

12345

No. \_\_\_\_\_

# Supreme Court of Illinois

Phelps, et al

---

vs.

Foster

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71641  7

1 United States of America  
State of Illinois

Among the ~~Rolls~~ Records and  
judicial proceedings of the Circuit Court in and for the  
county of Boone & State aforesaid the following among other pro-  
ceedings were had to wit:

State of Illinois

Boone County Circuit Court; October Term A.D. 1856. At a Court  
held at the Court House in Beardsgen on Monday the 6<sup>th</sup> day of October 1856

Present

Honorable Isaac G. Wilson Judge

Payette B Hamlin Clerk

Leonard L Lake Coroner acting Sheriff

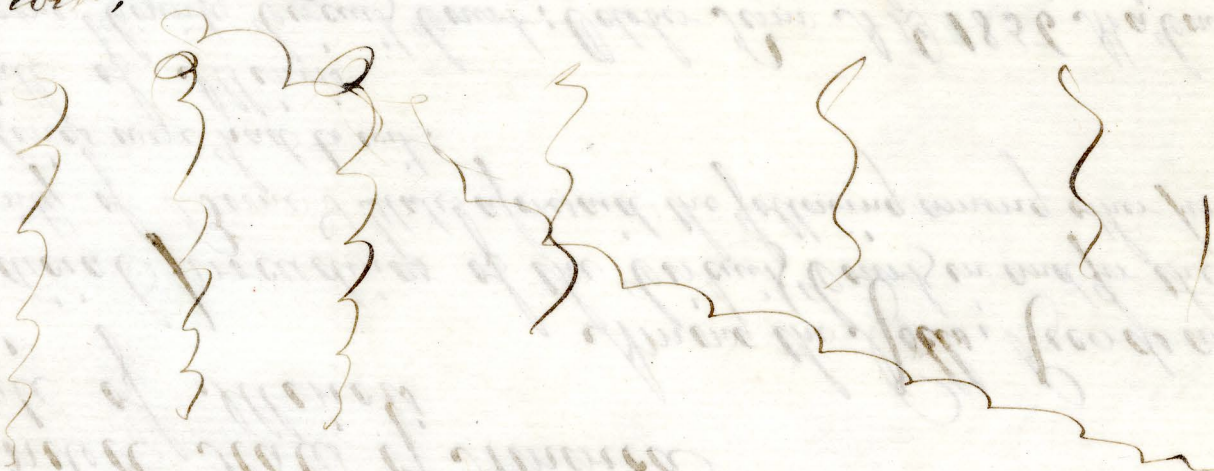
M. M. Boyce State Attorney

The Coroner of said county acting as Sheriff returned into Court the Venue  
Facias issued by the Board of Supervisors of said County of Boone aforesaid  
for the following named persons to wit

|                |                   |                                   |
|----------------|-------------------|-----------------------------------|
| A. W. Colton   | E. G. Lamb        | Andrew Whitney, N. W., Per        |
| Isaac Rue      | R. A. Blodgett    | Isaac Irish John Lawrence         |
| Charles Reed   | John Andrus       | John W. Lanni John Lumley         |
| Jacob Winnegar | Daniel R. Gardner | Martin Keeler Samuel P. Lane      |
| J. D. Irish    | Hiram Hopkins     | J. R. Mordoff David Caswell       |
| Matthew Warner | Charles Whitmore  | John Belcher to be and appears at |

the present term of the Circuit Court to serve as Grand Jurors who were returned  
by the said Coroner as duly summoned excepting John Belcher and Charles  
Whitmore who were not found in the county, the balance of said jurors being  
duly called severally answer to their names excepting Hiram Hopkins who made  
default E. G. Lamb Samuel P. Lane J. R. Mordoff Matthew Warner were excu-  
sed by the Court from serving as Jurors H. W. Bell, D. W. Weeks, A. W. Johnson  
& J. M. Peter were by the Coroner summoned as Takers Whereupon they the  
said Jurors were duly empannelled having answered to their names There-  
upon the Court appointed John Lawrence Foreman & he together with the  
aforesaid jurors were duly sworn to attend as Grand Jurors at this  
present term of our said Court & having been duly charged by the  
Court retired to consider their forepresentments

Now this 24<sup>th</sup> day of April AD 1856, the following, Complaint and Bill in Chancery praying an injunction was filed and is in the words and figures following to wit:



3  
State of Illinois } In the Borne Circ Court  
Borne County } ss In Chancery

To the Honorable Isaac G. Wilson, Judge  
of the Thirteenth Judicial District of the state  
of Illinois

Your Orators, William A. Phelps,  
Thomas Aitkin, William L. Stan & Jason Taylor, would  
represent to your Honor that they are, and for a  
long time heretofore have been copartners doing business  
in New York under the name and style of Phelps  
Aitkins & co. That doing business as aforesaid, they in or  
about the 10<sup>th</sup> day of October AD 1853, sold and delivered  
to Joseph W. Foster, one of the Defendants hereinafter  
named, a large quantity of Goods, Wares and merchan-  
dise, of the Value of Two Thousand and Eighty dollars  
for which the said Foster on the said Tenth day of Oc-  
tober, made, executed and delivered to the said Phelps  
Aitkin & co. his certain Promissory note in writing, by  
which he promised to pay the said Phelps Aitkins & co  
or order the said sum of Two Thousand & Eighty dollars  
six months after the date thereof. That at the time of the  
purchase of said Goods and Merchandise, the said Jo-  
seph W. Foster, as an inducement to the said Phelps  
Aitkins and co, to give him the credit of the said six  
months, stated and represented to them the said Phelps  
Aitkin & co, that he was the owner and in the possession  
of Goods, Wares and Merchandise and debts due him  
that were good to the amount of Five Thousand Dollars  
and that he was the owner of a house & Lot in the village  
of Belvidere in said county worth at least the sum of  
Seven Hundred Dollars. That he was indebted to One  
One George Lyon in the sum of Fourteen Hundred dol-  
lars, To one A. L. Titerworth in the sum of Two hundred

4 dollars to Meepers Cooley Wadsworth &c. Two hundred dollars to E. Kempstead. One hundred dollars, and the sum of Two hundred and ten dollars for certain Bills of goods before that time by him bought amounting in all to the sum of Two Thousand and Ninety Dollars. and that the above was all and the only debts due and owing by him to any one. And your orators further shew to your Honor that they were induced by said representations to extend credit to the said Foster in the purchase of the goods as aforesaid.

And your orators further shew unto your Honor that the said statements of the said Joseph W. Foster at the time of his purchasing said goods were false. That he then was indebted to divers other persons besides those above named. in divers large sums amounting to over Two Thousand Dollars. That he was not the owner in fee of any house & Lot in Belvidere as above mentioned.

And your orators further shew to your Honor that just before the maturity of said note the said Joseph W. Foster made a pretended sale of all his stock of Goods and property to his brother Thomas P. Foster. That said pretended sale was made to his said brother without taking any inventory or ascertaining in any manner the true value and real amount thereof. That said pretended sale was made for a nominal sum only and that all and the only consideration that said Joseph W. Foster received in pretended payment therefor was divers notes of his said brother Thomas P. Foster for the sum (as he says) in all of about six Thousand dollars. and only has remaining in his possession notes for the payment of Thirty two hundred dollars. none of which last mentioned notes became due and payable until two years after the date of the said Pretended sale, and that they were  
ran some of them

and Thirty months & three years thereafter. and that your Orators are informed & believe the said Thomas P. Foster is really a person of no solvency. but is according to his own admissions and acknowledgements owing and bound to pay debts nearly equal in amount to his own valuation all the property he has or pretends to own. That on the maturity of the said first above mentioned note it was presented for payment, when the said Joseph W. Foster claimed and pretended that he had no property with which to pay or satisfy the said note except the notes given by his Brother Thomas in pretended payment of the goods. But as aforesaid none of which became due and payable until two years from the time of the said pretended sale, and he entirely and absolutely refused to surrender, turn out, or apply any of them or any thing of Value towards the payment of the said first above mentioned note.

And your Orators further show to your Honor that they are informed & believe, expressly charge the fact to be, that said pretended sale by said Joseph W. Foster to the said Thomas P. Foster was only made in pretence and for the purpose of <sup>covering</sup> conveying the goods up the said goods merchandise and keeping them from the creditors of the said Joseph W. Foster and with the intention of removing them from said County to be sold for the future benefit of the said Joseph W. Foster, and that the said pretended sale was devised and made by the confederating and collusion of the said Joseph W. Foster & the said Thomas P. Foster with the express intent thus fraudulently to delay, hinder & prevent the creditors of the said Joseph W. Foster from obtaining payment of their just demands.

