
Plffs attys.

And afterwards towit on the Seventeenth day of June in the year aforesaid said Plaintiffs filed in the office of the Clerk of said Court their replication in the words & figures following towit.

State of Illinois
Cook County ss

The Cook County.
Court of Common Pleas
of the April Term A.D. 1858

Benjamin Hicks.
& Caleb D Hicks.
vs
John R Mills

And the said plaintiffs as to the said plea of the said Defendant by him secondly above pleaded (to the 3d & 4th counts of said declaration says that the said Plaintiffs by reason of anything by the said Defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against the said Defendant because he says that they the said Plaintiffs were not nor are indebted to the said defendant in the manner & form as the said Defendant hath above in his said second plea in that behalf. alleged and this they pray may be enquired of by the Country &c.

King Scott & Wilson
Attys for Plffs.

And afterwards to wit on the fifth day of October 1858 said day still being one of the days of the September Term of said Court the following among other proceedings were had and entred of record in said Court to wit.

Benjamin Weeks,
& Caleb D Weeks.
as
John R Mills. } Asst.

This day come said plaintiffs by King Scott & Wilson their Attorneys and the said defendant by Coates McAllister Jewett & Peabody his attorneys also comes and issue being joined it is ordered that a jury come whereupon comes the Jury of good and Lawful men namely.

J. H. Gardner.	D. P. Wood.
Theo. Hubbard.	J. N. Harris.
Danl Hammitt.	F. B. Botsford.
Wm. R. Kimball.	A. S. Fay.
Jas Briggs.	David Bloom.
Wm. L. Felton,	Joseph Shaids.

Who being duly elected tried and sworn to try the issues joined aforesaid after hearing a portion of the evidence and the hour of adjournment having arrived upon agreement of the parties it is ordered that the jury may separate and meet the Court again on the coming in of the Court tomorrow morning.

And afterwards to wit on the Sixth day of October in the year aforesaid said day still being one of the days of said term of said Court the following among other Proceedings were had and entred of record to wit in said Court to wit.

Bing Weeks.
& Le. D. Weeks
vs
John R Mills. } Asst.

And now again on this day comes the said parties to this cause by their attorney aforesaid and the Jury empannelled herein on yesterday for the trial of this cause also came and were duly polled by answering severally to their names and after hearing further evidence and proceedings and the hour of adjournment having arrived upon agreement of the parties it is ordered by the Court that the Jury may adjourn and meet the Court again on the coming in and opening of the Court tomorrow morning.

And afterwards to wit on the seventh day of October in the year aforesaid said days still being one of said term of Court. the following among other Proceedings were had and entred of record in said Court to wit.

49

Benj Hicks
& Jo. D. Hicks.
vs
John R Mills
} asst.

And now again come the parties to this cause by their attorneys aforesaid and the Jury empannelled for the trial of this cause also come and on being called severally answered to their names and after hearing all the evidence submitted arguments of counsel and instructions of the court retire to consider of their verdict and afterwards come into court and say we the Jury find issues for the said plaintiffs and assess their damages to the sum of Five thousand six hundred and seventy five dollars and eighty nine cents,

And thereupon the said defendant by his counsel submits his motion herein for a new trial in this cause.

And afterwards to wit on the twenty ninth day of October in the year aforesaid said day still being one of the days of said term of Court the following among other proceedings were had and entered of record in said Court to wit.

511

Benj Weeks.
& le D Weeks.
vs
J. R. Mills. } Asst.

And now at this day again come the parties to this cause by their attorneys aforesaid and the Court after hearing the arguments of counsel upon the motion of said defendant heretofore submitted herein for a new trial in this cause, and having fully considered the premises and being well advised overrules said motion Whereupon said defendant by his counsel enters his exceptions to the ruling of the Court in denying his said motion for a new trial.

Therefore it is considered said plaintiffs do have and recover of the said defendant their damages of Five thousand six hundred & seventy five dollars & eighty nine cents in form aforesaid by the Jury aforesaid assessed together with their costs and charges in this behalf expended and have execution therefore.

And thereupon said defendant prays an appeal in this cause to the Supreme Court of the State of Illinois which is allowed to him upon the condition that he file his appeal Bond in the penal sum of Seven Thousand Dollars to be approved by the Judge of this Court said Bond to be filed in ten days and his bill of exceptions within thirty days from this date.

57 And afterwards to wit on the Fourth day of November in the year aforesaid John R Mills filed in the office of the Clerk of said Court his appeal bond in the words and figures following to wit.

Know all men by these presents that we John R Mills and Mathew Laflin, are held and firmly bound unto Benjamin and Caleb D Wicks in the Penal sum of Seven thousand dollars lawful money of the United States for the payment of which well & truly to be made we bind ourselves our heirs and administrators jointly severally and firmly by these presents Witness our hands and seals this first day of November A.D. 1858.

The condition of the above obligation is such that whereas the said Benjamin & Caleb D Wicks did on the 29th day of October A.D. 1858 in the Cook County Court of Common Pleas in and for the County of Cook and State of Illinois recover a judgment against the above bounden John R Mills for the sum of five thousand six hundred and seventy five dollars and eighty nine cents besides the costs of the said suit from which judgment the said John R Mills has taken an appeal to the Supreme Court of said State. Now therefore if the said John R Mills shall duly and diligently prosecute his said appeal and shall pay the judgment costs interest and damages which shall be given awarded or assessed in case the said judgment shall

be affirmed in said Supreme Court then this obligation to be void, otherwise to remain in full force & virtue.

John R Mills. (Seal)
Mathew Laflin, (Seal)

Approved by me.
John M Wilson Judge &c.

And afterwards to wit on the twenty seventh day of November in the year aforesaid the defendant filed in the office of the Clerk of said Court his Bill of exceptions which is in the words and figures following to wit.

State of Illinois County of Cook ss.

In the Cook County Court of Common Pleas

Benjamin Weeks.
Caleb D. Weeks,
vs
John R Mills.

