

PETITION

OF THE

LEGAL REPRESENTATIVES OF MOSES SHEPHERD,

Praying the settlement of a claim due the deceased on account of masonry and other work on the Cumberland Road.

DECEMBER 18, 1834.

Read, and ordered to be printed.

To the Senate and House of Representatives of the United States, in Congress assembled:

The memorial of the legal representatives of Moses Shepherd, deceased,
RESPECTFULLY REPRESENT:

That Lydia Shepherd, late the wife of Moses Shepherd, was appointed by the last will and testament of the said Moses Shepherd, deceased, sole executrix thereof, and to whom letters testamentary were, in due form of law, granted; and, that Daniel Cruger hath since intermarried with the said Lydia Shepherd. That on the 17th day of February, in the year 1817, the late Moses Shepherd, contracted with Colonel Eli Williams, the authorized agent of the United States to do certain mason work on the Cumberland road. That the work was faithfully performed, according to the terms of the contract, under the direction and to the satisfaction of the agent of the U. States, appointed to superintend the work as it progressed, and to measure and receive the same. That in pursuance of directions from the agent of the Government, and by the express authority of the Secretary of the Treasury, the said Moses Shepherd also executed certain other work, not included in his contract, for which he was promised and entitled to receive compensation. That a change having been made in the location of one of the bridges contracted to be built by the said Moses Shepherd, he undertook at his own expense to make the increased distance of the road occasioned by such alteration; that, in consequence of that undertaking, he was required and has actually paid for 53 perches of road; whereas the real increase of distance is only 38½ perches, whereby he has paid for 14½ perches more than he was bound to have done, making a difference of \$406, or thereabouts.

Your memorialists beg leave to exhibit the following as a statement of the claims of the estate which they represent against the United States, viz.

1st. For extra coping, including the iron clamps, amount not ascertained.
—(See instructions at page 165, rep. No. 253, for the year 1828.)

2d. Excess of increased distance between the old and new route for the road paid for by Shepherd, \$406.

Note.—The location of one of the large bridges was changed by the orders of the Secretary of the Treasury at the request of Colonel Shepherd, who undertook to make the increased difference of the road occasioned by such change, at his own expense. The commissioners reported this difference between the new and old routes to be 54 poles, for which Colonel Shepherd was charged \$1,490 62½, and this sum was deducted in the account upon which a former bill for his relief, was predicated; whereas it has since been ascertained by actual survey that the real difference is only 38½ poles, so that he has paid for 14½ poles, amounting to \$406 more than he should have done.

3d. Wing wall and culvert near the late Col. Shepherd's house, \$378 60.

Note.—The county road intersecting the national road at the large bridge near the late Moses Shepherd's house, it became necessary, instead of building the wing wall across the county road, and thereby stopping up a road legally established by competent authorities of the State of Virginia, to give it a southern direction, so as to receive this road. In this situation, it answered the same purpose, and cost considerably less than if it had run parallel with the other wing wall. The wall being turned, it was necessary to change the location of one of the culverts. This wing wall and culvert were not measured before Thompson was displaced. The commissioners refused to measure them, and their contents not being known, he has never been paid for them.—(See testimony of John Gilchrist, pages 126 and 127, rep., No. 253, for the year 1828—also Josias Thomson, page 131.)

4th. For walls and culverts, built and removed, by order of superintendent, and not measured either by him or the commissioners, \$445.

Note.—This wall was originally built by directions of the superintendent, afterwards removed by his orders, and for which no allowance has been made.—(See deposition of Thompson, pages 129 and 130, No. 253, for the year 1828.—L. D. Chamberlain, 171; Noah Clark, 173.)

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.

Note.—This item is the amount deducted by the commissioners for a defect in one of the bridges, which they said it would be necessary to repair. No repairs were made on this bridge from 1819, when completed, until last year, and it was as good and substantial for all practical purposes when repaired as when first injured in 1820. The defect not being the result of defective workmanship, but the consequence of the walls being too thin for the filling; the contractor is not responsible therefor. The walls were built of the thickness directed by the superintendent, which being filled with heavy clay gave way. (See Thompson's deposition, page 134; Gilchrist, 127, Chamberlain, 175, rep. 253 for the year 1828.)

6th. Extra work by Smith, \$30.

Note.—See the deposition of Hugh Smith, page 177, Thompson 130, rep. No. 253, for the year 1828.

