No. 12124

Supreme Court of Illinois

Canal Trustees.

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vs.

Lynch.

71641

United States of America
State of Illinois
County of Cook } ss:

Pleas before the Honorable Hugh T. Dickey Judge of the Cook county court within and for the County of Cook and State of Illinois at a term thereof begun and holden at the court House in the city of Chicago in said County and State on the 1st first monday being the second day of October in the year of our Lord one thousand eight hundred and forty eight and of the independence of the United States the seventy third.

Present the Honorable Hugh T. Dickey, Judge.
Patrick Ballingall Prosecuting Attorney.
Isaac Cook Sheriff.
Attest James Curtis Clerk.

Be it remembered that heretofore to wit on the twenty fourth day of January in the year of our Lord one thousand eight hundred and forty eight. David Lynch puts in his plea Arnold Tay his Attorney in a plea of Trespass on the case upon promises against the Board of Trustees of the Illinois and michigan canal. And thereupon there was issued out of said cook county court a Summons in the words and figures following to wit.

"State of Illinois }
Cook County } ss: The People of the State of Illinois to the Sheriff of said County: Greeting.
We command you that you Summon The Board of Trustees of the Illinois and Michigan Canal if they shall be found in your county. personally to be and

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appear upon the cook county court of said county, on the first day of the next term thereof to be holden at the Court house in the city of Chicago in the said county on the first monday of February next to answer unto David Lynch in a plea of trespass on the case on promises. to the damage of the said Plaintiff as he says in the sum of Three thousand Dollars. And have you then and there this writ with an endorsement thereon, in what manner you shall have executed the same.

Witness the Honorable Hugh T. Dickey Judge of our said court. and the seal thereof at the city of Chicago in said county this 24th day of January A.D. 1848.

James Curtis Clerk"

L.S.

Which said writ was afterwards returned into the Office of the clerk of said court with an endorsement thereon of the return thereto in the words and figures following to wit.

"executed by reading the within in the presence of Robt Stewart Esqr. Secretary to the Board of Trustees of the Illinois and Michigan canal and delivering unto a true copy of the same. Jany 27. 1848.

J. Cook Sheff by John Brack Deputy"

And that on the twenty fourth day of January. in the year of our Lord one thousand eight hundred and forty eight. the said David Lynch filed in the office of the clerk of said court his certain declaration in the words and figures following to wit.

"State of Illinois

Cook County court. Of February Term in the year of our Lord one thousand eight

hundred and forty eight.
Cook county ss:

David Lynch plaintiff in this suit by Arnold and Kay his Attorneys. complains of the "Board of Trustees of the Illinois & Michigan Canal" defendants which is summons &c. of a plea of trespass on the case upon promises: For that whereas the said "Board of Trustees of the Illinois and Michigan Canal" heretofore to wit on the first day of March in the year of our Lord one thousand eight hundred and forty seven at Chicago in the County of Cook aforesaid was indebted to the said Plaintiff in the sum of three thousand dollars lawful money of the United States of America for the work and labour care and diligence of the said Plaintiff by the said Plaintiff before that time done performed and bestowed in and about the business of the said Board of Trustees of the Illinois and Michigan Canal and for the said Board of Trustees of the Illinois and Michigan Canal" and at its special instance and request. And Also for divers materials and other necessary things by the said Plaintiff before that time found and provided and used and applied in and about that work and labour for the said Board of Trustees of the Illinois and Michigan Canal" and at its like special instance and request. And being so indebted to the said Plaintiff the said "Board of Trustees of the Illinois & Michigan Canal in consideration thereof afterwards to wit on the same day and year last aforesaid and at the place aforesaid undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said "Board of Trustees of the Illinois and Michigan Canal" should be thereunto afterwards requested.

And whereas Also afterwards to wit on the same

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day and year aforesaid and at the place aforesaid in the consideration that the said plaintiff had before that time at the like special instance and request of the said Board of Trustees of the Illinois and Michigan Canal" done performed & bestowed divers other work and labour exercised diligence in & about the business of the said Board of Trustees of the Illinois & Michigan canal" and for the said Board of Trustees of the Illinois and Michigan Canal" and had before that time found provided used and applied divers other materials and other necessary things in and about that business. the said Board of Trustees of the Illinois and Michigan Canal undertook and then and there faithfully promised the said plaintiff that if the said "Board of Trustees of the Illinois and Michigan Canal" would well and truly pay to the said plaintiff, so much money as he the said Plaintiff reasonably deserved to have of the said "Board of trustees of the Illinois and Michigan canal" for the same when the said "Board of trustees of the Illinois and Michigan Canal" should be thereunto afterwards requested. And the said plaintiff avers that he reasonably deserved to have of the said "Board of Trustees of the Illinois and Michigan Canal" for the same the further sum of Three thousand dollars. of like lawful money as aforesaid, to him at the place aforesaid. Whereof the said defendants afterwards to wit on the same day and year last aforesaid and at the place aforesaid had notice.

And whereas Also the said Board of trustees of the Illinois and Michigan Canal, afterwards to wit on the same day and year last aforesaid and at the place aforesaid was indebted to the said plaintiff in the sum of three thousand dollars. like lawful money as aforesaid. for so money before that time lent & advanced by the said plaintiff to the said "Board of trustees of the Illinois and Michigan Canal" at the special instance and request of the said Board of Trustees of the Illinois and Michigan Canal. and being so indebted the said board of trustees of the Illinois and Michigan canal

in consideration thereof afterwards to wit on the same day & year aforesaid and at the place aforesaid undertook & then & there faithfully promised the said Plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned when the said board of Trustees of the Illinois & Michigan Canal should be thereunto afterwards required.

And whereas also the said Board of Trustees of the Illinois and Michigan canal afterwards to wit on the same day & year last aforesaid and at the place aforesaid, was indebted to the said plaintiff in the further sum of three thousand dollars of like lawful money as aforesaid for so much money before that time paid laid out and expended by the said plaintiff to & for the use of the said Board of Trustees of the Illinois and Michigan Canal" and at the like special instance and request of the said Board of Trustees of the Illinois and Michigan Canal and being so indebted the said Board of Trustees of the Illinois and Michigan canal" in consideration thereof afterwards to wit, on the same day and year aforesaid and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned, when the said "Board of Trustees of the Illinois and Michigan Canal should be thereunto afterwards required.

And whereas also afterwards to wit on the same day and year last aforesaid and at the place aforesaid the said Board of Trustees of the Illinois & Michigan Canal was indebted to the said plaintiff in the further sum of three thousand dollars of like lawful money as aforesaid for so much money before that time had and received by the said Board of Trustees of the Illinois and Michigan canal to and for the use of the said plaintiff. and being so indebted the said board of Trustees of the Illinois and Michigan Canal in consideration thereof afterwards to wit on the same

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day and year aforsaid and at the place aforsaid undertook and then and there faithfully promised the said Plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned when & the said Board of Trustees of the Illinois & Michigan canal should be thereunto afterwards requested.

And whereas also the said Board of Trustees of the Illinois and michigan canal afterwards to wit on the same day and year last aforsaid and at the place aforsaid accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said board of trustees of the Illinois and michigan canal to the said plaintiff and then and there being in arrear and unpaid and upon such accounting the said Board of trustees of the Illinois and michigan canal then and there was found to be in arrear and indebted to the said plaintiff in the further sum of three thousand dollars of like lawful money as aforsaid. and being so found in arrear and indebted to the said Plaintiff the said Board of Trustees of the Illinois and michigan canal in consideration thereof afterwards to wit on the same day and year aforsaid and at the place aforsaid undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned when & the said Board of Trustees of the Illinois and michigan canal should be thereunto afterwards requested. Nevertheless the said Board of trustees of the Illinois and michigan canal although often requested so to do. hath not as yet paid the several sums of money above mentioned, or any or either of them or any part thereof to the said plaintiff. But to pay the same or any part thereof ~~the~~ to the said plaintiff the said Board of trustees of the Illinois & michigan canal, hath hitherto altogether refused and still doth refuse to the damage of the said plaintiff of three thousand dollars and therefore the said plaintiff brings.

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suit &c. Arnold & Lay. Attys for Plff.

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And that Afterwards to wit on the ninth day of February in the year of our Lord one thousand eight hundred and forty eight came the Board of Trustees of the Illinois and Michigan canal. and filed a plea in the words and figures following to wit.

"The Board of Trustees of the Illinois Michigan canal } Cook county court
Plff. } of February Term
vs } A.D. 1848.
Daniel Lynch }

And the said Board of Trustees of the Illinois and Michigan canal by J. Butterfield their Attorney come and defend the wrong and injury when &c. and say that they did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him and of this they put themselves upon the country &c. J. Butterfield Defts Atty."

And thereupon said Plaintiff as and his similiter thereto in the words and figures following to wit

"And the said Plff do the like
Arnold for Plff."

And that Afterwards. to wit on the seventeenth day of October in the year last aforesaid during said October Term of said court being one of the days thereof. the following order and proceedings. was had and entered of record in said court to wit.

"Daniel Lynch
vs
Trustees of the Illinois Michigan canal } Apl.

And now come the parties by their Attorneys and issue being joined herein on motion of the

(Copy of account sued on)
Trustees of Illinois & Michigan Canal
To Daniel Lynch Dr
To 25.400 lbs Oscars in sch No 21 a 32.50 $ 8128.13
3967 " " " 49.95
$ 8178.08
Cr 24 112.50 By 0 Bbls Spears in Sch 22 a 35c $ 439.28
$ 16. 617.30
Whole Amount due

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Plaintiff It is ordered that a jury come to try the same whereupon come the jurors of a jury of good and lawful men to wit.

Thomas Green Cyrus Mann Ulalia P. Roche
Joseph Robinson J. Chadbourne Jacob Snyder
Joseph Case Chris Jenks Calvin Barnes
Patrick O'Mally James McMullen A.B. Wheler.

who were duly empannelled tried and sworn well and truly to try said cause upon the issues joined herein and after hearing part of the evidence in the cause were with the consent of the parties allowed by the Court to separate to meet the court at the opening thereof to morrow morning"

And that Afterwards to wit on the eighteenth day of October in the year of our Lord one thousand eight hundred and forty eight and during said October Term of said court. being one of the days thereof. the following proceedings and orders were had and entered of record to wit

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ee. David Lynch
vs
Trustees of the Illinois & Michigan Canal } Apt

And now again come the parties by their Attorneys. and the jurors of the jury empannelled in this cause being called also come and after further hearing the evidence adduced in this cause were with the consent of the parties allowed to separate to meet the court at the opening thereof to morrow morning for a further hearing of this cause"

And that Afterwards to wit on the nineteenth day of October in the year last aforesaid during said October Term of said court. being one of the days thereof the following proceedings and orders were had and entered of record in said

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Court to wit

" Daniel Lynch
vs
The Board of Trustees of the
Illinois and Michigan Canal

} Asst.

And now again come the parties by their attornies, and the Jury empannelled herein being called also come and after hearing the remainder of the evidence herein and a part of the argument of Counsel, were with the consent of parties allowed to seperate to meet the Court for a further hearing of this Cause at the opening thereof tomorrow morning."

And that afterwards, to wit on the twentieth day of October in the term last aforesaid during the said October term of said Court being one of the days thereof, the following proceedings and order were had and entered of Record in said Court to wit

" Daniel Lynch
vs
The Board of Trustees of the
Illinois and Michigan Canal

} Asst

This day again come the parties by their attorneys, and the Jury heretofore empannelled herein being called also come, and after hearing the remainder of the argument of Counsel and instructions of the Court retire under the charge of a sworn officer of the Court to Consider of their verdict, and afterwards come into Court and say We the Jury find the issues herein for the Plaintiff and assess his damages at the sum of One thousand and sixteen dollars and

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ninety six cents

And thereupon the said defendants enter their motion for a new trial herein which said motion is in the words and figures following to wit:

Cook County Court

The Board of Trustees of the Illinois & Michigan Canal
vs
Daniel Lynch

Come the defendants and move the Court for a new trial in this cause upon the following grounds

1st Because the verdict of the Jury is against law and evidence

2d Because the Court erred in giving instructions to the Jury and also in refusing to give instructions to the Jury

3d The Court erred in admitting improper ~~testimony~~ evidence.

J. Butterfield
Atty for Defts

Oct 20. 1848

And that afterwards to wit on the third first day of October in the year last aforesaid during said October term of said Court being one of the days thereof, the following proceedings and orders were had and entered of Record in said Court to wit:

Daniel Lynch
vs
The Board of Trustees of the Illinois and Michigan Canal

Assumpsit

And now come the parties by their attorneys, and the Court after mature

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deliberation had on the motion for a new trial made herein, and being fully advised thereon do now overrule and deny said motion, to which ~~opinion~~ decision of the Court said defendants take exceptions.

It is therefore considered that the said Plaintiff do recover against said defendants the said sum of One thousand and sixteen dollars and sixty six cents, his damages aforesaid in form aforesaid assessed and also his Costs and Charges in this behalf expended and have Execution therefor.

And ~~the~~ said defendants pray an appeal from the judgment herein to the Supreme Court of this State, and it is granted upon their filing an appeal bond in the penal sum of ~~one~~ Five thousand dollars, Conditioned as required by law, with Justin Butterfield as Security therein within sixty days from this date.

And that afterwards to wit on the same day and term last aforesaid, during said October term of said Court and being one of the days thereof the said defendant presented and filed his bill of Exceptions herein, which is in the words and figures following to wit

"Cook County, Court
Daniel Lynch
vs
The Board of Trustees of the
Illinois & Michigan Canal

Be it remembered that on the 17th day of October of the October term of the Cook

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County Court in the year One thousand Eight hundred and forty Eight. this Cause came on to be tried before the Honorable Hugh D Dickey. Judge of said Court and a Jury empannelled in said Cause. The plaintiff introduced William Gooding who sworn as a witness who swore that he was Chief Engineer of the Illinois and Michigan Canal from the time of the Organization of the Board of Trustees in 1845. until May 1848. That the sections 21 & 22. were preemption work, and were awarded under the Canal law, of Feb.y 21. 1843, at the estimate of the Chief Engineer; Section 21 was awarded to Benjamin Wilder, & Section 22 to the plff On the 7th of August AD 1845. Contracts were entered into. between the Board of Trustees & the said Wilder & said Lynch, for the Construction of said sections. The Contract for Section 21 was with Wilder, that for section 22 was with the Plaintiff All the work performed by said Lynch on said sections, was done under said Contracts. Lynch assumed the Wilder Contract & received the estimates by power of Attorney from Wilder. Lynch Commenced work in the fall of 1846. and on the 2d of July 1847. the work was relinquished by Lynch with mine Consent with the understanding that Lynch should be paid the retained per centage according to the estimates of the work previously made. He was not entitled to the retained per centage by the Contract.

Lynch was anxious to close up for the work which he had done and leave the Job and said he would accept the measurements and estimates previously made. And the closing certificate for the final payment was so made

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up by Witness on the 2d of July 1847. at the time of the settlement Lynch Complained. that his work had not been correctly estimated. he claimed that he had excavated (as Witness thinks) some 200 or 300 yards which had not been estimated to him. and wanted a remeasurement. Witness told him that it could not then be more accurately measured for the reason that it was a great part of it covered with water, that if Lynch chose to defer the settlement, for a short time, till the water could be drawn off, he would have the work remeasured, and that he would be paid for every yard he had done then. if not, if a settlement was then made, and the retained percentage paid, it must be final. Lynch concluded to settle upon the estimates as made and Witness made out the closing Certificates for a final settlement on the two sections. Witness considered the settlement final. Sometime afterwards upon the application of plaintiff Witness directed Mr. Lake, assistant Engineer to remeasure the work. I directed the work to be remeasured to satisfy myself and him. that justice had been done him, as he complained, and to see what amount of work there was to be done by the Trustees on those sections. After Lynch left the job. the Trustees by an Agent or superintendant. were finishing up the work. Witness object in Ordering the remeasurement was to ascertain how much remained for the Trustees to take out. We thought Lynch had been over estimated.

Witness considered the settlement final, and had the remeasurement shewn him underestimated Witness would not have made another return without the order of the Board

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In answer to interrogatory put by Plffs Counsel, Witness says he never said that if upon the remeasurement it should be found that Lynch was under estimated, he should be paid — dont know that Mr Stuart said so.

Plffs Counsel here exhibited to Witness a Copy of a letter, and inquired whether it was a Copy of the letter written by him to McLane, Witness answered that the letter was about such an one as he would have written, and he presumed it was a Copy.

Plffs then offered to read said Copy of letter in evidence, which was objected to by Defts Counsel. Objections overruled by the Court, and the Copy read. To which decision the defendants Counsel excepted. Said Copy is made part of this Bill of exceptions, and is hereto attached Marked "A". The objection to the reading of the Copy of the letter, was on the ground of the letter being irelevant and impertinent; no objection was made on account of its being a Copy and not the original

Witness states that the amount of the percentage generally retained upon Contracts was 10 per cent. It is money kept back on the current estimates, to ensure the Completion of the jobs.

Statement

Robert Stuart was then Called and Sworn as a witness on the part of the Plff. He Secretary of the Board of Trustees, and pays out the money on estimates as assistant to the Treasurer. The President and Treasurer reside out of the State. In their absence Witness disburses money under the direction of the Treasurer. Witness made all the

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payments to Lynch upon the estimates and Certificates of the Chief Engineer. Recollects that Arnold & Lynch came to the Canal Office after the payments had been made and before the suit was brought. That he and Arnold examined amounts paid and saw Receipts

Question in writing.- What if anything was said by you at the time spoken of, in relation to the Board correcting any errors in Mr Lynch's estimates, and their disposition to pay for all the work done.? Question objected to by defts Counsel. Objection overruled by the Court and an exception taken. Answer I said neither the Board of Trustees nor the Engineer could have any disposition to wrong Mr Lynch, as an expression of my own opinion. I did not state that a remeasurement would be made, because Lynch had settled at his own request. I did not state, that he would be paid for any more work. Defts Counsel asked witness to state what was said between Witness and Lynch at the time of the last payment. Witness answered that Lynch complained that he had not been estimated for all he had done, some hundreds of yards had not been estimated. Witness answered him that that was a matter between him (Lynch) and the Engineers, that neither the Board of Trustees or the Engineers wanted to wrong him, or any other person; that there could be no motive for them so doing.

Witness stated to Lynch at the time of payment that he could only make payments on the Engineers estimates and Certificates. Lynch finally said he would receive the money and close it up on the estimates as made - that he would risk it. Witness had no authority to order or direct estimates

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M

new estimates Did not deny to Lynch that there should be a re estimate, or that any error would be corrected by the Board if discovered. The retained per centage Witness would not and could not, within the scope of his duty, have paid excepting upon a final ~~certificate~~ settlement for work on the sections. This Conversation was at the time of the ~~final~~ payment of the final closing estimates on the 6th of July 1847

The defendants Counsel here exhibited to Witness Seventeen Certificates, comprising the several estimates, made by the Chief Engineer for work done on said two sections under the Contracts to which are attached receipts for the payments of the estimates so certified. The Plaintiffs Counsel, admitted the execution of the Receipts and the receipt of the moneys mentioned therein

The said several Certificates and Receipts are made part of this Bill of exceptions and are hereunto attached marked "B"

Witness Stears swore that he made the payments of the money mentioned in the said Receipts as therein stated, and took the said receipts for the defendants

Russell E. Peacock was then called and sworn as a witness on the part of the Plaintiff Swears that he was Engineer on the Canal from 1837 until Canal stopped, and after the resumption until 1845 Knows the sections No. 21 & 22. Assisted in making the estimates of quantities before the lettings in 1845. Mr Whittle was the Resident Engineer. They were portions of Summit Division

Witness was asked by Plaintiffs Counsel to state in what manner the measurements

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were, which question was objected to by defts Counsel, on the ground that it already appeared that the work done by the plff upon said sections was under special Contracts, and that the plff was bound to produce said Contracts, to shew what stipulations were contained therein in relation to measurements and estimates. The Court sustained the objection. The plaintiffs Counsel called upon the defts Counsel for the production of their Counterparts of said Contracts, which was done, and the Plaintiffs gave said Contracts, with the relinquishment thereon endorsed in evidence. Said Contracts are made part of this Bill of exceptions and are hereunto attached, marked "C."

The defendants Counsel then objected to any evidence, other than the estimate and decision of the Chief Engineer, or in case of his absence or inability to act of the Principal Assistant or Engineer having Charge of the work embraced in these Contracts, being received as to the amount or quantity of work done, under said Contracts, unless a refusal on the part of said Engineer or Engineers, to act, be first shown.

The Court overruled the objection, deciding that he would admit the evidence offered, subject to be ruled out if he should think proper after further consideration

Whitney (Hancock) says that in July or August 1845 when they made the measurement of the work, it had been covered with water. The work stopped in 1841 and was resumed in 1845. & that most of the time since water stood on these sections, that this would have the effect to make the bottom 7 to 10 inches semi fluid and when they first commenced Measurement

This was how I took Measurement on which to base Estimate

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nearly the whole of the section was in that condition An approximate estimate is made before Contracts are let. We went on and took the levels in July or August 1845 They did not lay out the whole work then, leaving a portion of it until it could be more correctly measured. Their object was to ascertain the depth to the hard material, and also the depth of the soft material They first measured on the upper end of ~~Section~~ 22. and lower end of 21. Mr Whittle and Mr Von Horne, were with Witnes in laying out 14 or 15 chains. Von Horne carried the level, and Whittle and Witnes, by turns carried the rod. Whittle instructed Witnes to press the rod down to the hard material. Witnes calculated the Original quantities, in the two sections soon after the measurements were completed. The quantities as measured, before Lynch Commenced were

On Section 21 26. 826 10/100 Cubic Yds
" " 22 24. 236 40/ " "

Witnes was then in the employ of the dept as Rodman. Von Horne as Asst Engineer Whittle as Resident Engineer Witnes set the pegs for bottom of Canal on the upper end of Section 22. Witnes left the work in July 1846 — does not recollect the condition as to water then. Knows that during the summer Lynch had to contend with Considerable quantities. At times it was difficult to ascertain quantities by measurement on account of Water. The estimates made at such times were approximations. We had sometimes to take soundings. Lynch told Witnes he thought there was an error in laying out the work first. Witnes answered that he

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(Lynch) must get directions from the Board for a new estimate, as it was laid out under the direction of the Resident Engineer & Mitnep supposed it to be correct.

Mitnep saw a certificate given by Mr Von Home, to Lynch of a remeasurement, was present at office when it was made. Dont know upon what data it was made. Thinks the Board refused to pay according to the certificate. Was at Canal Office in December last when the Gooding letter was written to Lake. Mr Gooding said that at the time the work was measured it was under water, and there might have been a mistake. He thought it was overestimated. Lynch asked a remeasurement, and said that he had told Mr Gooding at the time the contracts were relinquished that he wanted a remeasurement and that Mr Gooding agreed it should be. The result of the conversation was that Mr Gooding would direct Mr Lake to make a new measurement, and he afterwards gave a letter to Lynch in Chicago to Lake to make a remeasurement. Mr Gooding thought that the measurement would show Lynch overestimated. Lynch thought otherwise, and for the purpose of ascertaining or settling the matter, as Mitnep understood the remeasurement was ordered. The contracts had been relinquished as understood from Gooding. Mitnep read the letter. Dont know whether it was sealed or not. thinks it was unsealed. Mitnep went with Lynch to Lake. Lake went on to the work. Lynch and Mitnep accompanied him. and Lake measured several chains, then said he Lake would measure no more. Did not know that he could get

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never them before, and said he was watched that he did not like the idea of being watched Witnes urged him to go on saying that he only wanted Lynch to have his dues. Lynch and witnes started for Chicago, met Mr Gooding on the road told him that Mr Lake had refused to measure and Lynch said he should get somebody else to measure the work. Dont know what Gooding replied Soon after Janry 7. 1848. Witnes measured the work for Lynch.

