

**[Undated Petition of Morris Seely to the Ohio General Assembly
requesting damages or the right to sue the state based on the breach
by the state of the contract he had entered into with the Canal Commissioners]**

To the Senate and House of Representatives
of the State of Ohio

Your memorialist Morris Seely represents that on the 14th day of January A.D. 1829 he made a proposal to the then Board of Canal Commissioners to sell to the State of Ohio a site to use the water power for hydraulic purposes from the Mad River feeder, which was accepted on the following day, and the acceptance entered on the minutes of the Board.¹ The reason of making the proposal and its acceptance grew out of a refusal on the part of the guardians of the minor heirs of D.C. Cooper to sell to the state a site for that purpose. The acceptance of the proposal of your memorialist by the Canal Commissioners was made upon conditions, among which was one, that your memorialist should make a cut from the canal and upon the same level up to a convenient point for the use of the water on said Seelys ground for the flow of the tail race water into the canal.² This cut was intended at the time to be a navigable canal on which basins were contemplated. Frequent applications had been made to the guardians of Cooper's heirs for a site at which to use the water power at Dayton, but the guardians, knowing this power to be immensely valuable and determining to avail themselves of a supposed advantage which they had by reason of owning the land adjoining the canal or feeder, that is their wards owning it, refused any proposition to sell a site to the state. Under those circumstances and by full confidence that his contract with the state would be complied with, your memorialist commenced the work and [last line on page cut off by copier] canal commissioners, in pursuance of the understanding and contract of the parties, advertised the sale of this water power, having

¹ A copy of this offer by Seely and the acceptance by the Canal Commissioners is included as Exhibits A and B in the *Special Report of the Board of Canal Commissioners in Reply to a Resolution of the Senate, relative to the Claim of Morris Seely*, February 10, 1839 (the "Special Report"). This memorial from Seely to the General Assembly was probably made some time in 1834 after an earlier inquiry by the Senate to the Canal Commissioners had resulted in the Canal Commissioners issuing a report in January, 1834 in which they indicated that Seely's canal had no value to them because they had made other arrangements (with the Cooper estate) for the use of the water power on the feeder.

² While the state owned the feeder, which provided water for navigation in the Miami Canal from a dam in Mad River, it did not own any of the property adjacent to the feeder, and so could not take advantage of the water power potential arising from the level of the water in Mad River behind the dam being approximately 12 feet higher than the level of the main canal at the basin in Dayton. In order to use this water power, the state needed to acquire land adjacent to the feeder as well as a means for returning the water removed for power purposes to the main canal so that it could be used for navigation purposes below Dayton. Seely's proposal addressed this need by providing the state with a lot adjacent to the feeder and a "tail race" (Seely's canal along which he platted hundreds of lots) that would direct the water removed from the feeder, after its use for power purposes on the lot sold to the state, back to the main canal below what would become Fairgrounds Hill. The state did buy 1 1/2 acres from Seely for this purpose, but his grander project was dependent on the state then selling the water power rights for use on the lot to someone who would actually use the rights (and discharge the water removed from the feeder for that purpose into Seely's canal--the "cut" he refers to in the memorial), since this was to be the source of water for Seely's canal. Because the Cooper estate was able to enjoin the sale by the state of the water power to be used on the lot purchased from Seely (until the Ohio Supreme Court eventually determined otherwise), they also effectively kept Seely's ditch dry. The state eventually purchased another similarly sized lot from the Cooper estate for construction of a lock (for which they apparently paid \$1,900/acre (compared to the \$250/acre they paid to Seely)).