And your Orators further show unto your Honor that the said goods are still remaining in

6 the store recently occupied by said Joseph. W. Foster, and amount at present in Value to between the sum of Three & Four Thousand Dollars as near as the same can be estimated generally.

3 And your Orators further shew unto your Honor that they have instituted proceedings at Law against the said Joseph. W. Foster for the recovery of their said demands. But that so it is, that a Judgment cannot be obtained until the next October term of this court, before which time the said goods will have been disposed of and placed beyond the reach and benefit of your Orators, all of which doing pretences & refusals of the said J. W. & Tho. P. Foster, are contrary to Equity and good conscience and tend to the manifest wrong and injury of your Orators in the premises, In consideration

In consideration whereof, and for as much as your Orators are in effect and at present remediless at Law against the said Thomas P. Foster, and to the end, that your Orators may be enabled to obtain the said goods to apply payment of their said demands; And that the said Joseph W. Foster & the said Thomas. P. Foster, their agents, attorneys and representatives may be enjoined & restrained by your Honor from apiging, selling, transferring, or in any manner disposing of or removing the said goods & merchandise, and that your Orators may have such other & further relief in the premises as nature of the case may require & as may seem meet & proper to your Honor.

Your Orators humbly pray that on your Petitioners filing a Bond in such a penalty as your Honor may direct, and with such security as your Honor or the Clerk of this Court may approve, conditional

For the payment to the said Thomas & J. W. Foster of all damage they may sustain by reason of the issuing of the injunction hereinafter prayed for, in case the same shall be declared to have been wrongfully issued That your Honor may grant a writ of injunction against the said Thomas Foster and the said Joseph W. Foster their agents Attorneys and representatives commanding and enjoining them the said Thomas & Joseph W. Foster their agents Attorneys and representatives that they do absolutely and entirely desist and refrain from assigning selling transferring or in any manner disposing of or removing the said goods and merchandise until the further order of this Court

May it please your Honor to grant unto your Orators process of subpoena to be issued out of & under the seal of this Court as the law directs against the said Joseph W. Foster and the said Thomas P. Foster as Defendants commanding them and each of them to appear and answer this bill of Complaint without oath on the first day of the next October Term of this Court

Boyce Stanton  
Compl't Solr

{ Thom<sup>s</sup> Phelps  
Thos. Atkin  
Wm L. Starr  
Jas. Taylor }

By John C. Benson  
their Atty

And ~~endored~~ upon the back of said foregoing bill is endored in words and figures following to wit

Filed April 24<sup>th</sup> 56

J. B. Hamlin Clerk

And now <sup>afterwards</sup> on the 25<sup>th</sup> day of April A.D. 1856 a ~~and~~ <sup>affidavit</sup> in pursuance of the foregoing Petition & bill of Complaint the following bond was filed in words & figures as follows to wit  
We now all men by these presents that we the undersigned William, N. Phelps, Thomas Atkin, William Atkin, L. Starr, and Jas. Taylor & J. A. Notchkins are jointly indebted unto Thomas Foster and Joseph W. Foster in the just and full sum of Five Hundred dollars for the payment of which

sum well and truly to be made we bind ourselves our heirs our  
heirs representatives and assigns. In witness whereof we have here-  
unto set our hands and seals this 23<sup>d</sup> day of April A.D. 1836

Whereas the above bounden William A Phelps Thomas Atkin  
William L Starr & Jason Saylor Copartners &c under the name & style of  
Phelps Atkin & Co are about to procure the issuing by the Judge of the  
Circuit Court of Boone County of an order of Injunction commanding and  
restraining the said Thomas Porter & Joseph W Porter to refrain and desist  
from selling or in any manner disposing of or removing a certain stock of  
goods wares and merchandize now in the store aforesaid occupied by the  
said Joseph W Porter until the further order of the Court. Now  
therefore the condition of the above obligation is such that if the said  
Phelps Atkin & Co shall pay or cause to be paid to the said Thos J. W. Porter  
all damages and costs that may be sustained by the said Thos J. W. Porter  
by reason of the wrongful issuing of said Injunction then the above  
obligation to be void otherwise to remain in full force & virtue

|                          |                  |                                                                                       |
|--------------------------|------------------|---------------------------------------------------------------------------------------|
| By J. R. Person Atty for | William A Phelps |  |
|                          | Thos Atkin       |  |
|                          | Wm L Starr       |  |
|                          | Jason Saylor     |  |
|                          | A. A. Notchkins  |  |