Be it remembered that this cause having come on to be heard at the September Term A.D. 1858 of said Court to wit on the 5th day of October A.D. 1858 before the Honorable John M Wilson Judge and a Jury the said Plaintiffs for the purpose of sustaining the issue on their part offered in evidence and read to the Jury the originals of the contracts set forth in the first and second counts of the Declaration the signatures to which were by the said defendants admitted to be genuine.

53 Plaintiffs then offered in evidence a certificate of Wm Lb Baysington dated the 29th day of November 1856 admitted to be in the hand writing of and signed by said Baysington in the words and figures following to wit.

"I hereby certify that the within Bill is in my judgment just and correct between the Parties I have carefully estimated and taken the whole matter into consideration and have given Messrs B & Le Duke a written list of different deficiencies that I wished them to do in order to complete the contract and when these different items are completed the building will be acceptable. Wm Lb Baysington

Nov 29th 1856. Superintendant."

which said certificate was written upon the back of a Paper containing the following account which was also admitted to be in Baysingtons hand writing

Chicago Nov 10th 1856

Mr J. R. Mills,

To B & L. D. Meeks Dr.

To extra Base on Party Wall 210 ft @	.40	84,00
" 595 ft extra Stone work in Party wall thickness	.17	101,15
" extra hight of Basement Story 391 ft	.17	66,47
" 70 lbs anchors for Iron Lintels.	.08	5,60
" Setting 120 Iron Lintels.	.20 1/2	25,00
" 1 Stone Pier in cellar.		24,50
" 560 ft Stone Work extra thickness to vault wall	16	89,60
" 5400 Brick in Fellandbros chimneys. @	$13,00	70,20
" Setting curb.		35,00
" 45,675 Brick in Partition wall	" $12,00	548,00
" 3600 Brick in fog in wall.	" "	43,20
" extra for turning arches in 1st Story.		30,00
" 600 Yds extra Plastering	@ .25	150,00
" 68 window eyes in area Wall	" .10	6,80
" 2310 ft. truck Pointing Labor mortar &c		50,00
" 3 Days extra Height of wall Brick work &c		96,00
		$ 1290,62
" Amount of Contract		20700,00
		$ 21990,62
Amt bot up.		20907,97
Amt		$ 1082,65

Mess B & L. D. Meeks.

To J. R. Mills. Drs.

5-5-

For 60 Days delay non compliance with
contract. @ $ 32,00 per day $1920,00
" Bill of Items (A Campbell) 32,97
" Delay caused to " " 350,00
" accomodation of Carpentr 5,00 $2307,97
" Certificates drawn. 17400,00
" Ordr to Ill Stone Dressing Co. 1200,00
carried up. $20,907,97

which said account was not offered in evidence by the Plaintiffs with said certificate. And the said Defendant by his counsel then and there objected to the reading of said Certificate as evidence unless said account was also read for the reason that said account was referred to in and thus made a Part of said certificate, which objection was overruled by the Court. To which ruling and decision of the Court the said Defendant by his counsel then and there excepted And said certificate alone was thereupon read to the Jury.

The said Plaintiffs next offered in evidence and read to the Jury a memorandum of Wm Mc Barrington the signature thereto being admitted by Defendants counsel to be genuine, dated the 20 th November A.D. 1856 which is in the words and figures following to wit:-

"Messrs B & C D. Meeks

Your attention is called to the following items that will be required to be done in order to close up the Contract of J R Mills.

Block of Stores, on cor of Lake St & Wabash avenue viz. Point up about chimneys and fire walls on roof and secure some loose brick. Point up under all the windows in each story, the same as done in the upper story. Point up under some of the arches under the side walks. Clean down front Stone work & side window caps & cement up. Drive holes in top of caps The Lintels over several of the windows are not wide enough to reach the wood frame should be pointed - Fill up where the slips sills were put in on Wabash Are not thick enough. Point up about Basement window frames. Wm M. Barrington.

Chicago Ill Nov 20th/56 - Superintendent

The Plaintiffs further to sustain the issues on their part next introduced as a witness John Riley who being first duly sworn testified as follows.

I know the Plaintiffs and Defendant was in the employ of the Plaintiffs when they were erecting Defendants' Building I was their foreman - The Plaintiffs are mason builders. I know the Building in controversy, was employed on that building by Plaintiffs and am a Mason by trade. I know of extra work being done by the Plaintiffs I know about the Party wall between Defendant and Mr Follansbee The base of that wall is 4 ft 6 in thick (It was here admitted by the Defendant that the change in the East wall of the building making it a party wall added 210 cubic feet to the base course of said wall 595 feet to Rubble wall which was extra)

I think there were ten anchors

5-7

weighing from 2 to 3 lbs each Dont Know price per pound there was 8 in. of extra height on Basement Wall I have estimated the extra wall Dont Know the amount of it in feet. Know of setting extra Iron Lintels about 120 ft Dont Know what it was worth per foot Know of stone cutter being employed two days in setting Iron Lintels worth $ 2,50 per day There was a Stone Pier in cellar Dont Know the Dimensions of it I saw it measured by Mr Hambleton Dont Know of any extra Depth to the Vault. Recollect when we were digging for the Vaults Walls Mr Boyington directing to work darker to get out of the way of frost, It was made a foot or eighteen inches darker and two inches thicker by direction of Mr Boyington From the Plan (which was here shown to witness) I judge the wall was to be 1 ft 4 in thick It was made 18 in or 20 in thick I Know of chimneys being built in Follansbees side of the Party wall Dont Know who ordered it, I Know about the setting of the Lumber for side walk The Plan shows 6 columns. in the second Story afterwards Brick wall was built in place of the columns. Third Story is 13 ft high and one foot for Girder 140 ft long and 12 in thick There is a jog in the wall for commencing of Stone way The jog makes 8 ft 6 in additional height to the wall and is carried up through the 1st 2d 3d 4th & 5th Stories. The height of the whole building is 71 ft There were Door sills in the Basement also window sills Dont Know the amount. There were 42 Iron columns. in the vaults. Dont Know how much it was worth per set them

