

No. 14137

Supreme Court of Illinois

Gedion Sibert

vs.

Daniel McAvoy

71641  7

GIDEON SIBERT, and others, Appellants,  
vs.  
DANIEL McAVOY, Appellee.

} Ap. al from Morgan.

The subject matter of this controversy was tried as an "agreed case" at the special November Term '51 of the circuit court of said county "by consent of parties by their counsel, the cause was submitted to the Judge of this court for trial, he to try matters of law and fact." "The Plaintiff then produced as a witness and offered to prove by Napolcon Koscialowski" (who was draftsman of the contract) "an expert engineer, that according to the terms of the contract sued on, and the length and depth of the ditch in said contract mentioned, there were 6125 yards of excavation in said ditch." A *pro forma* judgment in the agreed case was rendered vs. M. for \$31,55 from which he appealed to the Supreme Court and which was affirmed. See 13th Illinois Reports.

To undermine the effect of said Judgment M. says in his bill "the depth of said ditch was not agreed upon, and the rule referred to was adopted to determine the depth, and it was this, two imaginary lines were to be drawn and the average length of these lines (that is a line from the bottom of the ditch to the upper edge of one side of the ditch) was to be taken for the real depth of the ditch, without reference to the actual depth of the ditch, and by that length of line adopted as the depth of the ditch, was the number of cubic yards of excavation to be determined, whether said rule made it more or less than the real quantity thrown out." Record 4. "That said contract was reduced to writing partly by a person employed for that purpose, and partly by said committee, and in the writing of said contract a mistake was made in this. The writer failed to insert in the contract that the length of the lines from the upper edge of the ditch to the centre of the bottom of the ditch was to be taken and assumed as the depth of the ditch, as agreed upon between the parties, *but in said contract it is written, that said lines are to be drawn when the measurement is made*: but the object of drawing said lines is not given in the contract, except that a diagram or a kind of unmeaning figure or cross-section of the drain is given or made in the contract, as a sort of explanation of said mode of measurement. This contract so erroneously prepared was signed by your orator and the committee with (without?) knowing of said mistake, or an understanding on the part of your orator, that the contract did not set out the true contract as it was made." Record 5, 6.

"Complainant supposing he had a remedy at law to collect said balance due and knowing nothing of the mistake or error in writing said contract, commenced suit in the Morgan Circuit Court for said balance (although it has since been discovered, and the fact is now here averred to be, that said court as a court of law, had no jurisdiction of said case.)

"At the trial of this cause, this David L. Hodges was produced as a witness and the contract being in his possession was produced in evidence, and then for the first time the mistake in writing said contract was discovered, and the said Long, Sibert and Thompson fraudulently and dishonestly then sought to, and

*did take advantage of said mistake," &c.* Record 7. "No final trial of this case was had in the said suit at law in the said circuit court, the jury having failed to decide, and at the November Special Term of said court 1851 the attorneys for both parties made an agreed case and took same to supreme Court" &c. Record 8. Bill prays for direction of particular issue, Record 10, 11, and two issues were directed, Record 17, 18.

The answer, Record 12 to 16, denies the allegations of the bill, excepting the history of the litigation of the parties resulting in the *agreed case* and Judgment thereon, and insists that that is a bar to the relief sought in the bill.

The issue (without specifying which) who found for M. and motion for new trial was made and overruled, Record 19.

Decree rendered, Record 26, 27, depriving appellants of the benefit and protection of results of *agreed case*, taking away from them the \$31,55 adjudged against M. in that case, and is against Beagle as administrator of Long *de bonis propriis and not to be paid by him in due course of administration.*

Assuming to be true (what we do not believe) that the circuit court had no jurisdiction of the action at law brought by M. on the discovery of that fact he ought to have dismissed his action without driving it to two mistrials, and ought to have sought, on his own principles, redress on other grounds and in another *forum*. But with a full knowledge of the facts, and all the facts of the case acquired at the first trial, after a second mistrial, he by his counsel makes an agreed case, (a very broad and comprehensive remedy) saying and offering to prove by Koscialowski that by "the terms of the contract sued on" he was entitled to recover for 6125 yards of excavation, and being baffled in this, he now says that this was all an idle unmeaning affair; that there was a mistake behind it, of which he had been long apprised, and that the Judgment in the agreed case must be nullified and the costs of all the litigation in which he had failed (and which he had paid) should be refunded to him, and which is allowed by the Record and proceedings of the court below, excepting in regard to the claim for costs. Is this allowable? It is not, if it be the interest of the State that there should be an end of strife. If no one should be vexed twice for the same matter of litigation. If there be any such thing as an estoppel by former Judgment or Decree, and especially if it be true that a party shall not be tempted by the policy of the law to resort to perjury or subornation of perjury to elude the consequences of his laches or dormancy.

An *Agreed Case*, with reference to existing and known facts, must be an estoppel, as to the scope of litigation, unless a party litigant has a right, on suggestion of falsehood or honest mental reservation, to set aside the result of any agreed case.

BROWN & SMITH,  
Att'ys. for Appellants.

Abstract

Libert & others  
v. S  
McAvery

G. W. T. A. L.

vs 3 Appeal from Judge  
Daniel McArvy -

When parties reduce their contract  
to writing - they are bound by the writing -  
\*all previous bargainings are merged  
in the written contract - and the parties  
are bound by it, unless there be a mistake  
in reducing the contract to writing - or fraud.  
A misapprehension, as to the construction  
of the contract - is no excuse to writing, will  
not warrant the interposition of the Chancellor  
or to modify it by parol testimony. To do  
so would open the door for perjury & sub-  
ornation of perjury -

Broadwell v. Broadwell 1: Gil.