The Plaintiffs counsel here proposed to read the minutes of Heacock's measurement of the work Objected to by the defendants Counsel Objection overruled by the Court. and the minutes allowed to be read to refresh his memory the witness stating they were his minutes, subject to be ruled out during the progress of the Cause

Witnes (Heacock) states the aggregate amount done on the two sections as follows

On Section 22. 23.549 $\frac{26}{100}$ Yds

and also below bottom 562. $\frac{84}{100}$ "

The last amount (562 $\frac{84}{100}$ was assumed to be below bottom of Canal, and is extra work exceeding that returned to the Canal I had the notes of the first survey or benches with me

On Section 21 had been Excavated 25.246 $\frac{67}{100}$ Yds

& also below bottom 154 $\frac{38}{100}$ "

Row path filling 397 $\frac{67}{100}$ "

Witnes was assisted by Mr. Woodworth, an Engineer in taking estimates; thinks the estimates correct. The minutes of said measurement are hereto attached marked "K" and made a part of this Bill of Exceptions

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Cross Examind. Says he was on the work when first laid out. That when the work was first measurid by him, Whittle & Von Horn, he supposed the levels were correct. That the rod was thrust down to the solid material, and they made an allowance which they thought right for the soft. Lynch was on the work, and Whittle told him how they had done it, and said he presumed it was all right.

Witrup thinks a small part of each section was completed to bottom when he left the work in July /46 cant say how much; it was in detached parts.

When Lynch & Witrup were there with Lake & Lake measurid about 9 Chains. Witrup thought that correct and did not remeasure it. When Witrup and Woodworth measurid there was water, but frozen and they walked on the ice. thinks the work was in good condition to measure. The ice was transparent so that every inequality in the bottom could be seen.

At the time they measurid the work the Drusters were working 60 or 70 men on these sections. Dont know how long these men had worked, or how much they had excavated. They measurid all, as well that done by the Drusters as by Lynch. saw the men there at work 2 or 3 days before they measurid. In the measurement they used the original benches to ascertain the bottom line of Canal. Thinks the Drusters had not excavated any below bottom. We took the benches established by a test level in June & calculated the same therefrom. We used rod, level, target and tape in making his estimate. The level was a

good one Witness tested it It was Bradley's he thinks. He is satisfied the line assumed for the bottom is correct. Thinks he could not well be mistaken. There was water but covered with thin ice & it was in good situation to measure.

N. P. Woodworth was called and sworn on the part of the Plaintiff. Assisted Mr Kincock in making the measurement — and states the quantity excavated the same as Kincock. Thinks the Drivers had not taken out more than 600 or 700 yards on Section 21. and on Section 22 thirty, five or forty yards Judged of the quantity by the number of men, and the manner in which they work, & the new earth deposited on the bank, & the appearance of the excavation. The measurements were made from Kincock's original notes. When there was excavation below bottom it appeared as if the banks had been trimmed long ago.

The excavation below bottom was worth more per yard than that above. It is unusual for Contractors to excavate below bottom. The bottom pegs seen by Witness did not indicate that the bottom should be below as Lynch had made it The Engineers in Charge would know if the excavation was below bottom The pegs seen by Witness were new ones. did not notice any old ones. Witness made the measurement from Kincock's original notes He knew nothing about their Correctness. If the notes were wrong the estimate must be.

Witness is an Engineer by profession and was Chief Engineer on the Central Rail Road

in this State

Says that although this work was covered with water, it was in good condition to measure, being frozen over and the ice thin and transparent, with sufficient strength to bear them up. Our measurements and estimates were made with great care and I believe to be correct.

Dennis Driscoll was then called and sworn on the part of the plaintiff. Says he work 4 or 5 months for Lynch on Canal ploughed in the bottom of the Canal. Understands the bottom pegs. Ploughed up some of them. Lynch said the Engineer ordered the ploughing below. Lake was there the day after he ploughed them up. Some places they ploughed lower than the pegs, but generally graded by them.

They dug ditches to draw off water below bottom. The bottom was hard. Mr Lake was the Engineer

Thomas Hogan was called and sworn on the part of the plaintiff. Was Clerk and book keeper for Lynch on the work. 18 or 20 months. He left on the 16th of June 1847. That was the last day Lynch worked. The most of Section 22 was finished. Except a few yards at west end, say 400 or 500 yards and a dam about middle. Witness saw the Engineers driving bottom pegs. ~~Sometimes they ploughed lower but not much. The men were directed to cut the work~~ 1st saw Nowlin & Hancock last by Lake. They generally graded the work by the pegs; sometimes they ploughed lower, but not

[1212+12]

much. The men were directed to Execute the work according to the Engineers directions. The men generally excavated as directed by Engineers. who were along every day or two. About as much of this end of 21 was not finished as of 22. & also a gravel mound & also about 200 yards and some trimming to be done Where bottoms the banks were principally trimmed. The excavated earth was to be carried 20 or 30 feet from the cutting Lynch deposited some mares We made the tow Path and levelled it off into shape.

John Van Horn was introduced & Sworn as a witness on the part of the plaintiff says he was assistant Engineer in 1845 and assisted Whittle & Peacock in laying out the work on these two sections. Was present as stated by Peacock, when measurements were made in first instance. Almost the whole had been covered with water The old excavation was of unequal depths. and was divided off by dams & the spaces between dams was covered with water. The banks would be washed down by the water & the dirt would mix with the water standing & would create a semi fluid, into which a rod would penetrate. The measurement was commenced August 13th 1845. Mr Whittle was Resident Engineer, and I was assistant Engineer He directed the rodman to thrust the rod through the semi fluid to the hard material — The calculations on the ground were made by all the three. — they were correct and no allowance was made for the semi fluid. Witness afterwards estimated the quantity of semi fluid

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on 18 chains on section 22, & believes his estimate was 1200 yards in addition to the quantity stated when the work was laid out* excavating below bottom shows very careless engineer or Contractor. I took several ~~estimates~~ measurements of the work to make estimates & could not help measuring work over again. I recollect from notes in my possession, after Lynch had taken off two ploughings. The notes still showed that the ground was higher, than the notes or calculations showed, and there was more to be excavated, than was computed by whittle in first instance, gave Lynch bottom pegs often. The Engineer direct, how deep the work is to go. If the work is deeper below bottom, it must be either because the Engineer or Contractor is careless. When I gave the certificate alluded to. I was in the employ of Trustees. Has had conversations with Col Oakley on this subject. Genl. Fry was State Trustee Col Chas Oakley now is.

× Eyd Whittle, Heacock & Mitnep made first measurement. Each took notes – here they are. Mitnep carried the level. Heacock was partly employed in holding the rod and measuring distance. Whittle was near the levelling instrument – the man with the instrument in most instances can see the rod. The level was generally about 3 chains from the rod; always within hailing distance. The Report would be made by Assistant to Resident & by Resident to Chief Engineer – there was water on work on 13 August from 6 to 18 inches

Mitnep dont know, of his own knowledge, that no allowance was made for semi fluid. None was made to his knowledge. He knows that no allowance was made for it in the notes and Calculations, but dont know what the Report

* This measurement of the soft fluid & estimate were ~~as~~ Lynch's request and without any orders from the Chief or other Engineer. It was sent to the Canal office. Lynch thinks on the 18 chains Lynch took out 1200 yards in addition to the quantity stated when the work was laid out

LL2124-13

was in relation to it now Resident to Chief Engineer

Witness thinks his estimate of semi fluid was made in the early part of 1846

Witness first ascertained quantity of semi-fluid by accular observation on the rod,

2d by direct measurement when the men were at work & 3d by the level in taking the estimate He measured only in one place in the 18 chains. first measured from the surface to the bottom of Canal, and then compared with the original notes, According to his measurement the semi fluid was more than ½ foot. The actual Canal bottom would vary an inch or two The squares between the dams were even, but each one was not of the same depth at the time of the first measurement.

Witness quit the Canal in Dec 1846. He frequently set bottom pegs He has no doubt they were set right. They are driven down to bottom of Canal. None of the excavation was below bottom when witness left. They had a Wheel for raising water near the centre of Sec 22. It was necessary to have ditches, to drain, below bottom.

Mr Woodworth recalled by Plff. Witness first went with Plff to the Canal on Christmas day 1847, and went again on 3d of Sept 1848 The first time he was there but few men were at work for the Privates (say 30), and at great disadvantage, not more than a yard per man, a day was excavated. When there on the 3d there were about 70 men and doing better. They may have taken out 600 or 700 yds on 21 at the time of witness measurement On 22 they had done

nothing the first time down — the second time they had taken out a dam, say 35 or 40 Yards

Thinks he can judge within a hundred Yards of the quantity, and it would not exceed 700 Yards. Has estimated work that way a great many times. Can judge by number of men employed, and the appearance of the earth removed.

Defence

William Gooding was called on the part of the defendants. Was Chief Engineer of the Canal up to May 1. 1848. It was his duty to supervise the action of the Officers of his corps, and all estimates were made by his direction

The 2 sections had been excavated about 4 feet when operations were commenced by Lynch, in 1845. The parts excavated had been covered with water, and a considerable portion had been softened by water. He directed Mr Whittle Resident Engineer, to make the measurement so as to give the quantity when the water was drawn off. and the soft material settled, and it was so estimated from the official Report of the Resident Engineer. Witness' estimate from the official returns of Whittle the Resident Engineer, were as follows

Amt. done, on Sec 21 — 23,542 Yds at 32¢ 7,533.44

" " " " 22 23,120 " " 35¢ 8092.00

The defendants Counsel here exhibited to the witness the seventeen certificates of estimates and receipts which are mentioned in the testimony of Robert Stuart

Witness states that the said certificates

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State correctly the estimates made on said work, that the certificates made on the first of June 1846. are made by Edward B Talcott, Principal assistant Engineer, and that at the time the said estimates and certificates were made Witness was absent on a journey to Pittsburgh, and that said Talcott, was authorized by the Board of Trustees, so to act in Witnes absence

On the 2nd of July 1847, Lynch came to the office and desired a final settlement for work done on these sections, said he was not exactly satisfied with the measurements made, & requested a remeasurement and settlement. Witness declined remeasuring the work then, on account of Water, but offered to close up the matter, upon the old estimates and pay Lynch the per centage retained, or, if he was dissatisfied, advised him to defer the settlement, until the water was drawn off when the work could be more accurately measured. Witness told him it was generally the case that the work was found overestimated, and Plaintiff finally concluded rather than wait for the water to be drawn off, to accept the payment as a final settlement. He did not determine at first whether he would accept, but afterwards came and said he would take the estimate and close up the business. My Clerk made out the papers and they were given to Lynch, or sent to Mr Stewart. The certificates were made out, and about $1000 of retained per centage was paid

The final closing certificates are not in the form used where work has been finished, but are in the form used where the Contract has ceased and the work is not completed

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After the matter was closed witness wrote the letter before read to Lake, and also verbally instructed him, and directed him, Wells Lake, who was assistant Engineer, to make a careful measurement of the work. It was done and reported. It showed Lynch overestimated on one section 200 or 300 yds & on the other about 500 yards.

The estimates made out and upon which plaintiff has been paid embrace the semi fluid as reported to witness, according to his directions by the Official return of Mr Whittle the Resident Engineer. and witness took the matter into account and decided upon it. The estimates presented of 2d July 1847 are Witness' final estimates on the two sections as made and approved by him, and those receipts, with the others should make up the amounts named by him on the two sections. These last certificates are final so far as this Contractor is concerned, and are in the form always used when the Contractor relinquishes & the job is not fully completed.

Witness considered the settlement with plaintiff a final one. His object in ordering the new measurement was to ascertain the quantity which remained to be taken out, and to satisfy the Plaintiff & the world that justice had been done him. If the measurement had shown Lynch under estimated, 30 Witness would have advised him to petition the Board of Trustees for relief.

Lynch told witness he would give a final discharge upon the payment of the retained per centage, at the time the closing certificate was given Lynch & witness both stated that the whole matter was settled

12/24-15

No allowance has ever been made, under such contracts, for making towing path. The placing of the earth there was less expensive than in the spoil bank, and is within the distance required by the Contract. The Resident Engineer is made by an order of the Board, responsible for quantities. I never personally examined or surveyed the sections 21. & 22. If there should be a mistake by the Resident Engineer or Engineers who measure I should be misled. Their surveys and Reports are the basis of my estimates. I told Lynch that if he had been under estimated, the proper course would be to petition the Board for relief. I should myself have advised them to pay, if a party had been settled with under a wrong estimate

Oliver P. Gooding was then called & sworn as a witness on the part of the Defendants.

Was Clerk for Chief Engineer at the time the last certificates were given to Pfff

The certificates in Court are the ones issued. They are not technical "final certificates" but are in the form used in such cases, when the contract was closed and the work not finished

Lynch was, at the Office most of the day upon which the account was closed. & he and the Chief Engineer were in negotiation about it at several times during the day. Lynch claiming that something more was due, and the Chief Engineer saying that he was not authorized to make the certificates for the payment of the retained per centage unless it was all closed.

Lynch said, when witnes. as clerk, was making out the certificates that he was going to Michigan wanted money to pay his men, & had determined to close it up

Robert Stuart called and examined by defendants Paid Lynch the money on the closing certificates July 6. 1848. & took his receipt therefor for the defts Lynch was at the Office sometime, and said he ought to have more, but said that Gooding said that it was impossible to make the measurement more accurate at that time, could not be before the work was drained.— Lynch concluded finally to close the thing then on the old estimates and the money was paid agreeable to the Chief Engineer's certificates

× Examined.— The money would not have been paid, if Lynch had not agreed to make the settlement final

Lynch claimed that either 200 or 300 yards or that many dollars, had not been estimated to him, whether yards or dollars witnes cannot say. I give the substance of the conversations with Lynch at several times, during several days, but cannot say that I state the precise words, word for word, at each conversation. + If we had supposed he was going to law we should not have paid him what we did

Wells Lake was called & sworn as a witnes on the part of the defendants

Has been on the Canal as rodman and as assistant Engineer. Had charge of

S43 214-16

Sections 21 & 22. In the early part of the Summer of 1847. The work was filled with water — Lynch pumped it off of the east part of Section 21 in May & June, and performed considerable work After he suspended in June he wished witnes to measure the work preparatory to making a settlement. Witnes said it would be difficult as the work was under water They however, took a boat and on the 25th of June measured a part of Section 21. The other had been measured previously when it was dry. The whole of Section 22. had been measured before. Afterwards witnes learned that they had settled upon these measurements. Sometime afterwards Lynch requested witnes to remeasure the work which he refused to do without orders

When the flooding letter above spoken of was received he went on to the work and measured that portion of 21 which had been last measured under water. It was now drawn off, and the residue of that section & also section 22 were under water — When the water was off of 22 in the winter he measured the whole of it. The measurements as made showed the amount remaining to be done more than the previous estimates as follows

On Section 21 276 $\frac{9}{100}$ Yds
" " 22 555 $\frac{21}{100}$ Yds

The Estimate made in June 1847 showed the Amount done to be

On Section 21 23.512 Yds
" " 22. 23.120 Yds

These were the returns made to the office. Thinks Pfff carried them to the Office at Lockport Witnes showed the estimate to Lynch and

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shewed him that he had deducted 140 yds for trimming banks; Lynch expressed himself satisfied if the 140 yds were not taken out. Witness said to him that he must make the deduction — this was for earth not removed from the slope bank. Witness is satisfied that the estimate and measurement are as correct as they could be made. He knew the work well. The last measurement, which shews the work previously over estimated, as above stated, is the most reliable, because the opportunity for taking it was better. He made use of greater care than in ordinary current estimates. There were places on the sections excavated below bottom. About a chain adjacent to the wheel, was some six inches below bottom, as witness supposed to draw the water to the wheel. It was not excavated below bottom by witness order. Witness went on to this work on Canal in fall of 1846. Some four chains of the work were bottomed, or nearly so. Witness caused bottom pegs to be placed. They were not placed below bottom.

Witness measurement in the winter was after that of Peacock & Woodworth. The water was from 2 to 4 feet deep, when they measured: when witness measured it was nearly dry. The men commenced work on the sections for the Drastics about 20th Nov. 1847. On Sec 21. they commenced with about 40 and increased to 150 There were from 75 to 100 men at work when Peacock & Woodworth measured the work

X Examined. Peacocks original notes were the basis upon which witness made his calculations of quantities

10 Peacock & Woodworth measured on the 6th & 7th of Jan.y 1848 Witness measured on the 10th of

Sworn.

There remained to be done on Dec 22. 1619 $\frac{06}{100}$ yds when Lynch quit it. It is difficult to tell the amount the Trustees had done up to the time Hancock & Woodworth measured. At that time there were many bars and dams, which when covered with water it is difficult to measure accurately. The bottom of the canal where there was the most water, was very irregular — many bars. and the bottom not uniform.

There were as many as five or 6 bars on Sec 22. They could be measured most correctly with the water off. I had the notes of Hancock and Van Wormer and state with exactness the amount of work that had been done by the state, but know about the number of men at work, and can form an estimate.

George Barnett called & sworn as a witness on the part of the defendants

Has been a Contractor on public works 14 years May been 5 years on this canal. Had charge of these two sections, as general superintendant under the Trustees. They commenced on them between the 1st & middle of Dec 1847. The work was all covered with water. bottom irregular, — a good many bars 7 on 22 & some on 21. The work could not have been measured accurately then — there was 4 or 5 feet of water. Witness commenced with 12 or 15 men — in 4 or 5 days had 30 to 40, and by 6th of January had at least 100 on Section 21. He commenced on 22 and worked about 2 weeks and then went on to 21. At the time Woodworth & Hancock measured the Trustees must have taken out at least 1200 Yds.

On 21 900

on 22 300.

35

Witness saw Mr Lake measuring the work done after Peacock & Woodworth. The water had been drawn off in the mean time, and the work was in the best condition when Lake measured — all the water was drawn off that could be. Witness remained on the work till it was finished.

X Cyd. Witness is not an Engineer, knows something of it from his experience as contractor. Could not judge better of the quantity than an experienced Engineer — The part they worked on first, was the only uniform part of the whole. Having done the work thinks he could judge better of the quantity than another.

On Dec 22 no one could judge of the quantity taken out after it was done because it was under water — and he could judge better of the quantity on 21 than a stranger to the work

Edward B. Dalcott. was called & sworn on the part of the defendants.

Heard the testimony of Mr Van Horn, on semi-fluid. The test which he states he made, would not determine the quantity. There is no rule by which it can be accurately measured when covered with water. It must be matter of judgment.

There was little or no semi-fluid. It was saturated clay and found only in Sloughs. One of the sloughs might have been 3 chains wide; On Section 21 there were 3 or 4 of them on Section 22 not any.

Thinks Mr Lake a more accurate Engineer than Mr Peacock, or Mr Woodworth, or Mr Van Horn He has seen more work — has more experience and more mature judgment. Witness only speaks of them from his own observation

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It has never been the practice under similar circumstances to pay for making tow paths.

Russell E. Hancock, called and examined by defendants

On making the original measurement of quantity on these sections, with Whittle & Van Horn, witness held the rod, pressed it down to the hard material, and made calculations as to the depth of the soft material & thinks they made an allowance for the depth of the soft material, whether on the ground, or in the office, he dont recollect. He thinks it was allowed because it ought to be. They did not hold up the rod for Van Horn to judge of the depth.

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X Exd. Witness believed that the work was correctly laid out The Van Horn certificate was given to Lynch, while witness was on the work. Witness was asked by Lynch or Van Horn to sign it & refused because he did not know whether it was right or not. Thinks Van Horn never made an estimate without his assistance

On Dec 21 500 to 600 yds may have been done by Privates when witness & Woodworth Measured — on 22 not over 50 yards

The foregoing was all the testimony given in the cause

The defendants Counsel moved the Court to rule out all the testimony given by the plaintiff in relation to the measurements of the work made by the said Hancock & Woodworth at the instance of the plaintiff. The Court overruled the motion, stating that it would in its instructions to the Jury state the rules of law applicable to the case, to which decision

mo to rule out testimony

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instructions asked for by Plff

the defendants excepted.

The Plaintiffs Counsel then asked the court to instruct the Jury as follows

1 If the Jury believe from the evidence that there was a settlement in July 1847 & if they believe that settlement was based on representations of Mr Gooding which were untrue, & that such representations influenced Lynch in making the settlement, then such settlement is not final and conclusive between the parties.

2 If the Jury believe from the evidence that the settlement was made by Lynch under a mistake, in regard to the amount excavated, and that such mistake was caused by the statements of Mr Gooding, then such settlement is not binding

3 If the Jury believe from the evidence that the settlement was based on mistake, and error in the estimates & computations of the Engineers in the employ of defendants, such settlement is not conclusive nor binding.

4. If the Jury believe that Lynch took the estimate and received the money, with the understanding on his part that he was receiving pay for the amount of Estimate only, & that the work was to be reexamined & if any mistake discovered, it should be corrected, then the receipt of the money is not conclusive.

5. If the Jury believe from the evidence that the contracts were relinquished by Lynch with the assent of the Board through their agent, with the understanding that he should be paid for what he had done, he is then entitled to recover under the common counts for any balance there may be, unless the same has been fully paid or fairly settled

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1 If the Jury believe from the evidence that the Chief Engineer has never finally acted upon and determined the identical questions arising in this cause and that he has never acted upon and finally determined the identical claims now set up by Mr Lynch, then so far as his decision would be a bar the law is for the plaintiff

2 If the Jury believe from the evidence that any portion of this claim has been decided upon by Mr Talcott assistant Chief Engineer — his decision is not binding on the parties unless it should appear that the certificate of Mr Talcott, in the absence of the Chief Engineer, or of his inability to act.

3. If the Jury are satisfied from the evidence that Mr Gooding's estimates were based on measurements & returns of his subordinates, in which there were mistakes and errors against Lynch, and if they believe he had directed a resurvey of the work for the purpose of reviewing his estimate, and that such resurvey had not been made and acted upon by him at time of instituting this suit then the former estimates of Mr Gooding are not conclusive on the parties

1 If the Jury believe from the evidence that Mr Gooding's estimates were based on errors & mistakes of his subordinates, his estimates thus founded on errors and mistake are not final & conclusive

2 If Jury believe from the evidence that Mr Gooding's estimates are mere transcripts from the Reports of his subordinates made out by him without investigation, deliberation, or judgment and that he has never acted judicially on the subjects embraced — his estimates so made are not decisions within the meaning of the Contract and are not binding on parties

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Pltffs instructions Given

The Court gave to the Jury the following instructions, portion of the Plaintiffs instructions, and refused the others, for which refusal the plaintiff excepted.

1st If the Jury believe that Lynch took the estimate, and received the money with the understanding on his part, that he was receiving pay for the amount of estimate only, and that the work was to be resurveyed and if any mistake discovered, it should be corrected, then the receipt of the money is not conclusive.