7th. Difference of measurement between superintendent and

commissioners 8715 perches, at \$3 25, is	-	-	\$29,323 75
Amount heretofore received as paid to sub-contractors	-	-	7,640 41

\$21,683 34

Note.—According to the principles recognised and adopted by two committees and confirmed by both Houses of Congress, the memorialists are entitled to be paid for the full amount of the superintendent's measurement, which exceeded that of the commissioners by 8,715 perches. But in making up the account which accompanied their report, the committee took into view only so much of this difference as was proved to have been paid to sub-contractors, amounting to the sum of \$7,640 41. The residue of this difference is now claimed, and it is insisted that the measurement of the superintendent was accurately made and that of the commissioners erroneous. To prove the accuracy of Thompson's measurement, the inaccuracy of that made by the commissioners, and the utter impracticability of making a correct measurement under existing circumstances, the memorialists refer to the nature of the work itself, and to the testimony of the following witnesses: John Gilchrist, 128, rep. No. 253, for the year 1828, Alexander Caldwell, 174, John Sample, 176, Richard Hardesty, 177, Abel Gay, 176 and 177, William Killen, 175, L. D. Chamberlain, 169. See also Keller at pages 122 and 123, and Gilchrist, pages 166 and 167, A. Lawrence, 167. See also the manuscript affidavits, on file of J. L. Skinner and Daniel Loomis. It will be seen by the testimony of Judge Caldwell, Gilchrist, and Skinner, that Hawkins, who was the measurer, under the direction of the commissioners, had, as the assistant of Thompson, previously measured a portion of the same work as it progressed and when it was accessible. He then made it much more than when he attempted subsequently to measure it for the commissioners; and that the commissioners made several efforts to measure some of the same work, and each time the result was different. These facts alone show the inaccuracy of their measurement, and fallacy of any effort now to make a correct one.

8th. Costs of suits incurred by inability to pay his workmen, and in consequence of the failure of the Government to settle his accounts at the stipulated period.

10th. Interest from the time the work was completed and when the money was to have been paid by the terms of the contract.

Your memorialists further represent that the account accompanying the report in the case of the late Colonel Shepherd, heretofore made, will show that no allowance was made for any one of these items, although the report settled the principles upon which their justice depends. It concludes by saying, (vide page 152, rep. doc. No. 253 for the year 1828,) "Your committee have examined all the suggestions and arguments of the commissioners, which are very voluminous, in connexion with all the facts and evidences developed in the examination, and they are not able to find any direct evidence to fix the charge upon Shepherd, or circumstantial evidence whereon to found a probable or strong suspicion of his improper or unlawful association with Thompson for the purpose of defrauding the United States." And again, in their report of 1825, vide rep. No. 253, page 149, for the year 1828, upon which report a bill passed for the relief of Colonel Shepherd, the same year, the committee say, "that the report made by the committee to whom the same subject was referred at the last session, contains, according to the view of the committee, a just exposition of the merits of the claim, which they refer to as the grounds of this report. In addition to the same they would add that the Secretary of the Treasury, in answer to the resolution adopted at the last session upon that report, admits the position assumed by the committee, that the Government ought to be bound

by the acts of its agent, unless they were fraudulent, and Shepherd privy to the fraud. But this committee does not agree with the Secretary in his conclusion, that Shepherd was in partnership with or privy to any fraud of the agent. So far from it, the evidence to their minds is satisfactory that Shepherd has acted with fairness, and without collusion of any sort with the agent, and that the whole of the work be performed, he executed under contract and directions of the agent of the Government; that as it regards the report of the commissioners, it seems to the committee, when compared with all the circumstances and evidences, is not much to be relied on. But the committee are of opinion that there is sufficient evidence of the justice of his demand, in the fact of his having performed the labor under the agents of the Government fairly and without fraud; and the objection that he has cleared eighty thousand dollars by his contracts, cannot lie, as there is no satisfactory evidence of the fact; but there is abundance of evidence that he has, instead of making, sunk money by his undertakings, but whether he has made or lost, is no criterion by which to adjust the accounts of an individual under fair contract and stipulated prices."

Your memorialists beg leave further to represent, that in the year 1826, being the next year after the bill, founded on the reports already referred to, passed for the relief of the late Moses Shepherd, the present claim of your memorialists was then presented to Congress, and a favorable report was made thereon, which will be found at pages 160, 161, 162, Rep. 253, for the year 1828, in which they say that "the United States had not only a superintendent upon the spot, whose duty it was to examine and measure the work when it could be done accurately, but there were also employed competent persons to assist in the discharge of those duties, who all unite in the accuracy of the original measurement. The memorialists, it appears, also caused some parts of the work, measured by the commissioners, to be measured by different persons at different times, some of whom point out the error in the principle adopted by the commissioners in their admeasurement, and all make out the work to be much more than the commissioners did. These measurers unite with some of the workmen originally employed in constructing the work, the original measurers and others, in giving it as their decided opinion that the commissioners erred in their measurement, and that accuracy was unattainable after the work was finished and the road filled in. As the contractor and his workmen were compelled to abide by the measurement of the superintendent, the Government, whose agent he was, is precluded from disputing it, without satisfactory evidence of his inaccuracy."