I Know about timing the arches in the first story
They were not called for in the Plan, and I suppose they were
extra dont Know what it was worth to turn the arches.
We were delayed by doing it Mr Boyington directed it to be done
The delay I should say was two Days, on account of these
arches a part of the wall was up and we had to take it
down. Dont Know anything about extra Plastering
There were window eyes in the vaults Dont Know how
many There was Such pointing done in the Gable end
of 1st Story on Wabash Avenue I Know of Setting
the centers for vaults There were 31 centres all
together worth 45 cts each, There was an extra
fire wall built above the roof I understood it was
extra. The plan does not show or call for any. It was
8 in high and 140 ft long lengthwise of the building
48 ft long across both front and rear of the build=
ding and 12 in thick. The brick arches under the
said wall were made 8 in thick The plan does not
show how thick they were to be made. I Know
of Plaintiffs excavating for the vaults under side
walks. I recollect seeing Defendant there while the
excavation was going on. I saw him stop the teams
from hauling out the Dirt Defendant said that he would
do it himself that the ground belonged to him They
were teams employed by the Plaintiffs Dont Know
what delay was caused by it The excavations for the vaults
were not ready when the masons had finished the walks.
Defendant stoped the digging for vaults when masons were on
3d Story The vaults were not ready for the masons when the building

was topped.
I recollect the change of Brick in the Wabash avenue front of the building. Yellow brick were first put in the wall They were pressed brick and of very good quality the wall taken down was about 4 ft high the whole length of the Building 140 feet long The defendant objected to the color of the brick The color I believe was the only objection He was talking to me about them. He did not seem to like them He did not say what he wanted done He & Mr Weeks made other arrangements about the brick after the wall was taken down of the Brick came for the wall I understood Mr Wells that he would go to milwaukee and get the Brick and he did so I should think it took 18 days to do this which caused eighteen days delay in erecting the building Defendant was about the building daily He was there when the wall was taken down and when the brick came. I came from New York to work on this building & around in Chicago 19th April 1856 The cellar was then excavated excepting along the line of Follansbees Lot There was a brick House on Follansbees Lot which was removed 3 or 4 weeks after I came Mr Weeks engaged me in New York to come here and take charge of the Defendants Building If Follansbees House had been out of the way they could have commenced work as soon as the earth was excavated, I dont Know whether the wall of the House stood on the line or not, I do know that the House was removed before the wall was built the brick furnished

by Defendant and put into the wall on the Wabash Avenue front were not so hard or so uniform in size as those first put in by Plaintiffs I think I could make as good a wall and as substantial with the brick taken down as with those finally used by Defendant.

Cross Examination

The old man Niland B Weeks employed me in New York and I came on in pursuance of an agreement made with him All the Weeks had charge of the job the old man and the young men The Plaintiffs are the sons of Niland B Weeks The oldest boy Benjamin Weeks had the principal charge of this job The old man was not there all the time They had other work to do and were working on Walter & Rogers Building also on a church on Wabash Avenue I had worked in Chicago about 4 months three years ago I am not well acquainted with pressed Milwaukee Brick I did not know the difference between Milwaukee Brick and any other light colored Bricks (witness is here shown the contracts before offered in evidence) I think The work on the Defendants building was done under these contracts The face Brick of the wall on Wabash Avenue were taken down I cannot say that the brick first put in the wall were Milwaukee Brick They were pressed Brick Mr Mills made objection to the color he did not object to any thing else about the brick

I dont Know where they came from It took about 16 days to get new brick and the delay in doing the work was 2 or 3 days besides - at the time I heard Mr Mills stop the teams from hauling away dirt there was a large pile of Lumber for the Building lying near The excavation might make it more troublesome but would not prevent getting the lumber in for the Carpenters I do not Know that this was the reason why Mr Mills requested the Plaintiffs to suspend the excavation.

(Direct examination resumed)

I Knew of some delay on account of the non delivery of the Iron Sill cause I think about one day The delay in putting up the solid brick wall as described by me was about two days. The wall that was built where the Iron Columns were to stand would take about two Days.

Joseph M Hambleton was next sworn on the part of the plaintiffs and testified as follows

I am a mason and builder in Chicago Have been in that business on my own account about four years, have been engaged in the business about 13 years Have built several buildings I Know that plaintiffs built the building for defendant on the North east corner of Lake Street and Wabash avenue in Chicago I have taken some notice of Mr Mills buildings and have

made some measurements of what Mr Hiland Bbeeks said was extra work The building was on the N E corner of Lake Strut & Wabash avenue My first item is 228 ft stone Curbing for side walk I think the setting of it was worth 25 cts per foot in 1856 — My next item was two courses of Iron lintels over Basement openings They were each 140 ft long deducting for the Piers — The Belt course ran through all the way I should think 25 cts per foot for each course was a fair price for setting them.

My next item is flues in party wall on the Pollander side of the Building There were 98 74 Brick in these chimneys. worth at that time $16 or $18 per thousand if it was done as an extra job well worth $16 $\frac{111}{1000}$ per ~~Ar~~

My next Item is setting Door and Window Sills There were 60 ft of each 120 feet and the setting was worth a shilling per foot Next Item is setting 36 iron columns under the side walk It was worth 50 cts apiece to set them —

My next Item is setting centers for vaults to turn arches on It is the Carpenters business to set them there were 31 set worth 75 cents per sett. The brick arches under side walk are next on my list These arches were 154 ft long by 14 ft and 4 inches wide and 8 inches thick on one side of the building and 53 ft long by 10 ft wide and 8 inches thick on the

the side which I computed at 4 in in thickness
making in all 24,000 brick worth $13.00 per thousand
they were laid in cement, The Wall 140 ft long, 14 ft
high and one foot thick would contain 44 100 brick worth
$.12. per thousand The Wall 3½ ft long, 71 ft high and one
foot thick would contain 5580 brick worth $12 per M
210 ft of Base cours in foundation will I should say
as worth 40 cts per foot The Rabble wall added
for party wall 20 in at base and running to a
point at the top and 140 ft long would amount
to about ten cords of stone worth $18 per cord
A wall 8 in high 20 in thick and 140 ft long would
contain about 1½ cords worth $18 per cord and 8 in
additional height on front and rear walls would
contain about 1½ cords at the same price Tuck
Pointing was in 1856 worth Eight cents per foot
and on the first story of the Wabash Avenue
front of Defendants building there would be
2240 ft of Pointing worth 8 cents per foot 1594 Brick
would be required to make up the additional Six
inches in the size of the Building in consequence
of putting the Party wall one on to Follansbees
Lot worth $12.00/100 per ~~M~~ The stone work would
contain 20 cubic feet more (1/8 of a cord) worth
$18. per cord The outside vault wall against the street
was 20 in thick which was 4 inches thicker than was
required by the contract This gives 802 ft (8 cords)
of extra wall worth $18. per cord— The inside area
wall reckoned at 18 in high and 18 in thick makes.

