

14569

No. 14569

Supreme Court of Illinois

Schaeffer

vs.

Troutman et al

71641  7

90
STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 11

1863

Sept 11
1863

ERROR TO TAZEWELL.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

In this case, a simple statement of the error apparent of record would seem to be all that is necessary to enable the court to see that the cause should be reversed.

This was a proceeding by bill to foreclose a mortgage on the south half of the *southwest* quarter of section 28, town 26 north, range 4 west 3d P. M., which was the tract mortgaged, as appears of record; and there is no allegation in the bill, and no proof in the record, that any other tract of land was intended to have been mortgaged, or was omitted or left out of the mortgage by accident or mistake. Yet, without any such allegation or proof of record, and while the answer of the defendant Schurtz was on file, denying notice and calling for proof, the court rendered a decree against the defendants, directing the foreclosure and sale of their interest in the south half of the *southeast* quarter of section 28, town 26 north, range 4 west 3d P. M., on which there was not then, and never had been, a mortgage given by defendants, or any of them, at any time; and none such was alleged or produced in evidence. The decree for this cause alone is manifestly erroneous, and should be reversed.

But the bill alleges that the note described in the mortgage was not paid, and was lost. Schurtz, by his answer, calls for the proof, and no proof was given of the loss of the note named in the mortgage; no note was produced in evidence, nor was there a copy of the same shown, nor was there any proof of the existence or contents of such note given in the case. This would seem to be imperatively required, before a decree could be had upon it. See *Palmer vs. Logan*, 3 Scam., R. 53; *Norris vs. Kellogg*, 2 Eng., 112. For these and other reasons apparent of record, this cause should be wholly reversed.

B. S. PRETTYMAN,
Attorney for Plaintiff.

SUPREME COURT OF ILLINOIS.

At Ottawa—April Term, 1860.

LORENTZ SCHAEFFER

vs.

CHRISTIAN TROUTMAN,

DAVID SHURTZ,

MICHAEL LOHR,

MICHAEL BARKER,

MATHIAS DENNING,

BENJAMIN BARTELOW,

CHARLES ANDREWS.

Error—Tazewell County.

Page, 1.

Bill to foreclose mortgage filed on the 6th day of November, 1850. Lorentz Schaeffer against Christian Troutman and David Shurtz.

2. Bill charges that Christian Troutman was justly indebted to the complainant in the sum of three hundred and fifty dollars, and that he executed his note therefor, bearing date 25th February, 1840, and that the note was lost, or destroyed, so that it was impossible for the complainant to produce it on trial, and requiring said Troutman to produce it at the trial.

3. Sets out the mortgage *hic verbae*, on the south half of the southwest quarter of section twenty-eight, township 26, N. R. 4 W, 3d principal meridian, containing 80 acres.

4. Condition of said mortgage to pay the sum of three hundred and fifty dollars due on said note, together with interest, which mortgage was acknowledged 27th February, 1840.

5. Acknowledgment.

6. Recording mortgage.

6 Allegation of the money being due, and the non-payment thereof, and charged that David Shurtz has some interest in the premises.

7 Prayer of process, and that the defendants be required to answer, &c. Prays a decree for the payment of the money, and upon default the equity be foreclosed.

Bill sworn to by the complainant, jurat. Affidavit of non-residence of Christian Troutman.

Proceeding at the November Term, 1850.

Security for costs, and summons against David Shurtz and Christian Troutman, dated 6th November, 1850.

Sheriff's return, dated 20th December, 1850.

Proceeding of the Court, April Term, 1850. The cause continued. An alias summons for Troutman—David Shurtz being summoned and makes default, and the bill taken as confessed against Shurtz.

On motion of the defendant Shurtz, the default set aside.

Shurtz's answer, alleging a mistake in sale—the same land sold by description of sec. 8, having purchased the same under execution by that description, against Troutman, and affidavit of the non-residence of Christian Troutman, and notice of publication. Certificate of the Printer.

Proceeding of the Special Term Circuit Court, on the second Monday September, 1851.

The bill as to Christain Troutman at the June Term, 1851, taken as confessed, and at April Term, 1852, this cause continued.

The proceeding of the Court held Sept. Term, 1852—this cause, by agreement of parties, was continued.

On the 17th Sept., 1852, the complainant filed his amended bill, making Christian Troutman, David Shurtz, Michael Lohr, Michael Baker, Mathias Denning, Benjamin Barthelow and Charles Andrews, defendants.

Affidavit of non-residence of Michael Lohr & al.

Summons dated 4th Oct., 1852, issued against defendants.

Summons served on Chas. Andrews, 14th Oct., 1852, by delivering him a copy. The other defendants, viz: Michael Lohr, Michael Baker, Mathias Barthelow, not found.

Notice of publication against the non-resident defendants.

Certificate of Publication.

Amended bill filed to make parties as above, May 4th, 1853, and cause continued

Bill sworn to by the complainant, jurat. Affidavit of non-residence of Christian Troutman.

Proceeding at the November Term, 1850.

Security for costs, and summons against David Shurtz and Christian Troutman, dated 6th November, 1850.

Sheriff's return, dated 20th December, 1850.

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10 Sheriff's return, dated 20th December, 1850.