605. 606. 607 -

Even in the case of alleged mistake in reducing the  
contract to writing - the case must be  
fair upon its face - and clearly & fully sus-  
tained by proofs - *idem* -

It is respectfully submitted to the court, that  
such is not the case at bar, & that the case is  
not clearly & fully sustained -

The allegator & Proctor must agree to  
warrant the rendition of a decree -

Moffatt v. Clements - 1: F. Cas. 384.

The allegator do not agree with the issues ordered  
by the court and the finding of the jury - as to  
the mode of ascertaining the depth of the ditch,  
and <sup>upon this point,</sup> the attention of the court is especially invited  
to the record. Two different modes are stated in  
the record bill, and yet a 3rd one is set forth in

X means the contract ~~is~~ as construed by this court 15 ell. 147 - Hoayed - was  
the person to measure the excavations - but the ~~width~~ is an inward that  
he or any one else measured the cubic yards in the  
the imaginary, digging ~~width~~ a man was measured

issues referred to the jury.

The issues referred to the jury are uncer-  
tain & insufficient, and do not sufficiently  
refer to the jury for trial - This question  
to wit - whether in making the contract to writ-  
ing ~~the following~~ <sup>the following</sup> mode of measurement ~~from copy~~  
~~made off~~ <sup>copy</sup> for ascertaining the depth of the ditch, (see  
copy <sup>of</sup> the mode stated in the bill) was by mistake  
omitted in reducing the contract to writing.

Beaugh Admr of Long was made a party  
at the instance of complainant. In the  
affidavit of complainant's solicitor, that  
the cause would not progress, until he was  
before the Court. The cause should be  
dismissed because of the erroneous decree  
against him.

The Chancellor is not bound by the  
finding of a jury upon an issue re-  
ferred, & should over another verdict,  
where the finding is contrary to his  
~~conscience~~ better judgment, as to the  
justice and truth of the case - X

Upon the whole, now - we look upon  
this case as an attempt - to get behind the  
construction of a contract - ~~as intended~~ <sup>as we perceived</sup>  
upon the circuit and in this court.  
~~intended~~ ~~by~~ ~~contract~~ by alleging a  
~~mistake~~ to correct the ~~construction~~ ~~placed~~  
upon the contract by the courts. It is clearly  
an afterthought.

We maintain, that the court is concluded  
by the records & proceedings, in set up  
as a defence in the answer, (see authorities  
referred to by both in his argument.)  
If however the court should

think otherwise. In the case, should be re-  
versed for ~~the~~ other causes - presented to the  
court - and in that court we ~~are~~ would ask the  
court to direct that the issues referred to the  
jury be set aside and that the court  
below be either directed to proceed to the  
trial of the cause, with the right to either last  
party to introduce evidence - or the  
court below will ~~insist~~ insist upon referring the cause  
to a jury that ~~certains~~ certain specific issues - as before suggest  
ed to be referred to the jury, directed to be tried -

Wm. Brown for appellants  
& D. A. Smith for appellees  
Court

E. Tibbitts  
vs  $\int$  Appeal  
Daniel McCreary

Points ~~made~~  
by Brown &  
authorities.

Plas held at Jacksonville within  
and for the County of Morgan and  
State of Illinois before the Honorable  
David M. Woodson Judge of the  
first Judicial Circuit of said State,  
sitting as a Court of Chancery  
on the 4<sup>th</sup> day of November  
A. D. 1853.

1 Daniel M. Hooy

vs  
William H. Long, Gideon Sibert  
and Orest C. Thompson. } In Chancery  
} Be it remembered  
that heretofore to wit, on the 13<sup>th</sup> day of February  
1852 the Complainant in this cause filed the  
following bill in Chancery in our said office  
to wit, -

To the Circuit Court of the County of  
Morgan and State of Illinois, sitting as a  
Court of Chancery. - Your Complainant Daniel  
M. Hooy, represents that on the day of or  
thereabouts the inhabitants of a certain  
district of Country, in the neighborhood of  
Meridian in said County of Morgan being  
desirous to drain their land, met together or  
being together for the better management  
for the said enterprise of draining, appointed  
William H. Long, O. C. Thompson and Gideon  
Sibert as a Committee to superintend said  
drainage, and to make all necessary  
contracts, and arrangements to effect said  
object, and then and there by some form

of proceeding, to your Order unknown, your said  
Committee power to raise money, by subscription  
and in other ways to pay for said work, and  
the expenses of draining, - In pursuance of the  
Authority so vested in said Committee, they  
proceeded to offer said job of draining to  
be done by Contract, and on said last mentioned  
day, they the said Seny Thompson & others  
contracted with your Order, to do said work,  
and he your Order, then agreed in substance  
that he would do said work, and dig for  
them a ditch or drain, which in all  
things as to its length, location and  
depth, was to be done under the direction  
of said Committee, and the parties then  
and there agreed, that as the length and  
depth that said drain would be, when  
done, under their direction, and as the  
ditch might be deep, in some parts thereof,  
and require a great many cubic yards  
to be excavated in a small distance, and  
in other places drain might be shallow,  
and require the ditcher to pass over a long  
surface, to excavate comparatively a few  
number of cubic yards, and as the actual  
costs of making said drain, and the amount  
of work necessary to complete the same, to  
suit their employer, and to answer the  
objects intended, was entirely unknown to  
both parties, It was agreed that the price  
of said work, to be paid to your Order  
by said Committee, should be twelve  
and a half cents per cubic yard, for