The foregoing bond is hereby approved as to the manner & form of  
its execution and as to the securities thereof  
April 23<sup>d</sup> 1836 Fayette R Hamlin  
Clerk

9  
And now on the 25<sup>th</sup> day of April AD 1856 a writ of injunction was issued against the defendants herein in words & figures following to wit

State of Illinois  
County of Boone The People of the State of Illinois to Joseph W. Porter and Thomas, P. Porter & you & each of your attorneys & agents and representatives Greeting

Whereas it has been represented to us in our Court of Chancery on the part of William St Phelps Thomas Athin William L Harr & Aaron Taylor copartners under the name & style of Phelps Athin & Co that they have lately filed their Petition in the Circuit Court of said County on the Chancery side thereof against you to be relieved touching the matters therein complained of and Praying that a writ of Injunction issue touching the premises And the said Court having on inspection of the Petition ordered that an injunction issue in accordance with the Prayer thereof

And therefore in consideration thereof strictly do enjoin & command you Joseph W. Porter & Thomas P. Porter you & each of your attorneys agents & representatives & each of you that you do absolutely & entirely desist & refrain from selling conveying assigning or in any manner disposing for removing the stock of goods & Merchandise in the store formerly occupied by said Joseph W. Porter & now occupied by said Thomas P. Porter in Belvidere in said County or any part thereof or any interest you or either of you may have therein until the further order of this Court in the premises & this you will in no wise omit

J. P. G. 3

In testimony whereof I have hereunto set my hand & affixed the seal of said Court at Belvidere this 25<sup>th</sup> day of April AD 1856 Fayette B Hamlin Clerk  
Upon the back of which said writ of injunction

the following endorsement was made to wit -

"I hereby certify that I have this day served the within writ by delivering a true copy of the within writ to the within named defendants in person Joseph W. Porter and Thomas, P. Porter April 29<sup>th</sup> 1856

Filed April 29<sup>th</sup> 1856. F B Hamlin Clerk N R Wilson Sheriff of Boone Co

And afterward to wit on the seventh day of October A.D. 1856, being one of the days of the <sup>saide County of Boone</sup> ~~saide~~ October Term of the Circuit Court of the following among other proceedings were had, to wit:

William H. Phelps, Thomas Aitkin,  
William L. Starr & Jason Saylor } Bill for  
Injunction  
Under the name and style of  
Phelps, Aitkin & Co.

vs.  
Joseph M. Foster & J. P. Porter

Now this day  
Come the Complainants by Boyce & Stanton their solicitors  
And the Defendant by his solicitors Fulk & Moore  
Also ~~the~~ Comes And the said Defendant by his so-  
licitor move the Court to dissolve the injunc-  
tion herein, Whereupon the Court being fully  
advised in the premises orders the Injunction  
dissolved. And afterwards to wit On the same  
day the defendant moves the Court for an al-  
lowance of Damages herein which motion is held  
under advisement by the Court as per stipulation  
of the parties on file herein.

And afterwards to wit on the 9<sup>th</sup> day of October  
1856, a Stipulation between the parties herein in  
words & figures following was filed

Phelps Aitkin & Co.

vs.

Joseph M. Foster &  
J. P. Foster

Boone Circuit Court  
October Term 1856.

It is Stipulated that Testimony be taken by the  
Complainants in this cause before J. B. McAmis Master  
in Chancery on the question of Damages in this case  
at any time before the 28<sup>th</sup> of October inst. upon their

days notice to Defendants Solicitors - And that of  
 the such testimony is chosen the Defendants have  
 five days after to introduce testimony in reply such  
 testimony when taken to be mailed to His Honor  
 Judge Wilson And an Assessment entered by him  
 And the same to take effect as of this Term.

If Appeal be prayed by Complainants to Supreme  
 Court Bond to be filed And Bill of Exceptions made  
 up & approved as to security by Judge Wilson  
 within ten days from the rendition of the judgment  
 of Assessment of Damages.

Fuller & Wood, S. A. Houlbut for Defs  
 Boyce & Stanton for Complainants

October 9<sup>th</sup> 1856.

