

No. 12711

Supreme Court of Illinois

Boomer, Imp.

vs.

Cunningham, et al

93-170

James B. Bodine
State 18

Robert J. Cunningham

93

12711

1859

73-170
Lucius B. Boomer implor
by

Robert J. Cunningham & others

Supd. Bond

Filed June 28 1858
L. Leland
Clerk

The People of the State of Illinois.

In the grace of God for ever and ever.
To all whom these presents may come - Greeting!!

Know Ye, that relating caused to be deposited the
Records and proceedings now remaining in the office of our Clerk of
our Circuit Court, in and for our County of Will, do forth there certain
records, records and figures following. To Wit:

Will County Circuit Court.
March Term A.D. 1858.

United States of America

State of Illinois } ss.

County of Will }

Know Ye the Honorable
Jas. C. Spator, Judge of the Circuit Judicial Court, and
State of Illinois, and presiding at the March Term of the
Will County Circuit Court, began and held, at the Court House
in the City of Joliet in the County and State aforesaid, on the Third
Monday (the seventh day) of March in the year of
our Lord one thousand Eight hundred and Fifty Eight, A.D., of
the Independence of the United States the Eighty Seventh.

Present Hon. Jas. C. Spator Judge of the Will County Circuit

Judge, St. Paul, Ill. State City for " " "

George R. Dyer Sheriff of Will County.

Alexander W. Smith Clerk of the Circuit Court of Will Co.

And further To Wit:

On the Twenty Eighth day of March
in the year of our Lord one thousand Eight hundred and fifty eight
Richard J. Cunningham, John W. Smith Esq. Henry Watson, Admin-
istrators of the Estate of Richard J. Wilson deceased. filed in the office
of our Clerk of our Circuit Court of the County of Will and State
of Illinois, their certain Bill of Complaint, in words and figures
following. To Wit:

In Chancery.

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Be the Honorable Justices of the Supreme Court of the Illinois Judicial Circuit, and Presiding Judge of the said County Circuit Court in Chancery sitting.

Humly complaining there unto your Honor, your Orators Robert J. Cunningham, John M. Intosh, and Henry Wilson, administrators of the Estate of Richard G. Wilson deceased, that on or about the thirtieth day of June A.D. 1856, your Orators the said, Robert J. Cunningham, John M. Intosh, and Richard G. Wilson then living, (now deceased,) entered into and signed a contract in writing with the Kankakee Bridge Company, a body corporate then consisting of H. Henry Spencer of the Firm of Chase, in the County of Kankakee and State of Illinois, Richard Warner Supervisor of the Firm of Reed, and John J. Camp, Supervisor of the Firm of Wilmington in said State of Illinois, which said Bridge Company were incorporated by virtue of an act of the Legislature of the State of Illinois, approved February Eighteenth 1855, for the purpose of building a bridge across the Kankakee River at Wilmington, in said State of Illinois.

Your Orators further show that by the terms of said Contract, (a Copy of which is hereto attached, and made a part of this Bill,) your Orators the said Cunningham, Intosh and the said Richard G. Wilson were on or before the first day of November A.D. 1856, (unless prevented by high water in the said Kankakee River, and if so prevented then as soon as could be done,) to excavate and clear the beds, furnish all the materials, erect and finish complete two abutments and two piers for a highway bridge, to be built across the West Branch of the Kankakee River in the Firm of Wilmington in said County of Will; beginning at the West Bank of said River, in the Section line dividing Sections twenty six, and thirty five, running thence to the Island in said River, that said Abutments were to be built with wings to be thirty six feet in length each in the River face, eight feet thick at the base, eighteen feet high, and the wings to be well capped at the level end, that said Piers were to be each thirty six feet long, eight feet thick at the base, and eighteen feet high, that all said Abutments and Piers, were to be leveled one and one half inch to the foot, from the base to the top; and that suitable parapets were to be constructed at each end of said Piers and Abutments so as to leave a roadway for the superstructure twenty two feet in the clear.

Your Orators further show that by the said agreement, the said Bridge Company, reserved the right to alter or change the Specifications in regard to the size of said Abutments and Piers, at any time before the work of laying the same should commence; and also reserved the right to determine the level of the facings of said Abutments, and the ends of the wings. And according to the

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Specifications contained in said contract, the Stone masonry of said Abutments and Piers was to be "Range Rock Work" consisting of Stone from one to two feet thick, having parallel and perpendicular beds, the end joints to be regularly squared; And the joints not to be more than one half inch thick in any part of said work, That there should be two headers on each face side of said Piers and Abutments, in every course; That said headers should be a general thing, extend two thirds through the wall, so as to make a lap with the headers on the opposite side; That the faces of the Stone should be left rough, except that the face edges of the Stones, should be finished off in the same manner as the like work was done on the Piers and Abutments of the Rail Road Bridge at the said City of Wilmington, That the said headers, should not be less in number in each course, than those in the said Piers and Abutments of the said Rail Road Bridge. That the face edges of the Stones to be finished off so as to conform to the batter or line of work; And the beds of all Stone of not less than one foot, nor more than eighteen inches in thickness, to be equal to one and a half of the face. The beds of all Stone more than eighteen inches thick, to be at least equal to the face of the same. The ends of said piers and Abutments, to be finished like those of the said Rail Road Bridge; And all work in said Piers and Abutments not particularly described in said Specifications to be done in the same manner as the like work of the said Rail Road Piers and Abutments, That all of the Stone should be laid in good water lime cement mortar, and be well bedded, and have a good mortar like bed of not less than six inches, That the foundation of said Piers and Abutments should be laid in such places as should be marked out by a competent Engineer to be employed, and paid by the said Bridge Company, That your Masters parties of the second part, should put upon said work a competent and sufficient number of workmen, to complete the said work before the first day of December A.D. 1856. That all the Stone to be used in said work should be taken from Prairie Creek quarry, and that all of said work should be done in a faithful and workman like manner, and should be fully equal in quality to the like work on said Rail Road Bridge.

And Your Masters further show that by the terms of said written agreement; The said Kankakee Bridge Company agreed and covenanted to pay to your Masters said Cunningham, Mcintosh, and the said Richard G. Wilson, Decedent, for the work to be done, as set forth and contained in said contract, the sum of Seven Dollars and fifty cents per cubic yard for the masonry work, and materials delivered and laid up in said piers and Abutments; That the work done in each month, should be estimated and paid for, in cash on the first day of the following month; providing and reserving thirty per cent of each estimate which should be held by said Bridge Company, as security for the faithful performance

of said Contract until the same should be completed, when the amount then
required should be paid over to your Orators.

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And Your Orators further Show
that in pursuance of said Contract, the said Bridge Company engaged Andrew
J. Matherson a competent engineer to locate and lay out said Piers and
Abutments, and to draft plans of the same; And also to make the monthly
estimates of the work; that said Matherson located and laid out said Piers
and abutments, at the points designated in said Contract, and drew plans
of the same, by which your Orators were to construct the same.

Your Orators further
show, that as soon as the said Piers and Abutments were located, and the plans
of the same were drawn, and placed in the hands of your Orators, and on or
about the twentieth day of July A.D. 1856, your Orators said Cunningham and
Mr. Intosh, began the erection of said Piers and Abutments, at the places designated
by the said Matherson, and according to the plans he had drawn and furnished
of the same. That they proceeded with the said work as rapidly as possible, placing
upon said work as many hands as could work with convenience and to advantage,
hoping and intending to complete the same within the time limited in the said contract,
And further show that they prosecuted said work with vigor from the time of said
commencement thereof, as aforesaid until about the first day of December A.D. 1856,
at which time your Orators had completed in any respect in accordance with
said Contract, the whole of said work, with the exception of the casing of the rings
of the Abutments on the West bank, and also a part of the West ring, of the East
bank, of said River, that your Orators by and with the consent of said Bridge Company
then left the said casing of said West Abutment, and also a part of the West
East ring, of the East bank unfinished until the next season. And further show that
said Matherson, as the Engineer of said Bridge Company as aforesaid then or or
and by, and under their direction made a final estimate of the said work including
the small amount of casing still to be placed upon the rings of said West Abutment
as aforesaid. That according to said Matherson's said estimate, the whole number
of cubic yards of masonry in said Piers and Abutments is One Thousand, Two
Hundred and forty six $\frac{44}{100}$ which your Orators believe and so charge is less than the
real and true amount, and that the aggregate amount and value of said work
according to said estimate is Nine Thousand One hundred and forty eight $\frac{44}{100}$
dollars. The estimate of said Matherson is hereto attached and proposed to be made
a part of this Bill.

And Your Orators further Show, that the money to defray
the costs and expenses of said work, and of building said Bridge was to be

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raised by a special Tax, upon the property in the Towns of Wilmington, and Reed,
in the County of New, and upon the Town of Essex, in the County of Rankin; as
provided in the said Act of the Legislature, approved September 18th A.D. 1855,
in said three last mentioned Towns, being the only ones which voted in favor of
such Tax, as provided in said Act; And your Orators further show, that out of
the assessments upon said Towns and Townships have been collected, amounting to
about the sum of fourteen or fifteen thousand dollars, as nearly as your Orators
can ascertain, and more than sufficient to have paid your Orators in full, if
the same had been properly applied.

Your Orators further show, and charge to both
to be, that the said Bridge Company have failed to comply with the terms of the said
contract; that they have failed and refused to pay the estimates as made and entitled
to from time to time by the said Mathewson, alleging the most frivolous excuses for
such refusal; And that the said Bridge Company have paid your Orators only
the sum of about five thousand dollars, as nearly as your Orators can ascertain
having yet due and unpaid to them the sum of about four thousand five hundred
dollars, and out of which they have been kept for a long space of time, and greatly
to their your Orators damage.

Your Orators further show that before the completion of
said Piers and Abutments, the said Bridge ^{Company} were informed and relieved ^{by} contract
with W. B. Stone and L. B. Warner, for furnishing the materials and putting up the
superstructure of said Bridge, which they have nearly if not quite completed. And
further charge that the funds used in paying said Stone and Warner, were a part
of the assessments made upon the said Towns of Wilmington, Reed, and Essex and
which your Orators contend should have been applied first to the payment of the
balance due your Orators, for their said work upon said Piers and Abutments.

Your Orators further show
that the main reason the said Bridge Company design for not settling with and
paying your Orators the amount due them, is that the dimensions of said Piers
and Abutments, are larger than those to be built, according to the specifications set
forth in the contract, and consequently cost more, than said Bridge Company had
anticipated. And that the said work was not performed in the time specified in
said contract.

Your Orators admit that such is the fact, that the size of said Piers
and Abutments was increased; but distinctly allege, and charge, that the same
was done by the said Mathewson when he drafted the plans of the same and order
and by the direction and supervision of said Bridge Company. Your Orators expressly
charge and aver, that they built said Piers, and Abutments in accordance with

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the plans drawn and furnished by said Mathensons; And that whatever change was made in the dimensions of said Piers and Abutments, was at the instance of said Bridge Company, under and by virtue of said Contract, which gave them the right to alter or change the specifications, as to the size of the said Piers and Abutments, at any time before the work of laying the same should be commenced.