excavation, but the number of cubic yards when the work was done, must be determined by an artificial rule of measurement then agreed upon between the parties, which rule must be arranged as to give more than the real quantity of cubic yards excavated, and where the excavation was light, the drain shallow, and much ground to pass over, the rule would give a greater amount of excavation in proportion to the real amount of earth removed than it would give, when the drain was deep, and a larger quantity of earth could be thrown out in passing over a shorter space, it was known to all the parties that along shallow ditches could not be dug, and properly finished for the same price per cubic yard of earth actually removed, as a ditch that would be deeper and just so deep, as that a man with a spade or shovel could cut the earth from the bottom to the surface and thus throw out a greater number of yards from the less length of drain, and the rule of measurement agreed upon, was so arranged as to increase or diminish the nominal quantity over the actual quantity of earth thrown out, in proportion as the drain was long and shallow or short and deep, thereby to increase the price per cubic yard, where it was more labor, or less labor, to remove from a given drain, a given quantity of earth. - It was agreed upon, that when the ditch was done, it

was to be of the average width, of three feet nine  
at the bottom, and six feet nine at the top,  
and this was to be the dimensions of the ditch,  
whether it was deep or shallow, as near as the  
nature of the surface of the earth over which  
the ditch passed would permit, but the  
depth of said ditch, was not agreed upon,  
and the rule referred to, was adopted to  
determine the depth, and it was that,  
two imaginary lines, were to be drawn, from  
the top edges of the ditch on each side,  
to the center of the ditch and the average  
length of these lines (that is a line from  
~~the~~ the bottom of the ditch to the upper edge  
of one side of the ditch) was to be taken  
for the real depth of the ditch without  
reference to the actual depth of the  
ditch, and by that length of line adopted  
as the depth of the ditch, was the number  
of cubic yards of excavation to be  
determined, whether said rule made it  
more or less, than the real quantity known  
out, — This rule and the whole mode of  
measurement, and its objects and results  
was all talked over explained and fully  
understood by the parties, when the contract  
was made, and to the end that the contract  
might be clearly understood, it was  
agreed that said contract was to be  
reduced to writing, and signed by the  
parties, and was to be left in the hands  
of David S. Hodges, to be referred to, by  
both and all parties, when wanted, —

and the said Committee selected said David S. Hodges to make said measurement, and determine the quantity of excavation, in the construction of said drain after it was done, said Hodges was not the choice of your Orator, but as said Long and others, for some cause then unknown to your Orator were very anxious that said Hodges should be selected to measure said ditch, he was agreed upon, and his name was inserted in the contract. Your Orator has since learned that said Hodges was interested in said drainage, and the benefits arising from said work, and had agreed to pay a part of the expense thereof, and your Orator now so states the facts to be, and therefore said Hodges was a very improper person to determine the quantity, and consequently the cost of said work. Your Orator now says that said Contract was reduced to writing partly by a person employed for that purpose, and partly by said Committee, and in the writing of said Contract a mistake was made in this, the writer failed to insert in the Contract, that the length of the lines, from the upper edge of the ditch to the center of the bottom of the ditch was to be taken and assumed as the depth of the ditch as agreed upon between the parties, but in said Contract it is written that said lines are to be drawn when the measurement is made, but the object of drawing said lines is not given in the Contract except that a diagram or a kind of unmeaning figure, or cross section of the drain is given, or made in the Contract, as a sort of explanation of said mode of measurement, this Contract so erroneously prepared, was signed by your Orator and the

Committed, with knowing of said mistake, or an understanding on the part of your Orator, that the Contract did not set out the true Contract as it was made, and the same was left with said Hodge, Your Orator further says, that among other things, it was agreed upon, and ~~nothing~~ ~~was~~ written down, in said Contract, that the said Committee should pay a certain per cent of the supposed value of the work, as it progressed, retaining the residue of the value, to secure the final completion of the work, and your Orator now shows, that while said work progressed, they did pay from time to time, near up to the sum they agreed to pay but not the full amount, but retained more than the sum agreed to be retained, yet throughout the whole transaction, they acted towards your Orator, and treated the Contract as it was originally made, and not as it was written down, between the parties, Showing clearly how they understood the Contract, a copy of the written Contract is hereto attached, and made a part of this bill. Your Orator now says, that understanding the Contract as herein stated and not as written down he proceeded to finish, and complete said work, under the direction of said Committee, and to their entire satisfaction, Up to the time the drain was finished and received, said Committee had paid towards said work to your Orator, the sum of four thousand and six dollars, and ninety five cents, retaining more than twenty per cent of the value of the work done, when under the Contract they had a right to retain said twenty per cent, according to the mode of measurement actually agreed upon

there was taken from said ditch, Six thousand  
One hundred and twenty five cubic yards of  
earth, for which he was entitled to receive from  
said employers, twelve and a half cents per cubic  
yard, making the aggregate sum of Seven  
hundred and fifty five dollars, fifty two and a  
half cents, which left due on the day that said  
mortg was done that should have been paid to your  
Orator three hundred and fifty eight dollars,  
and fifty seven and a half cents, at the finish-  
ing of the mortg, said employers were not ready  
to pay the balance due, but promised from  
time to time to do so, and never pretended or  
insisted that they had fully paid for all of said  
mortg, time passed and there employers did not  
pay, and this complainant supposing he had  
a remedy at law to collect said balance due,  
and knowing nothing of the mistake or error  
in writing said Contract, commenced suit in  
the Morgan County Circuit Court for said  
balance (altho it has since been discovered, and  
the fact is now here averred to be, that said Court  
as a Court of law, had no jurisdiction of said case,