purchased a site of your memorialist for its use, for the sum of five hundred dollars for same, to be paid therefore, to your memorialist. After this advertisement appeared and on the day before the sale was to be made, the guardians of Coopers heirs in pursuance of their original purpose to appropriate this power to the use of their wards, without regard to the interests of the state, applied to a Judge of the Court of Common Pleas for Montgomery County for a writ of injunction to restrain the acting commissioners from a sale of the water power and from appropriating this power in the manner contemplated by the contract between your memorialist and the commissioners. And such facts were stated and sworn to upon the face of the petition, without an answer or evidence, that the complainants were entitled to a hearing in equity, and granted the injunction. While your memorialist was progressing with the work, and in full faith of the fulfillment of the contract on the part of the state, he purchased several out lots on the plat of Dayton adjacent to the cut by him made, having previously purchased the ground for the cut itself. And while constructing the work your memorialist laid off more than three hundred lots; sixty-one of which he advertised for sale while the work was in progress. Much pains were taken by the guardians of Coopers heirs³ & a few of their active friends, to impress upon the public mind that your memorialist was proceeding with the work without authority, that it never would be accomplished, and [last line on page cut off by copier] an imposition upon purchasers. Although the guardians were men of wealth and influence, yet your memorialist conscious of a fair contract with the state through the commissioners, had no doubt that he would be able to sell the lots at a fair price, and both himself and the purchasers acting under the pledged faith of the state would be protected. Such, however, were the doubts [enacted] by the representations of Messrs. Phillips and Steele the guardians of Coopers heirs, that your memorialist in order to obtain a fair price for the lots deemed it prudent to insist in the terms of the sale, that if there should be a failure on the part of the state to use the water power at the point purchased by the canal commissioners and a consequent failure to use the cut [making] by your memorialist for canal purposes, the sale should be inoperative at the option of the purchasers. He felt at perfect liberty to do so having a complete contract with the commissioners made with perfect fairness on both sides. Upon these terms he made sale of sixty-one lots at public auction for eight thousand dollars. The cost of the outlots in which these lots were laid out was twenty four hundred dollars. The balance of the lots had been advertised for sale about four weeks before the water power was to be sold, and the day of sale fixed for the sale of the lots, was four days after the day fixed for the sale of water power. Your petitioner is prepared to prove that but for this injunction restraining the sale of the water power, he would have realized a clear profit on these lots beyond question of 24 thousand dollars. Your petitioner was also the owner of one third part (undivided) of a plat of 283 lots laying on both sides of the cut, on which he is also prepared to prove that, but for the same cause, he would have realized a profit of at least eleven thousand dollars. By whatever name these profits may be called prospective or otherwise, they were indisputably such as your memorialist would have realized if the faith of the state pledged for the performance of her contracts so far as her authorized agents could pledge it, had been kept. Your memorialist further shows that he constructed three basins on the said cut at the expense of seven hundred dollars which would have [been] useful and profitable as well to the commercial interests of Dayton as to your petitioner had the contract with the canal commissioners been performed. Further, by the terms of acceptance by the canal commissioners of your petitioner's proposal, the site to be sold to the state was to be on lot No. 3 or No. 17 to be selected by the acting

³ Daniel C. Cooper was the original proprietor of Dayton, and after his death in 1818, prominent Daytonians H.G. Phillips and James Steele managed his large landholdings in Dayton for his children.

commissioner. Your petitioner commenced the work promptly and in earnest, and believing that the site on lot no. 17 was equally eligible with lot No. 3 for the use of the water power and more advantageous to him, directed his work towards the point on lot No. 17 and performed excavation to the amount of \$400; when the acting commissioner⁴ concluded that lot no. 3 would be the preferable point, and your petitioner changed the work accordingly by which change he suffered a loss of \$400.

At the time of making the contract and constructing the work, your petitioner was in moderate circumstances as to property, and relied for success much on his character for integrity, enterprise, and industry. This character had availed him with the canal commissioners in obtaining the contract, and with this contract conveying with it the pledged faith of the state he then and now conscious that according to every principle recognized among honest men as fair and honorable, he was justified in the manner of proceeding with the work, in making purchases, sales and improvements with a view to the fulfillment of the contract on the part of the state; not doubting that it would be fulfilled without delay. All his hopes were laid upon this; and but for the failure on the part of the state, he would have been able to meet every expense, fulfill every contract which he made, complete every improvement which he had commenced, and by fidelity to this contract on his part; energy and industry in the prosecution of the work, would have realized a handsome estate as the result of his industry and enterprise. The injunction by the state officer, and the grievous delay of the suit in chancery and the consequent non-fulfillment on the part of the state, deprived him of the means of fulfilling his contracts with others, of making sales of his lots and progressing with his improvements, both in contemplation and progress, greatly injured, his credit which with his industry & enterprise constituted his chief capital, and brought upon him insolvency and ruin. The works which he had commenced, were pointed at and denominated by the adherents of Phillips & Steele "Seelys folly"; and creditors seldom willing to appreciate on apology from their debtors when from any cause their debt is not paid, were but to willing to join in the denunciations. It remains to be seen by the decision of the representatives of the people of Ohio, whether an humble individual thus acting under the authority of the state [last line on page cut off by copier] insolvency, and his works thus constructed remain to be pointed at in derision as momentos of "Seelys Folly."