438 ft (4 38/100 cords) at $18.00 per cord.

Niland B. Weeks. was then called and sworn as a witness on the part of the Plaintiffs and testified as follows.—

I live in Chicago have resided here nearly three years. I came here 1st July 1855 my family came some after I am a mason by trade and father to the plaintiffs I was engaged upon the Buildings of Defendant The wall on the Wabash avenue side was commenced and got up about four feet with Milwaukee pressed Brick when the Defendant came round and objected to the color of the brick I told defendant there were a superior quality of Milwaukee pressed Brick But he did not like the color and I told him if he wanted other brick he might get them and deduct the cost from the next estimates and we would take down the wall already up He went to Milwaukee and got the Brick The wall was taken down and the new brick put in It was 14 days delay from the work stopped until the new brick came The old brick were better and smoother than the new. The Brick I first purchased were pressed in the Philadelphia Press. one brick at a time The others were Pressed in a larger Press and were not so smooth and uniform I have had considerable experience with Brick & have used them for many years. The brick taken down were after wards used in Mr Browns buildings on Michigan

Avenue Mr Brown used the same kind of brick for his house.

At the time the contract was made with the Defendant he was intending to build on his own lot alone and he afterwards made an arrangement to build in connection with Mr Hollanshee which made a party wall between them 4 ft 6 in as the base instead of three feet The rubble wall was to be a 20 in <u>blumb wall</u> The change to a party wall made it wider at the base and sloped on both sides I heard Mr Hambletons calculations I did not go over them with him but presume they are correct. We had the foundation of the party wall nearly done when a new grade was fixed for the street. and Mr Barrington the architect and Superintendent ordered us to make it 8 in higher to meet the new grade It was raised It was 140 ft long and 20 in thick — Front and rear was 27 inches The setting of 120 ft of Iron Lintels and 140 ft of Betting was extra There was an extra stone Pier in the cellar It was about 7 or 7½ ft long about 8½ ft high and 20 in thick. There are no Piers required by the contract. The vault wall was carried down 18 in deeper than the Plan called for The wall was 18 in thick The bank wall of the vault was to be 16 in thick Mr Barrington was there and I told him it was not thick enough for a Bank wall and that it ought to be at least 20 in he said build it and I will allow for it It was built

20 inches thick Mr Barrington directed the chimneys to be built in the party wall for Mr Hollandsbee building and said that the same should be allowed for by Defendant They were built as directed There was curbing at The plan and specifications do not show that we were required to do it I spoke to Mr Barrington about it and something was said about our doing it without charge but I told him if we did it we must be paid for it and he wanted it done I spoke to Mr Barrington about it whilst the work was going on I dont know that I recollect the conversation It was necessary to be done The Plans call for 2 iron columns in second story A Brick wall was put up instead which was extra Mr Hambletons estimated the wall, The amount and price were about right as he fixed them. The jog of 3½ ft for Stairway was also estimated by him It was extra 60 ft of Door sills and 60 ft of Window sills in the Basement and 33 ft of Window sills in the Vaults were not called for in the Plans and specifications and were extra I dont know What were intended but stone sills were furnished There were 42 iron columns extra in the vaults They were for the arches under side walk The plan shows that the arches were to be supported in that way The extra charge is for setting these Columns and 50 cts apiece is a reasonable price In the middle

of the Basement. are columns and wooden lintels in toh of the columns to support the middle wall of the first Story. Anchors were strung from columns to column to relieve the lintles in the center It took no more bricks to build the arches than it would to build a plain wall but the labor was more $40.00 was a fair price for it. There was 60 yds of extra Plastering done in the Hall of 2d Story There was more Plastering than the specification called for, The usual price of Plastering was 25 cts per yard – The 68 window eyes were extra in the vault & were for hanging shutters They were furnished but not required by the plan They were worth 10 cts each setting window & Door sills in Basement was extra and was done and is worth what Mr Hambleton said it was There was extra Tuck Pointing done in laying up pressed brick the mortar is scraped out, and then after the Building is up the joints are filled up and trimmed down equally. This is what is called Tuck Pointing. Mr Hambletons computed the amount correctly we set the centers for building the arches under the side walks The number and price I think were perfectly fixed by Mr Riley and Mr Hambleton an additional thickness of four inches was put to the arches for supporting the side walks The plan does not show any thickness for them. I dont recollect any communication with Mr Baysington about the extra thickness except

a general conversation about the insufficiency of the walls Mr Bayington told me to do what I thought necessary to make the work stand and the plaintiffs should be paid for it There was an extra fire wall on the top of the Building The amount and price as fixed by Mr Hambleton I should think was fair. Four arches were rebuilt Follansbees arches fell and took away the support from three or four of ours I should say that the rebuilding of these arches was worth from $90.00 to one hundred dollars I paid Mr Douglass $40 for digging and excavating out the cellar after Ulrich left it, I made a contract with Mr Ulrich for diggings out the whole Basement and the Trenches Bayington stopt Ulrich from excavating he told me in order to make arrangements to build a party wall with Follansbee and Ulrich would not go back to it after he left the job, and some arrangement was made I believe for Ulrich to leave it, we were then intending to build a seperate wall Mr Bayington told me he directed the excavation to be stopped provided it would not delay the building. This he told me afterwards The digging out of the vaults charged in the Bill I think it was intended to drop which was done by Cunningham

(The memorandum of Mr Bayington stating the deficiencies dated November 20th 1856 and before offered in evidence was now shown to the witness) ——

Mr Bayington gave me this memorandum

himself. The counsel for the Plaintiffs then asked the
Witness the following question,

Question State whether the work called for by
the memorandum of deficiencis was done.