Your Orators charge that they have performed the work, and built said Piers and Abutments in strict conformity to the said contract and have faithfully kept all their covenants in regard to the same in every particular, save and except as to the time of completing said Piers and Abutments which delay was caused by high water in the said Kankakee River, which began some time in the month of October A.D. 1854, and continued so as to prevent the final completion of said work, until some time in the month of July A.D. 1855. And further the said Bridge Company was in no way injured, or delayed by reason of the said work not being completed within the time stated in said Contract; That the said Piers and Abutments were completed before the time mentioned in said Contract; Except said coping of the West Abutment, and also a part of said coping on the North wing of said Abutment on the East bank. And that said Bridge Company were not ready to use the same for the superstructure, until a long time afterwards.

Your Orators further show, that they have frequently, and in a friendly manner, applied to said Bridge Company, to settle with your Orators, and pay them the balance due upon said contract, but in every instance without success. That said Bridge Company have at all times declined such settlement, alleging and giving out, that your Orators are not entitled to any further compensation for said work, when in truth and in fact, said Bridge Company well knew, that there is due your Orators the sum of at least four thousand five hundred dollars.

Your Orators further show that the mode of payment adopted in some instances was for said Bridge Company to draw Orders in favor of your Orators, upon the Collectors of the said several Towns, who were charged with the collection of said Special Tax, to be by said Collectors accepted and paid out of the assessment when so collected. That for a part of the estimate for the month of December A.D. 1854. the said John J. Camp as one of the said Bridge Company drew an Order upon the Collector of the Town of Huntington for the sum of five hundred dollars. That the other members of the said Bridge Company refused to sign said Order, and not being so signed by a majority of said Bridge Company, was not paid by said Collector. Which said Order is still unpaid, and in the hands of your Orators ready to be produced as this Honorable Court may require.

And further that for a part of the

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amount due, your Crators for the amount of the month of December 1836, the said John A. Camp executed and delivered his individual Note to your Crators for the sum of One Hundred Dollars, alleging at the time, that he would have the money in a few days, and would pay your Crators the amount of said note. Your Crators charge that said Camp has not paid said note: being applied to by some one of your Crators. That your Crators still have said note ready to be delivered up as the Supreme Court, shall direct. Your Crators charge that they have thus been most grossly disappointed and imposed upon by the conduct of said Bridge Company, and Supervisors of said Town, and have suffered great loss and injury in consequence of this refusal to pay your Crators their just due in the premises.

Your Crators further shew that the Assessments upon said Town of Wilmington and Part in the County of Hills, and the Town of Carey in the County of Kankakee, for the year A.D. 1837, amounting to the sum of about Seven thousand, Six Hundred Dollars, has not yet been collected by the several collectors, but will be collected in the course of the coming winter, and further shew that the amount of said Assessment when collected will be subject to the Order and Direction of the said Bridge Company of which the said Richard Warner is Treasurer. As your Crators are informed and believe, that your Crators believe and so charge that it is the intention of said Bridge Company, and the Supervisors of said Town, to apply the money to be collected in said Town to the payment of said Stone and Premier, and in the erection of a Bridge connecting the East Bank of the Kankakee River, with the Bridge now being erected by said Stone and said Premier, upon the Piers and Abutments built by your Crators; That said Bridge Company have already commenced to build the said Bridge across the East branch of said River. And as your Crators are informed and believe have already expended a large amount of money upon the same being all the balance of the money collected in said Town for the years of A.D. 1835 and 1836, and which your Crators charge rightfully should have been applied in the payment of the balance due your Crators upon said Contract to build said Piers and Abutments.

And Your Crators further shew and so expressly charge that it was provided in said Contract that your Crators said Cunningham and M. D. Cook and said Richard L. Wilson should be paid for the said work out of the taxes of the aforesaid Town first to be raised and prior to all other claims.

And Your Crators further shew, that as they are informed and believe, that at some time during the year A.D. 1837, the said Town of Carey in the County of Kankakee, was divided by the Ward of Supervisors of said County into Two Towns, One of which continues under the name of the Town of Carey the

other has been named the Penn of Norton.

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And your Crators further shew that as they are informed and believe, the whole amount of the taxes to be raised in the said Penns of Wilmington, Red, and Essex, for the three years provided for in said Act of Assembly A.D. 1853, will not be sufficient to pay all the costs and expenses of building said Bridges, into some four or five thousand dollars. And further that said Bridge Company have no other means, or the authority, or ability to procure the necessary means for that purpose.

And further shew, and expressly charge that said Company have withheld the money that of right should have been paid to your Crators in payments for their work as aforesaid, in order to be able to complete said Bridge with the same. That said Company are now expending and intending to expend, the whole of their said funds in and about other portions of work on said Bridge, and to leave nothing to pay your Crators said claim, and thereby to cheat and defraud your Crators out of their said just demands. And further shew that your Crators are informed and believe and do expressly charge that said Bridge Company have already drawn orders in favor of said State and said Warner and other persons to your Crators, now unknown, upon the Collectors of the several Penns aforesaid for the whole or a portion of the tax of the year A.D. 1857, with the fraudulent intent of preventing your Crators from instituting any legal proceedings for the recovery of the amount due them therefrom.

And your Crators well hoped that the said Bridge Company would have paid your Crators the amount of money due upon the said Contract; but now so it is, may it please your Honor, the said Bridge Company, and said John J. Camp Supervisor of the Penn of Wilmington, Richard Warner, Supervisor of the Penn of Red, Gardner Reece, Supervisor of the Penn of Essex & Major Wendell Supervisor of the Penn of Norton, A. B. Stone and G. B. Warner, each and any of them having notice, and being fully advised of your Crators rights in the premises concerning and confederating among themselves and with others persons to your Crators now unknown, but who when discovered, your Crators pray may be made defendants herein, have to cheat and defraud your Crators out of their just dues, have kept back, and refused to pay over to your Crators the balance due upon said contract. That one of said Company has drawn an order for nine hundred dollars, and after placing the same in the hands of your Crators, the others fraudulently refused to sign the same thus rendering the said order of no value whatever to your Crators.

And further that the said John J. Camp one of

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the said Bridge Company executed and delivered to one of your Orators his promissory note for the sum of one thousand dollars, and then refused to pay the same, retaining the same amount in his hands from the funds of said Bridge Company, as your Orators believe and so charge, their most grossly delinquent Orators, and having time without any means to make full payment to the workmen and laborers, whom they had employed in the building of said Piers and Abutments; All of which actions and things, sentences and decrees, are contrary to Equity and good conscience; and tend to the manifest wrong and injury of your Orators.

Your Orators charge that the money to be collected on the Assessment of the year A.D. 1857 shall first be applied to the payment of your Orators claim, that they by reason of the work which they performed, under a prior contract, should have priority of claim upon the funds of said Bridge Company, and that the amount that may be due said Stone and said Warner, and the amount which may be due for the building the Bridge across the East branch of the Kankakee River, and any other claims upon said Bridge Company should be held as secondary to the claim of your Orators.

Your Orators further charge that said Company have been giving and are still giving orders for the Appropriation of the money so to be collected in the said Towns, as fast as the same shall be collected in paying said Stone and Warner and the expense of building the said Bridge, across the East branch of said River, to the utter exclusion of the claim of your Orators, that your Orators are informed and believe that the amount of said assessment so to be collected, will not be sufficient to pay your Orators the balance due them, and the amount that will be due, to said Stone and Warner, and the expense of the Bridge across the East branch of said River, that should said Bridge Company and said Supervisors carry out their projected plans and expend the money arising from the tax upon said Towns for the year A.D. 1857, which is the last assessment, authorized by law for building said Bridge, your Orators would be left entirely remediless.

Your Orators further show, that they are entirely remediless in the premises by the strict rules of the common law, and are therefore compelled to seek redress in this Honorable Court, where matters of this nature are properly cognizable, and where relief only can be obtained.

Your Orators further show that Daniel Chase is Collector for the Town of Kilmington, John J. Smith is Collector for the Town of Red in Will County, and Samuel Carr, is Collector of the Town of Norton, and John Quick is Collector of the Town of Creek in Kankakee County,

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Your Orators pray that the said Kankakee Bridge Company were comprised
of the said Richard Harner, John S. Camp, and Gardner Royce and Major
Hurdell as aforesaid and George A. Gray, John S. Smiley, Samuel Carr, John
Leick, the Collectors of the said Pinks, and A. B. Stone and G. B. Farmer
and Charles H. Hicks, Treasurer of said County of Will in State of Illinois, and
David Perry, Treasurer of the County of Kankakee, in the State aforesaid may be
made Defendants to this Bill of Complaint. That your Honor will grant a writ of
Subpoena, in Chancery directed to each and any one of said Defendants, requiring
them and each of them, to appear before this Honorable Court on a certain day
and then and there, to do full and perfect answer make to all and singular
the allegations in this Bill contained, as fully as if again interrogated ^{interrogated} ~~interrogated~~
under oath as to the said Bridge Company and said Defendants, and said Stone and
Farmer, being expressly named, but the answers of the said George A. Gray, John S.
Smiley, Samuel Carr, Collectors as aforesaid, and the said Charles H. Hicks Treasurer
as aforesaid, and David Perry, Treasurer as aforesaid it be upon their respective solemn
oaths.

And may it please your Honor to grant unto your Orators, a writ, or writs,
of Injunction, issuing out of, and under the seal of this Honorable Court, to be
directed to the said Bridge Company, restraining and enjoining said Bridge Company
their Officers, and Agents from paying out any money now in their hands or under
their control, which is the proceeds of the tax heretofore, or hereafter to be collected in
said Pinks for the building said Bridge, and from issuing or giving any order to
any person whatever, upon any Collector, or Collectors, of said Pinks, or upon the
County Treasurers of Will, or Kankakee Counties, or upon any person charged with
with the collecting or keeping of any money belonging to said Bridge Company until
the further order of this Honorable Court, And also a writ or writs of Injunction
directed to George A. Gray, John S. Smiley, Samuel Carr, who are the several Collectors
of the Pinks of Wilmington and Reed, Essex and Jackson, restraining and enjoining
them and each of them from paying over, any tax collected by them levied for the
purpose of building said Bridge, to any person or persons whatever, except to the
Treasurers of their several Counties of Will and Kankakee. And from accepting any
order, or orders, drawn by the said Bridge Company or any other person or persons
whichever until the further order of this Court. And also a writ of Injunction directed
to said Charles H. Hicks, Treasurer of the County of Will, and David Perry Treasurer of
the County of Kankakee both said Counties being in the State of Illinois, restraining them
from paying out any money which they now have, or which may hereafter come into
their hands, which is or may be the proceeds of the tax to be levied, and collected
in any of said Pinks, being said Bridge Tax, until the order and further order of

This Honorable Court.