At the trial of this cause, that David S.  
Ardges was produced as a witness, and the  
Contract being in his possession was produced  
in evidence, and then for the first time the  
mistake in writing said Contract was discovered,  
and the said Senz, Sibert and Thompson,  
fraudulently and dishonestly then sought to  
and did take advantage of said mistake,  
and said Court of law could not look  
into said question of the error in writing  
said agreement, but was bound to take

said writing as it stood, and the said Hayes having measured said ditch, not according to the actual agreement of the parties, but measured as he said the actual quantity of excavation, and stated that the same amounted to three thousand, and three and one quarter Cubic Yards, which at 12 1/2 cents per yard, amounted only to three hundred and seventy five dollars and fifty cents, which left the Complainant indebted to the parties \$31.55 or thereabouts. - No final trial of this case was held in the said court at law in the said Circuit Court, the jury having failed to decide, and at the November Special Term of said Court 1857. the attorneys for both parties made an agreed case, and took the same to the Supreme Court, to procure a construction of said written Contract, in which agreed case, it was admitted, that if a fair construction of said Contract, as it was written only authorized this said Complainant to ~~excavate~~ <sup>claim</sup> 12 1/2 cents per yard, for the real amount, or number of Cubic Yards excavated, then he had received \$31.55 over and above the amount due, by said Contract, as it was written, and former Judgment was reversed by said Circuit Court against the Complainant, in favor of said Sing and O'Neil for that sum, this agreed case was taken to the Supreme Court, and said Court gave a construction to said Contract in substance, that as said Contract was written, the real amount of excavation only could be measured and paid for, and that said diagram, and the statement of these lines in said written Contract, had no meaning, and did not change the

mode of measurement, from the real quantity excavated,  
and consequently by said proforma Judgment, of  
said Circuit Court, was affirmed, in all this proceeding  
at law, the question of the error or mistake, in the  
writing of said Contract was not tried, or made  
ever made in said case, - Your Orator now charges  
that he has no remedy, for the wrongs and injuries  
thus complained of, except in this Honorable  
Court of Chancery, where matters of mistake  
accident and fraud, can alone be heard and  
corrected, Your Orator now says that it was  
with more than \$800.00 to do said work, and  
that it cost him near Six hundred dollars  
besides his own time, risk and labor, to  
complete the same, and these employers  
well knew said fact, and it was and is  
dishonest and fraudulent in them to refuse  
to pay, what they have actually agreed to pay,  
because the said agreement was not written,  
as the parties intended, Your Orator further says,  
that by the dishonest conduct of said Long,  
Pierce and Thompson, in taking advantage of  
said mistake, and by reason of said mistake,  
a large amount of cost has been made by the  
parties to said suit at law, a great portion of  
which was made by said Long and others, which  
in justice and equity they ought to pay and  
the said Complainant here files as a part  
of this bill, two bills of cost, showing the  
costs made in said suit at law and  
designating the costs made by each party  
to said suit, - Your Orator says that said  
Judgment at law, is most unjust and

inequitable, and he should not be required to pay  
the same. He further charges that he is entitled  
to recover of and from said Long, Stebbins and  
Thompson and their associates in said  
enterprise, said balance due him, of \$358.67 1/2  
cents and interest thereon from the first day  
of January 1851. and the costs of this suit.

Your Orator therefore prays, that said William  
Henry Stebbins Stebbins and Capt. C. Thompson  
and their associates when discovered, be made  
defendants to this bill in Chancery and that  
they answer specifically and definitely every  
allegation of this bill, but said answers need  
not be under oath. Your Orator further prays  
that an issue out of Chancery be made in this  
cause to be tried by a Jury, in the Court of  
law, to be sent into that Court for the purpose  
and that the question to be tried shall be  
"Was or was not, the lines mentioned in said  
Contract, from the upper edges of said ditch, to  
the centre of the bottom of said ditch, and the  
average length of one of said lines to be  
assumed as the depth of said ditch, whether  
said length of lines, should be more or less than  
the real depth of said ditch, and was or  
was not, that the rule agreed upon by said  
parties, to said Contract by which the quantity  
of excavation in said ditch, was to be measured,  
whether said rule would make said quantity more  
or less than the real quantity and was not that  
part of said Contract left out of said written  
Contract by mistake, and should not that  
part of the Contract, fixing the said rule of

measurements have been written down in said  
written agreement. - Your Orator further prays  
that if said decision of said Jury shall  
determine, or if it shall be determined in any other  
manner in this case, that said Contract was made,  
and said mistake did occur, as herein contended  
for, then that this Court, will Order and decree,  
that said defendants pay to your Orator the  
said balance due, and said interest, and  
the costs so unjustly made and caused to be  
made as aforesaid. And he prays generally  
all other and further relief, that his case  
may seem to require when fully heard, and  
more especially he prays that said defendants  
be enjoined from collecting said Judgment  
at law, and all of said costs, so by them  
made and recovered of said complainant,  
and that at the hearing of this cause,  
said injunction become perpetual,

