

IN SENATE OF THE UNITED STATES.

JANUARY 28, 1835.

Read, and ordered to be printed.

Mr. ROBINSON made the following

REPORT,

[WITH SENATE BILL NO. 55.]

The Committee on Roads and Canals, to whom was recommended the "Bill for the relief of the legal representatives of Moses Shepherd, deceased," with instructions to specify the several items on which allowances shall be made, the amount allowed on each item, and the aggregate amount on all the items, and which amount should be in full of all claims pertaining to the several contracts made by Moses Shepherd, for constructing any part of the Cumberland Road; report herewith a bill in conformity to said instructions:

The first item in the bill is, 1st, for 1,712 feet coping, lineal measure, including dowells, at \$2 per foot, \$3,424

The price per foot as here allowed is the same as was allowed John McClure, for similar work, done about the same time, at the Treasury Department, and who had no contract for any specific amount, under an act of the 2d session of the 18th Congress for his relief; and which sum your committee deem a just and fair compensation. Report No. 131, first session 19th Congress.

In support of this charge, your committee refer to the following instructions given to Moses Shepherd by Josias Thompson, the superintendent, and will be found at page 165 of printed document of House of Representatives, No. 253, 1st session 20th Congress:

"UNITED STATES ROAD, August 24th, 1817.

"COL. SHEPHERD. Sir: I have received directions from the Secretary of the Treasury to have all the walls coped with heavy stone, and well clamped, to prevent them from injury by evil disposed persons. You will therefore have all your walls coped with the heaviest stone that can be procured; but in lieu of clamping, you will have them dowelled with locust pins, of an inch in diameter, or with iron dowells; and where it is not convenient to get heavy stone, you will put in two dowells of iron; three-fourths of an inch will be large enough.

"JOSIAS THOMPSON, Superintendent."

The measurement of the coping was made by John Gilchrist, an experienced mason, and will be found at page 165. It is as follows:

						Feet.	In.
<i>Parapet heavy coping.</i>							
Bridge on	Wood run	-	-	-	-	466	0
Do	Deep Hollow	-	-	-	-	257	0
Do	Block House	-	-	-	-	225	0
Do	west of Carter's	-	-	-	-	219	2
Do	west of Gooding's	-	-	-	-	178	5
Do	at Gooding's	-	-	-	-	204	0
Do	at west end of Shepherdsville	-	-	-	-	161	8
Lineal measure, total,						1712	3

January 1, 1825.

JOHN GILCHRIST.

2d. For excess of increased distance between the old and new route for the road, heretofore retained by the Government out of moneys due the said Moses Shepherd, for labor performed on the Cumberland road. . . \$406.

The site of one of the large bridges was changed, by the approbation of the Secretary of the Treasury, on Shepherd's agreeing to make the increased distance of the road at his own expense. He was charged for this at the Treasury \$1,490 62½, and the amount was retained, estimating the increased distance between the old and the new routes at 54 poles. But it has since been ascertained by actual survey, that the real difference is only 38½ poles, so that he has paid for 14½ poles too much, and which amounts to \$406. To show that the sum of \$1,490 62½ has been retained, see page 168.

To establish the true difference in the distance, reference is made to the deposition of John Gilchrist, at page 168, who says, "that on the 12th day of January instant, (1824,) he made a survey of what is called the old location of the Cumberland road, near Colonel Shepherd's house; that in making the survey he took the notes of Colonel Williams, deceased, [he was one of the original commissioners who laid out the road] as he is informed, as his guide, and commenced at a point designated by a rock running south 56° east to the hackberry tree mentioned in the said notes, and found the distance to be 181 poles, 15 links. That he also measured the present course of the road from the hackberry tree, and found the distance to be between the two points 220 poles and 3 links, making the difference between the two routes 38½ poles.

3d. For wing wall and culvert near Moses Shepherd's house, \$378 60.

The county road intersects the Cumberland road at the large bridge near the late Moses Shepherd's house; and it became necessary instead of building the wall across the county road, to give it a southern direction so as to receive this road. The wall being turned, it became necessary to change the location of one of the culverts.