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And Your Orators further pray that upon a final Hearing of this cause, upon such proofs, as shall be adduced, Your Honor will order adjudged and decree that the said Bridge Company, shall pay to your Orators the amount that shall be found to be due them, out of the money to be collected in the said several Years for the year A.D. 1857, or out of any other money which they may have in their hands, or under their control, which has been raised for the purpose of building said Bridge. And further, that the said Treasurers of the said Counties of Will and Santrope be required to pay over to your Orators any money which they may have, or which may hereafter come into their hands, as part of the Pay for the years 1855, 1856, 1857, and sufficient to pay your Orators such salaries as may appear to your Honor to be due them upon said Contract. And Your Orators pray your Honor, to grant such other and further relief to them in the premises, as to equity and good Conscience shall appear just and equitable, and the Nature and Circumstances of this case may require. And as in Duty bound will ever pray.

Robert J. Cunningham,
John M. Dulock.

State of Illinois
Will County

On this 15th day of December A.D. 1857, before me personally appeared, Robert J. Cunningham, & John M. Dulock, who being duly sworn say that they have heard read the above Bill of Complaint, and know the contents thereof, and that the same, and the matters and things therein contained, are true of their own knowledge, except as to the matters which are therein stated to be on their information or belief, and as to those matters they believe them to be true.

Subscribed & sworn to before me this
15th day of Dec. 1857

Robert J. Cunningham
John M. Dulock

Alexander Mcintosh

Clerk, Cir. Ct.

By C. H. Macomber Deputy.

Exhibit A

Copy of Agreement.

Article of Agreement made this thirtieth day of June A.D. 1856, between the Hannibal Bridge Company of the State of Illinois of the first part, and Robert J. Cunningham, John M. Dulock, and Richard G. Wilson of the County of Will and State of Missouri of the second part Witnesses. The said parties of the second part

do hereby for themselves, their heirs, executors and administrators, covenant
 promise and agree, with and to the said party of the first part, that they the said
 parties of the second part, their heirs, executors, administrators or assigns, shall and
 will for the the considerations hereinafter mentioned in or before the first day of
 September A.D. 1856, unless prevented by high water in the Kanawha River, and
 if so prevented then as soon thereafter, as shall be practicable, excavate and clear
 the beds, furnish all materials, erect and finish complete two Abutments and
 two Piers for a highway Bridge, to be built across the West Branch of the Kanawha
 River in the Town of Wheeling in said West County, beginning at the West Bank
 of said River on the Section Line dividing Section Twenty Six, and thirty five,
 and running thence to the Island opposite; said Abutments to be built
 with wings and to be of the following dimension to wit, thirty six feet in length
 on the River face, eight feet thick at the base, and eighteen feet high, the
 wings to be with, closed on the level end, said Piers to be each thirty six
 feet long, eight feet thick at the base, and eighteen feet high, all of said Abutments
 and Piers to be finished one and one half inches to the foot from the base
 thereof to the top, suitable Parapets to be constructed at each end of said Piers
 and Abutments, so as to leave a road bed for the Superstructure, twenty
 five feet wide in the clear.

The said party of the first part, promising to them-
 selves the right to alter, or change the Specifications herein in relation to the
 size of said Abutments, and Piers, at any time before the work of laying
 thereof shall be commenced, and also promising to themselves to determine
 the level of the facing of said Abutments, and the ends of the wings thereof,
 all of the work herein specified to be built in conformity with the following speci-
 fications to wit, The Stone Masonry of said Abutments, and Piers, shall be of
 the kind, denominated "Rough Rock Work", consisting of Stones from one to
 two feet thick having parallel and perpendicular beds and end joints and regularly
 squared, the joints not to be more than one half inch thick, in any part of the
 face of said work, There shall be at least two Headers on each face side of said
 Piers and Abutments in every course, said Headers extending as a general rule
 one third through the wall so as to make a lap with the Headers on the opposite
 side, The faces of the Stone shall be left rough, except that the face edges of
 the Stone shall be pitched off in the same manner as the like work is done
 in the Piers and Abutments of the Rail Road Bridge in said Wheeling,
 The Headers aforesaid not to be less in number in each course than those
 in said last mentioned Rail Road work, The face edges of the Stone to be
 pitched off so as to conform to the latter or line of work, and the beds of

of all stone of not less than a foot nor more than eighteen inches in thickness to be equal to one and a half of the face, the beds of all stone more than eighteen inches thick to be at least equal to the faces of the same. The ends of said Piers to be squared like those of the Rail Road Piers aforesaid. All the work in said Piers and Abutments, not particularly included in these specifications to be done in the same manner as the like work is done in said Rail Road work. All of the stone are to be laid in good water lime Cement Mortar and well bedded, and having a good and workmanlike bond of not less than six inches.

The foundations of said Piers and Abutments shall be laid in such places as shall be marked out by a competent Engineer to be employed, and paid by the said party of the first part. The said parties of the second part, do hereby further agree to put upon said work a competent and sufficient number of hands to complete this Contract before the first day of December A.D. 1856. All the stone to be used ~~for~~ in said work, shall be taken from the quarry at Paines Creek in said Wilmington. And all of said work shall be done in a faithful and workmanlike manner, and to be fully equal in quality to the like work on said Rail Road Bridge.

And the said parties of the first part hereby covenant, promise and agree, with and to the said parties of the second part, their heirs administrators, executors and assigns, that the said parties of the first part shall and will in consideration of the covenants and agreements being wholly performed and kept as herein specified by the said parties of the second part, well and truly pay, or cause to be paid unto the said parties of the second part their executors, administrators or assigns, the sum of Seven Dollars and fifty Cents per cubic yard for the Mason Work & Materials allowed in said Abutments and Piers, the work done in each month to be estimated on the first day of the following month, and paid for in cash when estimated, excepting and reserving, twenty per cent of each estimate, which is to be held by the said parties of the first part as security for the faithful performance of this Contract, until the same shall be completed, when the amount of such reserved money shall be paid over to said parties of the second part.

It is understood that the foundations of said Abutments and Piers, shall be laid on the rock of the River bed.

In Witness

Whereof we have heretofore interchangeably set our hands to this, and one other of some tenor and dated the day and year first above written. ~~and~~ of materials delivered intended before signing. - J. I. Camp.

The Kankakee Bridge Company by H. Hunsy Supervisor of the Firm of Cress, Richard Warner, Supervisor of the Firm of Reed, John C. Camp Supervisor of the Firm of Wilmington

A. J. Cunningham.
John Mcintosh
Richard G. Weiss.

14

Let the Injunction issue in accordance with the prayer of the within writ. Upon complainants filing bond with security to be approved by the Clerk in the sum of Six Thousand Dollars,
Dated this 26th day of August, 1857.

Done at my Chambers in
J. C. Norton
Judge of the
Judicial Circuit, Ill.

Exhibit 'P'.
A. J. Matheson's Estimates.

"H. Abut."

S. Wing	21.50 x 17.70 x 5.37 =	75.68'
Extras, S. Wing	39.10 x 8.95 x 2.70 =	34.90'
Breast Wall	41.60 x 18.10 x 5.75 =	159.60'
S. Parapet	9.80 x 4.60 x 4.40 =	6.38'
N. Parapet	9.80 x 4.60 x 4.40 =	6.38'
S. Wing	21.50 x 17.18 x 5.37 =	72.69'
N. Wing	26.60 x 7.90 x 2.70 =	21.11'
		<u>376.64</u>

376.64

E. Abut

S. Wing	21.50 x 19.10 x 5.37 =	81.24'
S. Wing	29.10 x 9.70 x 2.70 =	28.13'
Breast Wall	41.60 x 18.40 x 5.75 =	163.11'
S. Parapet	9.80 x 4.60 x 4.40 =	6.38'
N. Parapet	9.80 x 4.60 x 4.40 =	6.38'

15

$$\begin{array}{l}
 N. Wing, \quad 21.57 \times 19.10 \times 5.57 = 81,214^{\circ} \\
 N. Wing \quad 26.10 \times 9.70 \times 2.70 = 25,22^{\circ} \\
 \hline
 391.60
 \end{array}$$

391.60

$$\begin{array}{l}
 W. Pier, \quad 38.70 \times 18.25 \times 7.57 = 196.18^{\circ} \\
 W. Parapet, \quad 4.40 \times 6.10 \times 14.10 = 3.91^{\circ} \\
 S. Parapet, \quad 4.94 \times 6.10 \times 14.10 = 14.37^{\circ} \\
 W. Piers, \quad 23.50 \times 7.50 \times 2.25 = 14.16^{\circ} \\
 S. Piers, \quad 24.30 \times 7.50 \times 2.25 = 15.15^{\circ} \\
 \hline
 233.72
 \end{array}$$

233.72

$$\begin{array}{l}
 E. Pier, \quad 38.70 \times 19.15 \times 7.50 = 205.86^{\circ} \\
 A. Parapet, \quad 4.40 \times 6.10 \times 14.10 = 3.91^{\circ} \\
 S. Parapet, \quad 4.94 \times 6.10 \times 14.10 = 14.39^{\circ} \\
 A. Piers, \quad 23.40 \times 7.50 \times 2.25 = 14.62^{\circ} \\
 S. Piers, \quad 25.20 \times 7.50 \times 2.25 = 15.75^{\circ} \\
 \hline
 244.53
 \end{array}$$

$$\begin{array}{r}
 244.53 \\
 \hline
 1,246.49
 \end{array}$$

376.64

391.60

233.72

244.53

1,246.49 C. yards

The within is a true statement of the Estimate of the abutments and Piers in the Road Bridge across the N. Branch of Kanawha River, at and opposite the Village of Wilmington as taken by me on Dec 9, 10, 11 A.D. 1856 as a final Estimate for Messrs Cunningham, McIntosh & Co.

The work is not now complete.

Wilmington Dec 11/56.

A. J. Matheson

And on the Twenty Eighth day of December in the year last
 aforesaid, the said Clerk of the Court of the Circuit Court
 of the County of Will and Subjunctive certain writ of Injunction,
 directed to the Sheriff of Will County, to execute, in accordance
 with the prayer of the said Complainants, in their said Bill
 of Complaint, set forth, and in compliance with an order then
 entered under the hand and seal of the Honorable Jesse C. Tilton
 Judge of the Eleventh Judicial Circuit and presiding Judge
 of the Will County Circuit Court in the State of Illinois -
 Which writ of Injunction is in the words and figures following, to wit:

"The People of the State of Illinois To The Honorable
 Judges Company, George A. Gray, John I. Smiley, Samuel
 Carr, Charles H. Weeks, David S. Gray, and John Smith - Greeting.

Whereas Robert of Cunningham John D. Smith & Co.
 "Trustee administrators of the Estate of Richard W. Wainwright,
 "have filed in the office of the Clerk of the Circuit Court of our County
 "of Will their certain Bill of Complaint, on the Complainants side
 "against said Carr, against your said Carr, The Honorable
 "Judges Company, George A. Gray, John I. Smiley,
 "Samuel Carr, Charles H. Weeks, David S. Gray, and John Smith,
 "praying among other things, for an writ of Injunction,
 "enjoining and restraining you the said The Honorable
 "Judges Company, George A. Gray, John I. Smiley, Samuel
 "Carr, Charles H. Weeks, David S. Gray, and John Smith, and
 "each of you, and your and each of your officers and agents in or
 "to this matter in said Bill of Complaint set forth.