Daniel McAvoy -

McCormick English Sol. for Comptts.  
Copy of Contract -

Mercedino, 6<sup>th</sup> Nov. 1850

We the undersigned committed for digging ditch,  
near Mercedino, to drain Olin's bottom do agree  
to pay Mr. Daniel McAvoy, the sum of 12 per  
cubic yard, of earth, measuring excavation in the  
following manner, from the centre to the one side,  
then to the other from centre, also that ~~the~~ the above  
measurements, to be made by G. S. Hodges, Esq.  
also we agree to pay, every two weeks, at the  
work progresses, retaining 20 per centum, till the  
work is finished, the ditch being more or less

than two miles, Mr. Daniel McAvoy, has exclusive right to the whole length of it, the above ditch to be made according to the directions of Wm. Leng, Gideon Sibert, and J. C. Thompson, and to be commenced forthwith, and prosecuted to completion as soon as possible,

Signed

Daniel McAvoy,  
Wm. Leng  
Gideon Sibert  
J. C. Thompson.

And afterwards to wit on the 14<sup>th</sup> day of March 1852 the defendants filed the following answer to the bill in this cause to wit —

State of Illinois, Morgan County to wit.

12  
The answer of William H. Leng, Gideon Sibert and Joseph C. Thompson, to a bill in Chancery exhibited against them in the circuit court of said County, for the March term 1852, by Daniel McAvoy complainant, — said respondents, saving and reserving, &c. for answer to so much of said bill, as they are advised, that it is material for them to answer unto say, that they admit the execution of the contract of the 6<sup>th</sup> of November 1850, as copied in the complainant's bill they say that about the date of said contract in Mendocino, in the presence of John Trubue and probably of George M. Beagle the complainant presented said contract, (to which there was afterwards a slight addition as to the ditch being dug under the directions of Wm. Leng in the hand writing of one Napoleon Mosciulakie, to respondents Wm. Leng and Gideon to be signed by them, and with the provision, that the said

13  
Koscialowski should make the measurement of the  
work, the said respondents, objected to that provision,  
and proposed that the said John Trubue, should  
draw up another Contract, the Complainant said,  
that that Contract would do, and all that he  
wanted was 12 $\frac{1}{2}$  cents for each cubic yard of  
earth that was thrown out of the ditch, the name  
of the said Koscialowski was then erased from  
said Contract and the name of D. L. Hoyle  
inserted thereof instead, the aforesaid addition  
was made to said Contract, and it was then  
signed by said Complainant and said  
respondents, and deposited with the said  
Trubue to keep, and procure (which he afterwards  
did), the signature of said respondent Joseph C.  
to said Contract, nothing was said at that time,  
or intended by said respondents (who cannot tell  
what intentions or mental reservations the said  
complainant had in the premises) about the  
line, from the centre of the bottom of the ditch,  
to its upper or outward margin, being assumed  
as the rule of measurement, to ascertain the  
depth of the ditch, or about any construction proposed  
for the measurement of the ditch, other than the  
actual cubic excavation of the same, Your said  
respondents never had any interview with the said  
Koscialowski about the matter, until about the  
time of finishing the work, and some time after  
the Contract was drawn and signed, and never  
authorized him, or any one else to insert in  
said Contract any such absurd unreasonable  
and unjust rule of measurement as this tenet,  
that the shallower the said Complainant should

16  
have said ditch dug, the deeper he would get into the  
pockets of your said respondents, or in other words  
that the less work he did, the more pay he would  
get, after the said Complainant finished the  
digging of said ditch, in a conversation as to the  
mode or rule of measuring the same, in the  
presence of some two or three disinterested  
persons, he the said Complainant said, that all that  
he wanted was 12½ cents for each cubic yard  
of dirt thrown out of said ditch, or something  
to that effect — Your respondents allege that  
that was not only an adequate, but it was a high  
price, with reference to ruling and usual rates  
for such a job, estimating by the rule of actual  
cubic excavation, Your respondents allege, that  
the foregoing was the just full, and true state  
of facts appertaining to the matter in controversy  
in this case, when the Complainant (who had  
then overpaid a sum of \$31.00) sued your said  
respondents on said Contract, to the March term  
1857 of this Honorable Court, at that term of the  
Court said Cause was tried, on the testimony of  
the said Kosciniowski and others, and the  
jury not being able to agree were discharged,  
at that trial not a word was said nor was there  
the slightest intimation from the Complainant  
or his Counsel, or any witness about the omission  
of any intention in reducing said Contract to  
writing, the burden of Complainant's alleged  
grievance, as set forth by his Counsel, and  
witness or witnesses was, that on the principles of  
Scientific rules, and construction, the ditch  
was to be measured, so as to arrive at the result  
of more than twice the number of 4 cords