Your memorialist further represent, that the work of all the contractors on the Cumberland road, whose work was remeasured by the commissioners, fell short in about the same ratio as that of the late Moses Shepherd; and they humbly conceive that this fact not only repels the charge of fraud, set up in the case of the said Shepherd, but goes to confirm and strengthen the proof already referred to, that, from the nature of the work, it was impossible to measure it correctly after it was completed. And your memorialists have always understood and believed the fact to be so, that all the contractors were paid according to the measurement of the superintendent, and that no deductions were made for the difference in measurement between that of the superintendent and the commissioners, except in the case of the late Moses Shepherd.—(*Vide Daniel Loomis's Affidavit in manuscript.*)

Your memorialists further represent, that in consequence of the failure of the Government of the United States to pay the late Moses Shepherd for his labor, according to the stipulations of their contract, he became much embarrassed, and was harassed and sued by his creditors, and compelled to raise money for the payment of his workmen by mortgaging his real estate, until he could apply to Congress for relief. Upon that application, his case was referred to a committee, who made a report in his favor, and a bill passed for his relief. It will appear, that although the report just alluded to, admitted the justice of his whole claim, the amount awarded in the bill was not a complete satisfaction and indemnity, but only intended as a remuneration for the particular items. To sustain this view of the case, your memorialists beg leave to refer to the fact, that the same committee in the House of Representatives, in the succeeding year, made a favorable report on the present claim, not considering the former act as a bar. (Vide Rep. No. 253, for the year 1828, pages 160, 161, 162, and 163; and see also the certificate of the Hon. Andrew Stewart, then and now a member of the House of Representatives, herewith annexed.) The late Moses Shepherd was just ready to sink under his embarrassments, occasioned by the want of good faith on the part of the Government; the whole of his patrimony, together with the earnings and savings of a long and laborious life, was about to be sacrificed, and, in his old age, himself and family liable to be turned out upon the world, without a roof to shelter them. Under these circumstances, he could not be expected to reject what was offered, because it was not all that was due him. He has done no act by which an abandonment of his rights can be inferred. In no case can the debtor discharge himself, by paying one-half of what is due to his creditor, saying: "There, take one-half, and be satisfied; I will not pay the balance;" unless the debtor acquiesce and agree to receive it, and as full satisfaction. This was never done. Even where accounts have been deliberately closed and settled by both parties, if any error or mistake has occurred, courts of equity will open accounts and correct them.

Your memorialists further represent, that by the failure of the Government to pay the late Moses Shepherd at the stipulated period, he was not only deprived of the use and benefit of the money due him, but was under the necessity of borrowing large sums of money to pay his workmen, for which he paid interest, but was, in numerous instances, from his inability to meet the demands against him, sued by his creditors and workmen, and compelled to pay interest, together with large amounts in costs. In support of this, your memorialists refer to the contract, page 9, Rep. No. 253, for the year 1828, the superintendent's receipt, the deposition of James Pemberton, and the certificate of the clerk of Ohio county; and that, as his compensation has been, as your memorialists allege, wrongfully withheld, your memorialists are entitled to be reimbursed for all costs occasioned thereby, together with interest thereon, as also on the balance due him on his contract.

Your memorialists further represent, that the estate of the late Moses Shepherd is still largely indebted for money borrowed by him, to enable him to complete his contract on the Cumberland road, upon which the said Moses Shepherd, in his life-time, paid, and your memorialists, since his death, have been paying, interest.

Your memorialists, therefore, pray, that a bill may be passed for their relief, instructing the accounting officers to settle their accounts, as the legal representatives of Moses Shepherd, deceased, upon the principles of equity

and justice, adopting the abstract returned by Josias Thompson, the superintendent, as the basis of the settlement; and to correct any errors made in former settlements.

DANIEL CRUGER,

On behalf of himself and wife.

Dec. 13, 1834.

DISTRICT OF COLUMBIA, ss.