11 Proceeding of the Court, April Term, 1850. The cause continued. An alias summons for Troutman—David Shurtz being summoned and makes default, and the bill taken as confessed against Shurtz.

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23 Certificate of Publication.

23 Amended bill filed to make parties as above, May 4th, 1853, and cause continued

21 Exceptions to answer of David Shurtz for reasons the answer does not
 22 answer allegations in the bill, and the said bill attempts to set up a sale
 23 of different land than land described in bill, and the answer not sworn
 24 to, and no date in which he claims the land by attachment.

25 Court holden first Monday Oct. 1853—decree made in the cause.

26 Decree for Six Hundred and Fourteen Dollars and Twenty-Five
 27 Cents, and decree for the payment of said sum in sixty days, & in default
 28 the land, to wit: south half s. e. quarter sec. 28, T 26 N. R. 4 W., be
 29 sold, and it appearing by proof, and exhibits, &c.

30 Decree alleges Shurtz having withdrawn his answer.

31 Court held 1st Monday in May, 1854. On motion of plaintiff cause
 32 continued.

33 Court held on 12th October, 1853. On motion of complainant this
 34 cause continued.

35 April Term, 1854, this cause, on motion, is continued.

36 Court at the Oct. Term, 1855, the master makes his report. Sale
 37 south half of east half s. e. quarter sec. 28, town 26 N. R. 4 west, 3d
 38 principal meridian, and sale of the premises to A. L. Merriman, for the
 39 sum of Seven Hundred and Thirty-Nine Dollars and Forty-Eight Cents,
 40 and the master thereupon delivers a certificate of purchase to said
 41 Merriman.

42 Master's report of the sale of said land.

43 Certificate of publication.

44 April Term, 1856—motion and leave for David Shurtz to open decree
 45 and upon hearing affidavits it is, on agreement of the parties, ordered
 46 by the Court decree be opened, upon Shurtz paying all costs.

47 Leave to file his answer thereon.

48 David Shurtz files his affidavit on 8th May, 1856. One of Edward
 49 Jones denying authority to withdraw answer, and the answer was sworn
 50 to, but by mistake the jurat was not attached—and one of his (Shurtz's),
 51 alleging that he never authorized any person to withdraw his answer,
 52 nor did he ever compromise said suit.

53 Preceding at the Sept. term, 1847; the cause was continued.

54 Proceeding of the court held April Term, 1857.

21 Exceptions to answer of David Shurtz for reasons the answer does not
 22 answer allegations in the bill, and the said bill attempts to set up a sale
 23 of different land than land described in bill, and the answer not sworn
 24 to, and no date in which he claims the land by attachment.

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 39 sum of Seven Hundred and Thirty-Nine Dollars and Forty-Eight Cents,
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 50 alleging that he never authorized any person to withdraw his answer,
 51 nor did he ever compromise said suit.

52 Preceding at the Sept. term, 1847; the cause was continued.

53 Proceeding of the court held April Term, 1857.

39 Motion to set aside an order heretofore made, vacating a decree rendered herein, and order said motion be sustained, and said order decreeing former decree to stand, be reinstated.

ASSIGNMENT OF ERRORS :

The decree is void.

1 The decree having been vacated, all proceeding under it is void.

2 The decreeing of the sale of the s. half s. e. fr. sec. 28, T. 26 N., R. 4 W. 3 P. M. there being no allegation in the bill, or proof that that piece of land was in the mortgage, or calculated to be so.

3 Vacating a decree places the parties in *statu quo*, and no decree could be properly had until Rule had been made on the defendant Shurtz to answer.

4 There was no proof of the loss of the note, nor was there any copy of the same pretended to be given, nor any proof of the contents of the note.

5 The sale is void, as made to complainant, not having a decree to sustain it, and decree being vacated.

6 There was no sufficient allegation in bill to sustain the decree, and no proof to support the allegations or to warrant such decree.

B. S. PRETTYMAN, Attorney.

17-90 22851 11
SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term, 1860.

LORENTZ SCHAEFFER

VS.

CHRISTIAN TROUTMAN, DAVID SHURTZ, MI-
CHAEL LOHR, MICHAEL BAKER, MATHIAS DEN-
NING, BENJAMIN BARTHELOW, CHARLES AN-
DREWS.

ERROR FROM TAZEWELL COUNTY.

ABSTRACT.

Filed Apr. 18. 1860

L. Leland
Clerk

1
Pleas to a Term of the Circuit
Court, begun and held at the
Court House in the City of Pekin
within and for the County of Tazewell
in the State of Illinois, on
the first Wednesday of the month
of April in the year of our Lord
One Thousand eight hundred and
fifty. Present the Honorable David
Davis Judge of the eighth judici-
al Circuit of the State of Illinois
composed of Tazewell Woodford &c.

Be it remembered that on the 6th day of November
in the year A.D. 1855 a ^{proceeding} Bill for foreclosure &
^{affidavit & bond} was filed, in the words and figures follow-
ing to-wit:

Lornitz Schaeffler	} In the Tazewell Circuit Court of the April Term A.D. 1855 In chancery to foreclose Mortgage The clerk will please issue summons in above cause returnable &c H.O. & A.L. Murrin
vs. =	
Christian Frontman & David Shultz	

To the Honorable David Davis Judge of the
8th Judicial Circuit in the State of Illinois - In

Chancery sitting.