And Whereas the Honorable Jesse C. Tilton Judge of the
 "Eleventh Judicial Circuit and presiding Judge of the Will
 "County Circuit Court in the State of Illinois, hath rendered upon
 "the Complainants Bill of Complaint aforesaid, and filed aforesaid
 "an order commanding our Clerk of our said Court to issue
 "a writ of Injunction, according to the prayer of said Bill
 "of Complaint, upon certain condition, which shall have been complied
 "with.

Now Therefore We command you the said The

"Hankake Bridge Company your officers and agents hereby,
 "doth, abstain, and refrain from paying out any money, nor
 "in your hands or under your control, which is the proceeds of
 "the Tax heretofore or hereafter to be collected in the Town of Wilmington
 "and Reed, in the County of Will in the State of Illinois, and
 "also in the Towns of Essex and Sutton, in the County of Kan-
 "kake, in said State, for the building of a Bridge across
 "the Kankakee River at Wilmington, in the County of Will & State
 "aforesaid, and from issuing, or giving, any order to any
 "person, whatever upon any collector or collectors of said
 "Towns, or upon the County Treasurers of Will or Kankakee
 "Counties, or upon any person, charged with the collecting
 "or keeping of any money, belonging to the said 'The Kan-
 "kakee Bridge Company, until the order and further order of
 "this Court shall be made in the premises."

"We also command you the said George A.
 "Gray, Collector of the Town of Wilmington, & John F. Smith, Collec-
 "tor of the Town of Reed in Will County, aforesaid, and
 "Samuel C. Smith, Collector of the Town of Sutton, & John Smith, collector
 "of the Town of Essex in said Kankakee County, and each
 "of you to wholly, doth, abstain, and refrain from paying, out
 "any tax, collected by you or either of you, levied for the purpose
 "of building the Bridge aforesaid, to any person or persons
 "whatever, except to the Treasurers of said several Counties of
 "Will and Kankakee, aforesaid, and from accepting any
 "Order or order, drawn by the said 'The Kankakee Bridge
 "Company, or any other person or persons, to any person
 "or persons, whatever until the order and further order of this Court
 "shall be made in the premises."

"And we do also command you the said Charles H.
 "Wicks, Treasurer of the County of Will in the State of Illinois, and
 "Ard T. Perry, Treasurer of the County of Kankakee in said State
 "and each of you, to wholly, doth, abstain, and refrain, from pay-
 "ing out any money which you, or either of you now have, or
 "which may hereafter come into you, or either of your hands
 "which is or may be the proceeds of the Tax to be levied and collected
 "in any of said Towns of Reed, Wilmington, Essex & Sutton, in said

County of Will and Bankhead aforesaid, Lewis said Judges
 "The rules the other and further orders of this Court shall
 be made in the premises. And hereupon then these three witnesses
 "Attest Alexander W. Smith our Clerk of said Circuit
 "Court aforesaid County of Will and the seal
 "of our said Court here affixed at office in the
 "City of Jekyll in the County and State aforesaid
 "this 1st day of December A.D. 1857.
 A. W. Smith Clerk



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To The Sheriff of Will County to Execute:

On the Back of said Writ of Injunction there appears the following
 Endorsement. To Wit:
 "This County Circuit Court" "In Chancery."
 "Robert Cunningham et al. vs. The Hankins Bridge Company."
 "Writ of Injunction." "Filed March 6th 1858. A. W. Smith Clerk"

And also on the Back of said Writ of Injunction there appears the return
 of the Sheriff of Will County, State of Georgia, in words and signed
 following, To Wit:

"I have executed this writ by delivering a true copy of the same
 to John G. Camp, Supervisor of the Town of Wilkes and Richard
 "Nancy, Supervisor of the Town of Rock, as each "Bridge Company."
 "St. George A. Gray, Collector of the Town of Wilkes and to John W.
 "Smith, Collector of the Town of Rock, and also to Charles H. C.
 "The Sheriff of Will County, the other defendants in this Writ
 "named are not found in my County this 9th day of January
 A.D. 1858."

"Fees 4 times	2.00
"4 copies	4.00
"80. Miles	4.00
"Return	1.00
G. R. Dyer. Sheriff	\$11.00
By John S. Simeons dep.	

And afterwards To Wit:

On the Second day of January in the
 year of our Lord one thousand Eight Hundred and Fifty Eight: the

was wind out of the office of the Clerk of the Circuit Court, in and for the County of Madison and State of Illinois, a Summons, in words and figures following to Wit:

State of Illinois.

County of Madison.

The People of the State of Illinois, to the Sheriff of said County, Greeting:—

"We command you, that you summon the Bankers in Company, Charles C. Weber, Cashier, George A. Gray, John J. Smiley, Samuel Com. John Smith, A. P. Stearns & J. B. Sumner of the several banks in your County, personally to be and appear before the Circuit Court of this County, on the first day of the month thereof, to be holden at the Court House, in the City of Joliet in said County, on the Third Monday of March, next to answer unto Robert Hemmingsman, John W. Sutrook and Henry Wilson administrators of the Estate of Richard J. Wilson deceased, jointly and severally, all and singular the matters and things, allegations and charges, contained in their certain Bill & Injunction, lately filed in said Court on the Chancery side thereof, and to stand to and abide by, & perform whatever order and decree our said Court shall make in the premises. — Come of said each, or a decree in law made against you by said Court."

And have you then show this writ with our endorsement thereon in what manner you shall have executed the same.



Attest, Alexander W. Sutrook, Clerk of our said Court and the seal thereof. Teste affixed, at office, in the City of Joliet, aforesaid, this 2nd day of January, A.D. 1858.

A. W. Sutrook, Clerk

And on the back of said Summons, there appeared the Sheriff's return in words and figures following To Wit:

I have executed this writ by delivering a true copy of the same to John J. Camp, Supervisor of the Town of Madison & to Richard Harris Supervisor of the Town of Red and each of the several Banks in said County, to George A. Gray, collector of the Town of Madison & to John J. Smiley, collector of the Town of Red and also to Charles C. Weber

"into Bill of Complaint aforesaid filed as aforesaid, and
 "under command of the Clerk of said Court to issue
 "a Writ of Supplication according to the prayer of said
 "Bill of Complaint upon certain conditions which
 "have been complied with."

Now Therefore we command
 "you, the said 'The Rockaway Bridge Company' your officers
 "and agents, to wholly desist, abstain and refrain from pay-
 "ing out any money from your hands, or under your control
 "which is the proceeds of the Tax heretofore or hereafter to be
 "collected in the Town of Wilmington and Reed in the County
 "of Will and State of Illinois and also in the Town of Evan-
 "ston in Rockaway County in said State for the
 "building of a Bridge across the Rockaway River at Wil-
 "ton in the County of Will and State aforesaid. And from
 "issuing or giving any order to any person whatever upon
 "any collector heretofore or of said Town or upon the County
 "Sheriffs of Will or Rockaway Counties, or upon any person
 "charged with the collecting or keeping of any money, be-
 "longing to the said 'The Rockaway Bridge Company'
 "until the other and further order of this Court shall be
 "made in the premises."

We also command you the said
 "George A. Gray, Collector of the Town of Wilmington and
 "John J. Sibley, Collector of the Town of Reed, in this County
 "aforesaid; of Samuel Cane, Collector of the Town of Stanton, of John
 "Koch, Collector of the Town of Evan, in said Rockaway County
 "and each of you to wholly desist, abstain and refrain from
 "paying over any Tax collected by you or either of you, levied for
 "the purpose of building the Bridge aforesaid, to any
 "person or persons, whatever, except to the Treasurers of your several
 "Counties of Will and Rockaway aforesaid, And you accept-
 "ing any order or orders drawn by the said 'The Rockaway
 "Bridge Company, or any other person or persons, to any person
 "or persons whatever, until the other and further order of this
 "Court shall be made in the premises."

And We also command

22



"Nathl Alexander Mc Intosh, our Clerk of our
" Circuit Court of our said County of Miller
" Is the seal of our said Court here affixed
" at office in the City of Ithaca, in the County
" and State aforesaid, this 27th day of
" December A.D. 1857

C. M. Sautash Clerk

"I. The Sheriff of ^{the} Timberlake County to Coroner."

Upon the back of said Writ of Injunction there appears the Sheriff's Certificate (enclosure) of service, in words and figures, following To Wit:

Thompson, who by reading the same to the within defendants says
"G. A. Gray, John T. Smiley, Samuel C. Condit & H. Vail, C. D.
"Hawes & B. Warner, are not to be found in any county this 18th day of
January 1851. Geo. S. Swaine 100 perhaps 5. 10. 10. 10. 10.
"F. Squire Siff. 100 J. Squire 100

"Send the said Judge Company, by Admiring two copies of the
 "Book to Gardner Put. & Major Wendell, Supervisors of the Town
 "of Concord & Weston, for each Company & Sumner & John Feichol
 "Lectors of Newbury, Concord & Concord Perry. Swains of Newbury
 "At this 9th day of March A.D. 1858. Fee 5 Shillings 2.00
 5 Copies 2.50.

F. Squire. 1811. By J. Squire. 1811.

23

And afterwards, To Wit:

On the Fifth day of January in the year
of our Lord one thousand Eight Hundred and fifty Eight, there was
issued out of the office of the Clerk of the Circuit Court in and for this
County, and State of Illinois. A Summoner directed to the Sheriff
of Cook County to Execute in words and figures following To Wit:

State of Illinois,

County of Cook. The People of the State of Illinois to the Sheriff
of Cook County, Greeting!

We command you, that you Summon "The Cook County Bridge
Company, George A. Gray, John J. Smiley, Samuel Carr, John
J. Rich, Charles C. Parks, David Gray, H. B. Stone & J. W. Brown
if they shall be found in your County, personally, to be and appear
before the Circuit Court of said County, on the first day of the month
thereof, to be holden at the Court House in the City of
Chicago, in said County, on the First Monday of March next
to answer and defend J. Cunningham, John Mc Intosh
& Henry Wilson, Administrators of the Estate of, Richard
& J. Wilson, decedent, fully, truly, and directly, all and
singular, the matters, and things, allegations and charges
contained in their certain Bill of Interdiction, lately filed
in our said Court, on the Chancery Side thereof, and to
stand to, abide by, and perform whatever order and decree
our said Court shall make in the premises. Hereof fail
where ordered will be entered against you by said Court.

And have you therefore this writ with an endorsement thereon
in which manner you shall have presented the same.



Witness Alexander Mc Intosh, Clerk of the Circuit Court
and the seal thereof, hereof affixed at the office
in the City of Chicago, aforesaid, this 4th day of
January A.D. 1858.