Question objected to by Defendants counsel on
the ground of incompitency and that the completion
of the work cannot be ~~proved~~ proved in that way which
objection was overruled by the Court To which
ruling and decision of the court the Defendant by
his counsel then and there excepted—

Answer The work was done It was done with
in two or three Days after the Date of the Paper I saw
the Paper about the date of it I went to the
building and saw one of the Plaintiffs then all the
work the Plaintiffs had to do was done prior to that time
except the items mentioned I gave Benjamin
the Paper and told him to go through and do all
it called for I went through the Building from
top to bottom and I believe everything was imme
diately done according to request of the Paper
I have a faint recollection that I said to Mr
Barjington that it was done My recollection
is not very ~~in~~distinct but I think I told Barjing-
ton two or three days after the date of the Paper that
it was done Mr Barjington was about the
building almost every day two or three times I think
till it was completed and was the Architect The
work was principally on the outside and could
be seen.

I returned from New York on the 14th or 15th of April and found things standing still at the Building on my return From the 14th April to the 17th May plaintiffs were delayed by the arrangements being made for party wall between Defts & Follansbee. & change from a single to a party wall I think we commenced the walls on the 14th May we had material on the ground suitable for the wall. originally intended next to Follansbees Lot I mean the base course was there when I returned from New York The Rabble stone came soon after The dirt next to Follansbees building might have been taken out in two days. and we might have commenced two days after the 14th April if no change had been made. The original wall was to be three feet at the base. The Plans were all left at Mr Boyingtons office The Plan containing the change cannot be found as I am informed when Mr Boyington told me about the alteration I told him I wanted him to lay out the additions in red lines on the Plan The original Plan called for 3 feet base wall wide. The base course put in was 4½ feet wide The stone on the ground were used so far as they would answer The rest were used for rubble wall at great loss we were delayed in getting stone suitable for the Base course 4½ feet wide which was the length of the stone As we were intended we were greatly delayed by

the change. There was a delay of two or three weeks on account of Defendants ordering the men who were digging away Defendant said the dirt was his and he would take it out as he wanted it, we were delayed three weeks on that account, We were delayed by the failure of the Carpenters to supply the beams On the first storey there were 12 days in putting in the Beams The Carpenters had a great deal of work to do more perhaps than they could do in the time they had agreed to do it, The Carpenters worked energetically. Our specifications gave them four Days for each floor and there were six floors. They took Eight days on each making in all an excess of 24 Days. making 24 days delayed by the Carpenters. The time required to do the extra work would be as the amount of the extra work is to the contract Price, which would make about 17⅓ days All the work mentioned was done under the contract offered in evidence except the extra work

(Cross Examination)

The Plaintiffs are my sons They are respectively 24 and 25 years of age The oldest had been in business three years before we came west I assisted the boys in making the estimates I employed most of the men — I think I brought about 30 men from New York I employed Mr Ulrich in connection with the

boys. to make the excavations The boys or one of them was present The work done by Douglass was apart of the work embraced in Ulrichs contract. Mr Ulrich called on us I took an active part in making all the contracts The Boys had other jobs at the time this was going on I spoke to Mr Hambleton to make the estimate I made out the list of extras which was shown me It is in my hand writing taken from the Books I did not, at that time carry on any business independant of my sons I negotiated for the Brick put into the wall that was taken down I had no negotiations with Mr Burnham of Milwaukee or his agent in relation to the brick Payments have been made on the contract and the whole amount of the certificates drawn is $17,400 which has been paid in cash and brick &c it was sometimes drawn by checks and sometimes otherwise I drew some of the checks I was often there The work done by Douglass above mentioned was included in Ulrichs contract Mr Ulrich has not been paid in full. The bricks put into the wall that was taken down I got from the man who supplied the Brick for Mr Browns House I dont remember his name I swear that they were pressed Milwaukee Brick and of the very best quality too. I did not go to Milwaukee myself. because I had engaged my brick of another man I did not hear Mr Mills say that the Brick

were not according to the contract I told Mr Mills not to let the man (Mr Burnham) know that I was doing the work or he might not let him have the Brick, I have had difficulty with him growing out of the previous years transactions The thickness of the basement wall & Mr Follansbee's chimneys were the only extras occasioned by the party wall expecting that it increased the width of the building as he had not ordered our materials for other parts of the building until up to a certain time My impression is that I told Mr Barrington that the work mentioned in the specifications of deficiencies was done I have no doubt that I told him so as soon as it was done, I met Mr Barrington frequent that the Buildings after that time.

The Plaintiffs then offered as testimony & read to the Jury the Deposition of Leo. P Douglass as follows to wit.

I know the Parties Plaintiffs and Defendant The former I have known for the last two years the latter for the last six years or there abouts I know that the Plaintiffs or their employees were engaged in excavating the Premises of Defendant at corner of Lake & Wabash Avenue in the City of Chicago in the Spring of 1856 and when which the Plaintiffs erected stores for defendant I was engaged in excavating the Premises next adjoining the Defendants for Charles Follansbee and while so engaged I excavated for the Party wall and also

excavated from three to four feet of Earth on the Premises of Deft & received Forty 29/100 Dollars of the Plaintiffs in part pay for the same This work was done on the north line of Defendants Premises adjoining the Premises of said Follansbee who paid me about thirteen Dollars being the balance of my bill for the work done on Defts Premises I know William H Boyington (architect) of Chicago and had a conversation with him in relation to Plaintiffs excavating the said Premises of Defendant It was about the 15th day of May 1856 in Lake Street in front of the Premises of said Defendant at the time when said Boyington came to see me about excavating a cellar for Mr L Parmelee Mr Boyington said "That Price of dirt (meaning to the stack on the South Side of Defts Premises belonged to Mr Follansbee to take out & he (Boyington stopped Mr Minch from doing it. I finished excavating the stack of Dirt referred to on the 22d day of May 1856 and the Plaintiffs commenced laying the foundation party wall at the rear end two or three days before that time.