Your Orator Lemmy Schaeffer humbly complaining unto your Honor respectfully represents - That on the twenty fifth day of February in the year of our Lord one Thousand eight hundred and forty, one Christian Frouman was jointly indebted to your Orator in the sum of three hundred and fifty dollars, and gave his note therefor bearing date the day & year aforesaid, payable in one year from ^{the} date thereof, which said note is out of the possession or control of complainant, and that the same has been lost or destroyed so that it is impossible for complainant to produce the same upon the hearing of this cause, and defendant is notified and required to produce the same, if in his possession.

Complainant further states that to secure the payment of said note as aforesaid, the said defendant Frouman executed and delivered to your Orator a Mortgage of which the following is a copy to-wit

This Indenture

"made this Twenty fifth day of February in the year of our Lord one Thousand eight hundred and forty. Between Christian Frouman of the County of Fagwell of the first part

and Lorny Shaffler of the County of Saint Louis in the State of Missouri of the second part Witnesseth That the said party of the first part, for and in consideration of the sum of three hundred and fifty dollars in hand paid by the said party of the second part the receipt of which is hereby acknowledged done by these presents grant bargain and sell unto the said party of the second part his heirs and assigns, one certain tract or parcel of land Situated in Lapeer County State of Illinois The south half of the south west-quarter of Section number Twenty eight (28) in Township number Twenty six (26) North of range number four (4) west of the third principal meridian, containing Eighty acres, together a Distillery erected thereon and Distillery utensils - Together with all and singular the hereditaments and appurtenances therunto belonging or in any wise appertaining - To have and to hold the said premises as above described with the appurtenances unto the said party of the second part his heirs and assigns forever - and the said party of the first part for himself and his heirs hereby covenant and agree to and with the said party of the second part his heirs and assigns, that he is well seized

4

of the premises above conveyed as of a good and indefeasible estate in fee simple, and has good right to sell and convey the same in manner and form as aforesaid, and that the above bargained premises in the quiet and peaceable possession of the party of the second part his heirs or assigns against the claims of all persons whomsoever. he will forever warrant and defend, Provided always that if the said Christian Foutman his heirs executors or administrators shall pay to the said Lorenz Schaeffler his heirs executors or administrators or assigns the sum of two hundred and fifty Dollars together with the interest that may accrue thereon in manner particularly specified in a certain note or obligation bearing even date herewith, executed by the said Christian Foutman to the said Lorenz Schaeffler then and from thenceforth these presents shall be null and void: otherwise they shall remain in full force and virtue -

In Testimony whereof the said Christian Foutman has hereunto set his hand and seal the day and year first above written
Signed sealed and Christian Foutman
delivered in presence
H.A. Coontz

5

State of Illinois }
 Preria County } of the Peace for said county do
 certify that on this day appeared before me
 Christian Frotsman, whose name appears sig-
 -ned to the foregoing deed of conveyance, and who
 is personally known to me to be the identical
 person who signed the same and acknow-
 ledged that he had executed the same as
 his voluntary act, and deed for the uses and
 purposes therein expressed, Given under
 my hand and seal at Preria this 27 day of
 February 1840 -

A My Justice of the Peace Seal

State of Illinois }
 County of Preria }^{ss} I William Mitchell Clerk
 of the County Commissioners Court for said
 County do hereby certify that Adolphus Mey-
 -er, Esq. whose name appears to the for-
 -going certificate, was on the day of the date
 thereof an acting Justice of the Peace in and
 for the County aforesaid duly commissioned
 and qualified as it appears to me of Record
 in my Office, and that as such full faith and
 credit are due to all his official acts -

L. S.

In testimony whereof I have here-
 -unto set my hand and affixed the
 seal of said Court at Preria this 27th day
 of February 1840. William Mitchell Clerk
 By R. Hamlin Dep. Clerk

Which said Mortgage was on the 13th day of March A.D. 1840, duly recorded in the office of the recorder of said County of Tazewell as appears from the certificate of the recording said county enclosed on said mortgage which mortgage is in the words and figures following ~~to wit~~ "Entered for record 13th March 1840 and duly recorded in the recorder's office of Tazewell County Illinois in Book B, pages 430, & 431, attest J. H. Morrison C. R. J. C. Illinois"

Complainant further states that the said money in said mortgage and note specified has long since been due and payable, and that no portion of the same has been paid to complainant or any one authorized to receive the same, and that he never assigned or transferred said note to any person whatever, and that the whole amount of principal and the interest which has accrued is still due and owing to complainant, by reason of the promises aforesaid. Complainant further states as he is informed and believes one David Shurtz claims some interest in said mortgage and promises, all which acts and doings of defendants are contrary to equity and good conscience

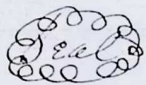
7 and tend to the manifest injury of Com-
-plainant. Inasmuch therefore as your
orator is remediless at common law
and has recourse only in this honorable
court; and to the end that justice may
be done, in the premises your Orator prays
that Christian Troulman David Sturty be
made defendants to this Bill of complaint
and that the usual process issue therefor,
that he answer fully and particularly
the matters and allegations in this bill
contained on oath, that an accounting
be had of the amount due your orator
upon said mortgage debt under the direc-
tion of this court; and that upon the hear-
ing of this cause said defendant be decr-
eed to pay the sum of money so found due
within some short day to be fixed by the
court and in default thereof that the said
mortgage premises be sold for the paym-
ent of the same - and for such other and
further relief as to this court shall seem
meet and proper. And as in duty bound
your Orator will ever pray &c.