of actual cubic excavation, at the next succeeding  
term of this Honorable Court, that was holden  
twice, in November 1851. there was another trial of  
the matter in Controversy in this case, under  
the same state of facts and circumstances,  
and with the same results, it was then proposed  
by the Council of Respondents to Council of the  
Complainant, that the facts of this case should  
be agreed, and that the Court should try  
matter of law and fact, this proposition was  
acceded to, and on the 8<sup>th</sup> day of November  
1851. the facts of the case were agreed, by  
15 the Council of the Complainant, and  
respondents, and the Court tried the case,  
and rendered a Judgment in favor of said  
respondents for \$31<sup>55</sup>/<sub>100</sub> and costs of suit, all  
of which were fully and at large affirmed,  
by the proceedings of record in said case, in this  
Court, which respondents pray your Honor to  
inspect on the hearing of this cause, said  
Judgment was appealed and affirmed in the  
Supreme Court of said state, and is in full  
force, unrevoked, and as respondents are  
sorry to say is unsatisfied. — Your respondents  
say, that the foregoing is a true, full and true  
statement of the matter in Controversy in this  
case, and they deny as false and fraudulent any  
and every intimation in Complainant's bill,  
that conflicts any respect, with any statement  
in this answer they especially deny as untrue  
and ~~untrue~~ <sup>untrue</sup> ~~untrue~~ <sup>untrue</sup> to the last degree, the  
statement in the bill, that pretended mistake  
in drawing up the contract, was not discovered

16  
until that of 4<sup>th</sup> there had been two trials of the case,  
before the facts were agreed, and nothing said  
or intimated about mistake in drawing up the  
Contract altho adduced in evidence in both  
trials, Respondents are advised today, that the  
agreed case, and result of it, constitutes a  
full and complete bar to the complainant's  
bill, and the relief therein prayed for, that his  
discovery of mistake if true, is "too late", that to  
indulge herein the course of proceedings, he  
is resorting to, would be an encouragement to  
recalcitance toward his dormancy, and would lay  
in his way temptations to undermine the legal  
effect of said agreed case, and the deception of  
the same, by perjury and subornation of perjury,  
and would be equivalent to granting him a new  
trial, because he did not make as much of his  
case, as to the proofs or agreement of the facts  
of it, as he might have made, with the exercise  
of reasonable skill and diligence, - Respondents  
therefore pray to be herein hereto dismissed, with their  
reasonable costs,

Wm H. Long  
Gideon Tibbels  
Brown Smith      Supt. C. Thompson  
for Respondents      Respondents

And afterwards writ on the 18<sup>th</sup> day of March  
1852 the complainant filed the following  
replication to said answer writ

Now again comes the said complainant  
in the above entitled cause, and for replication  
to the answer of the said defendants filed  
herein say, that the said answer, and the

various allegations thereof, so far as they in any manner gain say or deny the allegations of the Complainants bill, filed herein are untrue, and so far as the allegations of the said Complainants bill are denied by the said answer, the said allegations are true in manner and form as herein stated, all of which this Complainant will prove and establish before this Honorable Court, in manner and form as required by law and as this Honorable Court shall direct, Wherefore your Complainant prays, again as in his said bill, he has heretofore prayed and set forth,  
McConnell & English for Complt

And afterwards tried on the Special November term 1832 the Complainant moved the Court to make up certain issues herein and send them to be tried by a jury which motion is in the most and figure following to wit, the Complainant <sup>now</sup> moved here tender the following issues to be tried by a jury, as necessarily growing out of the suit in Chancery, and he prays the Court to order and direct that said issues be tried as aforesaid - 1<sup>st</sup> It is alleged by the Complainant, that the mode of ascertaining the depth of the ditch, mentioned in the bill, as intended to have been agreed upon by the parties, was to draw a line, from the centre of the ditch, at the bottom thereof to the upper edge of the ditch, and the length of that line was to be taken, as the actual depth of the ditch, whether the actual depth of said ditch was more or less, and that there

18  
There was a mistake in writing the Contract, and in that particular, the Contract was not made to express the real intention of the parties. The defendant deny that the length of said line is drawn from the center of the bottom of the ditch to the upper edge of the same, must be taken as the real depth, of said ditch, but the depth of said ditch must be ascertained by measuring the real actual depth of said ditch. — 2<sup>nd</sup> —  
The Complainant alleges that by the Contract of the parties, and as it was intended to be written, adopting the mode of measurement intended by the parties, he said Complainant is entitled to be paid for excavating Six thousand one hundred and twenty five cubic yards, at 12 cents per yard, and that it not being so written was a mistake of the person employed in writing said Contract. — On the part of the defendant this is denied, and it is alleged that the real amount of excavation from said ditch was three thousand and three and one quarter yards only, and that was according to the Contract of the parties, and that no such mistake as the Complainant alleges was made in writing said Contract. —

And afterwards to wit, on the 18<sup>th</sup> day of November 1852 the following order was entered in this cause to wit, The Court having duly considered the Motion entered by the Complainant, to refer this cause to a jury, orders that the same be sustained, and the cause is continued. —

And afterwards to wit on the 2<sup>nd</sup> day of April 1853 at

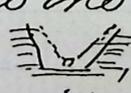
19  
the March term of the Morgan circuit Court the following  
order was made in this cause, to wit, This day came the  
parties by their attorneys, and to try the issue joined in  
this cause there came a jury, to wit, N. J. Stevens,  
Samuel Black, William Williamson, Jacob Barton,  
John Dunwan, Benjamin Capell, Mark Fay, James  
Buckingham, James Kirkman, Ambrose Henderson,  
Henry Capell, and Robert Murby, who being elected  
tried and sworn well and truly to try the issue  
joined as aforesaid after hearing the testimony adduced  
and the arguments of counsel, retired in charge of the  
proper officer to consider of their verdict, and after  
hearing the testimony adduced and the arguments  
of counsel being about some time, came into Court  
and upon their oaths do say that they find the  
issue for the plaintiff, whereupon to try the issue  
joined in this cause the defendant enter their  
motion for a new trial of said issue, which being  
heard is overruled —