Daniel Loomis, of Coventry, in the State of Connecticut, being duly sworn, deposeth and saith, that he had a sub-contract for constructing seven miles of the Cumberland road, east of Alexandria, in Pa., under Th. McGiffin, one of the commissioners, [together with] Baird and Campbell, in 1817, which he executed under Josias Thompson, a superintendent, until his removal in October, 1819, and afterwards under his successor. That he also 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. That the Government agreed to pay him 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 said Thompson and his assistants, until his removal as aforesaid, and measured by the said Thompson 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 by this deponent, the work done by Colonel Shepherd, and of 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.

This deponent further saith, 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 this deponent 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 the said measurement of the commissioners.

This deponent further saith, that Thomas McGiffin, one of the said commissioners, had a sub-contract under this deponent, for mason work on said road, and although Thompson's measurement was much greater than the commissioners, he was paid for the same at the Treasury Department, according to Thompson's measurement, as he was informed and believes.

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

And this deponent further saith, that he has been informed, and believes it to be true, that all the contractors on the road for bridges and other mason work, constructed under, and measured by Thompson and assistants, except Colonel Shepherd, were paid according to Thompson's measurement, at the Treasury Department, without regard to the measurement made by the commissioners.

That Thomas McGiffin, aforesaid, Baird and Campbell, had contracts for making about sixteen miles of the Cumberland road, from Alexandria to Washington, at about ten thousand dollars per mile, for twelve miles of said road, and nine thousand seven hundred and fifty dollars per mile, for four miles; seven miles and one hundred eighty-five rods of which this deponent constructed as a sub-contractor.

DANIEL LOOMIS.

Sworn and subscribed this 31st day of January, 1834, before me,

MATHEW M. COLE, J. P.

The deposition of J. L. Skinner, of the City of Washington, in the District of Columbia, is as follows:

Who says, that in the years 1817, '18, '19, he was engaged on that part of the western division of the Cumberland road lying between Alexandria and Wheeling, as an original contractor, and also as a contractor under Moses Shepherd deceased, both of road and mason work, of which Josias Thompson was superintendent, and William Hawkins, deceased, and others, his assistants.

That these works progressed regularly, to the satisfaction of the public and all concerned, so far as the deponent knew, through the years 1817, '18, '19, down to October, 1819, when Thompson was removed from office, and before the works were completed throughout, because a suspicion had arisen that the measures of Thompson were incorrect.

And Messrs. Lacock and others were appointed commissioners by the Government, (*ex parte*,) to examine and remeasure the same, after Thompson; which they did in the years 1819, '20, '21; whereupon, they found, as they supposed, that Mr. Thompson had overestimated the work several thousand dollars; of which they made a report to the department, but which has not been followed in the subsequent settlements.

The deponent is now called upon to give his knowledge and opinion of the aforesaid measurements, having been settled with for all his work on this road, and having no further claims on the Government on account of it.

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 commissioners' 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.

1. 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.

2. Besides 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.

3. 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 im-

possible 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.

But the deponent will forbear any further detail, lest he should seem to instruct those who are much better acquainted with such works than himself, and will only add, that which perhaps he ought to say of himself, 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.

And further saith not.

J. L. SKINNER.

Sworn to before me this 6th February, 1834.

D. A. HALL, *J. P.*

I was a member of the Committee on Roads and Canals, of the House of Representatives, in 1825, to which was referred the memorial of Moses Shepherd. It appeared to the committee that Mr. Shepherd's estate was involved to a very large amount, for debts created by him in the execution of his contract with the United States, for the construction of bridges, and other mason work, &c., on the Cumberland road. He represented that, in consequence of the failure of the Government to pay him according to the terms of his contract, judgments had been obtained against him, in favor of laborers and sub-contractors, for work done under him on his contract, operating on a large personal estate; and that, to furnish himself with funds to enable him to complete his contract, he had borrowed, from the North Western Bank of Virginia, about forty thousand dollars; to secure which, he had executed deeds of trust on a large and valuable real estate, and that the equity of redemption, on the trust deeds, was about being foreclosed. That, as not more than one month of the session remained, after the committee were prepared to report, to pass a bill through both Houses, it was recommended to Mr. Shepherd, under these circumstances, to withdraw the doubtful parts of his claim, and present them to a future Congress. Mr. Shepherd acted in conformity with this advice; and a bill was reported, on the 8th day of February, for his relief, and passed on the last days of that month.

I was a member of the same committee, in the succeeding session of Congress (1826), when Mr. Shepherd presented a memorial for further relief. it was referred to the said committee, and that committee, not considering the former act as a bar to said claims, made a favorable report, which will be found at page 160, of document 253, of House of Representatives, together with a bill for his relief.

ANDREW STEWART.

April 14, 1834.