A. J. Mc Intosh, Clk

Indorsed back of said Summons there appears the following
Note. (From the Clerk)

*

And Afterwards To Wit:

On the Tenth, sixth day of December, in the year last aforesaid, the said Complainants in said Bill of Complaint mentioned and described, filed in the office of the Clerk of the Circuit Court of the County of this and State of Illinois, as aforesaid. Which Bill is in the Under-Signed following to Wit:

24

Know all men by these presents, that we Robert I. Cunningham John W. Sulist John Semark, Archibald I. St. Antyner, and John Finckhanger, of this County, Illinois, as held and jointly, have unto Richard Warner John P. Camp and Gardner Royce, who comprise the Ken-How-Kee-Budgo Company, and their Successors in office, and unto George A. Gray, Collector of the Town of Wilmington, and Smiley, Collector of the Town of Hobbs in this County, Illinois, and unto John Finch, collector of the Town of Deer Land, Collector of the Town of Weston, in the County of Cook, Illinois, and unto Stone and Remer, in the penal sum of Six Thousand Dollars, to be paid to the said Richard Warner John P. Camp, Gardner Royce, and their Successors in office, and to the said George A. Gray, Smiley, John Finch and Weston, for which payment, well and truly to be made we bind ourselves, our heirs, Executors and administrators, jointly, by these presents. Subscribed with our seals and dated this day of December A.D. 1857.

Witness the above names of Robert I. Cunningham John W. Sulist, Campbell and his joint plaintiffs in the County of Champaign, of this County, against the above named Richard Warner John P. Camp, Gardner Royce George A. Gray, Smiley, John Finch, Stone and Remer, praying

among other things for a writ of injunction, to restrain the said defendants, from paying the City money, that may come to their hands, being raised by an assessment upon the said Town of Wilmington, and Weston, in the County of Cook, Illinois, filed by the said Robert

J. Cunningham, and John W. Sutach, against the said
 Richard W. Warr, John I. Camp, Gordon Royce, George A.
 Gray, Smiley, John Fisher
 "Shew & Proved. And whereas the
 "Hon. Geo. A. Nelson, Judge of the Circuit Court of this
 "County, has affirmed an injunction, for that purpose,
 "according to the prayer of the Bill, upon the said Com-
 "plaintiffs giving Security, according to said order.
 "Now therefore the conditions of the above
 "obligation is such, that if the above bounden Robert I.
 "Cunningham, Esq. John W. Sutach, their Executors, or
 "administrators, shall well and truly pay, or cause to be
 "paid to the said Richard Warr, John I. Camp, Gord-
 "on Royce, George A. Gray, Smiley
 "Shew & Proved. Moreover, all such costs and
 "damages, as they may sustain by reason of
 "wrongfully coming out of said without injunction, then
 "this obligation, to be void, & otherwise to remain in full
 "force and virtue."

Robert Cunningham

John W. Sutach

J. Stewart

A. J. Mc Intyre

John Fisher

"Approved by me, this 31st day of December A.D. 1857."

A. J. Mc Intyre

(Continuation from preceding sheet of plaintiff's account)

ing Certificate of Service, or return, of which, the following, in words
 as signed is a true copy. To Wit:

Sheweth Granted this Writ by reading & obliuing, after which
 the within named defendants, except George A. Gray, John
 J. Smyth, Samuel Kan, Charles McVick, A. D. Stone,
 & J. B. Brown, cannot be found in my County this 18th
 "day of January 1858"

J. Quinn, Shff.
 By J. W. Rogers, Dep't.

26

And Also

Served the Judge Company by delivering two copies of this
 Writ to Gardner Rogers & Majors Verdict Supervisors of the Town
 of Green & Norton in each Company, & Samuel Kan, & John
 High, Collectors of the Town of Green & Norton & David Perry
 Treasurers of Waukegan County, this 4th day of March
 "A. D. 1858."

5 Copies	2.50
5 Copies	2.00
Mileage	8.00
Ret. &	.11

J. Quinn Shff. By J. Rogers, Dep't. \$13.11

And Also

Served by delivering a true copy to the within named J. Parrot
 Town of John High and the within named in my County, this
 "18th day of January 1858"

Two Copies	\$1.00
Copy	.10
Mileage	5.00
Return	.11

J. Quinn Shff. By J. Rogers, Dep't. \$7.11

* (How much Bond) (How much Bond for return)

And afterwards To Wit:

On the Twelfth day of March in the
 year of our Lord one thousand Eight Hundred and
 Fifth, English, it being one of the regular days of said March
 Term of said Court for the said year, Eighteen Hundred and

27

Fift. Eight appeared, and the said Court being then duly organized and sitting for the transaction of business, the following proceedings were had and entered of record by the said Court in words and figures following. To Wit:

S. 1169 "Robert Huntington, John S. Antick & Henry Wilson
"administrators of the Estate of Richard J. Wilson, deceased, }
vs. } "Dell G.
"The Knickerbocker Bank Company, Charles H. Webb, David } "Symington,"
"Jr., George A. Gray, John D. Smiley, Samuel Carr, }
"John Smith, A. P. Stone, & S. B. Bremer, }
And on the said day the said Defendants by Randall & Snapp
"their Solicitors" and in their own behalf to dissolve the injunction
"granted in this cause."

And Afterwards To Wit: On the Seventh day of March in
the year of our Lord one thousand eight hundred and fifty eight
in the morning, one of the regular days of said March Term of said
Court for the year Eighteen Hundred and Fifty Eight appeared
at the said Court being then duly organized and sitting for the
transaction of business, the following proceedings were had and
entered of record by the said Court in words and figures following
To Wit:

S. 1169 "Robert Huntington, John S. Antick & Henry Wilson
"administrators of the Estate of Richard J. Wilson, deceased, }
vs. } "Dell G.
"The Knickerbocker Bank Company, Charles H. Webb, David } "Symington,"
"Jr., George A. Gray, John D. Smiley, Samuel }
"Carr, John Smith, A. P. Stone, & S. B. Bremer, }
And on the said day the said Defendants by Randall & Snapp their Solicitors

Transaction of business the following proceedings were had and
entered of record by the said Court, in words & figures following
To Wit:

24

1169

Robert H. Hammond, John W. Hatch, Henry D. Kim
administrators of the Estate of Richard F. Kim deceased. "Bill and
The Waukegan Bridge Company, Charles H. Hulse Symetion"
vs. "
Rand Remy, George W. Gray, John J. Smiley,
Leander S. Schuchert, A. D. Stone & J. B. Brown.

And now, at this day came the
Complainants, by Mr. Roberts & Associates, their Solicitors, and
also the said Waukegan Bridge Company, by the Supervisors
Comparing the same, and on motion of said Complainants
against said defendants, it is ordered, that A. H. referenced to Alex-
ander Anderson and Adam Lemeltrick, to examine the mas-
s produced by complainants for said Bridge Company men-
tioned in said Complainants Bill, and hear such evidence
as shall be adduced by those respective parties, and report
to this Court, the amount and value of said work under
the contract between said Complainants and said Bridge
Company set forth in said Bill with all convenient speed.

And afterwards, To Wit:

On the Twenty fourth day of
May, in the year last aforesaid, it was being one
of the regular days of said May Term of said Court;
for the year aforesaid, and the said Court being then
duly organized and sitting for the transaction of business
the following proceedings were had and entered of record
by the said Court, in words and figures following To Wit:

1169

30

"Richard Hummingham, John M. Dutch, Henry Nelson
 Administrators of the Estate of Richard J. Nelson deceased.
 vs.
 "The Bankers Bridge Company, Charles H. Wake
 "David Gray, George A. Gray, John J. Smiley, Samuel
 "Carr, John Welch, A. B. Stone & J. B. Bonner.

"Bill of
 Injunction."

"And now
 "again come the said Complainants, by Mr. Roberts & Gundersen
 "their Solicitors, and enter their motion for writs of said depen-
 "dants, to file their answer herein to said Complainants said Bill
 "of Complaint in this cause, by tomorrow morning, at 9 o'clock.
 "The Court here & fully advised in the premises it is ordered, that said
 "Dependants, do answer, by tomorrow morning, at nine o'clock."

And afterwards, To Wit:

On the Twenty fifth day of May
 in the year last aforesaid, it also being one of the regular
 days of said May Term. And the said Court being then
 duly organized and sitting in open Court for the transaction
 of business the following proceedings were had and entered
 of Record, by the said Court in and among following
 To Wit:

1069

"Richard Hummingham, John M. Dutch, Henry Nelson
 Administrators of the Estate of Richard J. Nelson deceased.
 vs.
 "The Bankers Bridge Company, Charles H. Wake,
 "David Gray, George A. Gray, John J. Smiley, Samuel
 "Carr, John Welch, A. B. Stone & J. B. Bonner.

"Bill of
 Injunction."

"And now
 "at this day, again come the said Complainants, by Mr. Roberts
 "and Gundersen their Solicitors, and enter their motion to call this suit
 "for hearing & otherwise as ordered by the Court that this suit be
 "now called as aforesaid. Thereupon recitation of said
 "Complainants, it is ordered by the Court that the trial of this
 "cause do now proceed, and that the said dependants, and

The undersigned architect testifies, as certified by
 this Court in the case of J. Robert S. Cunningham, John W. B. Dullish
 Esq. Henry Wilson Administrators of the Estate of Richard B. Wilson
 deceased, against the Kankakee Bridge Company and others now
 pending 14 undetermined in the Chancery side of the said Court.

Would respectfully report that after having been
 duly sworn by the Court & the Jurors Esq. Clerk of said Court, and
 having been upon the ground and personally examined the work
 done by said Complainants for said Bridge Company, and having
 heard all the evidence adduced by both Complainants and defend-
 ants. Do hereby award and decide as follows: That they find
 that the Complainants did not fully complete the work, now being
 described in the said Contract between said Complainants, and
 said Bridge Company, a copy of which is attached to the
 Bill of Complaint in this case, by the time therein specified - that
 such delay was in a measure owing to said Bridge Company
 having enlarged some portions of said Work, and increased
 the amount thereof after said Contract was executed and
 before said work was commenced; and further that said
 Company was not materially injured or delayed in conse-
 quence of said Work not having been completed by the time specified -
 that said Work was completed by Complainants some time in the
 latter part of November or the first part of December 1856, with the
 exception of the coping upon the West abutment which was done
 in the following spring and further, that in the Spring of 1857
 the upper portion of the Two Piers was somewhat injured by
 the Ice pushed in the Kankakee River, and that the upper
 ends of said Piers, were during the same season, abraded by said
 Bridge Company at an expense of about Six Hundred dollars, that
 the masonry of said Complainants, was worth the contract
 price (Seven dollars and fifty cents per cubic yard) with the
 exception of the coping or retaining walls, which were added and
 enlarged by order of said Bridge Company, after the execution
 of the Contract, which said coping or retaining walls are worth five
 Dollars per cubic yard. That the amount in the Piers and
 abutments after deducting 6,000 cubic yards (less the amount
 of a void abutment included in the West abutment) is one thou-
 sand one hundred & thirty five seven (1,136.57) cubic yards

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"Amounting at \$7.0 per cubic yard, to the sum of Eight thou-
 sand four hundred Seventy nine Dollars and Sixty Eight
 cents (\$7,479.28). That there are one hundred ninety twenty
 six hundred (119,26) Cubic yards in said wing or retaining
 walls, amounting at \$10 per cubic yard the sum of five thou-
 sand four hundred & twenty cents (\$5,460.30) making in all
 the sum of nine thousand ninety five dollars and fifty Eight
 cents (\$9,435.58). That of the opinion and order of the
 said said Complainants, should bear the expenses which said
 Bridge Company have been to in repairing or rebuilding, the
 upper portion of said pier, amounting to Six hundred Dollars
 (\$600) which being deducted leaves the sum of Eight thousand
 four hundred, twenty five Dollars and fifty Eight cents (\$8,435.58)
 which said Complainants should receive for the whole of said work.