And after words to wit on the ninth day  
 of October A. D. 1856, being one of the days of the  
 October Term A. D. 1856, of the Circuit Court of  
 said County of Boone the following among other  
 proceedings were had as appears by the words &  
 figures following to wit.

|                                                             |                                          |
|-------------------------------------------------------------|------------------------------------------|
| William H. Phelps, Thomas Aitkin                            | } Boone Cir. Court<br>October Term 1856. |
| William S. Hare & Jason Taylor                              |                                          |
| Partners under the name and<br>Style of Phelps Aitkin & Co. |                                          |
| vs.                                                         | } Bill for Injunction<br>in Chancery     |
| J. W. Foster & L. P. Foster                                 |                                          |

And now at this day being one of the days of  
 the October Term of the Circuit Court of Boone  
 County before His Honor Isaac G. Wilson Judge  
 of the 13<sup>th</sup> Judicial Circuit now sitting as Chan-  
 cellor this Cause came on to be heard upon  
 motion of the Defendant by his Solicitor to dissolve  
 the Injunction heretofore granted in this case  
 And to dismiss

the the Bill. Which motion was resisted by Complainant through his Counsel

And it appearing to the Court upon inspection of the record now Pending in said Court that a Certain suit at law wherein said Complainants were Plaintiffs & J M Foster Defendant had at this present Term been dismissed because the process therein issued & by which said defendant was brought into Court was void & that this present Bill of Complaint was ancillary thereto and that the injunction & said Bill prayed was based upon the pendency of said suit at law and was prayed solely for the purpose of restraining the defendant herein from removing disposing of or intermeddling with a Certain stock of Goods therein sought to be described with the determination of said suit at law so that the same might be & remain subject to the judgment & Execution in said suit at law when obtained & that no other relief was prayed in said Bill. The motion of said Defendant to dissolve said injunction & discontinue said bill by the said Court was refused. Whereupon & before entry of final decree the said defendant by their said solicitor moved the said Court to accept the damages sustained by said Thomas P Foster by reason of the wrongful suing out of said injunction which His Honor then & there in open Court proceeded to hear & determine by testimony taken & heard in open Court & the said Thomas P Foster by his said solicitor having rested his Cause upon such oral testimony the said Phelps Atkins & Co by their solicitor prayed leave of the said Court to introduce testimony on their parts Whereupon by Consent of Parties signified by written stipulation on file in this Cause it was agreed that testimony should be taken by said Phelps Atkins & Co on said question of Assessment of Damages at any time before the 28<sup>th</sup> October Instant upon three days

14 notice to Defendant J P Foster Solicitor And that  
after Closing said testimony on the part said  
defendant should have five ~~clerk~~ days thereafter  
to introduce testimony in reply All such testimony  
to be taken before Fayette B Hamlin Esq Master of  
this Court & when completed to be minute to his Honor  
Judge Wilson And assentments of damages to be made  
by him upon the testimony in the case And entered  
as of said October Term of the said Circuit Court of  
Boon County

And afterwards as by <sup>terms</sup> ~~reason~~ of an action  
a certain other stipulation on file in this Cause  
will appear the time for taking said testimony on  
the part of said Phelps Arthur & Co was by Consent  
of Court continued till until the 5<sup>th</sup> day of November  
1856 & James B Taylor Esq by same Consent Chosen  
Commissioner to take the same And afterwards on  
the fifth & sixth days of November before said James  
B Taylor Esq, said Phelps Arthur & Co produced pro-  
ceeds to introduce testimony on their part & the said  
J P Foster Enclosed in reply on his part which was  
minute to writing by said James B Taylor Esq & now  
remain depositions on file in this Cause which  
said depositions together with the minutes made by  
his Honor of the oral testimony heard before him  
in pursuance of said stipulations were forwarded & delivered  
to the said Judge And when the said Court  
being fully advised having fully considered  
all the proofs and allegations so before him & the  
testimony herein being closed and being fully  
<sup>advised</sup> ~~considered~~ of & concerning the same assent the dam-  
ages by him the said Thomas P Foster sustained  
by reason of the wrongful suing out of said subpoena  
at the sum of Twelve hundred & fifty dollars &

Order & Adjudge & decree that the said Thomas  
 P Foster have & recover of the said William N Phelps  
 Thomas Arthur William L Starn & Jason Taylor  
 Complainants in said Bill of Complaint said  
 sum of Twelve hundred & fifty dollars & his costs  
 in & about said Appraisement of Damages & have  
 attorney fees therefor And that said Bill of  
 Complaint be dismissed at the costs of said complain-  
 ants And that this decree in terms of stipulation  
 between the parties be entered up & take effect as of  
 the October Term 1856 of this Court

25 Nov 1856

Isaac Wilson

State of Illinois }  
 Boone County } Daniel H Whitney Clerk of the Boone  
 County Circuit Court do hereby Certify  
 the foregoing to be a full, perfect, & Complete  
 Copy of the record & proceedings had in  
 the above entitled Cause as shown by my  
 hand & the seal of said Court at  
 Bellevue this 20th day of January  
 A D 1857.