2d If the Jury believe from the evidence that the contracts were relinquished by Lynch with the assent of the Board through their agent, that he should be paid for what he had done. He is then entitled to recover under the common counts for any balance ~~that~~ there may be due, unless the same has been fully paid or fairly settled.

3d. If the Jury believe from the evidence that any portion of this claim has been decided upon by Mr Dalcott assistant Chief Engineer, his decision is not binding ~~xxx~~ on the parties, unless it should appear that the certificate of Mr Dalcott, was in the absence of the Chief Engineer, or his inability to act.

The defendants Counsel asked the Court to give the five following instructions.

First If the Jury believe from the evidence, that the contracts under which Lynch did the work, for which he claims to recover pay in this suit were relinquished, or agreed to be put an end to, in consideration of Lynch accepting of the final estimates as made by the Chief Engineer & being paid his back percentage, then the plaintiff cannot recover in this form of action, and the law is for the defendant.

Gwin

12/24/25

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Second If the Jury shall believe that there was a difference of opinion between the Chief Engineer & Lynch, in regard to the correctness of the measurement of the work done by him under the contract, and the estimates made thereof by the Chief Engineer & that the said Lynch finally, deliberately agreed with the said Chief Engineer, that he would accept of and agree to said measurement & estimates so made, upon being paid the amount appearing to be due him on such estimates and the back percentage as a full settlement & the said amount & per centage were so paid to him, then the plaintiff is not entitled to recover in this action

Third If the Jury believe from the evidence in this case, that there was some difference of opinion between Lynch and the Chief Engineer, in relation to the correctness of the estimates made by the Chief Engineer for the work done by Lynch under said contracts, and that Lynch agreed finally to accept & receive, the amount due to him as stated in the certificate given by the Chief Engineer on the 2d July 1867 in full settlement of all his claims for work done under the said contracts & the said amounts were so paid, then the verdict should be for the defendants.

Fourth If the Jury believe from the evidence that the Chief Engineer of the Canal, estimated the work done by Lynch under the contracts for

Sec 21 at	23542 22/100	Yds at	32¢	$ 7,533.44
" 22 "	23120	Yds "	38¢	8,192.60

and that the said Lynch before the commencement of this suit, has been paid for the said estimates they are conclusive upon the parties, and the plaintiff is not entitled to recover, if they were made by the Chief Engineer and received by the plaintiff as final

estimates

Fifth. If the Jury believe from the evidence that the Chief Engineer of the said Canal, made or caused to be made, the admeasurement of work done by Lynch under the said contracts, at the quantities as stated in the preceding instructions, and that he made the estimates thereon, as his estimates, for work done xxx upon said sections, and the amount to be paid therefor and the said sums of money have been paid to said Lynch, as stated in his receipt, which have been given in evidence, then the said estimates if made in good faith & without fraud, are conclusive in this case, even though a mistake in quantity may have been afterwards discovered, since they were made by the Chief Engineer, and accepted by the Plaintiff with the view and intention, that an estimate should be afterwards made If the Jury believe from the evidence that the Chief Engineer of said Canal admeasured & estimated the work done by Lynch under the said contracts, and that the said estimates so made, were paid to said Lynch, before suit brought, in pursuance of the covenants and stipulations of the said contracts, then said estimates are final and conclusive, and the law is for the defendant.

The Court gave the three first instructions and refused to give the two last instructions, as asked, for as aforesaid asked for by the defendants as aforesaid, and the said Court gave to the Jury the following instructions in writing

1st It is the province of the Court, and not of the Jury, to construe the legal meaning of written agreements, and the Court construes the following clauses in the Contract as follows

" And it is mutually agreed that the said works "during their progress, shall be subject to the examination

[4-21-24-81]

"and inspection of the Board of Trustees or their agents,
"and to prevent all disputes and misunderstandings, it
"is mutually agreed that the Chief Engineer shall
"determine the amount or quantity of the several kinds
"of work herein contracted to be done &c and his estimate
"and decision shall be final and conclusive"

"And it is further mutually agreed, that during the
"progress of the work, payments at the discretion of the
"Board, shall be made by the Board of Trustees at
"intervals of not exceeding three months, which payments
"shall not be less than seventy per centum of the amount
"certified by the Chief Engineer to be then due for work
"performed under this Contract"

The Court construes the above clauses of the contract as clauses, so far as respects payments to be made for work done, as clauses inserted in the contract by mutual agreement, to prevent disputes and mis-understandings. And that if the Trustees have employed a competent Chief Engineer, and persons to make the estimate, they are not bound to pay the Contractor, except upon the estimate of the Chief Engineer. And that the plaintiff has no right to claim payments from the Trustees except upon the estimate of the Chief Engineer, or in case of his absence or inability to act of the principal assistant or Engineer having charge of the work, unless it appears that they have refused to make an estimate, or that they are incompetent to make an estimate. The estimate of the Chief Engineer is final & conclusive. This is the contract between the parties by which they must be governed.

2d If the Jury shall believe from the evidence that the plaintiff and the Chief Engineer came to an agreement, and that the terms of it were that the

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contract was to be rescinded, and that the plaintiff was to be paid, the amount which was paid to him, as the final estimate of the Chief Engineer of the work done. The parties thinking at the time there might be a mistake on one side or the other and running the risk at the time of any mistake in the estimate. the money was paid and accepted by the plaintiff, upon a final estimate of the Chief Engineer then the plaintiff is not entitled to recover for any work done under the contract even if a mistake was afterwards discovered. 3d If the Jury shall believe from the evidence, that the plaintiff had refused or neglected, to perform the contract, and that an agreement was made, between the plaintiff and the defendant, for a final settlement, and the contract to be rescinded: and that a final settlement, which was understood at the time, by the parties, to be a final settlement, was made, executed, and performed then the plaintiff is not entitled to recover.

3d

4th But if the Jury shall be of the opinion, that the agreement was, that the estimate of the Chief Engineer, upon which the last payment was made and accepted, was not the final estimate, but that the agreement had reference, at the time to another estimate, that should be made, upon which the difference, if any, should be paid or refunded to either party, and that it was not a final settlement by the agreement of the parties, Then the plaintiff would be entitled to recover the difference, if any. But the evidence of the difference can, under the contract, only be, a re-estimate made by the Chief Engineer, assistant Engineer, or Engineer having charge of the work, unless the plaintiff shall first show, that the Chief Engineer had refused to make or cause to be made a re-estimate, or that the

5/12/54-22

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persons whose duty it was, by the Contract to make the estimates, were incompetent to make accurate and proper estimates, in which last mentioned cases, that is, of refusal or incompetency, the Plaintiff might establish his claim by other evidence

5th If therefore the Jury shall be of the opinion that the estimate and payment on it were final, or that the agreement was a final one, as referred to by the Court, in the above 2d & 3d instructions, they are then bound to exclude, and are directed by the Court to exclude all evidence of the quantity of work done under the Contract given in this cause, and to find for the defendants so far as work done under the Contract

6th But if the Jury shall be of the opinion from the evidence, that the estimate and payment on it were not final, as understood by the Parties, at the time they were made, or that the agreement was not a final one, as understood at the time, then they will further consider, whether the Plaintiff has been unable to furnish the evidence, which the Contract calls for, of the amount of work done, which evidence is the estimate of the Chief Engineer.

If, in such case, they shall be of the opinion, from the evidence, that the plaintiff could by reasonable exertion, obtain a re-estimate by the Chief Engineer, as evidence of the amount of work done, then they are bound to exclude all other evidence of the amount of work done under the Contract, and to find for the defendants

But if in such case, the Jury shall be of opinion, that the Plaintiff was unable, by reasonable exertion to procure the re-estimate of the Chief Engineer, as evidence of the amount of work done, by the unreasonable or wilful refusal of the Chief Engineer

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to make the same or cause it to be made, then the Jury are at liberty to find the amount of work done by all the evidence in the ~~xxx~~ cause.

The defendants excepted to the giving of the instructions asked for by plaintiff, and to the refusal of the Court to give the instructions asked by the de=
=fendants

After the giving of said instructions by the Court the Jury retired to consider of their verdict and on the 20th of October A.D 1848. returned into Court and rendered their verdict in favor of the said Plaintiff for One thousand and sixteen dollars and ninety six cents. and thereupon the defendants filed their motion for a new trial upon the following grounds.

1st Because the verdict of the Jury is against Law & Evidence

2d Because the Court erred in giving instruc=
=tions to the Jury; and also in refusing to give in=
=structions to the Jury

3d The Court erred in admitting improper ~~testimony~~ evidence

After hearing the argument of Counsel upon the said motion, the Court overruled the said mo=
=tion for a new trial, to which decision of the Court, the defendants excepted, and prayed the Court to sign and seal this bill of exceptions, according to the Statute in such case made and provided which is done.

Hugh D. Dickey
Judge &c &c

L.S.

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$12124-73

x 24

No. 12 **ILLINOIS AND MICHIGAN CANAL.** $ 329 94/100

47

CANAL OFFICE, October 10 1845.

I Certify, That Benjamin Wilder

Contractor for Section Number Twenty one on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 23d day of July and the 10th of October inst. last, amounting, at contract prices, to the sum of Three Hundred and Eighty Eight and 16/100 DOLLARS;

and after having made a deduction from the same of fifteen per cent., I find that a balance of

Three Hundred and Twenty nine and 94/100 dollars is now due the said

Benjamin Wilder according to the terms of ~~said~~ his contract.

EXAMINED AND APPROVED, this 24th day of October 1845.

Wm Gwynne
Wm Gwynne

Chief Engineer.

Jacob Dixy

Resident Trustee.

REGISTERED, Robert Strait

Secretary.

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Benjamin Wilder Three Hundred Twenty nine 94/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W W Swift

President Board of Trustees.

RECEIVED, this 8 day of Decr 1845, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Three Hundred and Twenty nine & 94/100 dollars, being the amount specified in Certificate No. 12 hereunto annexed.

(Signed Duplicates.)

Benjn Wilder
by Danl Lynch attorney

SI 2134-3M

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No. 13 **ILLINOIS AND MICHIGAN CANAL.** $ 776 21/100

CANAL OFFICE, October 10 1845

98

I Certify, That Daniel Lynch

Contractor for Section Number Twenty Two on the **ILLINOIS and MICHIGAN CANAL,** ha executed work or furnished materials on said

between the 23d day of July and the 10th of October inst. last, amounting, at contract prices, to the sum of One thousand one Hundred and forty nine and 40/100 Dollars;

and after having made a deduction from the same of 15 per cent., I find that a balance of

Nine Hundred and seventy six and 99/100 dollars is now due the said

Daniel Lynch according to the terms of his contract.

Examined and Approved, this 24 day of October 1845. } Wm Gooding *Chief Engineer.*

Jacob Fry **Resident Trustee.**

Registered,

Robert Stuart **Secretary.**

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Daniel Lynch nine hundred and seventy six 99/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W. A. Swift **President Board of Trustees.**

RECEIVED, this 8 day of Decem 1845, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Nine Hundred and Seventy six and 99/100 dollars, being the amount specified in Certificate No. 13 hereunto annexed.

(Signed Duplicates.)

Dan Lynch

5/2124-25

No. 79 **ILLINOIS AND MICHIGAN CANAL.** $2230 25/100

CANAL OFFICE, January 1st 1846

49

I Certify, That Daniel Lynch

Contractor for Section number (22) on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 10th day of October & 31st of December last, amounting, at contract prices, to the sum of Twenty six Hundred & Twenty four & 65/100 DOLLARS;

and after having made a deduction from the same of 15 per cent., I find that a balance of

Twenty two Hundred & Fifty & 95/100 dollars is now due the said

D. Lynch according to the terms of his contract.

EXAMINED AND APPROVED, this 9th day of January 1846

Wm Gooding *Chief Engineer.*

Jacob Fry **Resident Trustee.**

REGISTERED,

Robert Strait **Secretary.**

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Daniel Lynch Twenty two hundred & thirty 95/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W H Swift

President Board of Trustees.

RECEIVED, this 9th day of February 1846, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Two thousand Two Hundred & thirty & 95/100 dollars, being the amount specified in Certificate No. 79 hereunto annexed.

(Signed Duplicates.)

Dand Lynch

S12124-26

No. 18 **ILLINOIS AND MICHIGAN CANAL.** $1176 24/100

CANAL OFFICE, January 1 1846

I Certify, That Benjamin Wilder

Contractor for Section number (21) on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 10th day of October & 31st of December last, amounting, at contract prices, to the sum of

Thirteen Hundred & Eighty four & 64/100 DOLLARS;

and after having made a deduction from the same of 15 per cent., I find that a balance of

Eleven Hundred & Seventy six & 94/100 dollars is now due the said

B Wilder according to the terms of his said contract.

EXAMINED AND APPROVED, this 9th day of January 1846.

Wm Gooding *Chief Engineer.*

Jacob Bay **Resident Trustee.**

REGISTERED, Robert Stuart

Secretary.

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Benjamin Wilder Eleven Hundred & Seventy six & 94/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W. D. Swift

President Board of Trustees.

RECEIVED, this 9th day of February 1846, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Eleven Hundred and Seventy six & 94/100 dollars, being the amount specified in Certificate No. 78 hereunto annexed.

(Signed Duplicates.)

Benj^a Wilder

By Dan^l Lynch Atto^y

S 12/24-27

28.

No. 168 **ILLINOIS AND MICHIGAN CANAL.** $1534.16

540

CANAL OFFICE, April 10th 1846.

I Certify, That Benjamin Wilder

Contractor for Section No 21 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section between the 1st day of January & 10 day of April last, amounting, at contract prices, to the sum of Fifteen Hundred & Sixty nine & 60/100 DOLLARS; and after having made a deduction from the same of 15 per cent., I find that a balance of Fifteen Hundred & Thirty four & 16/100 dollars is now due the said B Wilder according to the terms of his contract.

EXAMINED AND APPROVED, this 23d day of April 1846.

Jacob Fry **Resident Trustee.**

Wm Gooding *Chief Engineer.*

REGISTERED,

Robert Stuart **Secretary.**

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Benjamin Wilder Fifteen Hundred & Thirty four 16/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W A Swift

President Board of Trustees.

RECEIVED, this 25 day of April 1846, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Fifteen Hundred thirty four 16/100 dollars, being the amount specified in Certificate No. 168 hereunto annexed.

(Signed Duplicates.)

Benjamin Wilder

By Dan Lynch atty

[12H-28]

29

No. 169 **ILLINOIS AND MICHIGAN CANAL.** $ 121.45

CANAL OFFICE, April 10th 1846.

I Certify, That Dan'l Lynch

Contractor for Section number 22 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 1st day of January & 10th day of April inst last, amounting, at contract prices, to the sum of

One Hundred and Forty Two & 45/100 — DOLLARS;

and after having made a deduction from the same of 15 per cent., I find that a balance of

One Hundred and Twenty One 21/100 dollars is now due the said

D Lynch his according to the terms of said contract.

EXAMINED AND APPROVED, this 23d day of April 1846.

Jacob Fry — Resident Trustee.

Wm Gooding — Chief Engineer.

REGISTERED,

Robert Stuart — Secretary.

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Dan'l Lynch One Hundred & Twenty one 21/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W D Smith — President Board of Trustees.

RECEIVED, this 25 day of April 1846, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, One Hundred Twenty one 21/100 dollars, being the amount specified in Certificate No. 169 hereunto annexed.

(Signed Duplicates.)

Dan'l Lynch

2/12/24-27

30

No. 306 **ILLINOIS AND MICHIGAN CANAL.** $1286.77

54

CANAL OFFICE, June 1 1846.

I Certify, That Daniel Lynch

Contractor for Section number 22 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section between the 10th of April and 31st of May last, amounting, at contract prices, to the sum of Fourteen Hundred & Twenty nine & 75/100 DOLLARS; and after having made a deduction from the same of 10 per cent., I find that a balance of Twelve Hundred and Eighty six & 77/100 dollars is now due the said D Lynch according to the terms of ~~said~~ his contract.

EXAMINED AND APPROVED, this 12th day of June 1846

Edw'd B. Talcott
Asst Engr

Chief Engineer.

Jacob Fry
Resident Trustee.

REGISTERED,

Robert Strait
Secretary.

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Daniel Lynch One thousand, two hundred & Eighty six & 77/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W D Smith
President Board of Trustees.

RECEIVED, this 6th day of July 1846, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Twelve Hundred Eighty six & 77/— dollars, being the amount specified in Certificate No. 306 hereunto annexed.

(Signed Duplicates.)

Dan'l Lynch

5 12/84-36

31

No. 305 **ILLINOIS AND MICHIGAN CANAL.** $2,052.52

52

CANAL OFFICE, June 1 1846.

I Certify, That Benjamin Milden

Contractor for Section number 21 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 10th of April and 31st of May last, amounting, at contract prices, to the sum of Two Hundred and Fifty Two & 80/100 DOLLARS;

and after having made a deduction from the same of 10 per cent., I find that a balance of

Two thousand and Twenty seven 52/100 dollars is now due the said

B Milden according to the terms of his contract.

EXAMINED AND APPROVED, this 12th day of June 1846.

Evd B. Talcott
Princ asst —
Chief Engineer.

Jacob Fry
Resident Trustee.

REGISTERED,

Robert Strait
Secretary.

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Benjamin Milden Two thousand & twenty seven & 52/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W. H. Swift
President Board of Trustees.

RECEIVED, this 6 day of July 1846, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Two thousand twenty seven 52/ dollars, being the amount specified in Certificate No. 305 hereunto annexed.

(Signed Duplicates.)

Lynch & Milden
By David Lynch atty

$12134-31

32

No. 432 **ILLINOIS AND MICHIGAN CANAL.** $1001 07

CANAL OFFICE, August 1 1846

543

I Certify, That Dand Lynch

Contractor for Section Number 22 on the ILLINOIS and MICHIGAN CANAL, has executed work or furnished materials on said Section between the 1st day of June & 31st of July last, amounting, at contract prices, to the sum of Eleven Hundred and Twelve and 30/100 Dollars; and after having made a deduction from the same of 10 per cent., I find that a balance of One thousand and One and 07/100 dollars is now due the said D Lynch according to the terms of said contract.

Examined and Approved, this 1 day of August 1846

Wm Gooding *Chief Engineer.*

Jacob Fry **Resident Trustee.**

Registered,

Robert Stuart **Secretary.**

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Daniel Lynch One thousand ~~do~~ one & 07/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W A Swift **President Board of Trustees.**

RECEIVED, this 9 day of September 1846, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, One thousand & One 07/100 dollars, being the amount specified in Certificate No. 432 hereunto annexed.

(Signed Duplicates.) Dand Lynch

{12/24-32}

33

No. 634 **ILLINOIS AND MICHIGAN CANAL.** 117 12

CANAL OFFICE, December 1st 1846.

54

I Certify, That Benjamin Milder

Contractor for Section Number 21 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 1st day of October & 30th November last, amounting, at contract prices, to the sum of

One Hundred and Thirty & 88/100 Dollars;

and after having made a deduction from the same of 10 per cent., I find that a balance of

One Hundred and Seventeen & 79/100 dollars is now due the said

B. Milder according to the terms of said contract.

Examined and Approved, this 1 day of December 1846

Wm Gooding *Chief Engineer.*

Jacob Fry **Resident Trustee.**

Registered,

Robert Stuart **Secretary.**

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of One Hundred & Seventeen 79/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W. A. Swift

President Board of Trustees.

RECEIVED, this 31st day of Dec 1846, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, One Hundred Seventeen 79/100 dollars, being the amount specified in Certificate No. 634 hereunto annexed.

(Signed Duplicates.)

Benja Milder
By David Lynch

12124-33

No. 635 **ILLINOIS AND MICHIGAN CANAL.** $1318 27

CANAL OFFICE, December 1st 1846

I Certify, That Daniel Lynch

Contractor for Section number 22 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 1st day of October & 30th November last, amounting, at contract prices, to the sum of Fourteen Hundred and Sixty four & 75/100 DOLLARS;

and after having made a deduction from the same of 10 per cent., I find that a balance of

Thirteen Hundred and Eighteen & 27/100 dollars is now due the said

D Lynch according to the terms of said contract.

EXAMINED AND APPROVED, this 1 day of December 1846

Wm Gooding *Chief Engineer.*

Jacob Dry **Resident Trustee.**

REGISTERED,

Robert Stuart

Secretary.

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Thirteen Hundred & Eighteen & 27/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W. W. Swift

President Board of Trustees.

RECEIVED, this 31st day of Dec 1846, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Thirteen Hundred and Eighteen 27/100 dollars, being the amount specified in Certificate No. 635 hereunto annexed.

(Signed Duplicates.)

Dan'l Lynch

12124-34

35

No. 720 **ILLINOIS AND MICHIGAN CANAL.** $ 66 70/100

CANAL OFFICE, February 1 **1847.**

545

I Certify, That Danl Lynch

Contractor for Section number 22 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 1st day of December & 30th January last, amounting, at contract prices, to the sum of One Hundred and Sixty Eight & 70/100 DOLLARS;

and after having made addition to the same of (500%) per cent., I find that a balance of

Six Hundred and Sixty Eight & 70/100 dollars is now due the said

D Lynch according to the terms of said contract.

EXAMINED AND APPROVED, this 1 day of February 1847. Wm Gooding *Chief Engineer.*

Jacob Fry **Resident Trustee.**

REGISTERED,

Robert Stuart

Secretary.

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Daniel Lynch Six Hundred & Sixty Eight & 70/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W. A. Swift

President Board of Trustees.

RECEIVED, this 1st day of March 1847, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Six Hundred and Sixty Eight 70/100 dollars, being the amount specified in Certificate No. 720 hereunto annexed.

(Signed Duplicates.)

Danl Lynch

5.1.81.24.25.7

36

No. 719 **ILLINOIS AND MICHIGAN CANAL.** $ 826 75/100

CANAL OFFICE, February 1st 1847.

5-6

I Certify, That Benjamin Wilder

Contractor for Section Number 21 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said 1st day of Section between the 1st day of December & 30th of January last, amounting, at contract prices, to the sum of Nine Hundred and Eighteen & 72/100 DOLLARS; and after having made a deduction from the same of 10 per cent., I find that a balance of Eight Hundred and Twenty six & 85/100 dollars is now due the said B Wilder according to the terms of said contract.

EXAMINED AND APPROVED, this 1 day of February 1847.

Wm Gooding *Chief Engineer.*

Jacob Fry **Resident Trustee.**

REGISTERED,

Robert Strait **Secretary.**

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Benjamin Wilder Eight Hundred & Twenty six & 85/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W B Smith

President Board of Trustees.

RECEIVED, this 1 day of March 184 7, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Eight Hundred and Twenty six 85/100 dollars, being the amount specified in Certificate No. 719 hereunto annexed.

(Signed Duplicates.)

Benjamin Wilder
By David Lynch Attorney

37

No. 862 **ILLINOIS AND MICHIGAN CANAL.** $ 300.

547

CANAL OFFICE, April 1 **1847.**

I Certify, That Benjamin Wilder

Contractor for Section Number 21 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 1st day of February & 31st March last, amounting, at contract prices, to the sum of

_____ DOLLARS;

and after having made ~~a deduction from the same~~ addition of (300$) retained per cent., I find that a balance of

Three Hundred dollars is now due the said

B Wilder according to the terms of said contract.

EXAMINED AND APPROVED, this 1 day of April 1847. } Wm Gooding *Chief Engineer.*

Jacob Fry **Resident Trustee.**

REGISTERED,

Robert Stuart

Secretary.

