36TH CONGRESS, 1st Session. } SENATE. { REP. COM. No. 245.

IN THE SENATE OF THE UNITED STATES.

MAY 29, 1860.—Ordered to be printed.

Mr. SIMMONS made the following

REPORT.

[To accompany bill S. 474.]

The Committee on Claims, to whom was referred the memorial of Rev. G. Hildt and others, praying the examination and settlement of the claims of J. W. Nye, report:

Your committee find the claim for macadamizing Pennsylvania avenue, in 1832, well stated in a report (No. 405) made by Mr. Carter to the House of Representatives during the present session, and they beg leave to adopt it as a part of this report:

The Committee for the District of Columbia, to whom was referred the memorial of Rev. G. Hildt and eight other clergymen, the mayor, aldermen, president and members of the common council, district attorney, and one hundred and thirty-eight citizens of Washington, D. C., praying an examination and settlement of three several claims of J. W. Nye upon the government; one for services rendered and moneys expended in macadamizing Pennsylvania avenue, Washington city, D. C., in 1832; *one for furnishing horses and carryalls for the service of the House of Representatives for the Twenty-eighth Congress; and the other for improving certain public grounds, beg leave to submit the following report:*

That at the first session of the Twenty-second Congress a law was passed for macadamizing forty-five feet of the center of Pennsylvania avenue, from the Capitol to the executive offices, putting said improvement under the control of the Commissioner of Public Buildings, and directing him to advertise for proposals. The Commissioner awarded said work to Peter Bargy, jr., of New York, and Hugh Stewart, of Pennsylvania, in nearly equal divisions, they being the lowest responsible bidders, and stipulating to perform the same at sixty-two cents per square yard. One part of the contract was as follows: "And it is further covenanted and agreed, that if the said contractors shall not prosecute the said work in such manner, or make such rate of progress as the Commissioner may deem necessary, or shall not work on such part or parts of the work hereby undertaken, and at such time or times as the Commissioner may prescribe, or shall not increase the force

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employed by them if so required by the Commissioner, the said Commissioner shall be at full liberty, and is hereby invested with full power and authority, to employ or contract with any other person or persons to complete the work hereby undertaken, at the proper cost and charge of the aforesaid contractors, without molestation, hindrance, or any interruption by said contractors in anywise or manner." And the contractors were required to give ample security for the faithful performance of said contract.

So severe were the terms of this contract, the contractors were unwilling to sign it until, by actual experiment, they had ascertained they could make a reasonable profit on it. To test this they were permitted to commence work without previously signing the contract.

On the 14th of August the contract was regularly signed and the necessary papers passed. On the 18th of the same month the cholera broke out in the city and raged with great violence, especially among the laborers on the work. Many were attacked while at work, and *thirty* persons died in *one night* in the vicinity of the residence of the superintendent of the work. Physicians advised the laborers to leave the city, and most of them left the work.

The contractors, under these circumstances, applied to the commissioner for permission to suspend the work until the epidemic subsided; but they were refused, and they were required to prosecute the work, or suffer it to be relet at their risk. The contractors had now no alternative left but to prosecute the work under these disadvantages, or suffer it to go into other hands which they could not direct or control.

They then offered an increased rate of wages; but the mortality increased fearfully, and the Commissioner, *without consultation with the contractors*, employed three physicians, who visited the men twice daily, advising them not to work *early* or *late*, and not *hard* at any time. The result was a mere nominal amount of labor performed by the men. The superintendent of the work thinks the men did not perform more than *one fourth* part as much work in a day as they did before the cholera, and their wages were raised from 62½ and 75 cents per day to from $1 to $1 37½ per day. The engineer employed by the government, who superintended the work, states under oath that he passed along the work several times a day, and took particular notice of the small amount of labor performed by the men, and that *two* men did not perform *more* work in a day than *one* did before the cholera.

The contractors were consequently compelled to employ *two hundred* men to perform the amount of work in a given time that *one hundred* would have performed in the same time had the cholera not visited Washington, or had the contractors been allowed to have suspended their work during its influence, and their wages were raised at *least* fifty per cent.

In justice to the contractors and humanity to the laborers, the work ought to have been suspended. The refusal to suffer it to be suspended, and the interference of the physicians employed by the government with the men, would seem to render the loss a *just* and an *equitable* claim against the government; and had not the contractors assigned away their claim, the committee consider that they would be

justly and *equitably* entitled to *full* remuneration for the diminished quantity of work performed by the men, and the increased price paid them to induce them to stay upon the work.

The commissioner who had charge of the work says the contractors used a due degree of diligence in the prosecution of the work, and he considers them entitled to receive the full amount of their expenditures, and a reasonable compensation for their services and the responsibilities they were under in doing the work.

But in the case of the present claimant, to whom Bargy and Stewart assigned their claims, it would seem to present still *stronger* claims on Congress for relief. Nye had done a large share of this work as subcontractor, amounting to as much as the additional amount claimed by said contractors upon the government. The contractors offered to transfer these claims against the government to Nye, provided he would accept them, and release the contractors from all further liability to him.