Your memorialist had erected a large three story Hotel in Dayton, and had dug and walled the cellar of another large building, prepared the brick and other materials for its construction; but which he was most effectively enjoined in completing by enjoining the sale of the water power, which in effect enjoined the fulfillment of the contract by the canal commissioners. Judgments were obtained against your memorialist, the Hotel was sold at two-thirds its appraised value which was notoriously appraised low, and by which he lost at least \$3,000. About \$4500.00 bricks were seized on execution, and before the sale, which was late in fall, were so reduced in value by exposure to rain and frost, that they were sold for less than \$100 and much other property sacrificed in the same manner. It has been said by some that this loss might have been prevented by paying off the debts. This is manifestly true. If your memorialist had owned other property or money by which the losses might be prevented he would not have suffered them. But when he had a contract with the state the fulfillment of which would equally have prevented these losses, had he not, relying upon the faith of the state, the right to consider it

⁴ Micajah Williams of Cincinnati was the Acting Canal Commissioner responsible for the construction of the Miami Canal at the time the contract with Seely was signed.

as property equally available with land or chattels? If not, he has been taught to place an undue estimate upon the faith of the state.

After this injunction was allowed and while this suit was pending, your memorialist, harassed by his creditors, and desirous as well on account of his own character, as to discharge his duties to them, [last line of page cut off by copier] expenses incurred in the actual construction of the work. Your memorialist did not then ask damages for the non-fulfillment of this contract (because the suit was still defending) and your petitioner being anxious to obtain a remuneration for the monies actually laid out by him to use in payment of debts, and not knowing what might be the result of the suit, proposed that his claim for damages⁵ should be considered separately from that incurred for actual expenditures. The legislature passed an act for the relief of your petitioner, referring the subject to the canal commissioners to carry its provisions into effect. This board, who have never been charged with partiality towards individuals, when individual interests come in conflict with the character of the commissioners for skill and economy, with their usual adroitness, found out a method to report to the legislature that the works constructed by your memorialist could be dispensed with, and a preferable route adopted.⁶ It will be recollected, that when the commissioners contracted with your memorialist, neither this preferable route nor any other could be obtained by the commissioners. This was the reason for making the contract. Now the honesty and fairness of this report may be exemplified by a simple illustration: A has a spring on his land within twenty rods of B's house. B, having no water, proposes to purchase of A, the right of bringing water from his spring to his house. A refuses on any terms to sell him the right. B of necessity makes a contract with C to bring him water from another fountain a mile distant, and to pay him for doing so one hundred dollars. C performs the work and about the time of its completion A becomes more neighborly [last line of page cut off by copier] and --- from his spring. B is very grateful for the offer, and modestly says to C "my neighbor B has at length agreed to accommodate me, so that the work you have performed will be of no use to me. I presume therefore you will charge nothing for your labor."

In the same report the commissioners represent that the works of your memorialist could only be used as a tail race, and for that purpose it would require \$2,023.32 to complete it. To show how utterly destitute of foundation this report in regard to the expense is, your memorialist states that since it was made the agents of the state have leased the site which they purchased of him for the interest of \$1500 per annum and the water is now used at that point and carried into the canal through the cut made [by] your memorialist, without the expense of one dollar although it has [_____ in the earth] from various causes for about [ten] years; and the capacity of the cut is amply sufficient to pass every drop of the feeder in the same manner. Here is a piece of economy on the part of the commissioners showing their fidelity to the state in [very] small matters. By the original contract your memorialist was to have \$500 per acre for the site; they afterwards, and after the work was commenced, rescinded the resolution as to the price, and

⁵ Lost profits.

⁶ Benjamin Tappan, President of the Board of Canal Commissioners, issued this report on January 1, 1834 in response to an inquiry in December 1833 from the Senate as to whether the Canal Commissioners had taken any action to carry out the requirements of an *Act for the Relief of Morris Seely* passed by the General Assembly on February 25, 1833, all as shown in the Special Report. It was in this report that the Commissioners indicated that Seely's "ditch" no longer had any value to the state for water power purposes (because they had made other arrangements with the Cooper estate).

allowed but \$250 per acre; so that they paid for the site having one and a half acres \$375 which they now rent at the interest of \$1500.

With respect to that part of the report which states that the cut made by your memorialist *“passes through lots owned by different individuals, some of whom have yet given no satisfactory assurance of an intention to cede to the state the right of the waterway”* your memorialist states and is prepared to prove, [last line on page cut off by copier] that purpose, and before that report was made, your memorialist so informed the commissioners and offered to produce the evidence if there remained the least doubt of the fact.