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Benjamin Wilder

Three Hundred dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W. L. Swift

President Board of Trustees.

RECEIVED, this 1st day of March 1847, from DAVID LEAVITT,

Treasurer of the Board of Trustees of the Illinois and Michigan Canal,

Three Hundred dollars, being the amount specified in Certificate

No. 862 hereunto annexed.

David Lynch Attorney for Benj Wilder

(Signed Duplicates.)

S 12 24-367

38

No. 881 **ILLINOIS AND MICHIGAN CANAL.** $183 64/100

CANAL OFFICE, Lockport June 1 1847.

548

I Certify, That Benj' Wilder

Contractor for Section Number 21 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 1st day of April and 31st of May last, amounting, at contract prices, to the sum of One Hundred and Eighty three & 64/100 DOLLARS;

and after having made a deduction from the same of 0 per cent., I find that a balance of

One Hundred and Eighty three 64/100 dollars is now due the said

Benj' Wilder according to the terms of said contract.

EXAMINED AND APPROVED, this 19 day of July 1847.

Wm Gooding *Chief Engineer.*

Chas Oakley **Resident Trustee.**

REGISTERED,

Robert Stuart **Secretary.**

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Benj~~amin~~ Wilder One Hundred Eighty three 64/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W. H. Swift **President Board of Trustees.**

RECEIVED, this 9th day of June 1847, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, One Hundred and Eighty three 64/100 dollars, being the amount specified in Certificate No. 881 hereunto annexed.

(Signed Duplicates.)

Benj Wilder
By David Lynch atty

512124-32

No. 948 **ILLINOIS AND MICHIGAN CANAL.** $1237.62

CANAL OFFICE, Lockport July 2 **1847.**

59

I Certify, That Benj Milder

Contractor for Section number 21 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 1st day of June & 30th June last, amounting, at contract prices, to the sum of Seven Hundred and Five & 60/100 DOLLARS;

and after having made ~~a deduction from~~ addition to the same of 5 31 60/$ retained per cent., I find that a balance of

Twelve Hundred and Thirty seven & 20/— dollars is now due the said

B Milder according to the terms of said contract.

EXAMINED AND APPROVED, this 19 day of July 1847. } Wm Gooding *Chief Engineer.*

Chas Oakley **Resident Trustee.**

REGISTERED, Robert Strain

Secretary.

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of Benj Milder Twelve Hundred and thirty seven & 20/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W B Smith

President Board of Trustees.

RECEIVED, this 6th day of July 1847, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Twelve Hundred and thirty seven 20/100 dollars, being the amount specified in Certificate No. 948 hereunto annexed.

Benj Milder by Dand Lynch atty

(Signed Duplicates.)

SJ2124-3

No. 950 **ILLINOIS AND MICHIGAN CANAL.** $ 488 7

CANAL OFFICE, Lockport July 2 **1847.**

CO

I Certify, That Dan'l Lynch

Contractor for Section number 22 on the **ILLINOIS and MICHIGAN CANAL,** has executed work or furnished materials on said Section

between the 1st day of August 1845 & 30th June last, amounting, at contract prices, to the sum of Eight Thousand and ninety Dno DOLLARS;

and after having made ~~a deduction from~~ addition to the same of 488 7/100 retained per cent., I find that a balance of Four Hundred and Eighty Eight & 7/100 dollars is now due the said D Lynch according to the terms of said contract.

EXAMINED AND APPROVED, this 19 day of July 1847. } Wm Gooding *Chief Engineer.*

Chas Oakley **Resident Trustee.**

REGISTERED, Robert Stuart **Secretary.**

The Treasurer of the Board of Trustees of the Illinois and Michigan Canal, will please pay to the order of D. Lynch Four Hundred and Eighty Eight & 7/100 dollars, being the amount certified to be due, as above, the same having been examined, approved, and registered.

W W Smith **President Board of Trustees.**

RECEIVED, this 6 day of July 1847, from DAVID LEAVITT, Treasurer of the Board of Trustees of the Illinois and Michigan Canal, Four Hundred and Eighty Eight 7/100 dollars, being the amount specified in Certificate No. 950 hereunto annexed.

(Signed Duplicates.) Dan'l Lynch

21214-39

41

ARTICLES OF AGREEMENT made and concluded the Seventh day of August in the year of Our Lord eighteen hundred and forty-five

BETWEEN Benjamin Wilder

of the one part, and the Board of Trustees of the Illinois & Michigan Canal of the other part, whereby it is covenanted an d agreed as follows, to wit:—

The said Benjamin Wilder do hereby covenant and agree to construct in a good, substantial, and workmanlike manner, all that part of the Illinois & Michigan Canal included in Section number twenty one (21)

which may be required by the Board of Trustees, or their Chief Engineer for the time being, reference being herein had to the location of said line and maps thereof made by William Gooding Chief Engineer in the employment of said Trustees. The said work to be done and performed, in all respects, according to the Specifications hereunto annexed.

It is further agreed, that the said Contractor shall not let, sub-contract, sell, transfer or assign his contract or any part thereof to any other person, without the consent of the Board of Trustees in writing first given, but shall give his personal attention to the prosecution of the work; and that he shall, upon the application of said Trustees or Engineer for the time being, discharge any overseer, laborer, or workman from his employment who shall be deemed by them or either of them incompetent, or guilty of improper or disorderly conduct; nor shall he employ persons discharged by any other contractor for such cause.

And it is also further agreed, that the said Contractor shall not sell or use, or permit to be sold or used, within or near the limits of said Section, intoxicating liquors either to persons in his employ, or to any other persons on, or near the line of the Canal.

And it is further agreed, that every part of the work comprised in this contract, shall be done according to the plan and directions of the Board of Trustees, or such agent as they may appoint, and be subject to such alterations from time to time as they, or said agent may direct; but no change of the line or plan shall entitle the Contractor to an increase of price upon any item of work although it may relatively, or in the aggregate, increase or diminish the quantity of any species of work to be done, unless such change shall remove the centre line of the Canal more than thirty feet, laterally, or the level of the bottom of the Canal more than one foot, vertically, and shall at the same time render the construction of the Section more costly, in which event the Chief Engineer shall make such allowance for the increased cost as he shall deem just.

And it is mutually agreed, that the said works during their progress, shall be subject to the examination and inspection of the Board of Trustees or their agents, and to prevent all disputes and misunderstandings, it is mutually agreed that the Chief Engineer shall determine the amount or quantity of the several kinds of work herein contracted to be done, and decide every question which can or may arise relating to the execution of this contract on the part of the said Contractor , and his estimate and decision shall be final and conclusive.

And it is further agreed, that if, in the opinion of the Board of Trustees or their agent, the said Contractor shall refuse, or unreasonably neglect to prosecute his contract as shall be required by said Board or agent, in order that its uniform progress shall give reasonable assurance of its completion as herein provided, or shall in the opinion of the Chief Engineer for the time being, perform the work imperfectly, and refuse to remedy such imperfection, or shall violate any of the provisions of this contract, the said Chief Engineer shall certify such neglect, refusal, imperfect performance, or violation of the contract, to the Board of Trustees, and it shall be in the power of said Board, the Resident Trustee, or such agent as they may appoint, upon receiving such certificate to declare and pronounce this contract forfeited on the part of the said Contractor , and any retained money, per-centage, or balance for work performed under said contract, which would have been due to the Contractor had he completed his work, shall be forfeited and become the right and property of said Board of Trustees, or the said Board may make such deduction from the payments to be made to the said Contractor as aforesaid, as they shall deem reasonable for such breach of covenants.

[12/134-48]

And it is further agreed by the parties to this contract, that in case of the absence, or inability to act, of the Chief Engineer, that then and in that case the principal Assistant, or the Engineer having charge of the work embraced in this contract, shall have, and is hereby invested with all the powers herein before given to the aforesaid Chief Engineer in the premises.

And the said Trustees covenant and agree to pay the said Benjamin Milden for completing this contract as aforesaid, the following rates, *to wit:*

For grubbing and clearing the _____, and felling and clearing trees without the bounds of the Canal,

For all excavation in prism of Canal, except embodied rock, at the rate of thirty two (32) Cents per cubic yard.

For excavation of embodied rock in prism of Canal, at the rate of _____ Cents per cubic yard.

For all earth excavation not in the prism of Canal, at the rate of _____ Cents per cubic yard.

For all rock excavation not in the prism of Canal, at the rate of _____ Cents per cubic yard.

For all embankment, at the rate of _____ Cents per cubic yard.

For puddling earth after the same has been deposited, at the rate of _____ Cents per cubic yard.

For dry wall, at the rate of _____ Cents per cubic yard.

For _____

For _____

And it is further mutually agreed, that during the progress of the work, payments at the discretion of the Board shall be made by the Board of Trustees at intervals of not exceeding three months, which payments shall not be less than seventy per centum of the amount certified by the Chief Engineer to be then due for work performed under this contract.

And it is further agreed, that whenever this contract, in the opinion of the Chief Engineer for the time being, shall be completely performed on the part of said Contractor , the said Engineer shall certify the same in writing, under his hand, together with his estimate as aforesaid; and the said Trustee shall, within sixty days after notice of such certificate pay to said Benjamin Milden the sum which, according to this contract, shall be due him . Provided, however, and it is expresssly covenanted and agreed on the part of said Contractor , that this contract shall be fully performed and completed on his part, by the first day of September in the year one thousand eight hundred and forty-six.

And whereas, the Board of Trustees have adopted and entered on their minutes, a resolution that if, during the progress of the work for the completion of the said Canal and the construction of the necessary feeders, and the making of such improvemements generally as they may deem necessary to make the said Canal the most available and productive, and the payment of the incidental expenses, they should become satisfied that the sum of $1,600,000 subscribed as a loan for the completion of the said Canal under the act of the 21st of February 1843, will not be sufficient for that purpose, then in lieu of paying the contractors upon the said Canal the whole amount of money earned by them under their respective contracts, the said Board of Trustees shall and may pay to the respective contractors not exceeding twelve and a half (12½) per cent. of the monies which may be earned by, and payable to the said Contractors, in the Bonds of the said Board of Trustees payable in the same manner, and at the same time, and out of the same funds, and in a *pro rata* or equal proportion with the payments to be made upon the certificates to be issued to the subscribers to the said loan of $1,600,000 as provideed in said act,—

63

Now, therefore, this contract is made and entered into, subject to the said resolution, it being expressly understood and agreed, that if the said Board of Trustees at any time during the progress of the work under this contract, or at any time before the payment of the amount reserved in their hands to secure the performance of this contract, they shall become satisfied that the said loan is not sufficient for the purposes in the said resolution expressed, then and in that case the said Board of Trustees shall have the right to pay upon this contract a sum not exceeding twelve and a half (12½) per cent. upon the whole amount earned and estimated to the said Contractor under this contract by executing to him their Bond payable in manner and form as in the said resolution expressed,—the amount of which Bond, when so issued as aforesaid, shall be credited to the said Trustee against so much of the back percentage retained by the said Trustees to secure the performance of this contract.

In witness whereof the said Party of the first part has hereunto set his hand and seal the day and year first above written

Signed and sealed in presence of } Benj^a Wilder Seal

Given under the hand of the Resident Trustee and the seal of said Board the day and year first above written

Jacob Bay
Resident Trustee

Seal

ISAIAH-41

43

SPECIFICATIONS

Of the manner of constructing Sections on the Illinois & Michigan Canal.

64

THE grubbing of timber to be 100 feet wide and laid out as shall be directed by the Chief Engineer for the time being; from which width all trees, saplings, bushes, and roots, shall be cut and grubbed up; and together with logs, brush, and wood, of every description, shall be burned up or removed from the ground to be occupied in constructing said Canal; and two strips, one on each side, and adjoining the above mentioned grubbing, making together fifty feet in width, shall have the trees, saplings, bushes, and stumps, cut within one foot of the ground to be occupied by said Canal; and no part thereof, nor any other substance, shall be laid, felled, or left, on either of the Sections adjoining this contract. All large trees not embraced in the clearing and grubbing aforesaid, which stand within ninety feet of the centre line of said Canal, and which by falling after the Canal is completed might break the banks or obstruct the navigation, shall be cut down and removed as may be directed.

For a space of suitable width under each bank all vegetable or perishable matter, and all porous earth shall be excavated and wholly removed into the outside of the bank; this work shall be, in all cases, two chains in advance of the embankment of which it is to form a base.

The Canal to be so constructed that the water shall be at least thirty-six (36) feet at bottom, sixty (60) feet wide at top-water line, and six (6) feet deep; the banks shall be at least three feet vertical measure above the top water line, and such slope preserved, in earth excavation, both above and below top water line, as shall give, for each foot of vertical rise, a horizontal base of two feet. The surface of the towing path shall be at least ten feet wide, and the surface of the bank opposite seven feet wide, the same slopes being preserved in both banks, as well on the outer as inside slopes, as in earth excavation. The banks of the Canal shall be constructed of the most pure, solid, and water-tight earth that can be obtained as aforesaid.

When the prism of Canal does not afford materials sufficiently impervious to form the banks or bottom of the Canal, it may be procured at such other places as the Chief Engineer for the time being shall direct. The embankments shall be formed in horizontal layers not exceeding one foot in thickness; and in raising one portion higher than another, the end of each successive layer shall stop short of the preceding at least three feet.

All earth necessarily excavated for the prism of Canal, or to make room for lining, or under the banks, shall be estimated as excavation, and in all cases where the earth necessarily excavated is not removed more than one hundred (100) feet to form the adjoining bank or banks, no estimate for embankment shall be made; and whenever the prism of the Canal does not require any excavation, or falls short of being sufficient to form and complete the adjoining bank or banks, then the materials necessary to complete such embankment shall be taken from the nearest surplus excavation, or such other place as the Chief Engineer for the time being may direct.

The spoil banks or surplus earth shall be laid in an even, regular manner; the inside shall have such a slope as the Chief Engineer for the time being may direct, and the top be finished in a uniform plane, having sufficient declivity to readily carry the falling water off the back side. In all cases of deep cutting, no part of the surplus earth, or spoil banks shall be deposited within thirty (30) feet of the cutting stakes on the towing-path side, nor within fifteen (15) feet on the opposite side (upon the original Plan of the Canal, unless it be otherwise directed by said Engineer; and in every case where the said Engineer shall so direct, the rock or earth excavated shall be deposited at the distance from the Canal above mentioned. Nor shall the Contractor permit any of the rock which shall be excavated under and by virtue of this contract to be taken away from the place of its deposite in any manner or for any purpose whatever; except by order or under the sanction and authority of the Board of Trustees first given.

No public or private road which crosses the line of Canal shall be obstructed by excavation or otherwise, until directions shall be given by the said Engineer to complete the Canal across such road or highway.

[12124-42]

No 21.

Benj Wilder

Contract

Relinquished

Closing Certificate issued

July 2. 1847

113

ARTICLES OF AGREEMENT made and concluded the Seventh day of August in the year of Our Lord eighteen hundred and forty-five

BETWEEN Daniel Lynch

of the one part, and the Board of Trustees of the Illinois & Michigan Canal of the other part, whereby it is covenanted and agreed as follows, to wit:—

The said Daniel Lynch do hereby covenant and agree to construct in a good, substantial, and workmanlike manner, all that part of the Illinois & Michigan Canal included in Section Number Twenty Two (22)

which may be required by the Board of Trustees, or their Chief Engineer for the time being, reference being herein had to the location of said line and maps thereof made by William Gooding Chief Engineer in the employment of said Trustees. The said work to be done and performed, in all respects, according to the Specifications hereunto annexed.

It is further agreed, that the said Contractor shall not let, sub-contract, sell, transfer or assign his contract or any part thereof to any other person, without the consent of the Board of Trustees in writing first given, but shall give his personal attention to the prosecution of the work; and that he shall, upon the application of said Trustees or Engineer for the time being, discharge any overseer, laborer, or workman from his employment who shall be deemed by them or either of them incompetent, or guilty of improper or disorderly conduct; nor shall he employ persons discharged by any other contractor for such cause.

And it is also further agreed, that the said Contractor shall not sell or use, or permit to be sold or used, within or near the limits of said Section, intoxicating liquors either to persons in his employ, or to any other persons on, or near the line of the Canal.

And it is further agreed, that every part of the work comprised in this contract, shall be done according to the plan and directions of the Board of Trustees, or such agent as they may appoint, and be subject to such alterations from time to time as they, or said agent may direct; but no change of the line or plan shall entitle the Contractor to an increase of price upon any item of work although it may relatively, or in the aggregate, increase or diminish the quantity of any species of work to be done, unless such change shall remove the centre line of the Canal more than thirty feet, laterally, or the level of the bottom of the Canal more than one foot, vertically, and shall at the same time render the construction of the Section more costly, in which event the Chief Engineer shall make such allowance for the increased cost as he shall deem just.

And it is mutually agreed, that the said works during their progress, shall be subject to the examination and inspection of the Board of Trustees or their agents, and to prevent all disputes and misunderstandings, it is mutually agreed that the Chief Engineer shall determine the amount or quantity of the several kinds of work herein contracted to be done, and decide every question which can or may arise relating to the execution of this contract on the part of the said Contractor, and his estimate and decision shall be final and conclusive.

And it is further agreed, that if, in the opinion of the Board of Trustees or their agent, the said Contractor shall refuse, or unreasonably neglect to prosecute his contract as shall be required by said Board or agent, in order that its uniform progress shall give reasonable assurance of its completion as herein provided, or shall in the opinion of the Chief Engineer for the time being, perform the work imperfectly, and refuse to remedy such imperfection, or shall violate any of the provisions of this contract, the said Chief Engineer shall certify such neglect, refusal, imperfect performance, or violation of the contract, to the Board of Trustees, and it shall be in the power of said Board, the Resident Trustee, or such agent as they may appoint, upon receiving such certificate to declare and pronounce this contract forfeited on the part of the said Contractor, and any retained money, per-centage, or balance for work performed under said contract, which would have been due to the Contractor had he completed his work, shall be forfeited and become the right and property of said Board of Trustees, or the said Board may make such deduction from the payments to be made to the said Contractor as aforesaid, as they shall deem reasonable for such breach of covenants.

12124-H3

And it is further agreed by the parties to this contract, that in case of the absence, or inability to act, of the Chief Engineer, that then and in that case the principal Assistant, or the Engineer having charge of the work embraced in this contract, shall have, and is hereby invested with all the powers herein before given to the aforesaid Chief Engineer in the premises.

And the said Trustees covenant and agree to pay the said Daniel Lynch _____ for completing this contract as aforesaid, the following rates, *to wit:*

For grubbing and clearing the _____, and felling and clearing trees without the bounds of the Canal, }

For all excavation in prism of Canal, except embodied rock, at the rate of thirty five (35) Cents per cubic yard.

For excavation of embodied rock in prism of Canal, at the rate of _____ Cents per cubic yard.

For all earth excavation not in the prism of Canal, at the rate of _____ Cents per cubic yard.

For all rock excavation not in the prism of Canal, at the rate of _____ Cents per cubic yard.

For all embankment, at the rate of _____ Cents per cubic yard.

For puddling earth after the same has been deposited, at the rate of _____ Cents per cubic yard.

For dry wall, at the rate of _____ Cents per cubic yard.

For _____

For _____

And it is further mutually agreed, that during the progress of the work, payments at the discretion of the Board shall be made by the Board of Trustees at intervals of not exceeding three months, which payments shall not be less than seventy per centum of the amount certified by the Chief Engineer to be then due for work performed under this contract.

And it is further agreed, that whenever this contract, in the opinion of the Chief Engineer for the time being, shall be completely performed on the part of said Contractor , the said Engineer shall certify the same in writing, under his hand, together with his estimate as aforesaid; and the said Trustee shall, within sixty days after notice of such certificate pay to said Daniel Lynch _____ the sum which, according to this contract, shall be due him . Provided, however, and it is expressly covenanted and agreed on the part of said Contractor , that this contract shall be fully performed and completed on the part, by the first day of September in the year one thousand eight hundred and forty-six.

And whereas, the Board of Trustees have adopted and entered on their minutes, a resolution that if, during the progress of the work for the completion of the said Canal and the construction of the necessary feeders, and the making of such improvements generally as they may deem necessary to make the said Canal the most available and productive, and the payment of the incidental expenses, they should become satisfied that the sum of $1,600,000 subscribed as a loan for the completion of the said Canal under the act of the 21st of February 1843, will not be sufficient for that purpose, then in lieu of paying the contractors upon the said Canal the whole amount of money earned by them under their respective contracts, the said Board of Trustees shall and may pay to the respective contractors not exceeding twelve and a half (12½) per cent. of the monies which may be earned by, and payable to the said Contractors, in the Bonds of the said Board of Trustees payable in the same manner, and at the same time, and out of the same funds, and in a *pro rata* or equal proportion with the payments to be made upon the certificates to be issued to the subscribers to the said loan of $1,600,000 as provideed in said act,—

Now, therefore, this contract is made and entered into, subject to the said resolution, it being expressly understood and agreed, that if the said Board of Trustees at any time during the progress of the work under this contract, or at any time before the payment of the amount reserved in their hands to secure the performance of this contract, they shall become satisfied that the said loan is not sufficient for the purposes in the said resolution expressed, then and in that case the said Board of Trustees shall have the right to pay upon this contract a sum not exceeding twelve and a half (12½) per cent. upon the whole amount earned and estimated to the said Contractor under this contract by executing to him their Bond payable in manner and form as in the said resolution expressed,—the amount of which Bond, when so issued as aforesaid, shall be credited to the said Trustee against so much of the back per centage retained by the said Trustees to secure the performance of this contract.

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And whereas the said Daniel Lynch is one of the subscribers to the loan of Sixteen hundred thousand dollars for the completion of said Canal authorized by the act of the legislature of the 21st day of February AD 1843. and the first instalment of his said subscription having been called for by said Board, amounting to the sum of Nine hundred and seventy five dollars. Now therefore it is expressly covenanted and agreed on the part of the said Contractor, and this contract is executed upon this express condition, that should the said Daniel Lynch fail, on or before the first day of November next to pay or cause to be paid to the said Board of Trustees the said sum of Nine Hundred and Seventy five dollars, the amount of his instalment called for as aforesaid, then, in that case, the said Board shall have full power and authority to declare this contract forfeited, together with all the money due and unpaid on the same, to the amount of the said instalment, and shall have full power and authority to contract for the completion of the same with any other person or persons they may deem proper.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

Signed and ~~delivered~~ above written in presence of

Daniel Lynch (Seal)

Given under the hand of the Resident Trustee and the seal of said Board the day & year first above written

Jacob Day
Resident Trustee

L S

45

SPECIFICATIONS

Of the manner of constructing Sections on the Illinois & Michigan Canal.

48

THE grubbing of timber to be_____feet wide and laid out as shall be directed by the Chief Engineer for the time being; from which width all trees, saplings, bushes, and roots, shall be cut and grubbed up; and together with logs, brush, and wood, of every description, shall be burned up or removed from the ground to be occupied in constructing said Canal; and two strips, one on each side, and adjoining the above mentioned grubbing, making together fifty feet in width, shall have the trees, saplings, bushes, and stumps, cut within one foot of the ground to be occupied by said Canal; and no part thereof, nor any other substance, shall be laid, felled, or left, on either of the Sections adjoining this contract. All large trees not embraced in the clearing and grubbing aforesaid, which stand within ninety feet of the centre line of said Canal, and which by falling after the Canal is completed might break the banks or obstruct the navigation, shall be cut down and removed as may be directed.