The Plaintiffs next called as a Witness Andrew Connell who being sworn testified as follows.

I am a Builder and have been for about 25 years Have seen and handled a great many Brick have been in Chicago about three years I dont know what brick were put into the wall of Defendants Building on Wabash Avenue but I have seen

75

Mr Browns House on Michigan Avenue and I should say it was built of the best quality of Milwaukee Brick according to the best of my knowledge they were Milwaukee pressed Brick, From the Data given me of the extra work done done on Mr Mills building I have made the following calculations

Setting Curb	at 25 cts lin ft.		$55.75
" Window & Door Sills in basement	½ lin ft.		14.50
" 42 Columns under vaults	4/-		21.00
" centers 30 in all.	6/-		22.50
" Iron Lintels & belt course, (120 ft)	2/-		30.00
24,000 brick in arches.		$13.00	312.00
44,100 " in wall of 2d Story.		$12.00	529,20
5580 " in jog in wall		"	66.96
3540 " in fire wall on roof.		$15.00	53,10

I have built vaults that fell. They were of the same size as those of Defendants and were Eight inches thick Three of them fell and I kept an account of the expense of repairing them. The three cost me one $70.00 I should say that $90.00 to $100.00 would be a fair price for the rebuilding of four arches—

The Plaintiffs next called as a witness William Cunningham who being sworn testified as follows—

I Know the Plaintiffs and I know the Defendant by sight I was employed by

plaintiffs on the building of Defendant in the year 1886 was employed to excavate the earth under the side walk I commenced on Tuesday morning The Building was then up to the second Story, Second Story not all up. I worked until Friday Had excavated on Wabash Avenue. About half the distance from Lake Street to the Alley. Mr Mills had some joist brought and the Carpenters commenced sawing and throwing them down into my work I threw them out and Mr Mills came down & ordered me to stop work I did so He said he owned the ground and when he wanted it he would take it out my father afterwards went on and finished the excavation when I saw the work afterwards the building was nearly completed.

(Cross Examination)

When my father commenced to take out the balance of the dirt under the side walk, the second Story of the building was nearly finished

A Iland B Ibecks recalled by Plaintiffs

The window sills and door sills in the Basement, and the window sills in vaults amounted together to 153 feet and were worth from 90 cts to one dollar per foot.

Here the Plaintiffs rested and the Defendant by his counsil thereupon moved the Court to exclude from the Jury all the evidence offered as to the work done under the

77

Contracts on the ground that it has not been shown that the building has been completed to the satisfaction of the Superintendent and no certificate has been produced from the Superintendent showing that the Plaintiffs are entitled to Payment.

Which motion was overruled by the Court to which ruling & decision of the Court the Defendant by his Counsel then and there excepted

The defendant thereupon and for the purpose of proving the issues on his part introduced as a witness Martin Minch who being first duly sworn testified as follows—

I know the building of the Defendant upon the corner of Lake Street & Wabash Avenue I made a contract with Hiland Bullocks to take out the foundation for that building I went on and took out all but a small lot my contract extended only to the outside of the walls and did not embrace the Sidewalks. I took out all but a small strip next to Hollanshers Building about 6 or 7 feet high — 5 ft at base and 3 flat top and about 60 ft long Mr Hollanshers wanted that to be left. I had a good deal of talk about the matter with Mr Bullocks. The Plaintiffs came round with Mr Hollanshers and told me to leave it as they expected to put

up Mr Hollandus Building and that both buildings would go up together I had a talk with Mr Hiland Burks. as to the time of doing the work. I applied to him for hay, as I was in the habbit of haying off my men every week he said then had got no estimates on the work and could not hay them, that the foundation was not out and that I had done the excavation much sooner than he ephected it to be done I did the excavation about the 12th of April.

(Cross Examination)

My contract Price was $265.00 I have received only $192.110 I gave an order to another man on Mr Burks for Eight dollars. I saw the man afterwards and he told me he had not got it I have not seen him since. And have not been called on for the Eight Dollars. It may have been paid. The stick of ground not taken out by me was about five feet deep. five feet wide at the base and two feet at the top and 60 or 90 ft long. There was about 35 yards of earth in it and it was worth about 11 cents per yard to take it out - I had a little difficulty with the Plaintiffs about my hay - and a little personal difficulty with one of them. Mr Bayington never said anything to me about stopping the digging

William Mc Bayington called and sworn on the

part of the Defendant testified as follows.

I am the person named in the Contracts as the Superintendent of the work in question I recollect that some facing of the wall on the Wabash Avenue front was taken down The brick with which the wall was commenced were in some respects good and acceptable and in other respects not. Some of them were soft others were impregnated with Lime Stone might crumble, Some of the brick were on the ground. They were of different colors and would make a front look very spotted unless selected It required selection I told the Plaintiffs or their father that they would need a large supply of those Brick to select from in order to make a good front There were as good brick in the pile as could be got any where, And one of them said that they would not have enough of them to make such selections as I required Plffs & Deft made an arrangement that the Defendant might get the brick as he wanted & the Plffs would put them in the wall Plffs said they had made arrangements for Mr Mills to go to Milwaukee and get the regular Burnham Milwaukee Brick I heard Mr H. B. Weeks. testimony The change from a single to a hearty wall in itself occasioned no delay — There was a delay in shifting and getting stone for footing as Weeks testified have been

a little delay in getting the Base course and moving
Mr Follansbee's House The Carpenters upon the first
floor took up more time than they were entitled to
and I made some allowance to Mr Weeks for it in
my calculations I never heard until here on the
stand that there was any delay occasioned by the
excavations for the side walks I never directed the
wall for the arches to be made thicker Mr Weeks
never claimed anything for it in any Bills presen-
ted to me.

They sometimes commenced putting in
joist before the walls were all ready on front of
the walls being ready for the joist— I made
out the writing dated 20th November 1856 and
offered in evidence by the Plaintiffs The deficiencies
therein mentioned actually existed at that time
I have no recollection of ever having been notified by the
Plaintiffs that the work specified in the writing
was completed. They may have notified me and
I forgotten it. I heard Mr Weeks testimony
respecting the extra depth of wall under the side
walk. My attention was called to it when the
wall was half way up I never directed it to be made
deeper or thicker and know of no reason why it was
made so.