Josias Thompson, the late superintendent, in answer to an interrogatory put to him, at page 131 of the document already referred to by the United States commissioner, "Did the erection of the wing walls at Shepherd's house lessen the expense of the United States, and were they not of essential benefit to Mr. Shepherd," says,

"The expense of the wing walls is about the same by the mode adopted. There is a county road leading down by Wheeling, and intersects the national road at the throat of the bridge. If any other course had been pursued it would have obstructed the county road."

John Gilchrist, in his deposition, at pages 126 and 127, says: "In relation to the culvert and wing wall near Shepherd's house, and which constitutes the third item in his account, the deponent states that this part of the bridge the commissioners refused to measure in his presence, giving as a reason, that it extended without the bounds of the United States road. There is at this point a junction between the United States road and a county road, at the east end of the bridge. The wing wall is thrown back to receive the county road. Had no road intersected at this point, the wing wall would have been carried round the course of the road, in proportion to the northeast wing, which would have been of greater magnitude than the present wall. Deponent thinks that the culvert at this point is necessary. There are in this culvert and wing wall, according to the measurement made by this deponent, 116 perches, 11 feet, 6 inches, amounting to the sum of \$378,60, at \$3,25 per perch."

4th. For a side wall built and removed by order of superintendent, and not measured either by him or the commissioners, at the lower end of Thompson's plantation, \$445.

This wall was originally in part built by directions of the superintendent, and afterwards abandoned, and not measured by him or the commissioners. The estimate is made from the testimony of witnesses.

Noah Clark deposes "that he was present and assisted in building a side wall, (being a mason by trade,) on the turnpike road near Little Wheeling Creek, at the lower end of Mr. Thompson's plantation; was employed by Mr. Shepherd; thinks there was at least one hundred and fifty perch of wall actually built, and that there was stone sufficient for six hundred perch, if it had been built in the wall. Mr. Thompson, the superintendent, was present while the work was progressing. The work was stopped, as he was informed, by the direction of Thompson." See page 173.

In the same document, at page 171, L. D. Chamberlain deposes "that in relation to an item for a wall begun and discontinued at the lower end of Thompson's place, in Col. Shepherd's account against the United States for work done on the Cumberland road, that while at work on said wall, in the employ of Col. Shepherd, the superintendent directed the building of the wall to be discontinued, alleging that it would be cheaper to the Government to cut a canal through the point at the bottom than to continue the wall. That besides the one hundred and fifty perch of stone, or thereabouts, mentioned in a prior deposition I have given in this case, as lost to Col. Shepherd by means of the unexpected discontinuance of the work, there was moreover lost to him the whole labor and expense of digging and laying out the foundation of the wall, and a large quantity of stone quarried out; the whole value of which, this deponent and all the workmen thought, it would amount to the value of three hundred and seventy-five or four hundred perches of stone wall."

5th. Amount retained for repairs to the Broken Back bridge, the bridge having given way in consequence of the thinness of the wall built under the direction of the superintendent, and for which the contractor ought not to be held responsible, \$961. The testimony in this case shows that the bridge was built under the direction of the superintendent, and that it gave way in consequence of the thinness of the walls, and not from any defect in materials or workmanship.

Thompson, at page 134, in his examination on the part of the Government, says: "The bridge is bulged at the side walls above the arch; I do not think it was owing to any defect in the workmanship or materials. The bulge is in consequence of the filling being too heavy for the thickness of the walls." And in answer to the question whether the stone used in the construction of this bridge are of as good a quality as those used in the construction of the other bridges? he answers, "I think they are."

John Gilchrist, at page 127, in reference to the Broken Back bridge, states: "That he has examined this bridge, and found it bulged at the side walls above the arch. It has been in this situation for several years; is of the opinion that the bulge does not increase. He is also of opinion that the materials and workmanship are good. That the bulge was produced in consequence of the side walls having been of insufficient thickness to sustain the very deep filling on that bridge, which was made principally of heavy clay."

L. D. Chamberlain, at pages 171 and 172 in his deposition, states, "that while the bridge at the lower part of Colonel Shepherd's plantation on the said Cumberland road, (the Broken Back bridge) was building, and when the walls were raised above the arch, the superintendent came to the bridge where we were at work, and told Colonel Shepherd that the Secretary of the Treasury had instructed him to have all the mason work on the road abridged, and directed Col. Shepherd to have the side walls reduced to their present thickness. Colonel Shepherd, with the mason that was doing the work, and my father, who was an old and experienced road maker, expostulated with the superintendent on the impropriety of reducing the thickness of the side walls then building, alleging that the depth of the filling was very great; that the earth that it was to be filled with was of a calcareous kind, and that as it became wet it would expand and push down the slender side walls then directed to be built; that no part of the whole work appeared to be injured except the upper part of the side walls."