For a space of suitable width under each bank all vegetable or perishable matter, and all porous earth shall be excavated and wholly removed into the outside of the bank; this work shall be, in all cases, two chains in advance of the embankment of which it is to form a base.

The Canal to be so constructed that the water shall be at least thirty-six (36) feet at bottom, sixty (60) feet wide at top-water line, and six (6) feet deep; the banks shall be at least three feet vertical measure above the top water line, and such slope preserved, in earth excavation, both above and below top water line, as shall give, for each foot of vertical rise, a horizontal base of two feet. The surface of the towing path shall be at least ten feet wide, and the surface of the bank opposite seven feet wide, the same slopes being preserved in both banks, as well on the outer as inside slopes, as in earth excavation. The banks of the Canal shall be constructed of the most pure, solid, and water-tight earth that can be obtained as aforesaid.

When the prism of Canal does not afford materials sufficiently impervious to form the banks or bottom of the Canal, it may be procured at such other places as the Chief Engineer for the time being shall direct. The embankments shall be formed in horizontal layers not exceeding one foot in thickness; and in raising one portion higher than another, the end of each successive layer shall stop short of the preceding at least three feet.

All earth necessarily excavated for the prism of Canal, or to make room for lining, or under the banks, shall be estimated as excavation, and in all cases where the earth necessarily excavated is not removed more than one hundred (100) feet to form the adjoining bank or banks, no estimate for embankment shall be made; and whenever the prism of the Canal does not require any excavation, or falls short of being sufficient to form and complete the adjoining bank or banks, then the materials necessary to complete such embankment shall be taken from the nearest surplus excavation, or such other place as the Chief Engineer for the time being may direct.

The spoil banks or surplus earth shall be laid in an even, regular manner; the inside shall have such a slope as the Chief Engineer for the time being may direct, and the top be finished in a uniform plane, having sufficient declivity to readily carry the falling water off the back side. In all cases of deep cutting, no part of the surplus earth, or spoil banks shall be deposited within thirty (30) feet of the cutting stakes on the towing-path side, nor within fifteen (15) feet on the opposite side (upon the original plan) of the Canal, unless it be otherwise directed by said Engineer; and in every case where the said Engineer shall so direct, the rock or earth excavated shall be deposited at the distance from the Canal above mentioned. Nor shall the Contractor permit any of the rock which shall be excavated under and by virtue of this contract to be taken away from the place of its deposite in any manner or for any purpose whatever; except by order or under the sanction and authority of the Board of Trustees first given.

No public or private road which crosses the line of Canal shall be obstructed by excavation or otherwise, until directions shall be given by the said Engineer to complete the Canal across such road or highway.

Section 45

Sec. 22

Daniel Lynch

Contract

Relinquished

Closing certificate issued

July 2, 1847

"A"

49

Chicago Dec 22. 1847

Mr Wells Lake,

Dear Sir:

Mr Lynch is anxious to have a remeasurement made of his work (sec^{s} 21 & 22) and if it is possible to take an estimate after what has been done by us, which will shew the actual quantity of excavation done by him with any more accuracy than the est. already made. I wish you would at once go over the sections again. Or if you can ascertain by estimating the amt. remaining in, and adding thereto what we have probably taken out, (estimating by the labor done) so as to make any closer approximation to the absolute amt. of work done than has already been made, arrive at it in this way.

Please examine into this matter and report results to me as soon as convenient.

Truly Yours

(Signed) Wm Gooding

"B"

Estimate on Sec No 21 Illinois & Michigan Canal January 7th 1848

Statement. ~~Estimate~~ Total Excavation on Section 26885 13/100 Cub Yds

Beg^{n} Wilder contractor

Amount to be done 1639 11/100 do do

Amt of Ex done on Contract 25246.02 Cub Yds at 32¢

" Ex made Orig^{l} Bottom 154.38 " "

Filling in Tow path 399.67 " "

We hereby certify that the above is a true statement of the situation of the work and amount done on the Contract. to wit.

25246.02/100 Cub Yds (done) Ex on Orig^{l} Contract

154 38/100 " " (") below Orig^{l} Bottom

399 67/100 " " (") Tow Path filling

N. P. Woodworth Engineer

R. E. Peacock "

(1318-46)

70

25.400.40 C Yds Excavn @ 32¢ $ 8128.13
399 07 " " Filling 1/- 49.95
$ 8.178.08
Amt. heretofore paid Contractor 7507.84
$ 670.24

"K"

Estimate on Section 22. Illinois & Michigan Canal January 7. 1848
Daniel Lynch Contractor

Total Excavn on Section 24.214 32 Cub Yds
Amt to be done 664 43 " "
Amt of Excavn done on Contract 23.549 96 " " 35¢
" " done under Orig. Bottom 562 84 " "

We hereby certify that the above is a true Statement of the situation of the work and amount done on Contract to wit

23549.96 Cub Yards by our Orig. contract at 35¢
562 84 do under Orig. Bottom @
A P Wordworth Engineer
R C. Peacock "

24.112.80 C Yds Excavn @ 35¢ $ 8.439.48
Amt heretofore paid Contractor 7.949.20
$ 490 28 "

And that afterwards to wit on the fifth day of December in the year of our Lord one thousand eight hundred and forty eight the said defendants filed in the office of the Clerk of the said Cook County Court their certain appeal Bond in the words and figures following to wit

"Know all men by these Presents, that the Board of Trustees of the Illinois and Michigan Canal, as principal, and Justin Butterfield as Security, are held and firmly bound unto Daniel Lynch, ~~in the penal sum of~~

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Lynch in the penal sum of Fifteen Hundred dollars for which payment well and truly to be made the said Board of Trustees bind themselves and their successors, and the said Justin Butterfield binds himself, his heirs Executors and administrators, firmly by these presents. In witness whereof the said Board of Trustees of the Illinois and Michigan Canal have caused this Bond to be signed by Charles Oakley, Resident Trustee of said Board, and William Gooding secretary of said Board, and the Corporate seal of the said Board to be hereunto affixed, and the said Justin Butterfield has hereunto set his hand and seal, this 23d day of November A.D. 1848

The condition of this obligation is such that whereas at the last October Term of the Cook County Court in a certain action of assumpsit in which the said Daniel Lynch is plaintiff and the said Board of Trustees of the Illinois and Michigan Canal are defendants. The said plaintiff obtained a Judgment against the said defendants for one thousand and fifteen dollars and ninety six cents damages, and Costs of suit, and the said defendants have prayed an appeal to the Supreme Court of the State of Illinois: Now therefore the condition of this obligation is such that if the said defendants shall pay the said judgment Costs, interest and damages, in case the said judgment shall be affirmed, and shall duly prosecute their said appeal then this obligation to be void, otherwise to remain in full force and effect

L S

Charles Oakley
Resident Trustee

Wm Gooding Secretary

J. Butterfield (Seal)

[12124-47]

72

State of Illinois }
County of Cook } ss I James Curtis Clerk of the Cook County Court, within and for the County and State aforesaid, do hereby certify, that the within and foregoing is a full true and perfect transcript of the Records and proceedings of said Court in the suit of Daniel Lynch against the ~~Trustees~~ Board of Trustees of the Illinois and Michigan Canal and of the Bill of exceptions filed therein and papers thereunto attached.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of said Court at Chicago in said County this first day of February in the year of our Lord one thousand eight hundred and forty nine

James Curtis Clerk

Objections Court July term 1849.

The Board of Trustees of the Illinois & Michigan Canal Appellants

adm.

Daniel Lynch Appellee

} Come the said appellants by J. Butterfield their attorney and say that in the record and proceedings of said cause and also in the giving of the Judgment aforesaid there is manifest error in this Court, it appears by the record and proceedings aforesaid that Judgment has been given for the said Plaintiff whereas Judgment should have been given for the defts:

2d. the Court erred in overruling the objection to the reading in evidence of a copy of a letter from Gen Duncan to the Plff.

3 the Court erred in the admission of the evidence of alterations and admeasurements made by and on the part of the Plff. to prove the amount of work done by him under the contracts:-

4 the the Court erred in refusing to make out the letter may given by the Plaintiff in relation to the admeasurement of the work made by Woodworth & Heacock at his instance

5th the Court erred in giving to the Jury instructions as asked for by the Plff.

6 the the Court erred in refusing to give instructions as asked for by the defts

7 the the Court erred in giving instructions to the Jury.

[2124-48]

of the Circuit Court overruling the motion
for a new trial.

on which the causes of action and all other proceedings in the
said cause and proceedings appearing the said appellant
prays that the said judgment may be reversed set
aside and held for naught.

J. Butterfield atty for
appellant

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Daniel Lynch
vs
The Board of Trustees
of the Ills & Mich. Canal

Plea
330 rods
Ent & Rul

$42.00
.50
$42.50

Feb 12. 1849
Ill. & Mich. Canal Co.

J. Butterfield
Defts atty.

Daniel Lynch Appella
vs
The Board of Trustees of the
Illinois & Michigan Canal

J Butterfield
Attys for Appellant

Appeal from Book
County Court

"Abstract"

This was an action
of assumpsit tried before the Hon S. T.
Logan Judge of the Cook County Court at the
October term 1848 - The declaration was
upon the common indebitatus count for
work & labor & the money counts plea the
General Issue. Upon the trial several
exceptions were taken and there was a
verdict for the Pff for $10496. The Defendant
moved for a new trial which was overruled
& a Bill of Exceptions taken setting forth
all the evidence. The Bill of Exceptions
states that William Goodwin sworn as a
witness on the part of the Plaintiff testified
that he was Chief Engineer of the Illinois &
Michigan canal from the time of the
organization of the Board of Trustees in
1836 until May 1842. That the sections 21
& 22 were pre emption work & were awarded
under the canal law of Feb 21 1843 at the
estimate of the chief Engr - Section 21 was
awarded to Benjamin Wilder & Sec 22 to the
Pff - On the 7th Aug A D 1845 Contracts
were entered into between the Board of Trustees
& the said Wilder & said Lynch for the

$2124-49

construction of the ~~contracts~~ of said sections. The Contract for Sec 21 was with Wilder & that for Sec 22 was with the Pliff. All the work performed by said Lynch on said sections was done under said contracts.

Lynch assumed the Wilder contract & received the estimates by power of attorney from Wilder - Lynch commenced work in the fall of 1845 & on the 2 July 1847 the work was relinquished by Lynch with Wilkes consent with the understanding that Lynch should be paid retained percentage according to the estimates of the work previously made - He was not entitled to the retained percentage by the contract.

Lynch was anxious to close up for the work which he had done and leave the job & said he would accept the measurements & estimates previously made & the closing certificate for the final ~~certificate~~ payment was so made up by Wilkes on the 2. July 1847. At the time of the settlement, Lynch complained that his work had not been correctly estimated, he claimed that he had excavated (as Wilkes thinks) some 200 or 300 yards which had not been estimated therein & wanted a remeasurement - Wilkes told him that it could not then be more accurately measured for the reason that it was a great part of it covered with water - that if Lynch chose to defer the settlement for a short time till the water

could be drawn off he would have the work remeasured & that he would be paid for every yard he had done, then, if not, if a settlement was then made & the retained per centage paid, it must be final —

Lynch concluded & state upon the estimates as made & witness made out the closing certificates for a final settlement on the two sections. Witness considered this settlement final.

Sometime afterwards upon the application of Pltf, Witness directed Mr Lake, asst Engineer to remeasure the work I directed the work to be remeasured so as to by myself & omitted portion had been done him as he complained & to see what amount of work there was to be done by the Trustees on those sections. After Lynch left the job, the Trustees by an agent or superintendent were finishing up the work, Witness object in ordering the remeasurement was to ascertain how much remained for the Trustees to take out — He thought Lynch had been overestimated.

Witness considered the settlement final that the remeasurement shewn him underestimated Witness would not have made another return without the order of the Board.

In answer to Interrogatory put by Pltfs Counsel Witness said, he never said that if upon the remeasurement it should be found that Lynch was underestimated

S12164-50

he should be paid — and knew that Mr Stuart said so.

Plffs Counsel here exhibited to witness a copy of a letter, & inquired whether it was a copy of the letter written by him to the Lake. Witness answered that the letter was about such an one as he would have written and he presumed it was a copy.

Plffs then offered to read said copy of letter in Evidence which was objected to by Defts counsel — Objection overruled by the Court & the Copy read — By which decision the defts counsel excepted — Said Copy is made part of this Bill of Exceptions & is hereunto attached marked "A" — The objection to reading the copy of the letter was on the ground of the letter being irrelevant and impertinent, no objection was made on ac of the its being a copy & not the original

Witness states that the amt of the per centage generally retained upon contracts was fifteen per cent — It is money kept back in the current Estimates to ensure the completion of the job

Robert Stuart was then called and sworn as a witness on the part of the Plffs. Is Secretary of the Board of Trustees & pays out the money on estimates as assistant to the Treasurer. The President & Treasurer reside out of the state — In their absence witness disburses money under the direction of the Treasurer — Witness made

all

all the payments to Lynch upon the estimates & certificates of the chief Engineer

Recollect that Arnold & Lynch came to the Comptr Office after the payments had been made & before the suit was brought — That I & Mr Arnold examined amounts paid & saw Receipts.

Question cultivating What if any thing was said by you at the time of the Conversation & the Board's correcting any errors in the Lynch's estimates & their disposition to pay for all the work done? Question objected to by defts counsel — Objection overruled by the Court & an exception taken —

Answer. I said neither the Board of Trustees nor the Engr entertained any disposition to wrong Mr Lynch as an explanation of my own opinion. I did not state that a remeasurement would be made, because Lynch had settled at his own request — I did not state that he would be paid for any more work. Plffs counsel asked witness to state what was said between witness & Lynch at the time of the last payment, Witness answered that Lynch complained that he had not been estimated for all he had done — some hundreds of yards had not been estimated Witness answered that was a matter between him (Lynch) & the Engineer that neither the Board of Trustees nor the Engr wanted to wrong him or any other person — that there could be no motive for their so doing

Witness wrote to Lynch

at the time of payment that he could only make payments on the Engineers estimate & certificate - Lynch finally said that he would receive the money & close it up on the estimates as made - that he would not ask it - Nelms had no authority to order a direct new estimates - did not say to Lynch that there should be a re-estimate & that any error would be corrected by the Board of discovered - The claimed per centage would not & could not with the scale of his duty have said (accepting for a final settlement for work on the Section - This conversation was at the time of the payment of the final closing of the estimate on the 6th July 1847.

The defendants counsel have exhibited herewith seventeen certificates comprising the several estimates made by the chief Engineer for work done on said 2 Sections under the contract by which are attached receipts for the payments of the estimates & certificates - The Pltf counsel admits the execution of the Receipts and the Receipt of the monies mentioned therein

The said several certificates & Receipts are made part of this Bill of Exceptions & are thereunto attached marked B - Witness Stuart swore that he made the payments of the money mentioned in the said Receipts as therein stated & took the said Receipts for the defendants.

Rufus E Peacock

was then called Sworn as a witness on the part of the Plff. Says that he was Engineer on the Canal from 1837 until the Canal stopped & after the resumption in the 1845 — Knows the Section No 21 & 22 — opposite in making the Estimates of quantities before the lettings in 1845 — Mr Whittlesey was the resident Engr — there were portions of the Summit Division — Witness was asked by Plff Counsel to state in what manner the measurements were — which question was objected to by defts counsel on the ground that it already appeared, that the work done by the Plff on the said Sections was under Specific contracts & that the Plff was bound to produce said Contracts & when what stipulations were contained therein in relation to measurements & estimates — The Court sustained the objection The Plffs Counsel called upon the defendants Counsel for the production of their counterpart of said contracts which was done, and the Plffs gave said Contract, with the Memorandum thereon endorsed in evidence — said Contracts are made part of the Bill of Exceptions & are thereunto annexed marked "C".

The defendants counsel then objects to any evidence, whether the estimate & decision of the chief Engineer in case of his absence or inability to act, of the principal Asst. Engineer having charge of the work embraced in these contracts being received as to the amount or quantity of work done under said Contracts unless a refusal on the part of the said Engineer

5/12/24-52

Engineer's last before them

The Court
overruled the objection declaring that he would
admit the evidence offered, subject to be excluded
if the Board thought proper after further consideration

Witnesses (Beach M)
says that in July or August 1845 when they made
the measurement of the work it had been covered
with water - The work objected to 1841 & was
measured in 1845 & that most of the time since
water stood on these sections that this would
have the effect to make the bottom 7 & 10 inches
semi fluid before they first commenced
measurement nearly the whole of the sections was
in that condition. An approximate estimate
is made before contracts are let - He went
on and took the levels in July or August 1845
They did not lay on the whole work then
leaving a portion of it under water more
correctly measured - Their object was to ascertain
the depth of the hard material & also the
depth of the soft material - They first measured
at the upper end of 22 and lower end of 21 -
Mr Whittle & Mr Van Horne were with
witness laying out 14 & 15 chains - Van
Horne carried the rod, Mr Whittle & witness
by turns carried the rod - Whittle instructed
Witness & prop the rod down to the hard
material - Witness calculated the original
quantities, as the two sections soon after
the measurements were completed - The
quantities as measured before Lynch
Commenced were

on

On Sec 21 . 26 826 cu yds } Cubic Yds
22 24 236 " }

Witness was then in the Employ of the dept as Rodman - Van Horne as asst Engineer, Whittle as resident Engr - Witness saw the pegs for bottom of canal at the upper end of Sec 22 - Witness left the work in July 1846 - dont recollect the condition as to water then - Knows that during the summer Lynch had to contend with considerable quantities - At times it was difficult to ascertain quantities by measurement on ac of water - The estimate made at such times were approximate. We had sometimes to take soundings - Lynch told Witness he thought there was an error in laying out the work first - Witness answered that he (Lynch) must get directions from the Board for a new estimate as it was laid out under the direction of the Resident Engineer Witness supposed to be correct.

Witness saw a certificate given by Mr Van Horne for a measurement of Lynch - was present at office when it was made - dont know upon what data it was made - Thinks the Board refused to pay according to the certificate - Was at Canal office in Dec last when the Gordon letter was written to Lake - Mr Gordon said that at the time the work was measured it was under water and there might have been a mistake - He

112124-53

thought it was an estimate. Lynch asked a remeasurement and said that he had told Mr Goodwin at the time the contracts were made relinquished that he wanted a remeasurement & that Mr Goodwin agreed it should be. The result of the conversation was that Mr Goodwin would direct Mr Lake to make a new measurement and he afterwards gave a letter to Lynch to Chicago & Lake to make a re measurement. Mr Goodwin thought that the measurement would show Lynch over estimate Lynch thought otherwise & for the purpose of ascertaining & settling the matter, as witness understood the remeasurement was ordered. The contracts had been relinquished as I understood from Goodwin When I read the letter. Don't know whether it was sealed or not thinks it was unsealed. Witness went with Lynch & Lake. Lake went on the work Lynch & Witness accompanied him & Lake measured several chains. Then saw the Lake would measure no more. Did not know that he could get nearer than before, & said he was not sure that he did not like the idea of being watched. Witness urged him to go on saying that he only wanted Lynch to have his dues. Lynch & witness started for Chicago - met Mr Goodwin on the road told him that Mr Lake had refused to measure & Lynch said he should get somebody else to measure the work. Don't know what Goodwin replied - soon after Jan 7. 1848 Witness measured the -

work for Lynch

The Pltff Counsel here purpose to read the minutes of Meacock's measurement of the work - Objected to by Defts Counsel - Objection overruled by the Court & the minutes allowed to be read to refresh his memory the witness stating they were his minutes, subject to be ruled out during the progress of the cause -

Witness (Meacock) states the aggregate amt. done on the two sections as follows

On Sec 21	$23.549	26/100
And also below bottom	562	84/100

The last amount 562 84/100 was assumed to be below the bottom of Canal and as extra work exceeding that returned to the Canal - Had the notes of the first survey & benches with me

On Sec 21 had been excavated	25246	02/100 yds
And also below bottom	154	32/100 yds
For solid filling	397	6/100

Witness was assisted by Mr. Woodworth an Engineer & Lynch estimates thinks the estimates correct - The minutes of said measurement as kept attached marked "K" & made a part of this Bill of Exceptions -

Cross Examined -

Says he was at the work when the work was first measured by him Whittle & Van Horn - he supposed the levels to be correct - That the rod was thrust down

the soft material & they made an allowance which they thought right for the soft - Lynch was on the work & a little told him how they had done it, & as he presumed it was all right

Wilmp thinks a small portion of each section was completed to bottom when he left the work in July 1846 can't say how much - it was in detached parts -

When Lynch & Wilmp were there with Lake, the Lake measured about 9 chains - Wilmp thought that correct & did not remeasure it - When Wilmp & woodworth measured, there was water but frozen & they walked on the ice, thinks the work was in good condition to measure - The ice was transparent so that every inequality in the bottom could be seen

At the time they measured the work the trustees were working 60 or 70 men on those sections - Don't know how long the men had worked & how much they had excavated - they measured all as well as they done by the Trustees as by Lynch - saw the men there at work 2 or 3 days before they measured - In the measurement they used the original benches to ascertain the bottom line of level - Think the Trustees had not excavated any below bottom - He took the benches established by a test level in June & calculated the same therefrom

He

He used rod, level, target & tape in making his estimate - The level was a good one - Witness tested it - Thinks Bradley is correct - He is satisfied the line upon for the bottom is correct - Thinks he could not be well mistaken - There was a station bar covered with ice if it was in good situation to measure.

H. P Woodworth was called and sworn on the part of the Pltf — assisted Mr Heacock in making the measurement & takes the quantity excavated the same as Heacock - Thinks the trustees had not taken out more than 600 or 700 yards on Dec 21 & on Dec 22 35 or 40 yards - Judged of the quantity by the number of men & the manner in which they worked & the new earth deposited on the bank & the appearance of the excavation.

The measurements were made from Heacocks original notes - Where there was excavation below bottom it appeared as if the banks had been trimmed long ago

The excavation below bottom was with more per yard than that above - No measure for contractors by cavate below bottom - The bottom pegs seen by witness did not indicate that the bottom should be below as such had made it. The Engineers in charge would know if the excavation was below bottom - The pegs seen by

SL2124-55

witness were new ones, did not notice any old ones - Witness made the measurement from Meacocks original notes He knew nothing about their correctness - If the notes were wrong the estimate must be.

Witness is an Engineer by profession & was chief Engineer of the Central Railroad of this State - Says that all this work was covered with water it was in good condition & measure being frozen over and the ice thin & transparent - will sufficient strength to bear them up - Our measurements & estimates were made with great care & I believe to be correct

Dennis Driscoll was then called & sworn on the part of the Plff - Says, he worked 4 or 5 months for Lynch on Canal - ploughed in the bottom of Canal understands the bottom pegs - Ploughed up some of them - Lynch said, the Engineers altered the ploughing below - Lake was there the day after he ploughed them up - Some places they ploughed lower than the pegs but generally graded by them

They dug ditches & drew off waters below bottom - the bottom was hard - Mr Lake was the Engineer

Thomas Horgan was called & sworn on the part of the Plff - Was Clerk and Book Keeper for Lynch - at the work 18 or 20 months - He left at the 16

June 1847 - that was the last day Lynch worked - the most of sec 22 was finished except a few yards at west end say 400 a 500 yards & a drain about middle - Witness saw the Engr driving bottom pegs - 1st Van Horn & Heacock last by Lake - they generally graded the work by the pegs - sometimes they ploughed lower but not much - the men were directed to excavate the work according to Engr's direction - the men generally excavated as directed by Engineer who were along every day or two - about as much of this end of 21 sec as not finished as of 22 and also a grand Knoal & also about 200 yards & some trimming to be done - where bottom & the banks were principally trimmed - the excavated earth was to be 20 or 30 feet from the cutting - Lynch deposited some nearer he made the low hatch and levelled it off into shape.