"And the undersigned, then present, do determine and award to
 said Complainants the sum of Eight thousand four hundred twenty
 five dollars and fifty Eight cents (\$8,435.58) as the just and reason-
 able compensation under said contract for their said work. That
 there was no evidence introduced by either party, as to the amount
 paid by said Bridge Company, to said Complainants or
 account of said Work."

"All of which is respectfully submitted."

John S. W. R.

Thos. Anderson Secy

Adam Comstock Esq

"And on the 3rd day of June, 1850, at New York, it appearing that one of
 the regular days of said May Term of said Court, for the said year,
 and the said Court being then sitting, organized, and sitting
 in open Court for the transacting of business the following proceedings
 were had and entered of record by the said Court in words
 and figures following to wit:

Robert Cunningham John Mc Intosh Henry Wilson
administrators of the estate of Richard J. Wilson decd.

"Bill of

1169

vs.
The Knickerbocker Bridge Company, Charles H. Wake.
Rand Rny. Corp. & Co. John S. Smiley.
Samuel Linn John Smith A. B. Storer & B. B. Bower.

"Injunction"

"And now come

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"day come the said complainants by Mr. Robert C. Enderspeck
and their motion on said Sunday, been shown to the court
it is ordered that the report filed therein by Alexander Anderson
"Says Adam Cunningham on yesterday last complained."

And afterwards to the

On the Twelfth day of June, in the year
before said, it also being one of the regular days of said May
Court of said Court for the year of said Court and the Court being
lawfully organized and sitting for the transaction of business
the following proceedings were had and entered of record, to wit:
said Court in words and figures following, to wit:

Robert Cunningham John Mc Intosh Henry Wilson
administrators of the estate of Richard J. Wilson decd.

"Bill of

1169

vs.
The Knickerbocker Bridge Company, Charles H. Wake.
Rand Rny. Corp. & Co. John S. Smiley.
Samuel Linn John Smith A. B. Storer & B. B. Bower.

"Injunction"

"And now come

"the said complainants by Mr. Robert C. Enderspeck their solicitors
and the said Bridge Company by Royal S. Hobbs one of
said corporation, and on motion of said complainants
solicitors and by and with the consent of the said Bridge
Company, it is ordered that a decree be entered herein, in
favor of the said complainants against the said defendants
for the sum of twenty one hundred and twenty five dollars
and twenty cents, and that the said defendants, pay to the
said complainants the said sum of twenty one hundred and

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Sixty five dollars and twenty two cents, out of any money in their hands or in the hands of the Treasurer of the Mill and Kaibab Companies, or in the hands of the Collector of the Town of Wilmington Red. Creek and Norton now collected, or to be collected hereafter for the purpose of erecting a Bridge across the Kaibab River at Wilmington, as provided in the act of the Legislature, approved the 18th day of February A.D. 1851. It is further ordered that the said sum of twenty two, hundred and sixty five dollars and twenty two cents, be paid to the said Complainants by the said Defendants, as soon as that amount of money shall come to their hands, and shall be paid before any other claim or demand against said Bridge Company. It is further ordered that Royal S. Noble, the Treasurer of said Bridge Company, be authorized, to draw any order, or orders, in favor of said Complainants or their attorneys, upon the Treasurers of Mill and Kaibab Companies, and the collector of the said Town of Wilmington, Red. Creek and Norton for the said sum of money, which shall be sufficient authority to said Treasurers and collector, upon whom the same shall be drawn, to pay the amount of such order or orders. It is further ordered, that Alexander Anderson and Adam Emistock, be named the sum of ten dollars each for fees, and act as arbitrators in this cause. That the said Dispute in this cause be dissolved as to all the defendants except as to said Supremes & said Bridge Company and that said Bridge Company pay all the costs of this proceeding.

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State of Illinois
County of Will. ss.

I Alexander M. Dutch Clerk of the Circuit Court in and for the County of Will. And State aforesaid, do Certify the foregoing to be a true and correct Transcript of the Records, and Papers on file in my office, in a certain suit in Chancery, wherein, Albert J. Cunningham, John W. Dutch and Henry Wilson Administrators, of the Estate of Richard G. Wilson deceased are Plaintiffs and the Wankakee Mill Co. are Defendants.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Court at Office in the City of Joliet, this 20th day of June A.D. 1858,

A. M. Dutch, Clerk
By Richd. Dutch Jr. Deputy

Arguments of errors.

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1st That the Court should have decreed that Stone and Boomer were entitled to be paid the amount of their contracts before any other payments were allowed from the fund in question.

2^d That the decree is that the defendants generally, should pay, and that the bill sets up no claim against Stone & Boomer.

3^d That the decree is that the defendants generally shall pay, and upon its face sets forth that it is rendered upon the consent of the Kankakee Bridge Company, who were not and do not claim to have been authorized to speak for Stone and Boomer.

4th That judgment should have been for the defendants instead of the complainants.

Beckwith, Merick & Bassin
Atty for Stone & Boomer

Lucius B. Boomer impleaded
with A. B. Stone. The Kankakee Bridge Co.
Telling Plaintiff in Error

v.

Robert F. Cunningham John
McIntosh Henry Nelson
defendants in Error.

On filing the above record
together with a bond in the penal sum of
three thousand dollars. Conditioned as the law
directs, ~~with~~ executed by the said Plaintiff
in Error as principal & Corydon Beckwith
as security. Let the writ of Error in this case
be made a supersedeas.

Blanton
Ch Just Ill

And now the said Bonner by leave of court first had obtained assigns the following additional ones

1. The court erred in the rendition of said decree when it appeared upon the face of said bill of complaint that said Henry Wilson was improperly joined as a complainant in said suit and that the proper parties were not made defendants;
2. The court erred in the rendition of said decree against said Stone and Bonner, and affecting their rights when ~~they were not before~~ ^{had no jurisdiction over them} the court by service of process or by voluntary appearance;
3. The court erred in making said order of reference, because the said Stone & Bonner were not at the time said order was in default nor was the cause at issue, and because the said order ~~directed~~ ^{was} ~~did not direct~~ ^{with respect to} an account of the amount due Stone & Bonner;
4. The court erred in the rendition of said decree, because it declared the plaintiff's claim to be a first lien upon the fund in the bill mentioned and directed said claim first to be paid thereout whereas it appears by said bill that Stone & Bonner were equally entitled with said plaintiff and the decree should have directed the plaintiff & Stone & Bonner paid pro rata.

By his Attyys
Beckwith Monick Cassin

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Lucius B. Boomer
impeached &c
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Robert J. Cunningham
& others

Transcript of
Record & assign. of errors

Filed June 26. 1838
Leland
Clark

Lucius B. Brown inphaded with
the Kan. Ka. Ku Bridge Company
vs
Robert J. Cunningham et al. Error to Will.

McRoberts & Goodspeed in behalf
of the defendants in Error, present the
following for the consideration of the
Court.

This was a Bill for relief, filed by the
defendants in Error, against the plaintiffs
in Error, at the December Term 1857 of the
Circuit Court of Will County, and determined
at the May Term 1858, ^{the Court} decreed the sum of
\$2165.22 in favor of the defendants in Error,
against the Bridge Company, and the Overseers,
and certain Collectors of the Counties of
Will and Kan. Ka. Ku.

To review this decree,
eight different Errors are assigned, which
we propose to examine in their order - first
affirming, that the causes assigned, nor
any of them are sufficient to authorize a
reversal.

The first Error assigned is, that the
Court should have decreed in favor of Stone
& Boomer, for the full amount of their contract,

before other payments were allowed from the fund, raised by the act of the legislature for the purpose of building the Bridge. This involves one of the main questions presented by the Bill - the right of the defendants in Error to be paid first out of the Bridge fund, claiming as they do, priority of right by virtue of their contract.

We contend that in as much as the defendants in Error had made a prior contract with the Bridge Company to build the piers and Abutments, upon which the Superstructure was to stand, and had performed the same, and were entitled to payment, before the contract was made with Stone & Boomer for the Superstructure, the defendants in Error had a prior right upon the Bridge Company fund collected under the act of the legislature for that purpose.

By the terms of the contract entered into with the defendants in Error, the piers and Abutments were to be completed between the 30th day of June, and the first day of November 1856, unless prevented by high-water in the River; and in the event of being so prevented, as soon thereafter as

Should be practicable. Now the inference is, that when Stone & Brown entered into the contract to build the Superstructure of this Bridge, they examined the locality where the Superstructure was to stand; and must of necessity have seen and examined the piers and Abutments.

They as a matter of course, upon seeing these piers and Abutments, would be led to inquire in regard to the persons who built them, and their rights and claims upon the fund for the work done. If so, were they not chargeable with notice of the prior right of defendant in Error; and were they not bound to respect them, when making their Contract? We think that such is the law, and consequently Stone & Brown entered into their contract bound by the prior rights of defendants in Error.

The piers and abutments were the first work constructed, and according to the contract the pay for it became due, and should have been made; consequently we insist; that defendants in Error have an equitable right, at least prior to all others. The act of February 15th 1858, was a

public act, and the plaintiffs in Error were bound to know its provisions, and the amount of the fund provided for building the Bridge.

Under the law of February ¹⁵ 1855, a certain amount of money, and no more was authorized to be raised as a special tax by the Bridge Company for the completion of the whole work. Being limited to a certain amount of money, the plaintiffs in Error were bound to inquire how much had been expended on the piers and Abutments, and how much would be left for the erection of the Superstructure.

The plaintiffs in Error would naturally have inquired of the Commissioners, before closing their Contract -

First - Who erected those piers and Abutments?

Second - Have the parties been paid the amount due them?

Third - What means have you to pay for the work?

Fourth - If the piers and Abutments have not been paid for how much, and cost

of what fund is the payment to be made?

Fifth. What amount are they entitled to under their contract; and when paid will there be a sufficient amount left to compensate us for the labor and material of the Superstructure?

The Bill seeks relief, on the express ground, that the Bridge Company, in order to induce Stone & Brown, ~~and the interested parties~~ to build the Superstructure of the Bridge, paid to them the money which should rightfully have been appropriated to the payment for the piers & abutments; and that the Bridge Company were thus committing a fraud upon the defendants in Error.

We will state a hypothesis, which when carried out, and applied, becomes a legal verity. Suppose that the defendants in Error at the time Stone & Brown made their contract, had received full compensation for their work; Could Stone & Brown, upon finding that there would be a deficit in the Bridge fund, compel the defendants in Error to account for what they had

received, and share pro rata with Stone & Bromes. No one we apprehend, will assume such a position, and yet it would be just as reasonable, and the same in legal effect, as to permit Stone & Bromes to claim that their rights were superior, or even equal to those of defendants in Error, which had been acquired under an executing Contract.