Daniel H. Whitney, Clerk  
 of the Circuit Court in and for  
 the County and State aforesaid

Let a supersedeas issue upon the plaintiffs in Error  
 filing the above record together with a bond conditioned  
 as the law directs ~~executed~~ by the said plaintiffs as principals  
 and Messrs H. Innesdell & John D A Brouns sureties in that  
 penal sum of twenty five hundred dollars  
 Jan'y 24 1856.

J. H. Carr  
 Just Suprem & Ills

In the Supreme Court of the State of  
Illinois - for the third Grand Division  
Term A.D. 1857.

And now come the said William, H. Phelps, Thomas Arkin,  
William, L. Harr & James Taylor Partners under the name & style of Phelps  
Arkin & Co Plaintiffs in Error by Joyce & Stanton their attorneys and  
say that in the record of said decree & proceedings aforesaid, there is

1<sup>st</sup> That the Court <sup>dismissed</sup> ~~sustained~~ the demurrer to the Bill of Complaint  
~~in the Court below without a demurrer Plea motion or an~~  
~~answer filed in the cause.~~

2<sup>d</sup> That the Court below assessed damages upon  
dissolving the injunction in this cause

3 That the Court below  
had no lawful or rightful authority to render said decree  
& judgment in favor of said Thomas, P. Porter and against  
said William H Phelps Thomas Arkin William, L. Harr & James Taylor  
Partners under the name & style of Phelps Arkin & Co Plaintiffs - for said  
sum of twelve hundred and fifty dollars, damages, & costs of suit  
And that the same is void for want of authority

4<sup>th</sup> That the  
decree below was for the Defendants in Error when by the law  
of the land it ought to have been for the Plaintiffs in Error

Wherefore  
& for divers other errors appearing of Record in said proceedings  
judgment & decree said Plaintiffs in Error pray that the same  
be reversed and they restored

And the said defendant  
says that there is not  
any Error &c.

Joyce & Stanton Attys  
for Plffs -

J. L. Looper, atty for Deft.

Know all men by these presents That we  
Wm. H. Phelps, Thomas Atkin, Wm. L. Starr  
and Jason Taylor as Principals and Wm. H. Trus-  
dell and John D. S. Collins as their trustees  
are held and firmly bound unto Joseph W. Fos-  
ter and Thomas P. Foster in the penal sum  
of Twenty five Hundred dollars, for the payment  
of which well and truly to be made unto the  
said Joseph W. Foster and Thomas P. Foster their exe-  
cutors, administrators and assigns we do bind  
ourselves our heirs executors & administrators  
jointly, severally and firmly by these presents  
Signed sealed and dated this twentieth (20)  
day of January 1854

The Condition of the above obligation is such  
that whereas at the term of the Circuit Court began  
and held in and for the County of Boone & State  
of Illinois on the 6<sup>th</sup> day of October A.D. 1856  
the said Court sitting in Chancery ordered and  
decreed a certain Bill of Complaint then lately  
filed in said Court by William H. Phelps,  
Thomas Atkin, William L. Starr & Jason Taylor  
Respondents under the name & style of Phelps, At-  
kin & Company against Joseph W. Foster & Thomas  
P. Foster to be dismissed at costs of compla-  
inants and upon such dismissal rendered  
a decree in favor of Thomas P. Foster for  
Twelve Hundred and fifty dollars damages

and costs of suit and the said William  
St. Phelps, Thomas Attkin, William L. Staw  
and Jason Taylor <sup>Partners under the name & style of Phelps Attkin & Co</sup> having sued out a writ of  
Error from the Supreme Court of said State  
to remove the proceedings Judgments and Decree  
in said cause to said Supreme Court for  
review, and the same being prayed to be  
made a Supersedeas. Now therefore if the said  
Plaintiffs William St. Phelps, Thomas Attkin,  
William L. Staw & Jason Taylor <sup>Partners under the name & style of Phelps Attkin & Co</sup> shall duly  
prosecute said writ of Error and pay the judge-  
ments costs, interests and damages, in case the  
said decree and judgment shall be affirmed  
then the above Bond to be void otherwise to  
remain in full force.