John Van Horn was introduced & sworn as a witness on the part of the Plff. says he was appointed Engr in 1845 & assisted Whittle & Heacock in laying out the work at these two sections - was present as stated by Heacock when measurements were made after entrance - almost the whole had been covered with water - the whole excavation was of unequal depths & was divided off by dams & the spaces between dams was covered with water - the banks would be washed down by the water and the dirt would mix with

[12124-52]

the water standing & would create a semi fluid into which a rod would penetrate
The measurement was commenced Aug 13 1845
Mr Whittle was resident Engineer & I was
asst Engr He directed the rod man & thrust
the rod through the semi fluid & the hard
material - The calculations on the ground
were made by all the three, they were correct
& no allowance was made for the semi fluid
on 18 chains on Sec 22 & Whittle his estimate
was 1200 yards in addition to the quantity
stated when the work was laid out - This
measurement of the soft fluid & estimate
were at Lynch's request & without any
orders from the Chief or the Engineers' - it
was sent to the Land Office - Says that
thinks on the 18 chains Lynch took out
1200 yds in addition to the quantity stated
when the work was laid out -

Excavating below
bottom shows any careless Engineer or
contractor - Took several measurements
of the work to make estimates & could not
help measuring work over again - I
recollect from notes in my possession the
Lynch had taken off two thoroughs - The
notes did showed that the ground was
higher than the note or calculations show
& there was more to be excavated than was
computed by Whittle upon instance -

Gave Lynch bottom lags often -
The Engineer direct how deep work is to
go - If the work is deeper below bottom

Pit

it must be either because the Engineer or Contractor is careless - when I gave the certificate alluded to I was with the Employ of Trustees - I had conversation with Col Crosby on this subject - Gen Fry was State Trustee, Col Chas Crosby now is

Corps Exd. Whittle, Meacock & Wilson made from measurement - Each took notes - here they are - Wilson carried the level - Meacock was partly employed in holding the rod & measuring distances - Whittle was near the levelling instrument - the man with the instrument is sometimes can see the rod - The level was generally about 3 chains from the rod, always within hailing distance - The report would be made by assistant & Resident, & by Resident & Chief Engineer - there was a rate in work of 13 Ay from 6 & 18 inches.

Wilson does know of his own Knowledge that no allowance was made for semi-fluid - none was made to his Knowledge - He knows that no allowance was made for it in the note & calculations, but does not know what the Report was in relation to it from Resident & Chief Engineer -

Wilson thinks his estimate of semi fluid was made in the early part of 1846

Wilson first ascertained quantity of semi fluid by ocular observation at the rod.

S13124-5V

2nd By direct measurement with the men at work & 3rd by the level in taking the estimate he measured only in one place viz the 8 chains - just measured from the surface to the bottom of Canal & then compared with the original notes - according to this measurement the semi fluid was more than ½ foot - The actual canal bottom would vary as such a two - The squares between the dams were even but each one was not of the same depth as the line of the first measurement - When I put the canal in Dec 1846 I ran it by set bottom pegs I have no doubt they were all right - They are driven down to bottom of Canal - none of the excavation was below bottom when cutting but they ran a wheel for raising water near the centre of sec 12 It was necessary to have ditches drawn below bottom

W. Woodward recalled by Pltf Wilcox first went on Pltf the Canal on Tuesday 1847 Went off on 3 Jan 1848 - The first time he was there but for a few days at work for the trustee (say 30) & at best its advantage not more than a yard per man a day was excavated

When there on the 3rd there were about 70 men & doing better - They may have taken out 600 or 700 yards on the 21 at the time of Wilcox measurement - On 22 they had done nothing the first time down - the next time they had taken out a dam

say 35 or 40 yards

I think he can judge within a hundred yards of the quantity if it would not Exceed 600 yards. Has estimated but that may a great many times - Can judge by number of men employed & the appearance the earth removed

Defence.

William Gowing was called on the part of the defendants - Was Chief Engineer of the Canal on 1st May 1848 - It was his duty to superintend the acting of the Officers of his Corps & all estimates were made by his direction.

The 2 sections has been excavated about 4 feet when operations were commenced by Lynch in 1845 - The parts excavated have been covered with water & a considerable portion has been softened by water - He directed the Whittle Resident Engr & took the measurement as to give the quantity when the water was drawn off & the soft material settled & it was estimated from the Official Report of the Resident Engineer - Was superintended from the Official returns & Whittle the Resident Engineer as follows.

Cubic yards in the 2d - 23542 from 32 - 753344
22 23120 8092.0

1212A-58

The defendants counsel has
& handed to the entry the following certificates &
estimates & receipts which are mentioned
in the testimony of Robert Stuart

Wilmp states that the
said certificate state correctly the estimate
made on said work that the certificate
made on the 1st June 1846 as made by
Edward B Talcott Principal Asst Engr
and that at the time the said estimates
& certificates were made Wilmp was
absent on a journey to Pittsburgh & that
said Talcott was authorized by the Board of
Visitors so to act in Wilmps absence

On the 2 July 1847 Lynch
came to the office & desired a final settlement
for work done on the Western Division he
was not exactly satisfied with the
measurements made & wanted a remeasurement
& settlement - Wilmp declined remeasuring
the work then as he stated but offered to
close up the matter upon the old estimates &
pay Lynch the percentage retained or if
he was dissatisfied advised him to defer
the settlement until the water was drawn
off when the work could be more accurately
measured. Wilmp told him it was
generally the case that the work was
found over estimate & P[illegible] concluded finally
rather than wait for the water to be drawn
off to accept the payment as a final settlement

He did not determine at first
whether he would accept but afterwards
came

case I should come take the estimate I
does at the beginning. My clerk made
out the Papers & they were given & signed
& sent to Mr Hunt. The estimates were
made out and about $1000 of retained per
centage was paid

The final claim estimates
are not in the form used when work has
been finished but are in the form used when
the contract has ceased & the work is in
complete.

After this matter was closed
entirely wrote the letter before read & take
I also verbally instructed him & directed
him Wells & Peck was appointed to make
a careful measurement. It was done &
reports. It shows by each one estimate
more section 200 & 300 yards & on the other
about 500 yards

The estimates made
out & upon which O.W. has been paid
embrace the semi-flue as reports to
entirely according to his directions by the
special return & substitute the Resident
Engineer. And entirely took the matter into
account & decided upon it. The estimates
presented July 2 1874 are entirely final
estimates on the 2 sections as made and
approved by him, and these receipts with
the others should make up the amounts
named by him in the two sections, these
last estimates are final so far as this
Contractor is concerned & are in the form
always used when the Contractor relinquishes

[12124-89]

& the job is not fully complete.

Mr Mapes considered the allowance with Pfl a fair one - His object in ordering a new monument was to ascertain the quantity which remained to be taken out and to satisfy Pfl and the world that justice had been done him. If the monument had been struck under oath Mr Mapes would have advised him to petition the Board of Freeholders for relief

Lynch told Mr Mapes he would give a final discharge upon the payment of the retained percentage at the time the closing certificate was given Lynch & Mapes both state that the whole matter was settled.

No allowance has ever been made under such contracts for making borings both - the placing of the earth there was up & down & not upon level ground and is within the distance required by the contract. The Resident Engineer is made by an order of the Board responsible for quantities - I have personally examined & compared the sections 21 & 22 - If there should be a mistake by the Resident Engineer it ought to be made -

Their Surveys & reports are the basis of my estimates - I told Lynch that if he had been underestimated the proper course would be to petition the Board for relief I should myself have advised them to pay off a party had been settled with under a wrong estimate.

Owen P Lovejoy was then called & sworn as a witness on the part of the defendants.

Was shown for the purpose of the same time the last certificates were given Pltff.

The certificates in Court are the ones upon which they are not technical "force certificates" but are the form used in such cases when the Contract was closed & the work not finished

Lynch was at the office most of the day upon which the Jr was closed & he & the Chief Engineer in negotiation about it at several times during the day — Lynch claiming that something more was due & the Chief Engineer saying that he was not authorized to make the certificates for the payment of the retained percentage until it was all closed

Lynch said, when ordering a check he was making out the certificates that he was going to Michigan & wanted money to pay his men & had determined to close with

Robert Shaw called on Ex. by defts paid Lynch the money on the above certificates July 6. 1848 & took his Receipt therefor for the defts — Lynch was at the office some time and said he might be home but said that Lovejoy said it was expected to make the measurement more accurate at that time — could not be

[12124-65]

upon the work Chas against Lynch
concluded finally & close the thing & Lewis
the old estimate & the money was paid
agreeable to the Chief Engineers estimates

Cross ex. The money would not
have been paid if Lynch had not agreed
to make the settlement finè.

Lynch claimed that
after 200 a 300 yards of the many dollars
had not been estimate by him at the yards
a dollar estimate but could say. I gave the
substance of the conversations with Lynch
at several times, during several days
but cannot say that the precise
words, word for word, or exact translation
I believe I suppose he was going to law or
should not have paid him what I did

Wells Lark has called
& sworn on the part of the defendants

Has known the Canal as
Roman & as Ch. Engr. Had charge of Sec
21 & 22 in the early part of the summer of
1847. The work was filled with water Lynch
suspended off the east end of Sec 21 in May
& June & performed considerable work —

After he suspended June he wished
estimate & measure the work preparatory to
making a settlement estimate & would
be dependent as the work was under water
They however took a boat & on the 25 June
measured part of Sec 21. Neither had

Been

been measured previously when it was dry. The whole of Sec 22 had been measured before. Afterwards Wilmot learned that they had settled upon these measurements. Sometime after Lynch requested Wilmot to remeasure the work which he refused to do without orders

When the Gordon's letter above spoken of was received he went on & the work & measured that portion of it which had been last measured under water — It was never drawn off & the remains of the Section, & also Sec 22 were under water — When the returns of 22 also were to be measured the whole of the measurement so made showed the amount remaining to be done more than the previous returns as follows

On Sec 21	27	21/100	Yds.
22	55	5/100	

The returns made in June 1847 showed the amount done & to be

On Sec 21	23542	Yds
22	23120	

These are the returns made to the Office — Wilmot says Pilch carried them to the Office & he Report, Wilmot showed the estimate to Lynch, & showed him that he had deducted 1440 yards training banks. Lynch satisfied himself of the 1440 yards were not to Report — Wilmot says to him that he must make the deduction — this was for earth not removed from the slope bank — Wilmot is satisfied that the estimate & measurements are as correct as they could be made — He knows

[illegible]

the work. The last measurement when I was there the work previously over estimate, as above stated is the most reliable because the opportunity for testing it was better. Use prudence & greater care than in ordinary current estimates. There were places in the section excavated below bottom. About a dam adjacent to the above has some dozen inches below bottom as Bitnip supposed to draw the water to the above. It was not excavated below bottom by Bitnip order Bitnip sent out this work on Canal in fall of 1846. Some 4 dam's of the work were bottomed & nearly so. Bitnip caused bottom pegs to be placed. They were not placed below bottom.

Bitnip measurement with whites was after that of Meacham & Woodworth. The latter was from 2 to 4 feet deep when they measured when Bitnip measured it was nearly dry. He men commenced work on the 4 sections of the Routes about 20 Dec 1845 - on Sec 21 they commenced with about 40 & gradually increased to 150. There were from 75 to 100 men at work when Meacham & Woodworth measured the work.

Capt Eld Meacham's original notes were the basis upon which Bitnip made his calculations & quantities.

Meacham & Woodworth measured on the 6th & 7th Jan 1846 - Bitnip measured on the 10th of Jan.

Here

There remains to be done on Sec 22 1649 Ft
yds channel such part of Dist is supposed
to be the amt the Trustees had done at the
time Hascall & Noyes left measured

At that time there were many bars &
dams which when covered with water it is
difficult to measure accurately The bottom
of the Canal where there was the most water
was very irregular - many bars & the bottom
not uniform.

There were as many as 5 or 6
bars on Sec 22. They could be measured
more exactly with the water off Shall the
rules of Hascall & Van Horn can't state
with exactness the amt of work that had
been done by the State but know about the
number of men at work & can form an
estimate

George Barnett called
I served as a Lieut in the part of the 2d
Ills Regt a contractor on Public works 14
years has been 5 years on this Canal Had
charge of Sec 2 Sec 3 as general superintendent
under the Trustees They commenced in the
latter part & middle of Dec 1847 The
work was all covered with water, bottom
irregular - a good many bars - 7 on 22
and some on 21 - The work could not have
been measured accurately then - there was 4
or 6 feet water - boys commenced with 12
or 15 men - in 4 or 5 days had 30 to 40 & by 6
Jan'y had at least 100 on Sec 21 Hascall
on 22 Van Ness about 2 miles & then next

[12124-62]

on 21 - At the time Woodward & Heacock measured the Trusses must have taken out at least 1200 yards.

on 21 900
on 22 300

Nelmes was clerk measuring the work soon after Heacock & Woodward the water had been drawn off in the mean time & the work was in the best condition when Lake measured all the water has drawn off that could be - Nelmes remained on the work till it was finished.

Cross Exd Nelmes is not an Engineer - Knows something of it from his experience as contractor could not judge better of the quantity than an experienced Eye The part they worked on first was the only unfirm part of the whole - Having done the work thinks he could judge better of the quantity than another.

On sec 22 no one could judge of the quantity taken out after it was done because it was under water - and he could judge better of the quantity on 21 than a stranger to the work

Edward B Fallcott was called & sworn on the part of the defendants

Read the testimony of Milton Horne on semi fluid - The test which he states he made would not determine the quantity There is no rule by which it can be accurately

accurately measured when covered with
water It must be a matter of judgment

There is little or no semi-
fluid - It was saturated clay & pounded
in stoops - One of the stoops might have
been 3 chains wide Dec 21 there were
3 or 4 of them on Dec 22 not any.

Thinks Mr Lake
a more accurate Engineer than Mr Heacock
& Mr Woodworth & Mr Van Horn - He has
seen more work has more experience &
more mature judgment - Never only
speaks of them from his own observation

It has never been the practice
under similar circumstances to pay for
making bar paths.

Russell E. Heacock
Called by, Examined by defendants.

In making the original
measurement of quantity on these sections with
White & Van Horn simply laid the rod, pressed
down the hard material & made calculations
as to the depth of the soft material & thinks they
made an allowance for the depth of the
soft material whether on the ground or in the
office he don't recollect He thinks it
was allowed because it ought to be - They did
not hold us to the rod for Van Horn to judge of
the depth

Cross Exd Stumps between which
the work was correctly laid out - The Van Horn
certificate was given to Lynch while witness
was at the work. Witness was asked by Lynch

[12124-63]

Van Horne objected because he did not know whether it was right or not. Thinks Van Horn never made an extension without his assistance

On Sec 21 500 to 600 yards may have been done by Trustees when Witness and Woodcock measured — On 22 nd on 50 yards

The foregoing is all the testimony given in the cause

The defendants Counsel moved the Court to rule out all the testimony given by the Pltf relative to the measurement of the work made by the said Hancock & Woodcock at the instance of the Pltf. The Court overruled the motion stating that it would in its instructions to the Jury state the rules of law applicable to the case which decision the defendants excepted

The Court gave to the Jury the following instructions for the Pltf instructions 1 refused the others for which & refusal the Plaintiff excepted

1st If the the Jury believe that Lynch took the contract & received the money with the understanding on his part that he was receiving pay for the work & labor only & that the work was to be measured & if any mistake discovered it should be corrected then the receipt of money is not conclusive

2nd If the Jury believe from the evidence that the contracts were

relinquished by Lynch with the assent of the Board through their agent that he should be paid for what he had done He is then entitled to recover under the common Counts for any balance that may be due unless the same has been fully paid & fully settled.

3rd If the Jury believe from the evidence that any portion of this claim has been decided upon by the Selecto of the Eng & his decision is not binding on the parties unless it should appear that the estimate of the Selectmen was in the absence of the Chief Engr & his inability to act.

The defendants counsel asked the Court to give the jury following instructions,

First, If the Jury believe from the evidence that the contracts under which Lynch did the work for which he claims to recover pay, & this suit were relinquished, & agreed to be put an end to, in consideration of Lynch accepting of the sums & estimates as made by the Chief Engr & being paid his back per centage, then the Plff cannot recover in this form of action & the law is for the defendant.

2nd If the Jury shall believe that there was a difference of opinion between the Chief Engr & Lynch in regard to the correctness of the measurement of the work done by him under the contract & the estimates made thereof

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by the Chief Engr & that the said Lynch finally
definitely agreed with the said Chief Engineer
that he would accept of & agree to said
measurement & estimates so made upon
being paid the amount appearing to be due him
on such estimates & the back per centage as
a full settlement of the said amount and
per centage when so paid to him, then the
Plff is not entitled to recover in this action

3rd If the Jury believe upon the
evidence in this case that there was some
difference of opinion between Lynch & the Chief
Engr as to the correctness of the estimates
made by the Chief Engr of the work done by
Lynch under said Contracts & that Lynch
agreed finally to accept & receive the amount due
him as stated in the certificates given by the
Chief Engineer of the 2nd July 1874 in full settlement
of all his claims for work done under the said
Contract & the said amounts were so paid, then
the Verdict should be for the defendant.

4th If the Jury believe from the
evidence that the Chief Engineer of the Board
estimated the work done by Lynch under the
Contracts for

Sec 21 2354½ cu yds @ 32/753.44
" 22 23120 — " @ 7/8 1892.00

& that the said Lynch before the commencement
of this suit has been paid for the said estimates,
they are conclusive upon the parties & the Plff
is not entitled to recover if they were made by the
Chief Engr & not by the Plff as price estimates

5th If the Jury
believe

believe from the evidence that the Chief Engineer of the said Canal made a certificate of the measurement of work done by Lynch under the said contracts at the quantities as stated in the preceding instruction & that he made the estimates thereon as his estimates for work done upon said sections of the amount to be had therefor & the said sums of money have been paid to said Lynch as stated & the vouchers which have been given in evidence that the said estimates so made in good faith & without fraud or conclusive in this case & although a mistake in quantity may have been afterwards discovered unless they were made by the Chief Engineer and accepted by the Pltff at the time and intended that an estimate should be afterwards made.

If the Jury believe from the evidence that the Chief Engr of said Canal measured & estimated the work done by Lynch under the said Contracts and that the said estimates so made are paid to said Lynch before suit brought in pursuance of the covenants and stipulations of the said contract then said estimates are final & conclusive & the law is for the defendant

The Court gave the three first instructions as Rd for by the defendants as aforesaid & refused to give the two last instructions as Rd for as aforesaid & the said Court gave to the Jury the following Instruction in writing

/ For the province of

$1,2124-45

the Court that the Jury do consider the Legal meaning of written agreement, & the Court construes the following clauses in the contract as follows.

"And it is mutually agreed that the said works during their progress shall be subject to the examination & inspection of the Board of Trustees & their agents & to prevent all disputes & misunderstandings it is mutually agreed that the Chief Engineer shall determine the amount & quantity of the several kinds of work herein contracted to be done & his estimate & decision shall be final & conclusive

And it is further mutually agreed that during the progress of the work payments on the discretion of the Board shall be made by the Board of Trustees at intervals not exceeding three months which payments shall not be less than 75 per centum of the amt certified by the Chief Engr to be then due for work performed under the contract.

The Court construes the above clauses of the contract so far as respects payments to be made for work done as clauses inserted in the contract by mutual agreement & prevent disputes & misunderstandings & that if the Trustees have employed a competent Chief Engr & persons to make the estimate they are not bound to pay the contractor except upon the estimate of the Chief Engineer & that the Plff has no right to claim payment from the Trustees except upon the estimate of the Chief Engr & in case of his absence or

inability back of the principal Ch. or Engineer having charge of the work until it appears that they have refused to make an estimate & that they are incompetent to make an Estimate. The estimate of the Chief Engr is final & conclusive. This is the contract between the parties by which they must be governed.

2nd. If the Jury shall believe upon the evidence that the Plff & the Chief Engr came to an agreemt. & that the terms of it were that the contract was to be rescinded & that the Plaintiff was to be paid the amount which was paid to him as the final estimate of the Chief Engr if work done. The parties thinking at the time there might be a mistake on one side or the other & running the risk at the time of any mistake & the estimate the money was paid & accepted by the Plff upon a final estimate of the Chief Engr then the Plff is not entitled to recover for any work done under the contract even if a mistake so afterwards discovered.

3rd If the Jury shall believe from the evidence that the Plff had refused & neglected to perform the contract & that an agreemt. was made between the Plff & Defendt. for a final settlement & the contract to be rescinded & that a final settlement which was understood at the time by the parties to be a final settlement was made, executed & performed, then the Plff is not entitled to recover.

4th But if the Jury shall believe the

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opinion that the agreement was that the estimate of the Chief Engr upon which the last payment was made & accepted was not the final estimate but that the agreement had reference to the final & another estimate that should be made upon which the difference if any should be paid or refunded to either party & that it was not a final settlement by the agreement of the parties that the Plff would be entitled to recover the difference if any. But the ascertainment of the difference can under the contract only be a re estimate made by the Chief Engr, or Engineer & Engr having charge of the work unless the Plff shall first shew that the Chief Engineer had refused to make a cause to be made a re estimate after the persons whose duty it was by the Contract to make the estimates are incompetent to make accurate & proper estimates in which last mentioned cases, that is, provided a incompetency the Plff might establish his claim by other evidence

1st If therefore the Jury shall be of the opinion that the estimate and pay[t] on it were final & that the agreement was a final one as referred to by the Court in the above 2nd & 3rd instructions they are then bound to exclude and are directed by the Court to exclude all evidence of the quantity of work done under the contract given in this cause & to find for the defendants so far as work done under the Contract

2d But if the Jury shall be of the opinion from the evidence that the estimate

estimate & payment out were not final
& understood by the parties at the time
they were made & that the agreement was
not a final one as understood at the time
then they will further consider whether the
Pltff has been enabled to furnish the
evidence which the contract calls for & the
amount of work done which evidence is the
estimate of the Chief Engineer.

If in such case they shall
be of the opinion from the evidence that the
Plaintiff could by reasonable exertion obtain
a re-estimate by the Chief Engineer as evidence of
the amount of work done, then they are bound to
exclude all other evidence of the amt of work
done under the contract & to find for the defendants

But if in such case the Jury shall be
of opinion that the Plaintiff has not been able by
reasonable exertion to procure the re-estimate
of the Chief Engineer as evidence of the amt of work
done by the unreasonable & wilful refusal of
the Chief Engineer to make the same a cause of
made then the Jury are at liberty to find the
amount of work done by all the evidence in the
cause.

The defendants except to
the giving of the instructions asked for by Plaintiff
& the refusal of the Court to give the instructions
asked by the defendants

After the giving of said
Instructions by the Court the Jury returned & entered
of their record & the 2d Oct 1849 defendants
Court & rendered their judgment in favor of the

[12124-67]

said Plaintiff for one thousand & sixteen dollars and ninety six cents & thereupon the defendants filed their motion for a new trial upon the following grounds.