H.O. & A.L. Memmian Secs. Lornby Schieffter
State of Missouri

County and City of St Louis } ss On this thirty first
day of October A.D. 1850 personally appeared

before me the undersigned a commissioner
 of the State of Illinois for the State of Missouri
 in and for said County Loring Schaeffler
 and bring by me first duly sworn deposes
 and says the foregoing bill by him subscri-
 bed is true in substance and fact.

In Testimony whereof I have hereunto set my
 hand and affixed my seal the day and
 year aforesaid.



In testimony whereof I the said
 commissioner have hereto subscri-
 bed my name and affixed my seal
 of office this thirty first day of October
 1850 Hann Butler Comr.

Loring Schaeffler

=vs=

Christian Troutman,

& David Schertz

Judge of the Circuit Court

To Appear Term A.D. 1857

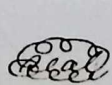
A.L. Merriman bring

first duly sworn deposes and

says that the above named defendant Chris-
 tian Troutman is a non resident of the State
 of Illinois, as he is informed and only
 believes A.L. Merriman

subscribed and sworn

to before me clerk of the circuit court of Bond



County Illinois Witness my hand and
 the seal of said court this 5th day of November
 A.D. 1850.

Jacob Gale clerk

9

Loring Schauffler

-105-

Christian Foutman

& David Shurtz

Jaywill Circuit Court
In Chancery

I do hereby enter myself
security for costs in this cause and acknow-
ledge myself bound to pay or cause to be
all costs which may accrue in this action
either to the opposite party or to any of the
officers of this court in pursuance of the
laws of this State. dated this 5th day of
November A.D. 1850- A. L. Merriman

And now afterwards to wit on the
6th day of November A.D. 1850 a summons
was issued in the words and figures follow-
ing to-wit

State of Illinois }
Jaywill County } ss The People of the State of
Illinois - To the Sheriff of
said County - Greeting -

We command you that you summon
Christian Foutman David Shurtz if they
to be found in your county to be and
appear before our Circuit Court for said
county on the first day of ^{the} next term thing
to be held at the Court House in the City of
Pekin on the first Wednesday of the month

of April next, then and there to answer unto the matters and things contained in a certain bill in chancery filed in our said circuit court, on the chancery side thereof by Lornutz Schaeffler, and to do and performe whatever our said Circuit Court shall order and decree in the premises, and you herof make due return with an endorsement of the manner in which you shall execute the same

Witness John A. Jones, Clerk and
 the seal of said circuit court
 at Pekin this 6th day of November
 One Thousand eight hundred and fifty
 J. A. Jones Clerk

And now afterwards to wit on the 21st day of December A.D. 1850, said summons was returned, with the following endorsement thereon to wit

Served by leaving a true copy of the within summons with David Shirts the other not found in my county Dec 20th 1850

R. J. Gilb Shiff J. C.

And now afterwards to wit at a term of the circuit court begun and held at the Court House in the City of Pekin within and

for the county of Tazewell and State of Illinois
 on the first Monday of April in the year of
 Our Lord Eighteen hundred and fifty one
 Present The Honorable David Davis Judge of the
 Eighth Judicial Circuit of the State of Illinois
 David B Campbell Esq. Prosecuting Attorney
 R. J. Gill Sheriff and John a Jones clerk the
 following proceedings were had in said cause
 to-wit: April 2nd 1851

Loring Schaeffler

-vs-

Christian Troutman

David Shurtz

} In Chancery

This day comes the complainant by his Solicitor Messrs. and on their motion it is ordered that this cause be continued with alias summons to the defendant Troutman, and the defendant Shurtz having been regularly served with process, was three times solemnly called and came not, but made default. It is therefore ordered that the complainant's bill be taken for confessed as to said defendant.

April 4th 1851

Loring Schaeffler

-vs-

Christian Troutman
 and David Shurtz

} In Chancery

and now this day comes the said defendant Shurtz by his attorney and on his motion the default as to said Shurtz having taken is set aside, and now on motions the defendant is ruled to plead answer or demur in sixty days from this date or in default thereof the matters and things in complainant's bill contained will be taken for confessed and a decree entered according to the prayer thereof.

And now afterwards to wit on the 13th day of September AD 1857 an answer was filed in the words and figures following to wit

State of Illinois	}	ss	In the Circuit Court of
Lazearll County			
County Schaeffler	}	= vs =	In Chancery.
Christian Fortman			
+ David Shurtz	}		

The separate Answer of David Shurtz one of the defendants. This respondent answering saith that he is ignorant of the matters in the bill charged. He had no notice thereof and calls for proof thereof.