As to the Second Error.

The decree is only against the Bridge Company, the Treasurers of Will & Ranka Lin Counties, and certain collectors. It is true, that the decree is entitled against all of the defendants, mentioned in the Bill, but it affects only the funds of the Bridge Company, and is binding only upon such of the defendants in the Bill, as may have some of the fund in possession. Stone & Bromes are required to pay nothing - they are responsible for nothing under the decree, not even for a part of the costs. In any event, the Second Error would not be a ground for setting aside the decree. This Court would reform it, if it should be considered.

informal in this respect.

As to the third Error.

It was proper for the Bridge Company to appear & consent to the decree, when it alone as a body corporate was bound by it, and no other parties were to be affected. The Bridge Company does not by this decree, appear for Stone & Boomer. They had appeared by Counsel, as shown by the Record.

As to the fourth Error.

It is an assumption without proof; and contains nothing suggestive of Error in the ruling of the Court.

As to the fifth Error.

We think that Henry Wilson, who was the administrator of the estate of Richard S. Wilson deceased, who was a joint contractor in building the piers and abutments, with the other defendants in Error, was properly joined as a complainant. If he had been omitted the Bill would certainly have been bad upon

deceased. He was a necessary party, because ~~by the terms of the Contract~~ was signed individually by Cunningham, McIntosh and Wilson, and not as partners, and they were to be paid as individuals. It was not a partnership, which the survivors must settle up alone. ^{Wilson} Henry, the representative of Richard S. Wilson deceased, could not be joined as a codefendant, because it was an interest antagonistical, and adverse to the interests of the defendants in the Bill.

As to the Sixth Error

The decree was correctly made against Stone & Boomer, so far as their interest in the claim of defendants in Error was concerned. They had appeared by Randall & Snapp, their attorneys, which was sufficient to give the Court jurisdiction over them, for all the purposes and objects of the Bill. The Record shows that on the 12th day of May 1888, Randall & Snapp, entered a motion on the part of

the plaintiffs in Error to dissolve the injunction. On the ^{16th} day of the same month and at the same term of Court, the plaintiffs in Error by Randall & Snapp move the Court to set a certain day for the hearing of their motion to dissolve the injunction. With the facts before the Court, as shown by the Record, it is preposterous to say that Stone & Brown were not properly before the Court. They were bound by the appearance of their counsel - we deem further comment upon this point unnecessary.

As to the Seventh Error.

The Record Shows that Stone & Brown were in default after having appeared by counsel. At page 31 of the Record it is shown that the defendants were all severally called and made default. This was on the ^{15th} day of May 1858 - more than two months after the appearance of all the defendants had been entered by Randall & Snapp.

As to the eighth and last Error.

We contend that the defendants in Error had a first lien or at least a prior right upon the fund provided for the erection of the Bridge - consequently they should be paid first.

It does not appear that Stone & Boonem were entitled equally with the defendants in Error - hence the decree should not have been for payment pro rata. Stone & Boonem had been defaulted - they had failed to show by answer or otherwise, that they were entitled to anything under the decree. The Court could not voluntarily give them relief, which they had not asked, nor show themselves entitled to. They could ask affirmative relief only by a Cross Bill.

McRoberts & Goodspeed
for Defendants in Error.

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Lucius B. Boomer
impraded &c.

vs

Robt. J. Lyman
et al
~~Boomer et al~~

Argument for Defendants
in Error.

Filed May 13. 1839
L. Leland
Clerk

SUPREME COURT.

APRIL TERM, A. D. 1859.

LUCIUS B. BOOMER, Impl. with
THE KANKAKEE BRIDGE COMPANY, et al.

vs.

ROBERT J. CUNNINGHAM,
JOHN McINTOSH and
HENRY WILSON, Admr's of
RICHARD L. WILSON, Deceased.

Error to Will.

By an act of the Legislature of the State of Illinois, entitled "An act to authorize the towns and townships therein named to levy and "collect moneys and expend the same in building a bridge across the "Kankakee river at Wilmington," approved February 15, 1855, it was provided that it should be lawful for the legal voters of the towns of Wilmington and Reed, of Will county and towns of Wapousa, Branville, Greenfield, of Grundy county, and townships, No. thirty and thirty-one, North of Range of Nine East, in Vermillion county, at their next annual town meeting, to vote for or against a tax for building a bridge across the Kankakee river, at Wilmington, notice of said vote should be given by the respective town clerks of towns, by posting up written or printed notices thereof, in three of the most public places in each of said towns, at least ten days prior to said town meetings.

By the act it was further provided that said vote should be taken by ballot, upon which should be written or printed, or partly written and partly printed: "Bridge" or "No bridge." That said votes should be counted as nearly as might be as votes at general elections, and should be certified to by the moderators and clerks of said town meetings, and filed in the office of the town clerks of said towns, respectively. The act also provided that if it should be found that a majority of the voters of said towns and townships voting upon the question, had voted in favor of the tax, then it should be the duty of the supervisors of the towns and townships voting in favor of said tax, to proceed and locate said bridge at Wilmington, to determine the plan and to contract for the construction of the same to the best of their knowledge and ability, at an expense not exceeding the amount which a tax of one per cent. per annum for three years would raise upon the valuation of said towns and townships, for the then current year of 1855.

The act further provided that said tax should be collected in the same manner as other taxes were collected, except that it should all be paid in money only. That the collectors should receive the same compensation as they then received for collecting general taxes. That said tax should be paid over by the collectors, when collected upon the order of said supervisors, and that said bridge, when completed, should be a public free bridge, and should be kept in repair the same as though it were a town bridge.

The act also provided that the said supervisors and their successors in office should be, and they were thereby constituted and declared a body corporate, under the corporate name of the Kankakee Bridge Company, and by that name might sue and be sued, contract and be contracted with, buy, sell, and hold real and personal property sufficient to carry out the provisions of said act.

The act also provided that should the town of Wilmington fail to levy a tax, then the act should be void.

Session Laws of 1855, pp. 667, 668.

The towns of Wilmington, Reed and Essex voted in favor of the tax, and the other towns voted against it, and the corporation therefore became composed of the towns of Wilmington, Reed and Essex.

I.

The fund which the decree in this case was intended to affect, was a fund collected and to be collected under the authority of the foregoing act of the Legislature. The only purpose to which the fund in question could be appropriated, was the construction of the bridge specified in the act. It was a trust fund for the benefit of whoever might have a claim under any contract with the Kankakee Bridge Company for building the bridge or for furnishing material therefor. The individual corporations could not be held liable upon any contract made with the corporation, and it had no funds, and no means of raising any funds beside the fund in question, and therefore the only means of paying the contractors was out of this fund.

The bill alleges that the complainants had a claim under a contract with the company, amounting to \$9,348.67—\$5000 of which had already been paid, and \$4,500 of which was yet due and unpaid. The bill also alleges that other persons *not made parties*, had claims under other contracts with the said company, to a considerable amount against the said

fund, and that the fund was not large enough to pay these several demands. It is submitted that if the fund in question was a trust fund for the benefit of those having claims on account of work done about the bridge or for materials furnished, that no decree could be pronounced distributing or parcelling out that fund in a proceeding where the bill disclosed the fact that certain of the *cestues qui trust* were not made parties, and when no reason is given for not making them parties.

The defect is vital to the character of the bill and the relief asked, and the objection may be insisted upon at the hearing, and any decree rendered may be reversed for error on this account.

Story Equity Pleading, §236.

II.

The decree adjudges that complainants had a first lien upon the fund in question, and directs that their claim shall be first paid and satisfied. The bill admits that Stone and Boomer, the plaintiffs in error, had a claim against said fund which was then due and unpaid, and they were equally entitled to payment with the complainant. The bill also alleges that the fund was insufficient to pay both complainants and Stone & Boomer.

It is difficult to perceive how, with these facts clearly appearing from the statements in the bill, any decree could be rendered, directing payment to be made to the complainant, and wholly ignoring the claim of the plaintiffs in error.

It cannot be contended that the decree was rendered by consent of the plaintiffs in error. The decree sets forth that the Bridge Company consented; but it does not appear that the Bridge Company was authorized to act for the plaintiffs in error; nor does it appear that it assumed or pretended to act for them.

III.

The decree rendered is a decree against the defendants generally, and therefore against Stone & Boomer who are made defendants in the bill, and in a matter affecting their rights; whilst the record shows that they were not in court, either by service of process upon them, or by voluntary appearance to the suit. By the returns set out on page four (4) of the abstract, it appears that neither the injunction nor the summons was served upon Stone, or Boomer, and the prayer of the bill does not ask for an injunction against them.

By the abstract, page 5 it appears—

“On the 12th day of March, 1858, the *said defendants*, by Randall & Snapp, their solicitors, come and enter their motion to *dissolve the injunction* heretofore granted in this cause.”

This and the following paragraph in the abstract, to the same effect, is everything contained in the record from which the *voluntary appearance* of these plaintiffs in error could be inferred, and it is submitted that their appearance could not be inferred from this general statement, for the reason that the general term, *said defendants*, could not apply to them in the connection in which it was used.

The motion made by *said defendants*, was to dissolve the injunction granted in the cause. Which of said defendants made this motion? The defendants at the time bound by the injunction, and upon whom the writ had been returned served.

At the time the motion was made there had been no service upon either Stone or Boomer, and there was no injunction then binding upon them or either of them.

IV.

On the 20th day of March, 1858, it was ordered that the defendants file their answer by the first day of May next.

On the 20th day of May, 1858, on motion of the complainants and the Kankakee Bridge Company, the cause was referred, by order of Court, to Alexander Anderson and Adam Comstock, to take proofs therein.

On the 24th day of May, 1858, another order was made directing the defendants to file their answer by the following morning, and on the following morning, being the 25th of May *they were defaulted for want of an answer*.

It therefore appears that the plaintiffs in error were not in default at the time the case was referred. It is submitted that no interlocutory decree of reference could be rendered until after a default had been taken, and especially a decree by which Stone & Boomer were deprived of a hearing before the referees, as to the amount of their claim.

BECKWITH, MERRICK & CASSIN,
Att's for Plaintiff in Error.

Supreme Court

L. B. Bonner Kinship

R. J. Cunningham
Et al

Plffs. vs.

Filed May 28. 1859

L. A. Weller
Clerk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of *Will*

Greeting :

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the *Circuit* Court of *Will* County, before the Judge thereof, between *Robert J. Cunningham, John McIntosh and Henry Wilson Administrators of the Estate of Richard S. Wilson deceased* Complainants

~~plaintiff~~, and *the Kaukaee Bridge Company, Charles H. Weeks, David Perry, George A. Gray, John Leich, A. B. Stone & Lucius B. Boomer*

defendants, it is said that manifest error hath intervened, to the injury of the said *Lucius B. Boomer*

as we are informed by *his* complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said *Robert J. Cunningham, John McIntosh and Henry Wilson Administrators as aforesaid*

that *they* be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if *they* shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said *Robert J. Cunningham, John McIntosh and Henry Wilson* notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice
of our said Court, and the Seal thereof, at Ottawa,
this *29th* day of *June* in the
Year of Our Lord One Thousand Eight Hundred
and Fifty-eight.