Upon the trial aforesaid the following instructions  
were given by the Court for the complainant, to wit,  
The Jury in this cause are instructed by the Court,  
that if the parties agreed as a part of their  
contract, that the length of the lines to be drawn  
from the centre of the bottom of the ditch to the  
top of the edge of the ditch as shown in the  
contract was to be taken as the ditch depth of the  
ditch, without regard to the real depth of the  
ditch, and that said part of the contract (showing  
that the length of said assumed lines was to be  
taken as the depth of the ditch,) was by mistake  
left out of said contract, the Jury will find

for Mr. Avey that fact, and in making their verdict they are to take into consideration all the conduct of the parties, in paying for said work, as it progressed, and all other circumstances proven on this cause, as tending to explain how the defendants and the plaintiff understood this contract, when the same was made, and while the work was in progress, — And at the same trial at law the following instructions were given in behalf of the defendants, to-wit: —

20 If the jury believe from the weight of the evidence in the case, that the contract of the parties, was that the ditch was to be measured by actual cubic excavation, then they must find the issue for the defendants, — 2<sup>nd</sup> That if the jury believe from the evidence there was no mistake in reducing the contract to writing, then they must find a verdict for defendants. —

And afterwards tried at the October term of said Court, by consent of parties said cause was submitted to the Court to be decided in execution, and at the trial of said cause, the following depositions and agreed case and contract were read as evidence, Copy of Contract, —  
Meredith Ill. C. of Nov. 1850

That the undersigned Committee for digging ditch near Meredith to drain Illinois bottom, to agree to pay Mr. Daniel McAvoy the sum of \$12 $\frac{1}{2}$  per cubic yard of earth, measuring excavation in following manner, from the centre to the one side, then to the other from centre, also that  the above measurement to be made by David S. Hedges, also we agreed to pay every two weeks, as the work progressed, retaining 20 per centum till the work

is finished, the ditch being more or less than two miles,  
Mr. Daniel McAvoy has the exclusive right to the  
whole length of it, the above ditch to be made  
according to the direction of Wm H Long, Gideon  
Sibert and J. C. Thompson, and to be commenced  
forthwith, and prosecuted to completion as soon  
as possible.

Daniel McAvoy

W. H. Long

J. C. Thompson

Gideon Sibert.

Copy of Agreed Case —

In the Circuit Court of Morgan County  
State of Illinois, Special November term

Daniel McAvoy Plaintiff

1857.

vs  
William H. Long, Gideon Sibert  
and Joseph C. Thompson, Defendants

in assumpsit

Agreed Case —

It is remembered

that the plaintiff declared against the defendants  
in assumpsit, on the following contract of the  
parties, (being the same contract above copied)  
and the defendants pleaded the general issue,  
with notice of set off, at this term of the court,  
by consent of parties by their counsel, the cause  
was submitted to the Jurors of this court for  
trial, he to try matters of law and fact, —  
It is agreed that the plaintiff under the contract  
caused to be dug a ditch 652 rods long,  
6 feet wide at the top, 3 feet wide at the bottom,  
and of the average depth of 20 1/2 inches, as  
the work progressed from time to time, and before  
it was measured, the defendants paid the plaintiff  
on account of it \$406.95. the plaintiff then

produced as a witness, and proved by the said David  
S. Hodge named in said Contract, that according  
to his interpretation, and understanding of the  
same, he had measured said work, and that  
there was contained in it  $3003\frac{1}{4}$  cubic yards,  
the plaintiff then produced a witness, and  
offered to prove by Napoleon Kercielowski, an  
expert engineer, that according to the terms of  
the Contract used on, and the length and  
depth of the ditch in said Contract mentioned,  
there were 6125 yards of excavation, in said  
ditch, which was objected to by the defendants,  
and the objection was sustained by the Court,  
and the offered evidence was rejected, the  
Court decided that from the terms of the  
Contract, the parties had referred the whole  
matter to David S. Hodge as to the rule to  
be adopted for the measurement of the ditch,  
and as to the construction of the Contract  
touching the mode of measurement, and that  
the plaintiff ought not to be permitted by  
other witness experts or others to show or prove  
that the rule of construction adopted by said  
Hodge, or that the measurements made by him  
was not according to a proper construction of  
said Contract, and that the measurement  
made by him, was not the correct measurement  
of the work, according to a proper construction  
of said Contract, but the parties were bound  
by his rule of measurement, and by his  
construction of the Contract. — To which opinion  
of the Court plaintiff at the time excepted,  
this being all the evidence given and

afford in the case, His Honor the Judge of this Court, rendered a pro forma Judgment against the plaintiff, and in favor of the defendant, for \$31.55, and the costs of this agreed case, which is to be certified by the clerk of the Court to the next term of the Supreme Court of this State, for the 2<sup>nd</sup> General division, in behalf of plaintiff as appellant, who may assign errors in the case as the Statute provides. If there be no error in the premises, the said Judgment pro forma, is to be affirmed, if there be any error in the premises, then said pro forma Judgment is to be ~~reversed~~ reversed, and cause to be remanded to this Court for trial at the first term of the same, that may be holden after the decision of said case, in the Supreme Court,

M. McConnell atty for Reff  
Brown, Yates Smith atty for Defts.

23  
Jacksonville November 8<sup>th</sup> 1851.

Copy of Depositions.