Respondent however further answering, that at the May term of the Circuit Court of Lazearll County in the year of our Lord Eighteen hun-

-dnd and forty the respondent received a judgment against Christian Foutman the defendant in an attachment suit in which the land in the bill described had previously levied upon. That said Land was sold upon said judgment & respondent became the purchaser thereof. took possession thereof and sold the same to one Michael Baker. Respondent further says that the sheriff of the County of Tazewell who sold said premises, made a mistake in the description of said land describing the same to be in Section Eight instead of Section Twenty eight which is the proper description of the said property. He denies any intention to defraud the complainant &c and prays to be dismissed with his costs.

Sworn & Subscribed
before me this 10th Sept 1857

David Scherby

And now afterwards to wit a notice and certificate was filed in the words and figures following to wit:-

State of Illinois	}	Circuit Court to the
Tazewell County		September Term A D 1857
Loring Schaffler	}	
-vs-		
Christian Foutman		
David Sketerville		In Chancery.

Affidavit having been filed, in said entitled cause satisfactorily showing that the defendant Christian Troutman is a non-resident of the State of Illinois, and summons having been issued returnable to the April Term A.D. 1857. Now public notice is hereby given to the said Troutman that unless he be and appear before our Circuit Court for said Tazewell County on the first day of the next Term thereof to be held at the Court-house in the City of Pekin, on the Second Wednesday of the month of September next and plead, answer or demur, to the Complainant's bill herein filed, the matters and things therein contained, will be taken for confessed and a decree entered according to the prayer thereof.

J. A. Jones Clerk

A. H. & A. L. Murrman Comp. Sol.

June 19

I do hereby certify that the annexed notice Leroy Schaeffer vs Christian Troutman, David Shurtz was duly published in the Tazewell mirror a weekly newspaper, printed in Pekin Tazewell County Ill. for four successive weeks, commencing with June 19th 1857 and ending with Aug. 1st 1857

Printers fees Nov 7. 1850^{1/2}. Geo Smith Publisher
 " " Jan 19 1857^{1/3}.

and now afterwards to wit at a special
 Term of the Circuit Court pursuant to an
 order of the Honorable David Davis Judge of
 the eighth judicial Circuit of the State of
 Illinois. Composed of Fugwell Woodford &c
 begun and held at the Court house in the
 city of Peoria within and for the County
 of Fugwell and State of Illinois on the
 second Wednesday of the Month of Septem-
 ber in the year of Our Lord Eighteen hund-
 red and fifty One Present the Honorable
 David Davis Judge David Campbell Esq
 Prosecuting Attorney William Gaither Esq
 Plaintiff and John A. Jones Clerk The following
 proceedings were had

September 24 A.D. 1851

Larry Schaeffler

-vs-

Christian Foutman

David Shurtz

In Chancery.

And this day ^{came} the Compl-
 aint by his Solicitor and it appearing
 to the satisfaction of the Court. that the
 said defendant Christian Foutman is a
 nonresident of the State of Illinois, and has
 been duly notified of the pendency of this
 suit: more than sixty days before the first
 day of the present term of this Court by

publication in the Jazewell Mirror a public
 news-paper published in the city of Pekin
 the first insertion thereof being on the 19th day
 of June A.D. 1851 and published for four suc-
 cessive weeks, & he the said Troutman having
 failed to appear and answer the complain-
 -ant's bill, the matters and things therein
 contained, as to him, are taken for confess-
 -ed by default. And on Motion this cause
 continued-

And now afterwards to wit at
 a Term of the Circuit Court begun and
 held at the Court-house in the city of Pekin
 within and for the County of Jazewell and
 State of Illinois on the first Wednesday of
 the Month of April in the year of our Lord
 Eighteen hundred and fifty two Present
 The Honorable David Davis Judge of the eighth
 judicial circuit of the State of Illinois
 David Campbell Esq Prosecuting Attorney
 William Gauthier Sheriff and John A Jones
 clerk

April 7th A.D. 1852

Lonny Schaeffler	} In Chancery
-vs-	
Christian Troutman	
David Shurtz	

17 now comes the complainant by his Solicitors and on his Motion this cause is continued.

And now afterwards to wit at a Term of the Circuit Court begun and held at the Court House in the City of Pk. within and for the County of Tazewell and State of Illinois on the third Wednesday of the month of September in the year of Our Lord eighteen hundred and fifty two Present the Honorable J. L. Dickey Judge of the Ninth judicial Circuit David Campbell Esq. Prosecuting Attorney William Scatter Sheriff and John A. Jones Clerk. the following proceedings were had in said Cause = September 16th A.D. 1852.

Lornz Schaaffler }
= vs = } In Chancery
C. Trounman }
David Shurtz }

This day came the parties and on motion this cause is continued by agreement of parties with leave to complainant to file an amended bill.

And now afterwards to wit on

the 17th day of September A.D. 1852 a Bill was filed in the words and figures following to wit-

Lorrey Schaeffler

-vs-

Christian Foutman.

David Schurtz.

Michael Lohr.

Michael Baker.

Matthias Dunning.

Benjamin Barthlow.

Charles Audnas.