The truth of the whole matter is, the commissioners could not obtain a site for the use of the water power which was known to be of immense value, of Phillips and Steele, whose wards owned the land adjacent to the feeder. It was of vast importance to the state that the power should be used---It was of vast importance to the citizens of Dayton and to the public. The commissioners then resolved to do their duty, and your memorialist having it in his power to affect these great objects with advantage to himself, made the proposal to the commissioners who with a view to the public interest accepted it. The contract was therefore made and performed by your memorialist on his part. By means of the injunction, the state failed on its part, and when by reason of its failure, your memorialist was defeated in the honest enterprise, his credit prostrated, and what other means he had sacrificed, he seems to have been too humble and unworthy to be sustained by the board of commissioners under whose authority and contract he had acted and who by means of this contract and its performance on his part, the estate of Cooper was compelled to offer reasonable terms to the state, the suit having at length been determined against them, the board not only accedes to their terms, abandoning your memorialist to his fate, but labor with that adroitness and ability for which are in some degree proverbial, to disparage the very work which they had authorized, and [last line on page cut off by copier] of using the water for hydraulic purposes. Your memorialist therefore prays that the legislature will adopt the proper measures for full investigation of his claim and the facts being found true grant such relief the humblest citizen is entitled to receive. Your memorialist believes that your Honorable body will not refuse if you should find that he has sustained damages in consequence of the violation of the contract made with the Canal Commissioners, to award him the same damages you would give if you were sitting as a Jury and the Case between two individuals. Your memorialist can not discern the reason why the state any more than an individual should be released from the payment of damages incurred in consequence of a violated contract. But if your Honorable body should be unwilling to examine his claim in detail then he prays you to pass a special act to enable him to bring his suit against the State in the Court of Common Pleas of Montgomery County.

/s/ MORRIS SEELY

To the Honourable General Assembly
of the State of Ohio

The undersigned memorialist, humbly represents to your honourable body that he humbly believes that he has a Just claim on the State for at least ten thousand dollars in support of his opinion and this declaration he respectfully asks leave to present the accompanying documents for your consideration as a part of his memorial the Legislature of Eighteen hundred and four influenced by the documents herewith presented passed a Law by the unanimous consent of Both Houses granting to me Five thousand dollars and at that time a large number of the members were disposed to raise the Bill to Fifteen thousand Dollars but aware as I was of the well founded delicacy and reluctance with which Legislators voted away the Peoples money I had given strong assurances, before the commencement of the investigation to the members generally and particularly the Committee of the Senate who investigated my claim and reported the Bill for Five thousand dollars that all I desired at that time was an investigation and the payment of five thousand dollars the payment of the balance [sic] if any then was I was willing to waive for the Consideration of a subsequent Legislature and therefore desired the members friendly to the payment of fifteen thousand dollars not to move an enlargement of the Bill at that Session inasmuch as it would be Justly regarded as a violation of the assurances I had given that I would only ask that Legislature to take the responsibility of paying five thousand dollars. Some of the members informed me that they could only consent to withhold a motion to enlarge the Bill from five to fifteen thousand dollars upon my assurance that I was satisfied with the five thousand dollars at that time with a view and intention of soliciting a subsequent Legislature to pay the remaining Ten thousand dollars which I now do this claim & have waived to this late period in consequence of my absence from home during the sitting of the Legislature since that time this claim and the accompanying documents I submit to the intelligence of your honourable body which I am well satisfied will lead you to that decision that will do honour to yourselves and Justice to me.

I am with profound respect your humble
but devoted Fellow Citizen

Dayton January 11, 1837

/s/ MORRIS SEELY

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They are two petitions Seely submitted to the General Assembly in which he asked to be reimbursed for costs and damages he claimed he had incurred because he felt that the state had not followed through with its commitment to use a lot he sold to them for water power--the outfall from which would have provided the source of water for his canal (which he committed to the state he would build to direct the outfall from the use of the water on the state's lot back into the main canal below town).

The first memorial, in particular, sets forth Seely's tale of woe. The state waited until they were sure Seely would complete his canal (really, a tail race, as far as they were concerned) and then announced that they would auction the water power rights. The Cooper estate went to court, and stopped the sale for a time, until the Supreme Court, in that case I sent you before, held for the state. In the interim, since there was no water coming out of the feeder canal on the lot for water power, there was no source of water for his canal, purchasers of lots backed out and Seely went broke (and he even lost the three story National Hotel he had built to his creditors). The state, however, by that time had decided to extend the canal north to Miami County, and needed to insert a lock in what had been the feeder (to raise boats over the "fall" from the Mad River dam to the main line of the canal), and they did what appears to have been a very expensive deal--almost 8x what they paid Seely--with the Cooper estate to purchase a 1 1/2 acre lot (just north of today's Fifth Street)---and the Coopers got the water power for their hydraulic system. At some point, the state apparently did sell the water power rights on the lot purchased from Seely, and a sawmill was constructed there (the Thresher sawmill referred to in the Montgomery County Historical Society article).

I need to do some more research, but it appears that the state eventually paid Seely at least \$5,000 for the out-of-pocket costs he incurred to build his canal, but while he asked for an additional \$10,000 to cover the lost profits on the real estate he purchased and platted, I'm not yet certain whether he actually received anything beyond the \$5,000.