To show that this deduction has been made, and the money retained, see page 158. No repairs were made on this bridge from 1820 until last year; and it was as good and substantial for all practical purposes when repaired as when first injured.

6th. For money paid Hugh Smith for extra work, in taking up the pavement under the bridge called Stewart's bridge, and sinking it two feet, \$30.

Hugh Smith, at page 177, deposes "that he was employed by Colonel Moses Shepherd to finish a bridge on the road, in the land of John Good. This bridge was called Stewart's bridge; that the superintendent, besides finishing said bridge, required this deponent to take up the paving which had been made under the arch of said bridge by Stewart, and sink the ground two feet lower than it was, and pave it again; for which work Colonel Shepherd paid him thirty dollars, exclusive of the expense of finishing said bridge."

7th. For the difference in measurement between superintendent and commissioners, at \$3 25 per perch, first deducting \$7,640 41, heretofore received as paid to sub-contractors, leaving a balance of \$21,683 36,

This part of the claim has been resisted on the ground that the measurement made by Thompson, the superintendent appointed by the Government, was fraudulent; and, with a view to establish this fraud, commissioners were appointed to examine and remeasure the mason work and stone bridges, and to take and report testimony.

The discrepancy in the measurements is accounted for on the ground of the utter impracticability of measuring such work correctly after it is finished. Ichabod L. Skinner, a gentleman now of high standing in the city of Washington, then a contractor for making a part of the Cumberland road bridges, and other mason work between Wheeling and Alexandria, in the State of Virginia, who states, in his deposition appended to the memorial of the legal representatives of Moses Shepherd, deceased, "that he carried to these public works several years' experience as an engineer, being then on the board of public works at home," which, indeed, was the reason why he was invited there from New England. He further states that "he believes the measures of Thompson to be substantially correct, and that the measures of the commissioners are not to be relied on, for reasons such as the following:

"First. As to Thompson's measure, it was sometimes made by himself, and sometimes by his deputy, and always as the work progressed; according to which, payments were made from time to time to the undertakers and laborers, in which cases there were three distinct interests to check each other—the superintendent, the contractor, and the laborer: all which would have, and did have, such measures as to satisfy them respectively. And although neither Mr. Thompson nor his assistant could, from the length of his road, (more than fifty miles from one extreme to the other,) be at all times present at every portion of its progress, yet he observed two essential rules in relation to the work: one, that no deep foundation of any abutment or pier should be put down but in the presence of himself or his deputy; the other, that no bridge should be filled in till it had been measured; to which, so far as the deponent knows, he uniformly adhered.

"Second. As to the commissioner's measure, it cannot be relied on, as is evident, *prima facie*, inasmuch as William Hawkins, the principal assistant of Thompson, was the chief engineer of the commissioners; and was, while with them, in fact, reviewing his own measures made under Thompson. And the truth is, that mason work of this description cannot be measured with certainty after it is filled.

"1st. Because many of the foundations of the abutments and piers are deeply sunk in the earth, and never can be found with accuracy after the bridges are finished, unless by opening the ground around them anew, which the commissioners did not do. Moreover, these foundations, as they ought to be, are usually broader than what is above the surface.

"2d. Because all the backings, which are the heaviest portions of what the masons call dead work, are entirely covered up, sometimes to the depth of many feet, by the fillings of the bridges.

"3d. Because there are tie walls between the wings when they are long and deep, which are wholly buried up by the fillings; and as they sometimes run across from one wing to the other, and sometimes stop short of this, their length, breadth, and height must of course be a matter of conjecture and not of measure, especially in the way the commissioners attempted it, by driving down a sharpened iron rod.