Deposition of William B. Warren for complainant.  
Question 1. - Was there or not, a suit of law, in the circuit Court of Morgan County, commenced by Daniel McArroy, to enforce the Contract now in controversy, which suit went eventually to the Supreme Court of this State, of which Court you are Clerk, -

Answer There was,  
Question 2. Is or is not, the paper now shewn to you marked "A" and signed by the parties in that suit, the original Contract, and, in the Supreme Court and the hearing of said case,

Answer - The paper was used upon the trial in the Supreme Court, and was taken from the files and brought down here by me, at the solicitation of Mr. McConnell. -

Question 3. Please state what amount of costs Daniel McAvoy paid to you in the said case in the Supreme Court, and is not the receipt here shown you, marked "B," the receipt given by Daniel McAvoy by you, and state the circumstances connected with said payment. -

Answer - Daniel McAvoy paid to me \$19.20 the receipt marked "B," is the receipt given by me to him, there was no regular bill of costs made out, because I was unwilling to make unnecessary costs against him.

24

W. B. Warren -

Deputation of Charles Martin for complainant.

Question 1. Are you not Clerk of the Circuit Court of Morgan County, If you state whether the paper now shown you marked "C," is an agreement filed in a case at law in your Court of Daniel McAvoy against the defendants in this suit in Chancery and state whether that is or not the paper, upon which said suit at law, was taken to the Supreme Court by consent of said parties.

Answer - I am Clerk of said Court, and the paper referred to and marked "C," is the agreement upon which said case was referred to the Supreme Court of said State -

Question 2. State what was the amount of the Judgment recovered by said Long, Sibert and Shimpson in said suit at law, against said

Mc Brooy, and state the amount of all costs recovered in said suit at law by said Henry Sibert and Thompson of said Mc Brooy, and state whether said Henry Sibert and Thompson did not collect all said Judgments and costs of said Mc Brooy by execution issued out of your office.

25 Answer— On the 8<sup>th</sup> day of November 1851, J. H. Long, Gideon Sibert, and Joseph C. Thompson recovered a Judgment in the suit at law in which said Mc Brooy was plaintiff, in said Court for the sum of \$31.50 besides the sum of \$24.50 their costs by them expended, in said suit, & afterwards issued an execution to the Sheriff of Sangamon County for the amount of said several Judgments, together with a fee bill, for the sum of \$33.50 for the amount of costs made by the plaintiffs in said suit, which execution was afterwards returned into my office by said Sheriff satisfied in full, by which return it appears that said Sheriff collected \$92.07 on said execution, being in full for interest and commissions on said payment execution.

Question 5— State if there was not before said agreed case was filed a non-suit motion of said Court, by a hung jury in said suit at law—

Answer there was—

Charles Martin  
The following affidavit showing the death of defendant Long, was filed on the fifth of December 1853, Personally came Murray McConnell before

me the undersigned Clerk of the Morgan County  
Circuit Court in the State of Illinois, and  
made oath that since this suit was at issue,  
and since the verdict of the jury made on this  
issue out of Chancery in this cause the defendant,  
William Henry has died, and this case cannot  
proceed without making his legal representatives  
parties to this suit —

subscribed this 3<sup>d</sup> day of December, 1853

Charles Austin Clerk —

26. Whereupon by consent  
of parties and by order of the Court Mason Beagle,  
administrator of said Henry is made a party to  
this suit, in the place and stead of said  
William Henry deceased, —

And afterwards to wit the Court having heard  
said cause the following decree was entered at  
of said October term to wit —

This cause coming on to be heard upon  
bill, answer and proofs in said cause, and it  
appearing to this Court, that the defendant  
William Henry since the May term of this Court,  
in 1853, had departed this life, and Mason  
Beagle has been appointed his administrator,  
whereupon by consent, the said Beagle as  
administrator as aforesaid, makes himself  
party defendant herein in the place and stead  
of the said defendant Henry deceased, and enters  
his appearance herein. And it further appearing  
to the Court that the Jury to whom was  
submitted the issue out of this cause, as to



State of Illinois }  
Morgan County } P. Charles Hardin Clerk of the  
Circuit Court within and for said County, do hereby  
certify that the within and foregoing pages contain  
a true and perfect copy of the records and  
proceedings had in the case of Daniel  
McAroy against Melvin Helms, Gideon  
Edert and Joseph C. Thompson as fully  
and completely as the same remain of record or  
on file in my office -

Done at Jacksonsville this 21<sup>st</sup> day of  
December A.D. 1853

Charles Hardin Clerk

28  
Fes Clerk of 9.50

For the Supreme Court of the State  
of Illinois 2<sup>d</sup> term December  
Term 1853

vidian Schut, Joseph C. Thompson &  
Melvin Helms administrators of William  
H. Lewis dec<sup>d</sup>. Appellants

vs? On Appeal from Morgan  
Daniel McAroy Appellee  
and now come the said Appellants  
by their attorney Brown & Smith to say  
that in the record proceedings aforesaid  
there are the following material errors

1<sup>st</sup> The court below ought not to  
have directed the issue to a Jury & decided  
on pages 17 & 18 as directed or either of them.

2<sup>d</sup> The court below ought to have  
granted a motion for a new trial because



Transcript of Re-  
cord

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Gideon Sibert &  
others  
vs; On Appeal  
Daniel McEvoy

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Filed Dec 31<sup>st</sup> 1853.

Chas. B. Wain  
clerk.

14127

Prepared