S. Selcraig

Clerk of the Supreme Court.

J. B. Rice Deputy

83-170
Lucius B. Boomer unpleaded with
A.D. Stone The Rankakee Bridge
Co. & others

Robert J. Cunningham & others

Sci fa

I have executed the within writ
by delivering a true copy of the
same to the within named
Robert J. Cunningham and
John Mcintosh. Henry
Wilson not found in my County

July 27th 1858

2 copies	1.00
Service	2.50
Miles	1.00
Return	1.00
Reading fee of Book	4.10

L. K. Dyer Sheriff

By C. L. Jander Dep't

Filed July 30th 1858
L. Deland
clerk.

STATE OF ILLINOIS, }
SUPREME COURT,

ss. The People of the State of Illinois,

To the Clerk of the Circuit

Court for the County of Will Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Will County, before the Judge thereof, between Robert J. Cunningham, John McIntosh and Henry Wilson administrators of the estate of Richard S. Wilson deceased Complainants ~~plaintiff~~ and The Kankakee Bridge Company, Charles H. Weeks, David Perry, George A. Gray, John S. Smiley, Samuel Carr, John Leich A. B. Stone and Lucius B. Boomer ——— defendants, it is said manifest error hath intervened, to the injury of the aforesaid Lucius B. Boomer one of said defendants ———

————— as we are informed by his complaint ——— and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 29th ——— day of June ——— in the Year of Our Lord our thousand eight hundred and fifty-eight.

J. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy

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Lucius B. Boomer in place of
with A. B. Stone the Klamath
Bridge Co. & others

vs
Robert J. Cunningham &
others

Writ of Error

This writ of Error is made a
superseas and as such
is to be obeyed by all
concerned.

L. Leland Clerk
by J. H. Rice Deputy

Filed June 28. 1838
L. Leland
Clerk

SUPREME COURT.

APRIL TERM, A. D. 1859.

LUCIUS B. BOOMER, Impl. with
THE KANKAKEE BRIDGE COMPANY, et al.

vs.

ROBERT J. CUNNINGHAM,
JOHN McINTOSH and
HENRY WILSON, Admr's of
RICHARD L. WILSON, Deceased.

Error to Will.

By an act of the Legislature of the State of Illinois, entitled "An act to authorize the towns and townships therein named to levy and collect moneys and expend the same in building a bridge across the Kankakee river at Wilmington," approved February 15, 1855, it was provided that it should be lawful for the legal voters of the towns of Wilmington and Reed, of Will county and towns of Wapousa, Branville, Greenfield, of Grundy county, and townships, No. thirty and thirty-one, North of Range of Nine East, in Vermillion county, at their next annual town meeting, to vote for or against a tax for building a bridge across the Kankakee river, at Wilmington, notice of said vote should be given by the respective town clerks of towns, by posting up written or printed notices thereof, in three of the most public places in each of said towns, at least ten days prior to said town meetings.

By the act it was further provided that said vote should be taken by ballot, upon which should be written or printed, or partly written and partly printed: "Bridge" or "No bridge." That said votes should be counted as nearly as might be as votes at general elections, and should be certified to by the moderators and clerks of said town meetings, and filed in the office of the town clerks of said towns, respectively. The act also provided that if it should be found that a majority of the voters of said towns and townships voting upon the question, had voted in favor of the tax, then it should be the duty of the supervisors of the towns and townships voting in favor of said tax, to proceed and locate said bridge at Wilmington, to determine the plan and to contract for the construction of the same to the best of their knowledge and ability, at an expense not exceeding the amount which a tax of one per cent. per annum for three years would raise upon the valuation of said towns and townships, for the then current year of 1855.

The act further provided that said tax should be collected in the same manner as other taxes were collected, except that it should all be paid in money only. That the collectors should receive the same compensation as they then received for collecting general taxes. That said tax should be paid over by the collectors, when collected upon the order of said supervisors, and that said bridge, when completed, should be a public free bridge, and should be kept in repair the same as though it were a town bridge.

The act also provided that the said supervisors and their successors in office should be, and they were thereby constituted and declared a body corporate, under the corporate name of the Kankakee Bridge Company, and by that name might sue and be sued, contract and be contracted with, buy, sell, and hold real and personal property sufficient to carry out the provisions of said act.

The act also provided that should the town of Wilmington fail to levy a tax, then the act should be void.

Session Laws of 1855, pp. 667, 668.

The towns of Wilmington, Reed and Essex voted in favor of the tax, and the other towns voted against it, and the corporation therefore became composed of the towns of Wilmington, Reed and Essex.

I.

The fund which the decree in this case was intended to affect, was a fund collected and to be collected under the authority of the foregoing act of the Legislature. The only purpose to which the fund in question could be appropriated, was the construction of the bridge specified in the act. It was a trust fund for the benefit of whoever might have a claim under any contract with the Kankakee Bridge Company for building the bridge or for furnishing material therefor. The individual corporators could not be held liable upon any contract made with the corporation, and it had no funds, and no means of raising any funds beside the fund in question, and therefore the only means of paying the contractors was out of this fund.

The bill alleges that the complainants had a claim under a contract with the company, amounting to \$9,348.67—\$5000 of which had already been paid, and \$4,500 of which was yet due and unpaid. The bill also alleges that other persons *not made parties*, had claims under other contracts with the said company, to a considerable amount against the said

fund, and that the fund was not large enough to pay these several demands. It is submitted that if the fund in question was a trust fund for the benefit of those having claims on account of work done about the bridge or for materials furnished, that no decree could be pronounced distributing or parcelling out that fund in a proceeding where the bill disclosed the fact that certain of the *cestues qui trust* were not made parties, and when no reason is given for not making them parties.

The defect is vital to the character of the bill and the relief asked, and the objection may be insisted upon at the hearing, and any decree rendered may be reversed for error on this account.

Story Equity Pleading, § 236.

II.

The decree adjudges that complainants had a first lien upon the fund in question, and directs that their claim shall be first paid and satisfied. The bill admits that Stone and Boomer, the plaintiffs in error, had a claim against said fund which was then due and unpaid, and they were equally entitled to payment with the complainant. The bill also alleges that the fund was insufficient to pay both complainants and Stone & Boomer.

It is difficult to perceive how, with these facts clearly appearing from the statements in the bill, any decree could be rendered, directing payment to be made to the complainant, and wholly ignoring the claim of the plaintiffs in error.

It cannot be contended that the decree was rendered by consent of the plaintiffs in error. The decree sets forth that the Bridge Company consented; but it does not appear that the Bridge Company was authorized to act for the plaintiffs in error; nor does it appear that it assumed or pretended to act for them.

III.

The decree rendered is a decree against the defendants generally, and therefore against Stone & Boomer who are made defendants in the bill, and in a matter affecting their rights; whilst the record shows that they were not in court, either by service of process upon them, or by voluntary appearance to the suit. By the returns set out on page four (4) of the abstract, it appears that neither the injunction nor the summons was served upon Stone, or Boomer, and the prayer of the bill does not ask for an injunction against them.

By the abstract, page 5 it appears—

“On the 12th day of March, 1858, the *said defendants*, by Randall & Snapp, their solicitors, come and enter their motion to *dissolve the injunction* heretofore granted in this cause.”

This and the following paragraph in the abstract, to the same effect, is everything contained in the record from which the *voluntary appearance* of these plaintiffs in error could be inferred, and it is submitted that their appearance could not be inferred from this general statement, for the reason that the general term, *said defendants*, could not apply to them in the connection in which it was used.

The motion made by *said defendants*, was to dissolve the injunction granted in the cause. Which of said defendants made this motion? The defendants at the time bound by the injunction, and upon whom the writ had been returned served.

At the time the motion was made there had been no service upon either Stone or Boomer, and there was no injunction then binding upon them or either of them.

IV.

On the 20th day of March, 1858, it was ordered that the defendants file their answer by the first day of May next.

On the 20th day of May, 1858, on motion of the complainants and the Kankakee Bridge Company, the cause was referred, by order of Court, to Alexander Anderson and Adam Comstock, to take proofs therein.

On the 24th day of May, 1858, another order was made directing the defendants to file their answer by the following morning, and on the following morning, being the 25th of May *they were defaulted for want of an answer*.

It therefore appears that the plaintiffs in error were not in default at the time the case was referred. It is submitted that no interlocutory decree of reference could be rendered until after a default had been taken, and especially a decree by which Stone & Boomer were deprived of a hearing before the referees, as to the amount of their claim.

BECKWITH, MERRICK & CASSIN,
Att's for Plaintiff in Error.

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Superior Court

L. S. Corcoran implor

R. J. Cunningham
Chas

Plffs argt

Filed May 28. 1839

L. Leland
clerk

Know all men by these presents; That we
Lucius B. Boomer and Longdon Prentiss
are held and firmly bound unto Robert L.
Cunningham, John McIntosh, and Henry
Wilson, admors of the Estate of Richard Wilson, de-
ceased, in the Sum of three thousand dollars (\$3000.00)
to be paid to the said Cunningham, McIntosh
and Wilson, administrators, their Executors and
administrators - To which payment well and
truly to be made, we bind ourselves and each
of us, jointly and severally and each of our
heirs, Executors and administrators, firmly, by
these presents - Sealed with our seals and
dated this twenty six day of June A.D. 1858

The condition of this obligation
is such, that whereas the said Cunningham,
McIntosh and Wilson, administrators, have obtained
a final decree in the Circuit Court of Will
County, sitting in Chancery, against the
defendants, for the Sum of twenty one hundred
and sixty five dollars and twenty two cents
in a certain case, in which the said Cun-
ningham, McIntosh and Wilson, administrators,
are complainants and the said Lucius B. Boomer,
A. B. Stone, ^{Complainant & Plaintiff} the Kankakee Bridge Company -
George A. Gray and John S. Smiley, Samuel
Carr, John Leich, Charles H. Weeks, and
David Perry are defendants - and which

said decree was rendered on the 12th day of
June AD 1858, and whereas the said Lucius B.
Boomer, in order to obtain a reversal of the same,
hath sued out a writ of error to the Supreme Court
of Illinois - Now therefore - If the abovesaid
Lucius B. Boomer, shall prosecute his said
writ of error to effect and shall in all things
abide by and perform said decree and answer
^{and pay} all damage and costs, if he shall fail to
make good his plea: then this obligation to be
void, otherwise remain in full force -

Lucius B. Boomer (seal)
Oaydon Breckinridge (seal)

State of Illinois }
Cook County^{ss} } I C Breckinridge testify and say that I am
withe the sum of six thousand dollars now and above all
my just debts and liabilities
Subscribed & sworn to this
24th day of June 1858. Before me.

C Breckinridge

Edward W. Smith
Notary Public