Fazwell Circuit Court

September Term

A.D. 1852

And said complainant by way of Amendment to his said Bill of Complaint. States that he is informed and believes Michael Lohr, Michael Baker, Matthias Dunning, Benjamin Barthlow, & Charles Audnas have an interest in the said Mortgaged premises.

Complainant therefore prays that they be made parties to the said Bill of Complaint, and that summons issue therefor, that they answer the same fully upon their several corporal oaths, and that they be barred & foreclosed of all Equity of redemption in said premises & for

19 such other & further order or decree as
to this court shall seem meet and proper.

And as in duty bound your
Orator will ever pray &c

H. O. & A. L. Merriman

Compts Soles

And now afterwards to wit on the
day and year last aforesaid an affid-
avit was filed in the words and figures
following to wit:-

State of Illinois }
County of Tazewell } ss

A. L. Merriman being
first duly sworn deposes and says that
he is informed and believes the within
named defendants Michael Lahr Michael
Baker Matthias Dunning & Benjamin
Barthlow are non-residents of the State
of Illinois.

Subscribed and sworn to
before me this 17th day of
September 1852

J A Jones clerk
pr J H Ball opt

A. L. Merriman

And now afterwards to wit
on the 4th day of October A.D. 1852 a summa

-one issued in the words and figures following to wit:-

State of Illinois } (The People of the State of Illinois
 Tazewell County } set To the Sheriff of said County -
 Greeting - We command
 you to summon, Michael Lahr, Michail
 Baker, Matthias Dunning Benjamin Bart-
 -klow, and Charles Andrus if they are to be
 found in your County, to be and appear before
 our Circuit Court for said County, on the first
 day of next Term thereof to be held at the Court-
 in the city of Pekin on the first Wednesday of
 the month of April next. then, and there to as-
 -sur unto the matters and things contained in
 a certain bill in chancery filed in our said
~~Circuit~~ Circuit Court, on the chancery side thereof
 by Loring Schaeffler against them, against
 them, unpleaded with Christian Frothingham
 and David Schurty and to do and perform
 whatever our said Circuit Court, shall order
 and decree in the premises.
 And you hereof make due return with an under-
 -sement of the manner in which you shall have
 executed the same.



Witness John A. Jones Clerk and the
 seal of said Court at Pekin this 4th day
 of October A.D. 1852, John A. Jones Clerk

Which said Summons was on the 14th day of October A.D. 1852 returned with an endorsement thereon in the words and figures following to-wit:

This Writ has been served upon the within named Charles Andreas by Reading and delivering to him a Copy of the same. the other defendants not found in this County Oct 14th 1852

Wm Gaither Shff J.C.

And now afterwards to-wit on the first day of May A.D. 1853 a Notice and affidavit was filed in the words and figures following to-wit:

State of Illinois } Circuit Court to the
Tazewell County } April Term A.D. 1853

Loring Schaffler

=VS=

Christian Foutman

David Schertz

Michael Lahr

Michael Baker

Matthias Dunning

Benjamin Bartholomew

+ Charles Andreas

In Chancery

Affidavit having been filed in said entitled cause, satisfactorily showing

that said defendants Michail Lahr Mich-
 ael Baker, Matthias Dunning, and Benjam-
 in Barthlow, are non-residents of Illinois
 and summons having been issued return-
 able to the April Term A.D. 1853. Now public
 notice is hereby given to the said non-resident
 defendants, that unless they do and appear
 before our Circuit Court for said Tazewell
 County, on the first day of the next Term thereof
 and plead answer or demurr to the compl-
 aint's Bill herin filed, the matters and
 things therein contained will be taken for
 confessed as to them, and a decree entered
 according to the prayer thereof. Dated at
 Pekin, this 8th day of October A.D. 1852,

John A Jones, Clerk

A.O. & A.L. Merriman Compt^{rs} Solicitors

I do hereby certify that the annexed
 notice was duly published in the Tazewell Work-
 -ly Mirror a Weekly newspaper printed in the
 city of Pekin, Tazewell County for four success-
 ive weeks commencing with the 8th day of
 October 1852 and ending with the 1st of Decem-
 ber 1853

Luc Smith Publisher
 Tazewell Weekly Mirror

And now afterwards to wit at ~~the~~ Term
 of the circuit Court begun and held at
 the Court House in the City of Pekin within
 and for the County of Tazewell and State
 of Illinois in the Year of our Lord Eighteen
 Hundred and fifty three. Present the Honorable
 David Davis Judge of the 8th Judicial Circu-
 it David Campbell esq Prosecuting Attorney
 David Keys Sheriff and John A Jones Clerk
 The following proceedings were had in said
 cause to wit

May 4th A.D. 1853.