"The same remarks are true of the spur walls, which, as they are intended for outside braces, must of course be deeply planted, and therefore cannot be easily measured. It is also true that if the wing walls are of much height, they are built not of the same thickness from bottom to top, nor with a bevil from bottom to top, but severally with inside offsets at suitable distances, to operate both as ties and braces. Now it would be plainly impossi-

ble to measure these offsets except by throwing out the fillings, as no soundings whatever by an iron rod would lead to any thing but a conjectural calculation.

“Finally, a constant endeavor to find the least fair measure of such a variety and amount of mason work might, with the best of men, insensibly and materially affect the result. The deponent recollects one notable instance of this. In this case a bridge, the third west of Alexandria, was built by one Baldwin; and finished early in the time. It was measured by Thompson, as of course; but Baldwin not being satisfied with Thompson’s measure, procured Hawkins to measure it after him, but Hawkins’s measure was so near Thompson’s that Baldwin was satisfied with Thompson’s measure, and was by this deponent paid accordingly; and yet this same bridge, when measured by the commissioners and Hawkins, fell short several hundred dollars; and the deponent believes that the mason work generally fell short about in the same ratio.”

Mr. Skinner is not only an intelligent but a disinterested witness. He states that “he has been fully paid for all his work on this road, and has no further claims on the Government on account of it.” It is known that a special act passed for his relief in 1825 or 1826, by which he received for extra work, &c., and interest, somewhere about \$14,000.

Daniel Loomis, of Coventry, in the state of Connecticut, whose affidavit is also appended to the said memorial, states, that “he had a large contract for building stone bridges on said road, which contract was made directly with the Government through its agent, the said Thompson, at three dollars and seventy-five cents per perch for all bridges of four feet chord and upwards, and three dollars per perch for all under; that his work was done under the direction of Thompson and his assistants until his removal, and measured by him and his assistants as it progressed; that reports having been circulated that there had been collusion and fraud between the Government agent and some of the contractors, Abner Lacock, Thomas McGiffin, and Thomas Wilson, were appointed commissioners by the Government to remeasure the work of this deponent, the work done by Colonel Shepherd, and all other contractors and sub-contractors on that part of the road which had been placed under the superintendence of the said Thompson; that the measurement of this deponent’s work, as measured by the said commissioners, fell short of the measurement of the superintendent several thousand perches; but the precise quantity it so fell short this deponent does not recollect. He remembers, however, that by the measurement of Thompson, his compensation under his contract amounted to about twelve thousand dollars more than by the measurement of the commissioners; that this deponent is a practical mason; that before his employment on the Cumberland road he was employed on public works in Pennsylvania, and particularly in the erection of the stone work of the Columbia bridge, on the Susquehannah river; that he was present at the measurement of his mason work on the Cumberland road, and entertains no doubt but that the measurement of his work, as made under Thompson, was correct.

“That he was informed and believes that all the work measured by Thompson and his assistants, and remeasured by the commissioners, fell short in the same ratio of his own, except what was called the side walls, which, from the greater facility of measuring than the bridges, fell short in a less ratio; that this deponent gives it as his decided opinion that it was

utterly impossible, from his personal knowledge of the work and nature thereof, to measure the mason work correctly on the Cumberland road after it was completed.

"That he was paid at the Treasury department for his mason work aforesaid according to the measurement of Thompson, by which he received twelve thousand dollars more than if he had been paid by the measurement of the commissioners, the officers of the Government disregarding their measurement.

"That William Hawkins was assistant to Thompson, and was afterwards employed by the commissioners to remeasure the work which had been previously measured by Thompson and himself; that this deponent, by permission from a Mrs. Hodge, got the stone on her farm to build a bridge over Catfish run, (so called,) near Washington, in Pennsylvania; that after the bridge was built, she claimed pay for the stone; that it was submitted to arbitrators to say how much he should pay for the stone; that the said bridge having been measured by the said Hawkins, under Thompson, as it progressed, Hawkins was called on to testify as to the number of perches contained in said bridge; that the bridge was afterwards measured by the commissioners, and fell short of Thompson's measurement several hundred perches; but the precise quantity he does not remember."