Nye had them presented to a number of members of both houses of Congress for their examination and advice, who, after a careful examination, informed him that they considered it a good and valid claim, and that he would run no risk in accepting it and releasing them, and advised him to do so. In support of their advice they referred him to a number of precedents, where Congress had granted relief, where the *justice* of the claims was not as clear as this. In consequence of this advice and these precedents pointed out to him by members of Congress, Nye took an assignment and released Bargy and Stewart from all further liability, thereby depriving himself of any security but the *justice*, the *honor*, and the *integrity* of Congress. Had he not released them, he could long ere this obtained both principal and *interest*. Nye being at that time, from sickness, unable to prepare the necessary papers for presentation to Congress, put them in the hands of the late F. S. Key, (then district attorney,) for him to prepare and present to Congress in the name of Peter Bargy, jr., and Hugh Stewart, without informing Congress of their assignment, Bargy's being presented first.

The funds for this work were intrusted to Mr. Conger, Bargy's clerk, who made his entries on page 79 of Bargy's ledger, kept by Conger, showing the amount paid by him. Other bills were paid by Bargy himself, and entered by Conger on page 2 of same ledger. Conger left the city and went to the West at the close of the work the first year, and did not return. The book was sent to him, that he might authenticate the accounts by oath, and show why certain judgments obtained against Bargy were not entered. His affidavit says: "These judgments were for that work done in 1832, but were not entered because *not paid*, and that he entered nothing that was not actually paid out."

The books of the second year were kept, and the disbursements made by Mr. Ford, clerk of Bargy; and Ford says that a considerable amount of the expenditures of 1832 were not paid until 1833, and were not entered in Conger's books. Conger's was the only book sent to Mr. Key, and the amount entered on page 79, as expenses of said work, and the above-named judgments, were all that were brought to

Mr. Key's notice. Mr. Key presented to the Senate a claim for $5,645, the amount of expenses entered by Conger on page 79, and these judgments, more than the amount received from the government for that work; which passed the Senate. But while this claim was before the Committee of Claims of the House, this error was discovered, viz: the omission to include the expenses paid by Bargy, and entered on page 2 of his ledger, and the money paid in 1833 for work done in 1832, and entered by Ford, the new clerk of Bargy; and the chairman of the committee proposed to make an amendment to the Senate bill, but the claimant (as it was near the close of the session) preferred to take the amount, and apply to Congress at its next session for the balance, rather than take the risk of losing the present bill. This bill passed the House March 9, 1839. At the next session the balance of this claim was presented to the House, and a report was made from the Committee of Claims in favor of its payment, but the House did not act upon it. Since that time it has received the sanction of several standing committees and one select committee, and has passed the Senate.

The claim of Stewart was presented in the Senate, received the sanction of the Committee on Claims, passed the Senate, sent to the House, and received the sanction of the committee of the House, but was not acted on by the House. At the next session a very able report was made in its favor by Mr. S. B. Leonard, chairman of the Committee on Public Buildings and Grounds, in which he adopted a different rule for the settlement of this claim from that adopted in Bargy's case, which was, to pay the whole expense of the work; so that, had the contract been taken too low, and a loss sustained, from that or any other cause, the government would have met the loss. The principle adopted by Mr. Leonard was to allow the claimant the loss sustained from the diminished quantity of work performed by the men, and the increased price of wages paid the men to induce them to stay during the influence of the cholera. This principle would seem a correct one, as it would place the contractors in the same condition they would have been placed in had they been allowed to postpone their work during the influence of the cholera, but would allow them nothing for any loss sustained from any other cause.

This principle has been adopted by a number of standing committees and one select committee. Mr. Leonard's bill was not acted on by the House.

At the next Congress Mr. Ward, chairman of the above committee, made a report to the House, in which he sustained the principle adopted by Mr. Leonard, but did not go into an examination of the amount justly due on that principle, but reported a bill allowing him the same amount of extra compensation as had been allowed in the case of Bargy, which passed both houses, by which the claimant received $6,666 25. The balance of Stewart's loss, according to the principle established by Mr. Leonard, has, since the passage of Mr. Ward's bill, received the sanction of a number of standing committees and one *select* committee, and has passed the Senate. The amount of work done by Stewart during the influence of the cholera, at his contract price, was $10,924 60. The amount done by Bargy during the

same time, at his contract price, was $7,871 40, amounting in all to $18,796, to which amount, according to the principle adopted by former committees, *one hundred* per cent. ought to be added for the diminished amount of labor performed by the men, the contractors being compelled to employ *two hundred* to perform what *one hundred* would have done in the same length of time had the contractors been allowed to suspend their work during the influence of the cholera; and to this amount add fifty per cent. for the increased price paid the laborers to induce them to stay on the work, and from this amount deduct the amounts paid the original contractors, and their assignee or attorney, and should there remain a balance, thus found, still unpaid, that the proper accounting officers of the treasury pay the same to J. W. Nye, the assignee of said contractors, and in accordance with the foregoing principle the committee report a bill and earnestly recommend its passage.

The amount due Nye from Bargy and Stewart for this work was as large as the amount claimed by them from the government; so that, had he obtained it without any delay, he would have received no more than was justly due him for services rendered and moneys expended, of which the government has received the whole benefit.

In justice to the claimant and his family, and in consideration of the great length of time most faithfully devoted by him to the prosecution of this claim, and to relieve Congress from any *further importunity* and expense, the committee recommend its immediate settlement.

All of which is respectfully submitted.