Loring Schaffler

-vs-

Christian Troutman,

David Shurtz, Michael

Lahr, Michael Baker,

Matthias Dunning,

Benjamin Barthlow,

& Charles Snodnas,

In Chancery

And now on this 4th
 day of May comes again the Complainant
 by his solicitor and it appearing to the Satisfac-
 -tion of the Court that due notice of the pend-
 -ency of this cause has been given by Publica-
 -tion in the Tazewell Weekly Mirror a Newspaper
 published in the City of Pekin for four weeks
 successively, the first insertion being more than

sixty days before the first day of the present Term against the defendants Michael Lahr Michael Baker Matthias Dunning, and Benjamin Barthlow leave is granted to complain to amend Bill by making new parties, and the defendants ruled to answer in sixty days, and this Cause continued -

And now afterwards to wit on the 7th day of October 1853 a Bill was filed in the words and figures following to wit

Lorny Schaeffler	} Lazearll Circuit Court Oct Term 1853
=VS=	
Christian Foulman	
& others	

Complainant excepts to answer of David Schurty for the following reasons

Said answer does not answer either of the allegations in said Bill, either directly or to the best of his knowledge & belief -

Said answer attempts to set up a title derived through a judgment of sale of a piece of land different from the land described in said bill -

Said answer does not give the date of the attachment nor whether it was before or

after the date of the recording the mortgage as alleged in said Bill.

Said Answer is not sworn to, -

And now afterwards tottill at a Term of the Circuit Court begun and held at the Court House in the city of Pekin in and for the County of Tazewell and State of Illinois on the first Monday of the Month of October in the year of our Lord One Thousand Eight Hundred and fifty three. Present the Honorable David Davis Judge of the 8th Judicial Circuit of the State of Illinois David Campbell Esq Prosecuting attorney David Keys Sheriff and John A. Jones Clerk. The following Proceedings were had in said cause.

October 10 A.D. 1853. =

Loring Schaaffler.	}	Tazewell Circuit Court,
=vs=		October Term A.D. 1853,
Christian Troutman.	}	In Chancery,
David Schurty.		
Michael Lahr.		
Michael Baker.		
Matthias Dunning.		
Benjamin Bartholow.		
Charles Andrus.		

And now on this day came this cause on to be heard upon the Bill

exhibits & proofs and the said David Schurly
 one of the defendants herein having withdrawn
 his answer heretofore filed in this cause,
 and it further appearing that all of said def-
 endants have been duly notified of the pend-
 ency of this cause and the same being three
 times solemnly called come not but make-
 default; - It is therefore ordered adjudged
 and decreed that the said bill be taken as
 confessed by defendants and each of them, -
 And it further appearing to the Court that
 the said defendant Christian Foulmer
 executed the note and mortgage in said
 bill described, upon which there is now
 due the sum of six hundred and fourteen
 Dollars and twenty five cents, that the said
 note has been lost or destroyed but has not
 been found. - It is therefore ordered adju-
 dged and decreed that said defendants pay
 to complainant or his solicitor the said
 sum of money and interest within sixty
 days from the date hereof, and in default
 thereof, that the master in chancery of the
 said County of Lapeer proceed to sell
 the Land in said Bill and Mortgage
 described, to wit The south half of the south
 east quarter of Section Number twenty eight
 (28) in Township No Twenty six (26) north in

27

Range No four (4) west of the third principal meridian at the public vendue, at the front door of the Court house in the county of Lapeer and State of Illinois upon giving prior notice thereof at least thirty days publication in some newspaper published & printed in said County of Lapeer, said notice to contain the place terms & time of sale and a description of the premises to be sold and upon such sale the master to execute to the purchaser thereof a certificate of purchase and a deed at the expiration of the legal time of redemption; provided that the same shall remain unredempted for the space of fifteen months after such sale & that said defendants & all persons claiming by through or under them be forever barred & foreclosed of all equity of redemption.

It is further ordered adjudged and decreed, that the said master make his report at the earliest opportunity - and this cause is continued.

And now afterwards to wit at a Term of the Circuit Court begun and held at the Court House in the City of Pekin within and for the County of Lapeer and State of Illinois on the first Monday

of the month of May in the year of our Lord
Eighteen hundred and fifty four. Present
the Honorable David Davis Judge of the
Eighth judicial Circuit of the State of
Illinois David Campbell Esq Prosecuting
Attorney David Keyes Sheriff and John
A Jones Clerk. the following proceedings
were had in said cause - To wit

May 11th A.D. 1854

Loring Schaeffler	} In Chancery
= vs =	
Christian Troutman	
David Schurly & others	

And now on this day
comes the complainant, by his solicitor
and on his motion this cause is contin-
ued -

And now afterwards let a term
of the Circuit Court be given and held
at the Court house in the city of Peoria
within and for the County of Taylor
and State of Illinois on the first Monday
of the month of October in the year of our
Lord Eighteen hundred and fifty four
Present the Honorable David Davis Judge

of the Eighth judicial Circuit of the State of Illinois David Campbell Esq Prosecuting Attorney David Keyes Sheriff and John A. Jones clerk. the following proceedings were had in said cause. to wit.

October 12th AD 1854.

Lorny Schaeffler.	} In Chancery
^{= vs. =} Christian Troutman	
David Sherb & others	

Now on this 12th day of October A.D. 1854, comes the said complainant, and on his motion this cause is continued.

And now afterwards to wit at a Term of the Circuit Court begun and held at the Court House in Pekin within and for the County of Taylor and State of Illinois, on the fifth Monday of the Month of April the same being the 30th day of said month in the year of our Lord Eighteen hundred and fifty five. Present the Honorable Daniel Davis judge of the Eighth judicial circuit of the State of Illinois Amos McWilliams Esq Prosecuting Attorney. Thomas L. Keene Sheriff and John A. Jones clerk the follow

proceedings were had in said cause,

April 30th 1855

Lorrey Schaffler,

-vs.-

Christian Foulman,

David Schurty et al

In Chancery

And now comes the
complaint and on his motion this
cause is continued.