Alexander Caldwell, (page 174,) judge of the district court for the western district of Virginia, having given circumstantially and in detail the result of an examination of a measurement made by the commissioners, showing a very great error committed by them of a side wall called Keffer's, he states, that "after the result of Shepherd's measurement of the wall aforesaid was made known to the commissioners, they remeasured the same, and made it contain considerably more, precise amount deponent does not recollect, than they had assigned to it on their first measurement; that after the commissioners had measured the small bridge west of Mrs. Gooding's, and stated the contents thereof, Shepherd requested a remeasurement by the commissioners, which was agreed to, and deponent was invited by Shepherd to be present thereat. Two practical masons were mutually selected; and in the presence of the commissioners and deponent, the bridge referred to was remeasured, and it was made to contain about one hundred perches more than the commissioners had made it by their previous measurement. The acknowledged inaccuracy of the measurement made of this bridge by the commissioners in the first instance, together with the results attending the measurement of Keffer's wall, destroyed all confidence in the correctness of the various measurements made by the commissioners. These inaccuracies grew, as deponent believes, out of the impracticability of measuring mason work under ground, and concealed from the view of the measurer."

John Gilchrist, a practical mason, whose depositions will be found at pages 166, 167, and 168, confirms W. Caldwell's statement as to the measurement of the bridge west of Mrs. Gooding's. At page 168 he says, "that he was present in the year 1820, when the committee on behalf of Government measured the bridge west of Mrs. Gooding's; at the time they measured the bridge, deponent informed them that they could not make a correct admeasurement by the plan they pursued; that according to the measurement of the committee, as returned by them in their general admeasurement, there were 940 perches 5 feet and 1 inch in the said bridge; that after this admeasurement in the year 1821, deponent understood that the

Hon. Wm. H. Crawford, on behalf of the Government, had agreed that the committee should choose one man and Col. Shepherd another, to remeasure some disputed measurement of the committee. That under this agreement this deponent was chosen on the part of Col. Shepherd, and Mr. Joseph Coulter on the part of the committee. That according to the measurement of said Coulter and deponent there were 1034 perches 12 feet in the bridge, making a difference of 94 perches more in the said bridge near Mrs. Gooding's than the committee made in 1820."

Josias Thompson, the superintendent, who was charged by the Government with fraudulent collusion with some of the contractors, and who had been removed by the Government, refused to be examined by the commissioners, for reasons which will be found in the testimony of A. Caldwell and P. Doddrige, esqrs., at pages 100 and 105 of the document already referred to. This refusal has been urged as a strong argument to establish his guilt, and to fix upon Shepherd the charge of collusion with him by the commissioners; but it will be seen that he was subsequently examined by the Government as a witness under a commission issued to James Collier, esq., and his testimony will be found at pages 129, &c., of the document already referred to. He says at page 130, in answer to interrogatories put to him by the United States, "that he measured the mason work embraced in Col. Shepherd's contract, as it progressed. These admeasurements were partial, and relied upon as being correct. When it was not practicable to measure the foundation, deponent required the affidavit of the men employed in building the work;" and the same page, he says that the bridge called by the commissioners the Broken Back bridge was built according to his directions. At page 136 he says, "in such part of the mason work as would be inaccessible when the work was finished, and a final measurement made, we were particular. In such cases the notes of the partial admeasurements were preserved. In some few instances, where the depth of the foundation could not be ascertained, I was in the habit of receiving the amount from the men engaged in building the same under oath."

There is much other testimony in relation to the measurement. See the depositions of John Sample at page 176, Richard Hardesty 177, Abel Gay 176 and 177, William Kellen 175, L. D. Chamberlain 169, and A. Lawrence 167.

On the subject of direct collusion, and of a private contract between Col. Shepherd, or others of the contractors, with Col. Williams, or *other agents* of the Government, Thompson was asked,

"From all the facts and circumstances within your knowledge, are you of opinion that there was a private contract between Col. Shepherd, or others of the contractors, with Col. Williams, or *other agents* of the Government?"

The counsel of Col. Shepherd is willing that the witness should state any facts within his knowledge, but objects to the opinion of the witness being taken.

Answer. "I know *no facts*, and decline giving my opinion as evidence."
—See page 135.

Franklin Woods and Jacob Atkinson, clerks of Colonel Shepherd, Alexander Caldwell, esq., then one of his counsel, and Philip Doddrige, esq., another counsel, were all examined as witnesses on the part of the Government.