Signed and sealed in  
presence of  
James B. Taylor

William St. Phelps }  
Thomas Attkin }  
William L. Staw }  
Jason Taylor }  
John B. Pierson atty }  
W. H. Buesdell }  
John A. Rollins }

State of Illinois ss. William H. Buesdell and John A. Rollins of said County  
Boone County. Before & state aforesaid being first duly sworn severally  
that they are the legal promoters and who signed the foregoing bond and  
ally that they & each of them are worth in real & personal property situate  
in the County of Boone aforesaid over and above their liabilities at least  
the sum of three thousand dollars W. H. Buesdell

Subscribed & sworn to before me  
this 20<sup>th</sup> day of Jan'y 1854  
James B. Taylor

John A. Rollins

The foregoing Bond is approved by me  
this 20<sup>th</sup> day of January 1856.

Daniel H. Whitney, Clerk  
of the Circuit Court  
Boone County, Mo.

Know all men by these presents, That we  
William H. Phelps, Thomas Atkin, William  
L. Haw + Jason Taylor as principals and  
William H. Truesdell and John D. A. Rollins  
as their Sureties are held and firmly bound unto  
Thomas P. Foster in the penal sum of Twenty  
five Hundred dollars for the payment of which  
well and truly to be made unto the said Thomas  
P. Foster his executors, administrators and assigns  
we do bind ourselves, our heirs, executors + admini-  
-strators, jointly, severally and firmly by these  
presents.

Signed Sealed and dated this twentieth  
day of January 1857

The condition of the above obligation is such  
that whereas at the term of the Circuit Court  
began and held in and for the County of Boone +  
State of Illinois on the 6<sup>th</sup> day of October A.D. 1856  
the said Court sitting in Chancery ordered and  
decreed a certain Bill of Complaint then lately  
filed in said Court by William H. Phelps Thomas  
Atkin, William L. Haw + Jason Taylor parties  
under the name + style of Phelps Atkin + Company  
against Joseph W. Foster + Thomas P. Foster ~~for~~ to be  
dismissed at costs of Complainants and upon such  
dismissal rendered as decreed in favor of Thomas  
P. Foster for Twelve Hundred + fifty dollars  
damages and costs of suit and the said

William H. Phelps Thomas Atkin William L. Starr and Jason Taylor partners under the name and style of Phelps Atkin Company having sued out a writ of Error from the Supreme Court of said State to remove the proceedings Judgment and decree in said cause to said Supreme Court for review, and the same being prayed to be made a Supersedeas. Now therefore if the said Plaintiffs William H. Phelps Thomas Atkin William L. Starr and Jason Taylor <sup>Partners under the name style & firm of Phelps Atkin & Co</sup> shall duly prosecute said writ of Error and pay the Judgment costs, interests and damages in case the said decree and Judgment shall be affirmed then the above Bond to be void otherwise to remain in full force.

Signed & sealed in presence of  
 James B. Taylor }  
 Wm. H. Phelps }  
 Thomas Atkin }  
 Wm. L. Starr }  
 Jason Taylor }  
 R. John W. Pearson, Att'y }  
 W. H. Truesdell }  
 John D. A. Rollins }

State of Illinois }  
 Boone County } William H. Truesdell and John D. A. Rollins of said  
 County of Boone & State aforesaid being first duly & severally sworn  
 that they the sureties named in & who signed the foregoing bond and  
 depose and say severally that they & each of them are worth in real  
 & personal property situate in the County of Boone aforesaid over and above  
 their liabilities at least the sum of three thousand dollars  
 subscribed and sworn to before me  
 this 20th day of Jan'y 1857  
 James B. Taylor Seal  
 John D. A. Rollins  
 W. H. Truesdell

The foregoing Bond is approved by me,  
May 20<sup>th</sup> 1856.

Daniel H. Whitney Clerk  
Circuit Court, Boone Co.

W.H.

73  
William H. Phelps & others

vs  
Joseph A. Foster & Thomas  
P. Foster.

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Transcript of record

Filed Jan. 27. 1857

L. Leland  
Clerk

By J. B. Rice Deputy

W. J. Phelps  
for App.

In the Supreme Court

Wm H. Phelps et al

vs

Foster & Foster

Error to Brown

Offs Points & Briefs

1st Error

That the court dismissed the bill on motion.