James Campbell being called and sworn
on the part of the Defendant testified as follows
I know the building in question I contracted with
defendant to do the Carpenter work of the

Building I know there was no delay to the masons occasioned by the Carpenters We gained from 13 to 15 Days on our Contract time as nearly as I could calculate. I saw the brick that were first put into the Wabash Avenue front. The make of the brick as to size and form was well enough but the color was bad. Some of them were white and some yellow. and some of them were soft They would make a spotted wall if put in without selecting. I commenced my work in May and was there until the next January - The excavation of the excabation under side walk was for my benefit and did not delay masons in finishing the building - The ground was necessary to enable the Carpenters to get the timbers into the building and Defendant agreed to let me have it and did so.

(Cross Examination)

It took from two to four days to put on the Timbers on each floor. I sublet to R J Rowland to put in the timbers. Generally the Carpenters were about four days on each bin

R. J. Rowland, produced & sworn on the part of the Defendant testified as follows -

I worked on the building in question. I had the Contract from Mr Campbell to put on the timbers for the masons. I am a carpenter

by trade, my attention was called to the taking down of the wall on the Wabash Avenue front The color of the brick did not suit me cannot say as to quality — The last were smoothed think I did not think that the masons were delayed at all by the Carpenters work I was ahead of my time I advised with the foreman of the masons Mr Riley as to the time when the timbers would be wanted and furnished them as required. Several times the masons were behind and did not come on after the beams were ready for two or three days.

(Cross Examination)

On the first tier of beams we might have been between six and eight Days, We always commenced to lay the beams as soon as any part of the walls was ready for them, and did not wait for the whole of the walls to be ready before beginning to put on the beams We put on a Beam whenever a place was ready for it. I was told I had eight days on each story to put on the timbers and think I put them on within that time.

The Defendant next offered in evidence a Promissory note of the Plaintiffs and the signature being admitted to be genuine the same was read to the Jury and is in the words and figures following.

83

$ 338 04/100 Chicago May 22d 1857

One day after date I promise to pay to the order of O & H. G. Sherman at their office Three Hundred & Thirty eight & 04/100 Dollars. Value recived No — Due —

B & L. D. Meeks.

"Endorsed" J R Mills. or order without Recourse to me.
O & H. G. Sherman.

The Defendant next offered in evidence the following Instrument the execution of which was admitted by the Plaintiffs

$194—

Mr J no R Mills will pay Theodorous Doty One hundred and ninety four dollars on charge same to a/c of

B. & L. D. Meeks.

Chicago Ill
May 21st 1857.

Here the Defendants rested and the Plaintiffs then called John Smith as a witness who being duly sworn testified as follows

I reside in Chicago and have resided here for two years and over I have no business in particular Sometimes I am teaming and sometimes I am loading stone - I know the buildings in question I drove brick team I took them away to Mr Browns House there were two kilns

of Brick then one Millwaukee pressed brick & another kind of brick one pile was taken to River Street. They were a different colored brick They were taken away before the wall was commenced the brick that the wall was commenced with were good brick. They were taken away to Mr Browns House. They looked to me to be good brick, They were darkish yellow in color and uniform and were double pressed Millwaukee brick I worked in a brick yard and know the different qualities of brick. Have been in the Brick business about sixteen years The Brick taken from defendants building to Mr Browns House were better than those now in Defendants building and retain color better & stand the weather better They are excelent brick,

(Cross Examination)

I saw the brick before and after they were laid in the wall I saw them in the wall and handled them before and afterwards. I drew them from the Millwaukee Depot to defendants building Did not try to see whether there was any lime in them They were a different shade of color from those now in the wall. A wall built partly of one kind of brick and partly of the other would have exhibited the different shades of color I can tell by examening a wall whether the brick are good

soft brick Well not stand one winter I was at Browns House when it was built. The brick for the front Wall of Brown's House were probably selected. The Brick were hauled to Mr Browns House by me I knew there was no chance to get them away from there without my knowledge There were probably three or four thousand taken over from Mr Mills Building Brick were arriving daily by the cars from Millbanken & taken by Plffs.

Mr. Mr. Barrington recalled by Defendants says. I never gave directions to have the area wall sunk the 18 inches that Weeks testified to.

John Riley recalled by the Plaintiffs

Mr Barrington did direct that the area wall should be sunk the 18 inches that Weeks testified to Barrington directed me to do it & I did it,

(Cross Examination)

It was at the time we were commencing the vaults No one was present. I told him they were not deep enough to be out of the way of frost The wall was to be 6½ ft below the surface of the Street and 6 in below the vault floor they were by Mr Barringtons directions made eight feet deep The certificate with the statement on the back thereof made by said Barrington was given

to the Jury by the consent of counsel on both sides.

The foregoing is substantially all the testimony introduced upon the trial of said cause - and the said defendant by his counsil thereupon asked the Court to instruct the Jury as follows.

Defendants Instructions

1st. That the parties in and by the contracts set out in the first & Second counts of the declaration and given in Evidence in this cause have fixed upon a certain mode by which the Plaintiffs right to payment under the said several contracts as upon a completion of the work therein mentioned shall be ascertained viz the certificate of the Superintendent in writing that they are entitled thereto The Plaintiffs therefore in order to enforce the said contracts or either of them as upon a completion thereof must show that they have done every thing on their part in this respect which could be done to carry the respective contracts into effect and they cannot compel the payment of any alleged balance under the said contracts or either of them as upon the completion of the work mentioned in the said respective contracts unless they procure and have such certificate in writing of the said Superintendent or show that by time accident fraud or by some other reasonable excuse they were unable to do so

2d If the Jury believe from the evidence that the matters contained upon the same paper and on the side thereof other than that on which the certificate of Humble Barrington

87

bearing date the 29th day of November 1856 is contained are the same referred to in said certificate then the jury ~~shall~~ should consider the said matters as a part of said certificate and as competent evidence and proper for their consideration in connexion with the other testimony in this case in determining the rights between the parties to this suit and the amount of recovery thereon,