F. Woods, at page 58, says: "the books were kept by single entry, and any moneys received were placed in the drawer and paid out without any entry against Colonel Shepherd. The grain delivered in was used in the

same manner, no charge or credit being entered in the books, other than against those who from time to time received. He has never seen any entry in the books of Shepherd, or any other fact or circumstance from which he would infer an improper connexion between Thompson and Shepherd, and has no knowledge, in point of fact, of any such connexion." He refused to give opinions.

Jacob Atkinson refused to give his opinion in regard to a supposed connexion between Colonel Shepherd and any agents of the Government. The question, as to any knowledge of facts, was not put to him.

To Judge Caldwell the following question was put at page 138.

"Have you not heard, or do you not know, that there was a private contract between Colonel Shepherd, or others of the contractors, and Mr. Thompson or other agent of the Government; and have you not seen such a contract in writing?"

The counsel of Colonel Shepherd objects to the witness answering as to what he has heard, except it was heard from Colonel Shepherd.

Answer. "I have not heard from Colonel Shepherd, or from others implicated, any thing in relation to such private contract, nor have I seen any written contract between them."

No questions of the kind were put to Mr. Doddridge, though he was examined at great length.

William Chaplin, at page 140, in answer to a question, "Do you not know, or have you not heard that there was a private contract between Colonel Shepherd, or others of the contractors, and Mr. Thompson, or other agent of the Government; and have you not seen such contract in writing?" says, "I have seen no such contract, nor have I heard that such contract was made. I have understood that Colonel Marshall had made such a representation to the Government; and from that a rumor arose that such a contract did exist."

It is understood that Colonel Marshall resides at Wellsburgh, on the Ohio river, several miles above Wheeling, where it was expected by the citizens of that place the Cumberland road would pass. Colonel Shepherd, it is believed, was very influential in having it established through Wheeling.

The character of the late Colonel Shepherd for integrity, industry, and frugality, is well supported during a long life, by gentlemen long and intimately acquainted with him, many of whom are known to several members of this body.

Noah Zane, late of Wheeling, deceased, testified, "That he had known Colonel Shepherd from his (Zane's) infancy, and known him to be a laborious, honest, and candid man."—See page 53.

Peter Yarnall, of Wheeling, in 1821, stated, "That he had lived in Wheeling for twelve years. He knows no man whose reputation is fairer than Colonel Shepherd's for labor, fairness, and frankness in dealing—has disbelieved all reports to the contrary."—Page 53.

Samuel Sprigg: "from his general knowledge of the character of Colonel Shepherd, he would not have suspected him of any improper connexion with the late superintendent, or any dishonorable, uncandid conduct. He knows of no man whose general character stood fairer than that of Colonel Shepherd, for labor, for frankness, and fairness."—Page 54.

Major Zac. Sprigg "has been acquainted with Moses Shepherd for upwards of forty years; his general character is good; and from his character

he would not suppose him capable of forming an improper or dishonorable connexion with the late superintendent, or any other person."—Page 56.

Daniel Steinrod "has lived in this settlement thirty-two years, about two miles east of Wheeling. He never knew Colonel Shepherd impeached for falsehood or fraud; does not believe that his moral principles would permit him to enter into any fraudulent connexion with any agent of the Government, or to commit any deliberate fraud."—Page 57.

F. Woods: "He has always found Colonel Shepherd a man of truth and fairness; his general character is so. And from his knowledge personally, and from his reputation, he would consider him incapable of forming an improper connexion with him or any other person. He has been raised within about four miles of Mr. Shepherd, has known him well and intimately since his infancy, and has never heard any intimation against his moral character."—Page 58.

T. Woods: "From his knowledge of the character of Colonel Shepherd he would not suppose him capable of an improper or corrupt connexion with any person. Has been acquainted with Colonel Shepherd for twenty years, ever since he (Woods) was a boy."—Page 71.

Judge Alexander Caldwell, of Wheeling: "The general character of Colonel Shepherd, as it regards openness, fairness, and candor in dealing, is good; and also a man of truth and veracity. From his personal knowledge of Colonel Shepherd, and of his general character, he would consider him incapable of forming a corrupt agreement with Mr. Thompson, or any other person. He knows of no facts or circumstances from which he could believe there was any improper connexion between Colonel Shepherd and Mr. Thompson."—Page 104.