In this case it is clear the court thought there was equity in the bill, but because by matter subsequent, the dismissal of the suit at law, one of the grounds upon which the case made by the complainant by his bill rested, was taken away it upon appeal the motion on terms of the defendant dismissed the bill — This matter should have been shown by supplemental answer.

There being equity in the bill the party should either have filed his plea answer or disclaimer — 3 same 69 —

2<sup>d</sup> That the court assessed damages on dissolving the injunction —

I have examined the cases reported in 2 Am. Eq. Digest. pages 91. & 2 & find they are all where damages have been allowed based upon Statute of the Particular State. The Statute of Kentucky is

given in Monroe 57. Ours is a copy  
literally of that act. In that case  
damages were asked upon a decree  
in chancery. The court in reply  
say the act is confined to judgments  
at law and could not be extended  
as the remedy given is an innova-  
tion upon the established rules of equity.

8 Dana 311. was the case of an injunction  
granted against a RR Co restraining the  
construction of their road & the Co under  
the Statute or practice of that State made  
their answer a cross bill & prayed for damages  
sustained <sup>in consequence of</sup> the injunction but it was dis-  
missed. The court intimating that if  
there were proof that the bill was prosecuted  
through vexatious or wanton motives the  
party might be liable yet a court of equity  
was not the proper forum for assessing the  
damages.

It is true in this case the party tender  
a bond - yet the parties remedy is Chancery on his  
bond & admitting that the court could take ju-  
isdiction of such a case it must be by cross bill.

Of the other cases I call the attention  
of the court to.

5 J. J. Marsh 80 -

5 Lill 136 + 239

4 Mirror 65

5 " 81

4 Dana 290

4 Bibb 436

8 Ohio 61-

6 Leigh 581-

3 Sav. Chy. Pract. (2d ed. 1851) p. 1845. Note 3.

There is not a word in all the Works on Chancery practice of such a thing as a court assessing damages for abuse of its process. ~~X~~ There <sup>as</sup> for contempt are sometimes imposed - and

The only case that I can find reported that gives any sort of color for this assessment is 3 Scam. 468 - The amount in that case was small, and was reported by the master among other items chiefly unobjectionable, & the report of the master not excepted to, so that possibly the point was not in fact before the Court.

W. J. Burgh

for App. in error

case cited by Spts counsel. 1 Paige 99. That the Apprs not liable if in exercise of their ordinary legal rights damages accrue to the Spts -

73  
Sup. Court

Phelps et al  
vs

Post et al

Off Brief—

Filed May 4, 1857  
S. Leland  
Clerk.

Wm. Bangs  
for off

~~The answer to this case cited by the  
complaint to show that the motion was  
proper, & moreover, that the Bill is their  
Bill, is not in this case was granted  
by the court itself & not by motion—  
1 Page infra book of court 125~~

### Additional suggestions—

I fall that the court had done upon the motion had been to dissolve the injunction and let the bill stand in court, under the cases cited the counsel would be right— but here the court went one step further dismissing the bill out of court on motion— It is this that is assigned for error not dissolving the injunction merely

If the Court has the power the counsel insists upon in the 1<sup>st</sup> 2<sup>d</sup> 3<sup>d</sup> ~~4<sup>th</sup>~~ points made on 213 page of his argument, in the general language stated by him— then if either party unnecessarily states facts which are libellous <sup>upon</sup> or unnecessarily wounds the feelings of the other party— or the suit injures him in any way for which he has no legal law the Court should in same suit go on and assess his damages— It might be convenient but there is no law for it—

So far as the stipulation is concerned the suit in error moves for an assessment

<sup>which</sup>  
~~that~~ the court upon his motion  
proceeded to take. In the course of so  
taking is the Off in error maintain  
tain stipulations but none of these  
consented that the court should take  
original cognizance of the matter  
It would be a perversion of justice  
& surprise upon the party - if we  
do accommodate the parties in a  
case when the court has no jurisdiction  
stipulations as to time & manner of  
taking evidence should be held to  
give the court original jurisdiction  
On examining the deems it will be  
found that the court proceeded to  
assess damage heard the ~~plaintiffs~~  
Witnesses of the depts in open court  
& then on application of the Offs gave  
them time to introduce witnesses  
in vacation -

I must say the Counsel  
are not disposed to meet the  
law of the case fairly when they  
resort to <sup>or such</sup> a construction of this  
news as that the question of damages  
was submitted by the parties to the  
court as an original cause  
& therefor concluded by his decision

73

William H. Phelps & others  
vs  
Joseph W. Foster

1857

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