No. 13300

Supreme Court of Illinois

Boomer, Impl.

vs.

Cunningham et al

Supreme Court of the State of Illinois Grand Division

Lucius B. Boomer impleaded
with The Kankakee Bridge
Company et al

vs

Robert J. Cunningham,
John Mc Intosh &
Henry Wilson admr of
Richard S Wilson deceased

Error to Will.

And thereupon,
afterwards to wit at the April Term 1859 of the
Supreme Court of the State of Illinois for the
Grand Division, Robert J Cunningham & John
Mc Intosh, ~~Defendants~~ in Error, by McRoberts
& Goodspeed their attorneys, come into Court and
say that there is no Error in the Record of
proceeding aforesaid; and pray that the
Justices of the said Supreme Court now
here, may proceed to examine, as well the Record
& proceedings aforesaid, as the matters
assigned for Error, and that the said
decree may be in all things affirmed.

McRoberts & Goodspeed
Pro Defts in Error

93.

Supreme Court.

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Lucius B. Broome impleaded &c.

vs

Robert Cunningham et al

Joinder in Error

Filed April 20, 1837

L. Leland
Clerk

Printed by Jameson & Morse, 14 La Salle street.

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.

93-170

Supreme Court

L. B. Boomer impl'd &c

vs

R. J. Cunningham Et al

Pltffs. Argt

Filed May 28. 1859

L Leland
Clerk

Printed by Jameson & Morse, 14 La Salle street.

SUPREME COURT.

APRIL TERM, A. D. 1859.

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

78-170

Supreme Court

L. A. Boomer
impl'ts

vs

R. J. Cunningham
et al

Plaintiffs Argument

1330

Filed May 28. 1879

A. Leland
Clerk

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