1st Because the verdict of the Jury is against the evidence

2nd Because the Court erred in giving instructions to the Jury & also in refusing to give instructions to the Jury

3rd The Court erred in admitting improper evidence

After hearing the argument of Counsel upon the said motion the Court overruled the said motion for a new trial, to which decision of the Court the defendants excepted & pray the Court to seal this Bill of Exceptions according to the statute in such case made & provided which is done

(Signed) Asyl P. Sweeny (Seal)
Judge

1st Was there an agreement as to re measurement and is a mistake in measuring proved.

2. Is the certificate of the chief engineer Conclusive -

13 Ohio 79

1 Hannigan 234

[12124-68]

Supreme
Oct 14 Term 1849 Court

Daniel Lynch

vs

Board of Trustees &c

Copy Abstract

Filed June 12. 1849.
L. Leland Clk.

Statement.

Keacock & Woodworth, make out done –

On Sec. 21, to bottom	25246.02	
" " " below bottom	154.38	
Total on Sec. 21	25.400	.40/100 yds.
Deduct Amt. done by Barnett for Masters	900.	
Takes June Estimate, upon which Lynch was paid, is	24.500	.40/100 yds
	23.542.	
The difference is	958	40/100 yds

Which difference at 32¢ per yard, amounts to $306.56

On Sec. 22, to bottom	23.529. 96.	
" " " below bottom	582. 84	
Total on Sec. 22	24.112 80	yds.
Deduct Amt. done by Barnet for Masters	300.	
	23.812.	87/100 yds
Takes June Estimate, upon which Lynch was paid is	23 120.	
The difference is	.692	87/100 yds

Which difference, at 35¢ per yard, amounts to $245.48

Total difference $552.04

{12124-69}

Statement of differences between the Estimates Made by Heacock and Woodworth for Daniel Lynch, and Wells Lake for the Trustees of Ill. & M. Canal.

Section № 21. Amount to bottom. 25.246.02
" below do 154.38
Total 25.400.40 C. yds

Section № 22. Amt. to bottom 23.549.96
" below do 562.84
Total 24.112.80 C. yds

Total Estimate by Heacock & Woodworth 49.513.20

Section № 21 on which Payt was made 23.542
" " 22 do do 23.120
Total 46.662

Sec № 21 Amt done by Barnett 900
" " 22 " " 300 1.200
Amt. Est° by Lake & done by Barnett 47.862 47.862
1.651.20

Deduct Heacock & Woodworth's Est. below bottom 717.22
Actual difference between Estimates 933.98

Total quantity in Sec 25.246.02 When finished
Amt paid for 23.542
1704.02 C yds Remaining to be done

Total quantity in Sec 22. When Completed 23.549.96
Amt paid for 23.120
Remaining to be done 429.96

1704
429
2133 - 1200 = 933

1/12/04-78

Statement of differences between the Estimates of Heacock & Woodworth and Wells Lake

6,024
449.48
1,160.55
40.45
$1,110.55

1 Hammond 234
13 Ohio 79
3 Sc. 322

Supreme Court

Daniel Lynch, appellee
ads
The Board of Trustees of
Illinois & Michigan Canal

Appeal from
Cook County Court.

And now comes the said Daniel Lynch appellee by Arnold & Peck his attorneys & says that there is no Error Either in the Record & proceedings aforesaid, or in giving the judgment aforesaid: And he prays the Supreme Court, now here may proceed to Examine as well the Record & proceedings aforesaid as the matters aforesaid above assigned for Error. And that the judgment aforesaid, in form aforesaid given, be in all things affirmed &c

Arnold & Peck
Attys for appellee

[1912 4-11]

32

Supreme Court

Daniel Lynch
Appellee
ads

The Board of Canal
Trustees —

Joinder in Error.

Filed June 12. 1849.
L. Leland Clk.

Daniel Lynch Appellee
vs
The Board of Trustees of the Illinois & Michigan Canal
Appellants

J. Butterfield
Atty for Appellee

Appeal from Cook County Court

"Abstract"

This is an action of Assumpsit brot before the Hon H. T. Dickey Judge of the Cook County Court at the October term 1848. The declaration was upon the common indebitatus count for work and labor and the money counts plea the general issue. Upon the trial several exceptions were taken and there was a Verdict for the Plaintiff for $1014.96 The defendant moved for a new trial which was overruled and a Bill of Exceptions taken. Setting forth all the evidence, the Bill of Exceptions states that William Gooding sworn as a witness on the part of the Plaintiff testified that he was Chief Engr of the Illinois & Michigan Canal prior the time of the Organization of the Board of Trustees in 1845 until May 1848 That the Sections 21 & 22 were pre-emption work and were awarded under the canal Law of Feb 21 1843 at the Estimate of the Chief Engineer. Section 21 was awarded to Benjamin Wilder & Sec 22 to the Pltff On the 7th August AD 1845 Contracts were entered into between the Board of Trustees and the said Wilder and said Lynch for the

[12124-72]

construction of said sections. The contract for Sec 21 was with Wilder, that for Sec 22 was with Mr Pelt, All the work performed by said Lynch on said sections was done under said Contracts. Lynch assumed the Wilder contract & received the estimates by power of attorney from Wilder. Lynch commenced work in the fall of 1845, & on the 2d July 1847 the work was relinquished by Lynch with Witness consent with the understanding that Witness should be paid the retained percentage according to the estimates of the work previously made. He was not entitle to the retained percentage by the Contract.

Lynch was anxious to close up for the work which he had done & leave the job & said he would accept the measurements & estimates previously made & the closing certificate for the final payment was so made up by Witness on the 2d July 1847. At the time of the settlement Lynch complained that his work had not been correctly Estimated; he claimed that he had excavated (as Witness thinks) some 200 or 300 yards which had not been estimated to him & wanted a re measurement. Witness told him that it could not then be more accurately measured for the reason that it was a great part of it covered with water that if Lynch chose to defer the settlement for a short time till the water could be drawn off, he would have the work remeasured & that he would be paid for every yard he had

due then, or not, if a settlement was then made & the 1st and percentage paid it must be final. Lynch concluded to settle upon the estimates as made & Wilmes made out the closing certificates for a final settlement on the 2 sections. Wilmes considered the settlement final. Sometimes afterwards upon the application of Plaintiff Wilmes directed Mr Lake assistant Engineer to remeasure the work & directed the work to be remeasured to satisfy himself and himself that justice had been done him as he complained & to see what amt of work there was to be done by the Trustees on those sections. After Lynch left they got the Trustees by an agent or superintendent to be employed in the work. Wilmes objected to ordering the remeasurement as to ascertain how much remained for the Trustees to take out. He thought Lynch had been over estimated.

Wilmes considered the settlement final & had the remeasurement shown him underestimated, Wilmes would not have made another return without the order of the Board.

In answer to Interrogatory put by Pltf Counsel, Witness said he never said that if upon the remeasurement it should be found that Lynch was underestimated he should be paid - does not recollect Mr Stuart said so.

Pltf Counsel produces & exhibits to Wilmes a copy of a letter & requires whether it was a copy of a letter written by him to Mr Lake

12124-73

Wilmp answered that it was about such an one as he would have written and presumed it was a copy.

Plff counsel then offered Brad's said copy of letter in evidence which was objected to by Defts Counsel. Objection overruled by the Court and the copy read. By which decision the defts counsel objected & excepted. Said copy is made part of this Bill of Exceptions & hereunto attached marked "A" & subjoined to the reading of the copy of the letter was on the ground of the letter being irrelevant and impertinent no objections was made on acct. of its being a copy & not the original.

Wilmp states that the amount of the per centage generally retained upon contracts was fifteen per cent. This money held back on the current estimates to insure the completion of the job.

Robert Stuart was then called and sworn as a witness on the part of the Plff - Is Secretary of the Board of Trustees & pays out the money on estimates as acct. of the Treasurer - The President & Treasurer reside out of this State - & their absence Wilmp disburses money under the direction of the Treasurer. Wilmp made all the payments to Lynch upon the estimates and certificates of the Chief Engr. Recollects that Arnold & Lynch came to the Canal office after the payments had been made & before the suit was brought that he and Arnold examined amounts paid & an Receipt

Lynch

Question in writing. What, if any thing was said by you at the time spoken of in relation to the Boards correcting any errors in Mr Lynch's Estimates & their disposition to pay for all the work done? Question objected to by Defts Counsel - Objection overruled by the Court and an Exception taken - Answer I said neither the Board of Trustees nor the Engr Could have any disposition to wrong the Contractor as an expression of my own opinion - I did not state that a remeasurement would be made, because Lynch had settled as he can request I did not state that he would be paid for any more work. Plffs Counsel asked Witness to state what was said between Witness & Lynch at the time of the last payment, Witness answered that Lynch Complained that he had not been Estimated for all he had done - Some hundreds of yards had not been Estimated - Witness answered that that was a matter between him (Lynch) and the Engr - that neither the Board of Trustees nor the Engr had to do with him or any person - that there could be no motive for so doing.

Witness told Lynch at the time of payment that he could only make payments on the Engineers Estimates & Certificates - Lynch finally said that he would receive the money & close upon the Estimate as made - that he would risk it - Witness had no authority to order a direct new Estimate - did not say to Lynch that there would be a new Estimate or that any error would be corrected by the

[1214-74]

Board of discovery. He reclaimed per centage
but was could not & would not within the scope
of his duty have paid & accepting for a final
settlement for work on the Section - This
Conversation was at the time of the payment
of the final closing of the Estimate on the 6th
July 1847.

The Defts Counsel here exhibited to
Witness seventeen Certificates comprising the
the several Estimates made by the Chief
Engr for work done on said 2 Sections under
the Contracts & which are attached Receipts
for the Payt of the Estimates so certified. The
Plffs Counsel admits the Execution of the
Receipts and the Receipt of the monies
mentioned therein.

These several Estimates
& Receipts are made part of this Bill of
Exceptions and are thereunto attached marked
B. Witness Stuart says that he made the
payments of the money mentioned in the said
Receipts & therein stated & took the said Receipts
for the defendants.

Rufus E. Peacock was
then called and sworn as a witness on the part of
the Plff. Says that he was Engaged on the Canal
from 1837 until the Canal stopped and after the
resumption until 1845; Knows the Sections
21 & 22 assisted in making the Estimates of
Quantities before the Letting in 1845 & while
was the resident Engineer there were portions of
the Summit division. Witness was asked by Plffs
Counsel & stated as near as he can the

measurements were. which question was objected to by defts Counsel on the ground that it already appeared — that the work done by the Plff on the said sections was under special contracts & that the Plff was bound to produce said Contracts & to shew what stipulations were contained therein in relation to measurements & Estimates. The Court sustained the objection. The Plffs Counsel called upon the defendants counsel for the production of their counterparts of said Contracts which was done, & the Plffs gave said Contract, with the relinquishment thereon indorsed in evidence said Contracts are made part of the Bill of Exceptions and are thereunto annexed marked "C."

The defendants Counsel then objected to any evidence other than the Estimate & decision of the Chief Engr in case of his absence & inability to act, of the Principal Asst. Engineer having charge of the work embraced in these Contracts being received as to the amt. & quantity of work done under said Contracts unless a refusal on the part of the said Chief Engr & Asst be first shewn.

The Court overruled the objection deeming that he would admit the evidence offered, subject to be ruled out if he should think proper after further consideration

Witness (Peacock) says that in July & Aug 1845 when they made the measurement of the work it had been covered with water. The work shipped in 1841 & was removed in 1845. The rest of the testimony

[1234-795]

hate stood as those sections – but this would have the effect to make the bottom 7 & 10 inches semi fluid when they first commenced measurement nearly the whole of that section was in that condition. An approximate Estimate is made before contracts are let. We went on and took the levels in July or Aug 1845. They did not let out Humble work till leaving a portion of it until it could be more correctly measured. Their object was to ascertain the depth of the hard material and also the depth of the soft material. They first measured on the upper end of 22 & lower end of 21. Mr Whittle & Mr Van Horne were with Witnesses staying out 1 + or 15 chains – Van Horne carried the level & Whittle & Witness by turns carried the rod. Whittle instructed Witness to prick the rod down the hard material – Witness calculated the original quantities in the two sections soon after the measurements were complete. The quantities measured before Lynch commenced were

In Sec 21	26821	In Cubic Yds
22	24821	45/ "

Witness was then in the employ of the defts as Roman – Van Horne as agt Engr, Whittle as Resident Engr.

Witness set the pegs for bottom of Canal on the upper end of Section 22 Witness left the work in July 1846 – don't recollect the conclusion as to what the – Knows that during the summer Lynch had to contend with Considerable quantities – At times it was difficult to

as certain

ascertain quantities by measurement on the
slate - The estimates made out at such times
were approximations - He had sometimes
the soundings - Lynch the Witness, he thought
there was an error in carrying out the work first
Witness answered that he (Lynch) must get
directions from the Board for a new estimate as
it was laid out & under the direction of the
Resident Engineer and Witness supposed it to
be correct.

Witness saw a certificate given by
Mr Van Horne of a remeasurement by Lynch, was
present & opened when it was made - Don't
know upon what data it was made - Think
the Board refused to Pay according to the Certificate
Was a Board office in Dec last when the Goodwin
letter was received & read - Mr Goodwin said that
at the time the work was measured it was
understated & there might have been a mistake
He thought it was our estimate - Lynch
asked a remeasurement & said that he had
told Mr Goodwin at the time the contracts were
relinquished that he wanted a remeasurement &
that Mr Goodwin agreed it should be - The result
of the conversation was that Mr Goodwin would
direct the Lake to make a new measurement
and he afterwards gave a letter to Lynch in
Chicago to Lake to make a remeasurement - Mr.
Goodwin thought that the measurement would
show Lynch our estimate - Lynch thought
otherwise & the purpose of ascertaining &
settling the matter as Witness understood the
remeasurement was ordered - The Contracts have
been relinquished as I understood from Goodwin -

S12 104-74

Witness read the letter - Don't Know whether it was sealed or not - Thinks it was sealed - Witness went with Lynch & Lake - Lake went on & the work L. Lynch & Witness accompanied him & Lake measured several chains - Then said he Lake would measure no more - Did not Know that he could get nearer than before, and said he was watched, that he did not like the idea of being watched - Witness urged him to go on saying that he only wanted Lynch to have his dues - Lynch & Witness start for Chicago, met Mr. Goodsell on the road told him that Mr Lake had refused to measure and Lynch said he should get somebody else to measure the work - Don't Know what Goodsell replied - Soon after Jan'y 1846 Witness measured the work for Lynch.

The Plff Counsel here proposes to read the minutes of Heacock's measurement of the work - Objected to by defts Counsel - Objection overruled by the Court & the minute allowed to be read to refresh his memory the witness stating they were his minutes, subject to be ruled out during the progress of the cause.

Witness (Heacock) states the aggregate cut done on the two sections as follows

On Sec 22. 23.549. $\frac{20}{100}$ yds

& Also below bottom 562 $\frac{84}{100}$

The last amt 562 $\frac{84}{100}$ was assumed to be below the bottom of canal and is extra work Exceeding that returned to the canal Had the notes of the first survey on benches with us -

On Sec 21 had been excavated 25.246 $\frac{03}{100}$ Yds

And all below bottom 154 28/100
Total filling 397 61/100

Nitnep was sworn by Woodward
an Eq. & a Key estimate, thinks the estimate
correct – The minutes of said measurement are
here to attached marked K. I made a part of this
Day's Exception

Crop examined, says he was on
the work when the work was first measured by
Wm. Whittle & VanHorn, he supposed the levels
to be correct – That the rod was thrust down to
the solid material & they made an allowance
which they thought right for the soft – Lynch
was on the work and Whittle told him how they
had done it & said he presumed it was all right.

Nitnep thinks a small portion of
each section was completed to bottom when he
left in July 1846 Can't say how much it was
in detached parts.

When Lynch & Nitnep were
there with the Lake measured about
9 chains, Nitnep thought the correct & did
not remeasure it – When Nitnep & Woodward
measured there was water but frozen and they
walked on the ice, think the work was in
good condition to measure – The ice was
transparent so that every irregularity in the
bottom could be seen.

At the time they measured
the work the Trustees were working 60 or 70
men on these sections – Don't Know how long
how many had been at it or how much they had
excavated they measured all as well as that
done

[12124-77]

by the Trustees as by Lynch - saw the men there
at work 2 or 3 days before they measured - In
the measurement they used the original benches
& ascertain the bottom line of Canal Think the
Trustees had not excavated any below bottom He
took the benches established by a new level &
line & calculated the same therefrom - He used
old level & target Hope in making his estimate

The level was a good one, Witness tested it - It
was Bradleys he thinks - He is satisfied the line
assumed for the bottom is correct - Thinks he
could not be well mistaken There was a little ice
covering with thin ice & it was a good attachment
& measure

H. P. Woodruff was called &
sworn on the part of the Pltff asserts McKeack
is making the measurement & takes the quantity
excavated the same as Keacock. Thinks the
Trustees had not taken out more than 600 yards
on Sec 21 & on Sec 22 350 or 400 yards Judges of
the quantity by the number men & the
manner in which they work & the amount
deposited on the bank & appearance of the
excavation. The measurements were made
from Keacocks original notes - Where there was
excavation below bottom it appeared as if the
banks had been trimmed by eye

The excavation below
bottom was with more pay yard than that
above - It is unusual for contractors to
excavate below bottom, The bottom Pegs
clearly & truly did not indicate that the
bottom should be below as Lynch had made it.

The

The Engr in charge would know if the excavation was below bottom - The pegs were Guttings were new ones - did not notice any old ones - Withrop made the measurement from Peacocks Engrs notes - He knew nothing about their correctness - If the notes were wrong the Estimate must be.

Withrop is an Engr by profession & was chief Engr on the Central Rail R with this work - says that altho' this work was covered with ice it was in good condition & measure being positive & the ice thin & transparent with sufficient strength to bear them up - Our measurements & estimates were made with great care & believe to be correct.

Jerry Driscoll was then called & sworn on the part of the Plff - says he worked on 3 months for Lynch on Canal, ploughed in the bottom of Canal understands the bottom pegs - Ploughed up some of them - Lake was there the day after to be ploughed them up. Some places they ploughed lower than the pegs but generally graded by them. &c

They dug ditches & drawn off water below bottom - The bottom was hard - Mr Lake was the Engr

Thomas Hogan was called & sworn on the part of the Plff - was clerk and Book Keeper for Lynch - on the work 18 or 20 months - He left on the 16th June 1847 - That was the last day Lynch worked - The most of the 22 was finished & left afterwards at the west end, say,

$12124-78

100 & 500 yards & a dam about middle
Witness & an Engr driving bottom Pegs -
1st by Van Horne & Hancock & last by Lake
They generally graded the work by the
Pegs - sometimes they ploughed loose but not
much The men were directed & executed the
work according to Engr's direction The men
generally excavated as directed by Engr's who were
along every day or two - About as much of this
End of 21 was not finished as of 22 & also a
Grave Road & also about 200 yards and
one running & before - where bottomed, the
banks were principally trimmed - The excavated
earth was to be carried 2 or 3 feet from the
Cutting, Lynch deposited some nearer - he made
the towpath & levelled it off with shafe

John Van Horn was
introduced & sworn as a witness on the part
of the Plff says he has appeared in 1845 and
assisted Whittle & Hancock & Lacey since
the work on these two sections - Was present as
stated by Hancock when measurements were
made in first instance - almost the whole has
been covered with water - The whole excavation
was of unequal depths & was divided off by dams
& the spaces between dams was covered with
water - The banks would be washed down by
the water The dirt would mix with the
water standing and would create a semi fluid
into which a rod would penetrate - The measurement
was commenced Aug 13. 1845 - Mr Whittle was
resident Engr and I was assistant Engr - He

direct the Foreman & there was the Rod through the semiflint & the hard material. He calculates with grounds were made by all the three - they were correct & no allowance was made for the semiflint - He says afterwards estimated the quantity of semiflint on 18 chains is Sec 22 & believes his estimate was 1200 yards in addition to the quantity stated when the work was laid on - This measurement of the soft flint and estimate were at Lynch's request & without any advice from the Chief & other Engrs - He was last to the Land Office - says that he thinks on the 18 chains Lynch took out 1200 yards in addition to the quantity stated when the work was laid on

Excavating below bottom shows very carefully by a Contractor - Took several measurements of the work to make estimates & could not help measuring work over again - I recollect from notes in my possession after Lynch had taken off the sleepers - The notes still showed that the ground was higher than the notes & calculations showed & there was more to be excavated than was computed by thirty cubic yards in a chain - Gave Lynch bottom pegs after the Engineer directs how deep work is to go - If the work is deeper below bottom it must be at the request of the Engr & Contractor usually; when I gave the Certificate alluded to I was in the employ of Trustees - Has had conversation with Col Oakley on this subject - Gen Dyer was State Trustee, but Col Oakley now is

(Copy Exd. Whittle, Dawes & Co's made first measurement - Each

£1214-78

to Rule - here they are - Withnips carried the level
Heycock usually employed in holding the rod
& measuring distances - Whittle was near the
levelling Instrument - the man with the Instrument
in most instances can see the rod - the level
was generally about 3 chains from the rod.
always within hailing distance The Report
could be made by Assistant to President to
President to Chief Engr. There was later on
work on 13th Lay from 6 to 18 inches.

Withnips does not Know
of his own Knowledge that an allowance was
made for semi fluid; none was made to his
Knowledge - He Knows that an allowance was
made for it in the notes & calculations, but don't
Know what the Report was relative to it from
President to Chief Engr.

Withnips thinks his estimate
of semi fluid was made in the early part of 1836

Withnips first ascertained
Quantity of semi fluid by ocular observation
of the rod.

2 by direct measurement when the
men were at work and 3rd & 4th by the level in
taking the Estimate ~~to take the level~~ he
measured only in one place in the 18 chains - was
measured from the surface to the bottom of Canal
& then compared with the original notes - according
to his measurement The semi fluid was more
than half a foot - The actual canal bottom
would vary an inch or ten. The squares between
the dams were not but each one was not of the
same depth as the time of the first measurement

Withnips.

Witness quit the canal 1 Dec 1846 - He frequently set bottom pegs, he has no doubt they were set right. They were drawn down to the bottom of canal - None where excavation was below bottom when witness left - They had a wheel for raising water near the centre of Sec 22 It was necessary to have ditches to drain below bottom

Mr. Woodruff recalled by Plff, witness present with Plff & the Canal on Thursday 1847 & went again on 3 Jan. 1848. The first time he was there, but few men were at work for the ladies (say 30) a great disadvantage, not more than a yard per man a day was ~~execute~~ excavated. When there on the 3 Jan there were about 70 men & every better They may have taken out 600 a 700 yards in 21 as the time of witness measurement. On 22 they had done nothing the first time down - the second time they had taken out a days say 35 or 40 yards

Thinks he can judge when a hundred yards of the quantity would not exceed 700 yards - He estimate work that way a good many times Can judge by number of men emp & the appearance of the earth removed ——

Defence - William Goodwin was called on the part of the Defts - was Chief Engr of

(12124-B)

the Canal on 1st May 1848. It was his duty to supervise the action of the officers of his corps & all Estimates were made by his direction

The 2 Sections had been Excavated about 4 feet when operations were commenced by Lynch in 1845. The last Excavation had been covered with water & a considerable portion had been softened by such

She directed Mr Whittle Resident Engr to make the measurements as to give the quantity when the water was drawn off & the soft material settled & was to estimate from the official Report of the Resident Engr. Witness estimate from the official Returns of Whittle the Resident Engr were as follows.