3d

If the Jury believe from the evidence that at the time of making the several contracts set out in the first and second counts of the declaration and read in evidence in this cause, and also in doing the work in question, the witness Hiland B. Meeks, was associated with the plaintiffs and doing business with them under the name of B & H. D. Meeks. and under that name entered into said contracts & performed all the work in question with the plaintiffs then he should have been joined as plaintiff and the jury must find for the defendant,

4th

That if the jury find from the evidence that any portion of the plffs claim in this suit is for work done by making alterations from the contract set out in the first and second counts of the plffs declaration & read in evidence and the plans & specifications connected therewith and that the said alterations were made by the direction of the Superintendent of the work mentioned in said contracts, Yet the plaintiffs in order to recover payment for such work must procure and ~~have~~ prove the certificate in writing of said Superintendent

that they are entitled thereto or shew that by timely accident fraud or some other reasonable excuse they have not been able to do so.

The second third and forth of which said Instructions were refused by the Court. The first was amended by the Court and by said amendment made to read as follows.,

Defendants Instructions

1st Given as amended

That the parties in and by the contracts set out in the first and Second counts of the declaration and given in Evidence in this cause have fixed upon a certain mode by which the plaintiffs right to payment under the said contracts as upon a completion of the work therein mentioned shall be ascertained viz. the certificate of the Superintendent in writing that they are entitled thereto The Plaintiffs therefore in order to enforce the said contracts or either of them as upon a completion thereof must shew that they have done every thing on their part in this respect which could be done to carry the respective contracts into effect And they cannot compel the payment of any alleged balance under the said contracts or either of them as specified or for extra work as upon the completion of the work mentioned in the said respective contracts unless they procure and have such certificate in writing of the said Superintendent or unless you believe from the evidence that all the work specified in the

memarandum given in evidence in the hand writing of Wm Barrington & refered to in the certificate of said Barrington in relation to the completion of the work was completed before the commencement of this suit.

And said first Instruction as amended was given by the Court— To which said ruling and decision of the Court in refusing said Second third and fourth Instructions and each of them so asked for by the said defendant and in modifying said first Instruction by the said defendant by his Counsel and then & there excepted,

And the Jury having retired to consider of their verdict afterwards returned into Court with the following verdict to wit.

B. & L. D. Meeks.
vs
John R Mills

We the Jury find for the Plaintiffs and assess the Damages at.
$5675.89.

Wm. N. Kimball Foreman

And the said Defendant by his Counsel thereupon moved the Court for a new trial in said Cause for the following reasons—

1st The verdict of the Jury is against the Law.
2d Said verdict is against the testimony in the case

3d The Court excluded proper & competent testimony from the Jury.

4 The Court permitted improper & incompetent testimony to be given to the Jury on the part of the Plaintiffs

5 The refusal of the Court to give to the Jury the 2d 3d & 4th Instructions asked for by the said Defendant.

6 The modification by the Court of the first Instruction asked for by Defendant.

Which said Motion after argument by counsel was overruled by the Court. And a Judgment was thereupon rendered upon the verdict of the Jury aforesaid. To which ruling and decision of the Court in overruling said motion for a new trial and entering Judgment upon said verdict the said Defendant by his counsel then and there excepted and prayed that this his Bill of exceptions might be signed and sealed by the Court which is accordingly done.

Done 29th 1858 John M Wilson Seal

State of Illinois
County of Cook } ss. I Walter Kimball Clerk of

Cook County Court of Common Pleas, in and for said County, do hereby Certify that the foregoing is a full and true transcript of all the pleadings, Bill of Exceptions & appeal Bond on file in my office & of the proceedings Entered of Record in said Court in the case wherein Benjamin Weeks & Caleb D Weeks are Plaintiffs and John R Mills defendant in an action of Assumpsit.

In testimony whereof I hereunto subscribe my name, and affix the Seal of said Court, at the City of Chicago in said County this 13th day of January A.D 1859 Walter Kimball Clerk

Supreme Court

John R Mills Plff in Error | Assignment of Errors

vs

Benjamin Weeks & Caleb D Weeks Defts in Error

Afterwards to wit at the April Term of the Supreme Court A D 1859 before the justices of the said Court comes the said John R Mills by Scates McAllister & Jewett his attorneys and says that in the record and proceedings aforesaid and also in giving the judgment aforesaid there is manifest error in this to wit the Court erred in admitting improper testimony and in Excluding proper testimony

Also in refusing the first instruction asked for

by defendants below and in modifying the same and in giving said Instruction as modified
And also in refusing to give the second third and fourth Instructions asked for by the defendant below

Also in overruling & denying the motion for a new trial and the motion to exclude the Evidence of Plff below=
There is also Error in this to wit that by record aforesaid it appears, that the judgment aforesaid, in form aforesaid given, was given for the said Benjamin and Caleb D Weeks against the said John R Mills Whereas by the law of the land the said judgment ought to have been given for the said John R Mills against the said Benjamin & Caleb D Weeks

And the said John R Mills prays that the judgment aforesaid, for the Errors aforesaid and other Errors in the record and proceedings aforesaid, may be reversed annulled and altogether held for Nothing And that he may be restored to all things which he hath lost by occasion of the said judgment &c

Scales McAllister & Jewett
Attys for Plff in Error

Supreme Court.

Benjamin WEEKS
& Caleb D. WEEKS
Defts in Error
ads
John R. Mills
Plff in error

} joinder in Error.

and hereupon afterwards, to wit at the April Term of the Supreme court, A.D. 1859. the said Benjamin WEEKS and Caleb D. WEEKS, by King, Scott & Wilson their attorneys fairly come here into court, and say, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and pray that the said Supreme court of Judicature upon the aforesaid Justicis thereof, now here, may proceed to Examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for Error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed &c.

King, Scott & Wilson
Atty's for Defts in Error—

Supreme Court
John R Mills
vs
Benjamin Weeks
& Caleb D Weeks
Transcript

$27.50

Fees for Transcript.

$27.50