Cut done in Sec 21 23542 yds @ 32c $7533.44
22 23120 — 80 92.80

The defendants counsel here exhibits to the witness the Certificates of Estimates & Receipts which are mentioned in testimony of Robert Stuart.

Witness states that said Certificates state correctly the estimates made on and on R, that the Certificates made with 1st June 1846 are made by Edw B Talcott Principal Asst Engr & that at the time the said Estimates & Certificates were made Witness was absent on a journey to Pittsburgh & that said Talcott was authorized by the Board of Trustees to act during witness absence.

On the 2 July 1847 Lynch came to the office & desired a final settlement to be made on these Sections.

said he was not exactly satisfied with the measurement made & requested a re measurement & settlement

Whereupon Engineer Hoskins & I proceeded to close up the matter upon the old Estimates & pay Lynch the percentage retained & after he was dissatisfied advised him to defer the settlement until the date was drawn off when the work could be more accurately measured - Perhaps better that it was generally the case that the work has found over estimates & Pfff finally concluded rather than wait for the date to be drawn off to accept the payment as a final settlement - He did and determined at last whether he would accept but afterwards came & said he would take the Estimate and close up the business. My Clerk made out the papers & they were sent to Lynch & Stuart - The Certificates were made out & about $1000 of retained per centage was paid -

The final discharge certificate are not in the form used where work has been finished but are in the form used when the Contract has ceased & the work is not Completed.

After the matter was closed Whitney wrote the letter before read & I take and was verbally instructed him and directed him Neely Lake who was assistant Engr & make a Careful measurement of the work - It was done and reported - It found Lynch over estimated on one section 200 a 300 yards & on the other about 60 yards -

The Estimate made out & upon which Pfff has been paid and a the semi final is reported to Whitney according to his

S12124-81

sections by the Official returns of Mr Mattle
the Resident Engr - and Wimps took the matter
into account and decided upon it - The estimates
presented of July 2. 1847 are witness and
estimates in the 2 sections as made and
approved by him, & those receipts with the
others should make up the amts named by
them in the 2 sections. These last certificates
are final so far as this Contractor is concerned
and are in the form always used when the
Contractor relinquishes & the job is not fully
Complete.

Wimps considers the settlement
with Pliff a final one. His object in ordering
the new measurement was to ascertain the quantity
which remained to be taken out & to satisfy Pliff
& the world that justice had been done him - If
the measurement had shewn Lynch under
estimate Wimps would have advised him to
petition the Board of Public Works for Relief

Lynch told Wimps he would
give a final discharge upon payt of the retained
per centage at the time the Assessg Certificate
was given - Lynch and Wimps both state that
the whole matter was settled.

No allowance has
been made under such contracts for
making banks &c. The placing of the earth
there was less expensive than in the spoil bank
& within the distance required by the Contract

The Resident Engr is made by
an Order of the Board, responsible for quantities
I have personally examined & surveyed the
Sections

Sections 21 & 22 - If there should be a
mistake by the Resident Engr a Engineer who
misses it should be misled - These surveys &
reports are the basis of my Estimates - I told
Lynch that if he had been underestimated, the
proper course would be to petition the Board
for relief - I told myself have advised him
to pay if a Party had been settled with under a
wrong Estimate.

Oliver P. Goodenough was then called &
sworn as a witness on the part of the defendant

Was clerk for Chief Engr at the
same time the last certificates were given to
Plff.

The certificates in Court are the ones
issued, they are not technically "final certificates"
but are in the form used in such cases when the
Contract was closed & the work finished

up to as the office was
of the day & when such the account was closed
& then the Chief Engr was in negotiation
about it at various times during the day &
Lynch claiming that something more was
due & the Chief Engr saying that he was not
authorised to make the certificate & the
pay & the Engr was percentage until it was
all closed - Lynch said when he was
was making out the Certificate that he was
going to Michigan, wanted money to pay his
men & had determined to close it up

Robert Stuart sworn

[12124-82]

and examine by depts. Paid Lynch on the money on the closing Certificates July 6 1848 and took his Receipt therefor for the debt. Lynch was at the Office sometime and said he ought to have more but said that God my said it was impossible & must be measurement more accurate as that time could not be before the work has claimed Lynch concluded finally & close the thing thereon the old Estimate & the money was paid agreeable to the Engr Certificates

Cross Exd. The money would not have been paid if Lynch had not agreed to meet the settlement finally

Lynch claimed that about 200 or 300 yards at that many dollars had not been estimated him whether yards a dollars bitnys cannot say - I gave the substance of the conversations with Lynch at several times during several days but cannot say that I state the precise words word for word. at each conversation I had supposed he was going to have me show him have paid him what he did.

Wells Lake was called and sworn as a witness on the part of the defendant.

Was been on the Canal as Roman & was assistant Engr. Had charge of Sections 21 & 22 in the early part of the summer of 1847. The work has filled with water Lynch pumped it off of the east part of Sec 21 in May & June & performed considerable work

After he suspended in June he wished witness to measure the work preparatory to making a settlement. Witness said it would be difficult as the work was under water - They however took a boat and on the 25 June measured a part of Sec 21 The other had been measured previously when it was dry. The whole of Section 22 had been measured before - Afterwards witness learned that they had settled upon these measurements sometime afterwards Lynch requested witness to measure the work which he refused to do without orders. When the Goodey letter above spoken of was received he went on to the work and measured that portion of 21 which had been last measured under water - It was mere drawing off the residue of that section & also Sec 22 were under water. When the water was off of 22 in the winter he measured the whole of it - One measurement so made showed the amount remaining to be done more than the previous Estimates as follows

On Sec 21 27 $\frac{96}{100}$ yds
22 255 $\frac{7}{100}$ yds

The estimates made in June 1847 showed the amount done to be -

On Sec 21 . 23 542 yds
22 23 . 120

These were the returns made to the Office - thinks Pfff carried them to the Office at Rockport - Witness showed the Estimate to Lynch & showed him that he had deducted

Lee

[12124-83]

yards trimming banks – Lynch expressed himself satisfied if the 140 yds were not taken out –

Witnesses said he thought he must make the deduction – this was for earth not removed from the slope bank – Witness is satisfied that the Estimate and measurement are as correct as they could be made He knew the work well – The last measurement which shows the work previously over estimated, as above stated is the most reliable because the opportunity for taking it was better He made use of greater care than in ordinary current estimates There were places with sections excavated below bottom – about a chain adjacent to this had been excavated inches below bottom as witness supposed to drain the water to the wheel – It was not excavated below bottom by witness order witness went on to this work on Canal in fall of 1846 Some 4 chains of the work were bottomed & ready to – Witness caused bottom pegs to be placed – They were not placed below bottom

Witness measurement with Minkler was after that of Peacock and Woodruff.

The water was from 2 to 4 feet deep when they measured – when witness measured it was nearly dry – The men commenced work on the sections for the Trustees about 20 Dec 1847 On Dec 21 they commenced with about 40 men increased to 150 There were from 75 to 100 men at work when Peacock & Woodruff measured the work –

Cross.

Applegarth. Heacock's original notes were the basis upon which both surveys made his calculations & quantities

Heacock & Woodworth measured on the 6th & 7th Jan 1848 Witnesses measured on the 6th Jan 49

They remained to be done on Sec 22 N 49 100 yds when Lynch quit it It is difficult to tell the amt. The trustees had done up to the time Heacock & Woodworth measured - At that time there are many bars and dams which when covered with water it is difficult to measure accurately The bottom of the Canal where there was the most water was very irregular - many bars & the bottom not uniform

There were as many as 5 or 6 bars in Sec 22 - They could be measured most correctly with the water off - Had the notes of Heacock & Van Horn cant Hale with boatings the amt of work that has been done by the sale bar Know about the number of men at work and can form an estimate

George Barnett called and sworn as a witness on the part of the defendants Has been a contractor on Public works 14 years, has been 5 years on this Canal - Had charge of these 2 sections as general superintendent under the Trustees - They commenced on them between the first & middle of December 1847. The work was all covered with water, bottom irregular - a good many bars - Sec 22 and

[12/24-84]

Some on 21 - the work could not have been measured accurately then - the water 5 feet water - Wilkins commenced 12 or 15 men - In 4 or 5 days had 30 or 40 by 6th Jan'y had at least 100 on sec 21. He commenced on 22 and worked about 2 weeks then went on 21 - as the time Woodworth & Peacock measured the Trenches must have taken out at least 1200 yds.

On 21 — 900
On 22 — 300

Wilkins says Mr Lake measuring the work soon after Peacock & Woodworth - the water had been drawn off in the meantime & the work was in the best condition when Lake measured - all the water was drawn off that could be - Wilkins remained on the work until it was finished.

Cap is anxious to put an edge Knows something of it from his experience a Contractor could not judge better of the quantity than an Experienced Engineer - The part that worked on first was the only unfinished part of the whole - Having done the work himself he could judge better of the quantities than another -

On the 22 no one could judge of the quantity taken out - after it was done because it was under water - and he could judge better of the quantity on 21 than a stranger to the work

Edward B. Talcott was called & sworn on the part of the defendants

Heard the testimony of Mr.

Van Horn as semi fluid. The best object to
state to be made would not determine the quantity
There is no rule by which it can be accurately
measured when covered with water. It must
be a matter of Judgment.

There was little or no
semi fluid. Was salmarsh day. Found
only a trough's. One of the troughs might have
been 3 chains wide. In Sec 21 there were 3 or 4
of them, in Sec 22 not any.

Thinks the Lake a
more accurate Engineer than Mr Peacock & Mr
Woodworth - & Mr Van Horn. He has seen more
work - has more experience & more mature
judgment - Wemp only speaks of them from
his own observation.

It has never been the
practice under similar circumstances to pay
for marking work.

Russell E. Peacock
called and examined by Appellants.

In marking the original
measurement of quantity on these sections
with Little & Van Horn Wemp held the
rod, piped it down to the hard material &
made calculations as to the depth of the soft
material & thinks they made an allowance
for the depth of the soft material whether
on the ground or the profile he does not recollect
He thinks it was allowed because it ought to
be. They did not hold out the rod for Van Horn
to judge the depth.

Examined, but say believe that the work
was correctly laid out. The Van Horn certificate
was given to Lynch while bitings was on the
work. Bitings was asked by Lynch & Van Horn
wage it because he did not know whether it
was right or not. Thinks Van Horn never made
an estimate without his appraisal.

On Dec 21 500 bbl or yds may
have been done by Trustees when bitings and
wood work measured. on 22 nd over 500 yards.

The foregoing was all the
testimony given in the cause.

The defendants
Counsel moved of the Court to rule out all
the testimony given by the Plff as to the
admeasurement of the work made by the
said Keasick and Woodworth at the instance
of the Plff. The Court overruled the motion
stating that it would instruct the
Jury to take the rules of law applicable
to the case to which decision the defendants
excepted.

The Court gave the Jury the
following instructions pursuing the Plaintiffs
& refused the others to which ruling the
Plaintiff excepted.

1st If the Jury believe that
Lynch took the estimate received the money
with the understanding on his part that he
was receiving pay for the amt of estimate only
& that the work was to be measured and if
any mistake discovered it should be corrected

then

then the receipt of the money is not conclusive

2 If the Jury believe from the evidence that the contracts were relinquished by Lynch with the assent of the Board through their Agent that he should be paid for what he had done He is then entitled to recover under the common counts for any balance there may be due unless the same has been fully paid & fully settled

3 If the Jury believe from the evidence that any portion of this claim has been decided upon by Mr Talcott as Chief Engr his decision is not binding on the parties unless it should appear that the authority of Mr Talcott was with the assent of the Chief Engr & was a fair & bona fide act —

The defendants counsel asked the Court to give the two following instructions.

First If the Jury believe from the evidence that the contracts under which Lynch did the work for which he claims in this suit were relinquished & agreed to be put an end to in consideration of Lynch accepting of the final estimates as made by the Chief Engr and being paid his back percentage then the Plff cannot recover in this form of action & the issues for the defendant

Second - If the Jury shall believe that there was a difference of opinion between the Chief Engr and Lynch in regard to the correctness of the measurement of the work done by him under

[2124-84]

the Contract & the estimates made thereby the Chief Engr & that the said Lynch readily and deliberately agreed with the said Chief Engr that he would accept & agree to said measurement & estimates so made upon being paid the amount appearing to be due him on said estimates & the back per centage as a full settlement of the said amt. a per centage was not paid to him, then the Plff is not entitled to recover in this action

Third If the Jury believe upon the evidence in this case that there was some difference of opinion between Lynch & the Chief Engr in relation to the correctness of the estimates made by the Chief Engr for the work done by Lynch under said Contract & that Lynch agreed finally & accepted & received the amt due to him as stated in the estimates given by the Chief Engineer on the 2 July 1845 in full settlement of all his claims for work done under the said Contract & the said amt was paid, then the verdict should be for the defendant

Fourth If the Jury believe from the evidence that the Chief Engr of the Canal estimated the work done by Lynch under the Contracts for

Sec 21. 23542 at 32½ per C. $7533.40
" 22. 23120 " " " 8192.00

& that the said Lynch before the commencement of this suit has been paid for the said estimates they are conclusive upon the parties & the Plff is not entitled to recover if they were made by the Chief Engr & fixed by the Plff as final estimates

Fifth. If the Jury

believe upon the evidence that the Chief Engr of the said Canal made a causd to be made the admeasurement of work done by Lynch under the said Contracts or the quantities as stated in the preceding instruction & that he made the estimates therein as his estimates for work done upon said sections and the amount to be paid therefor and the said sums of money have been paid to said Lynch as stated in his Receipts which have been given in evidence, then the said estimates, if made in good faith & without fraud are conclusive & this case notwithstanding a mistake in quantity may have been afterwards discovered unless they were made by the Chief Engr & accepted by the Plff and the true intention that an estimate should be afterwards made—

If the Jury believe upon the evidence that the Chief Engr of said Canal admeasured and estimated the work done by Lynch under the said Contracts & that the said estimates so made were paid to said Lynch before suit brought in pursuance of the covenants & stipulations of the said Contracts, then said estimates are final & conclusive & the law is for the defendant.

The Court gave the three first instructions as prayed by the defendants as aforesaid & refused to give the two last instructions so as prayed & the said Court gave to the Jury the following Instruction in writing

1st That by the provisions of the Contract & by the law of the Jury & construe the legal meaning

S12124-87

of written agreement & the Court endorses the following clauses in the Contract as follows.

"And it is mutually agreed that the said works during their progress shall be subject to the examination & inspection of the Board of Trustees & their agents & to prevent all disputes & misunderstandings it is mutually agreed that the Chief Engr. shall determine the kind or quality of the several kinds of work herein contracted to be done &c and his estimate & decision shall be final & conclusive

And it is further mutually agreed that during the progress of the work payments at the discretion of the Board shall be made by the Board of Trustees at intervals of not exceeding 3 months which payments shall not be less than 70 per centum of the Amt certified by the Chief Engr. to be due for work performed under the Contract.

The Court construes the above clauses of the contract as clauses so far as respects payments to be made for work done, as clauses inserted in the contract by mutual agreement to prevent disputes & misunderstandings & that if the Trustees have employed a competent Civil Engineer & person to make the estimate they are not bound to pay the contractor except upon the estimate of the Chief Engr & that the Plff has no right to claim payments from the Trustees except upon the Estimate of the Chief Engineer or in case of his absence or inability to act of the principle assistant or Engineer having charge of the work and it appears that

that, they have refused & made an estimate that they are incompetent. The estimate of the Chief Engineer is final & conclusive. This is the contract between the parties by which they must be governed.

2. If the Jury shall believe from the evidence that the Plff & the Chief Engineer came to an agreement & that the terms of it were that the contract was to be rescinded & that the Plff was to be paid the amount which was paid him as the final estimate of the Chief Engineer & for work done. The parties thinking at the time there might be a mistake on one side or the other and running the risk as the time of any mistake in the estimate, the money was paid & accepted by the Plff upon a final estimate of the Chief Engineer & then the Plff is not entitled to recover for any work done under the contract even if a mistake was afterwards discovered.

3rd If the Jury shall believe from the evidence that the Plff had refused or neglected to perform the contract & that an agreement was made between the Plff & the Defendt for a final settlement & that the contract should be rescinded & that a final settlement which was understood at the time by the parties to be a final settlement was made, executed & performed then the Plff is not entitled to recover.

4th But if the Jury shall be of the opinion that the agreement was that the estimate of the Chief Engineer upon which the last payment was made and accepted was not the final estimate but that the agreement had reference at the time

to

[illegible]

another estimate that should be made upon which the difference if any should be paid or refunded & either party that it was not a final settlement by the agreement of the parties then, the Plff would be entitled to recover the difference if any. But the evidence of the difference can under the contract only be a re-estimate made by the chief Engr, asst Engr or Engr having charge of the work unless the Plff shall first show that the chief Engr had refused to make or cause to be made a re-estimate & that the persons whose duty it was by the contract to make the estimates were incompetent to make accurate and proper estimates in which last mentioned cases that is of refusal & incompetency the Plff might establish his claim by other evidence

2nd Mr If therefore the Jury shall be of the opinion that the estimate and payment on it were final & that the agreement was a final one as referred to by the Court in the above 2 & 3 instructions they are then bound to exclude and are directed by the Court to exclude all Evidence of the quantity of work done under the Contract given in this cause and to find for the defendants so far as work done under the contract.

Cdly But if the Jury shall be of opinion from the evidence that the estimate and payment on it were not final as understood by the parties at the time they were made & that the agreement was not a final one as understood at the time then they will further consider whether the Plff has been unable to furnish the

evidence which the contract calls for, of the amt. of work done which evidence is the estimate of the Chief Engr.

If in such case they shall be of the opinion from the evidence that the Plff could by reasonable exertion obtain a re-estimate by the chief engineer as evidence of the amt. of work done, then they are bound & exclude all other evidence of the amt. of work done under the contract & find for the defendants.

But if in such case the Jury shall be of opinion that the Plaintiff was unable by reasonable exertion & procure the re-estimate of the Chief Engr as evidence of the amount of work done by the unreasonable & wilful refusal of the Chief Engr to make the same or cause it to be made, then the Jury are at liberty to find the amount of work done by all the evidence in the cause.

The defendants excepted to the giving of the instructions asked for by Plaintiff and to the refusal of the Court to give the instruction asked by the defendants.

After the giving of said instructions by the Court the Jury retired to consider of their verdict and on the 20th October 1848 returned into Court and rendered their verdict in favor of the said Plaintiff for one thousand and sixteen dollars and ninety six cents and thereupon the defendants filed their motion for a new trial upon the following grounds.

1st. Because the verdict of the Jury is against Law and Evidence

2nd Because the

[illegible]

Court erred in giving instructions to the Jury and also in refusing to give instructions to the Jury

3rdly. The Court erred in admitting improper Evidence.

After hearing the argument of Counsel upon the said motion, the Court over-ruled the said motion for a new trial, which decision of the Court the defendants excepted and prayed the Court sign and seal this Bill of exceptions according to the statute in such case made and provided, which is done

(Signed) Hugh T. Dickey (L.S.)
Judge &c.

Cook County Circuit
Superior Court

Daniel Lynch

vs

The Board of Trustees
of the Illinois and
Michigan Canal

Abstract

Filed June 12. 1849.
J. Leland Clk.

The Board of Trustees of the Illinois & Michigan Canal
vs
Daniel Lynch
Appellant's Costs.

Appeal from Cook County Court.
Judt. affd.

Fil. Transcpt. 20, fil. mas 6¼, Appea. 25, Dk. cause 12½	.63¾
Fil. & abstct. 31¼, Ent. joinder 25, Ent. argt. 25, Cautn. for further argt. 25,	1.06¼
Ent. further argument 25, Ent. Subm. 25, Ord. taking time 25,	.75
Ord. reversing 25, Ord. remanding 25, Ent. judt. & opinion 40 fol. 7.20,	7.70
Fil. opn. 6¼, Copy of judt. 80, Certf. & seal 80, Ent. judt. for costs 25,	1.31¼
Ord. for 24 hrs. 25, Execution 50, fil. & Dk. 18¾, Sheffs. retn. 12½,	1.06¼
Bill of costs 87½, Copy 25, postg. 20, Satisfn. 25, fees for transcpt. &c. 42.50,	43.57½
Amt.	$56.10

A true copy from my fee book as taxed & recorded therein
S. Leland Clk. Sup. Court.

[illegible]

Supreme Court

Canal Trustees

vs

Daniel Lynch

Bill of Costs — $56.10

State of Illinois, ss.

Supreme Court, Third Grand Division, at Ottawa:

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

WE COMMAND YOU, That of the goods and chattels, lands and tenements, and real estate of Daniel Lynch ——— you cause to be made the sum of fifty six ——— dollars and ten ——— cents, costs in the said Supreme Court, which The Board of Trustees of the Illinois & Michigan Canal ——— lately recovered against him before the Justices of our said Supreme Court, as appears to us of record, and make return hereof in ninety days.

WITNESS, the Hon. Samuel H. Treat, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 27th day of July ——— in the year of our Lord one thousand eight hundred and forty nine.—

S. Leland Clerk of the Supreme Court.

41 2124-92

5397

Supreme Court.

The Board of Trustees of the Illinois & Michigan Canal

vs

Daniel Lynch

Execution.

Bill of Costs ——— $56.10

Fee Bill ——— 3.62½

Amt. $59.72½

This Execution is returned satisfied in full. May 1850

P. D. Cook

Sh'ff

C. C.

Rec'd. Costs herein $59.72½

May 27, 1850

L. Leland

for Geo. S. Hilton

Atty

Rec'd 30 July 1850 at 9 A.M.

Filed May 29. 1850

L. Leland Clk.

Sheriffs fees $1.25 Besides per cent age per centage 57 per cent

$2.98

5.94

in all ——— $14.45½ Cts

Supreme Court, 3d Grand Division - June Term 1849.

The Board of Trustees of the Illinois & Michigan Canal
vs
Daniel Lynch

Appeal from Cook County Court.
Judt. affd. June 30. 1849.

Appellee Costs - Appn. 25, Fil. joinder 6¼, Fil. 2 points 12½, 43¾
Rule for abstracts 25, bill of costs 37½, Cy 25, Certf. & Seal 50, 1.37½
Fil. & Dk. 18¾, Skffs. etc. 12½, Satisfn. 25, Dk. fee 12½, 1.81¼
Amt. $ 3.62½

State of Illinois, ss.

Supreme Court—Third Grand Division, at Ottawa:

The People of the state of Illinois to the sheriff of Cook county---Greeting:

WE COMMAND YOU, that of the goods and chattels, lands and tenements of _____ you cause to be made the sum of three _____ dollars and sixty two & a half cents, the amount of the foregoing bill, which is due and unpaid, and is a true copy from the Fee Book in my office; and hereof make due return in ninety days.

WITNESS, the Hon. Samuel H. Treat, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 27th day of July A. D. 1849.

L. Leland *Clerk of the Supreme Court.*

S12124-93

Supreme Court.

Canal Trustees

vs

Daniel Lynch

Fee Bill $3.62½

Filed May 29. 1857.
I. Leland Clk.

Streeter's fee Bill
mileage
etc

511
25
12½
50 88½ Bd

59.92
5
29.5
2.58

No 32
Canal Trustees
vs
Daniel Lynch

1849