And now afterwards at
a Term of the circuit Court begun and
held at the Court-house in the City of
Pekin within and for the County of
Lazear and State of Illinois on the first
Monday of the month of October the same
being the 1st day of said month in the
year of our Lord Eighteen hundred and
fifty five Present. The Honorable David
Davis Judge Amzi McMillan Esq Prose-
cuting attorney Thomas C Rees Sheriff
and John A. Jones clerk the following
proceedings were had in said cause.

October 11th A.D. 1855

Lorrey Schaffler

-vs.-

Christian Foulman

David Schurty et al

In Chancery

and now this cause came on to be heard upon the report of the master filed herein: to-wit:-

State of Illinois } Circuit Court to the
Lazaville County } ⁵⁵ October Term A.D. 1855

Lorrey Schaeffer }
-vs- } In Chancery
Christian Troutman. } Bill to Foreclose
David Shurtz, Michael } Mortgage,
Lahr, Michael Baker, }
Matthias Dunning: et al }

The Report of John A. Jones Master in chancery of said County and Commissioner appointed to execute the decree in this cause rendered at the October Term A.D. 1853. - Said master respectfully to the court makes his Report: That the said defendants entirely failed to pay the amount of the decree and interest and cost of suit according to the provisions thereof; and he the said Master advertised the mortgaged premises to-wit: The South half of the South East quarter of Section number Twenty Eight (28) in Township number Twenty six (26) North Range number Four West of the Third Principal meridian, for at least

thirty days in the Tazewell Weekly Mirror
 a newspaper printed and published in
 the County of Tazewell a copy of which is
 herewith filed as part of this report, and
 on the 7th day of July in the year of our
 Lord, one thousand eight hundred and
 fifty five between the hours of ten and
 four o'clock at the front door of the
 Court house in Pekin exposed the same to
 Public sale for cash in hand to the highest
 bidder and that A. L. Merriman bid
 therefor the sum of seven hundred and
 thirty nine dollars and forty eight cents
 (739 48), and he being the highest and
 best bidder, the said tract of Land was
 struck off to him the said A. L. Merriman
 — And the said master further reports
 that he executed and delivered to the said
 A. L. Merriman a certificate of purch-
 -ase, entitling him the said A. L. Merr-
 -iman or his assigns to a deed to the sa-
 -id Mortgaged premises, unless the same
 in the meantime be ordered according
 to law.

All of which is respectfully
 submitted John A. Jones Master Chy
 Oct-10 1855 J. C.

Masters Sale

State of Illinois } Circuit Court to the
 Tazewell County } ^{ss} October Term A.D. 1853.

Lorrey Schaffler

vs.

33

Christian Boutman,

David Shurtz, Michael

Lahr, Michael Baker,

Matthias Dunning,

Benjamin Barthlow,

+ Charles Anderson,

In Chancery

Pursuant to the

Decree in said entitled cause rendered at said Term of said Court: I shall on the 7th day of July next between the hours of ten o'clock and four o'clock of said day, at the front door of the Court House in Pekin, expose to public sale for cash in hand the following described real estate situated, lying and being in the County of Tazewell and State of Illinois to-wit: The South half of the South East quarter of Section number Twenty Eight (28) in Township number Twenty Six (26) North Range number four west of the third principal Meridian. Certificate of sale, upon compliance with the terms of the Decree, will be delivered to the purchaser.

John A Jones Master

Manning, Mirman

Chancery T. C.

Solicitors for Compt

Pekin May 31, 1856

34 " The undersigned Publisher of the Jaycewell
" weekly Mirror a weekly newspaper printed
" in Pekin Illinois do certify that the ann-
" -ced Master Sale was duly published
" in said Jaycewell Weekly Mirror for four
" successive weeks. prior to the 7th day of
" July 1855 Iro Smittle

Publisher

And the same having been heard &
no one opposing it the same and
the sale therein reported is hereby app-
roved and confirmed—

And now afterwards to wit at
a Term of the Circuit Court begun and
held at the Court House in the City of
Pekin within and for the County of
Jaycewell and State of Illinois on the
Fourth Monday of the Month of April
the same being the 28th day of said Mon-
th in the year of our Lord eighteen hundr-
ed and fifty six. Present the Honorable
David Davis Judge, Amzi McWilliams
esq Prosecuting Attorney Thomas C Reens
Sheriff and John A. Jones Clerk the
following proceedings were had in
said cause to wit

April 29th 1856.

35

Jonny Schaefferts.	} In Chancery Bill to foreclose Mortgage.
^{-vs-}	
Christian Foutman	
David Schurby Michael	
Lahr, Michael Baker,	
Matthias Dunning, Ben- -jamin Barthlow & Charles Andrus	

And now on this day this cause came on to be heard upon the motion of the said defendant David Schurby to open the Decree and upon hearing affidavits in support of said motion It is ordered adjudged and decreed. by consent of Parties that the decree be opened as to said defendant Schurby upon the payment of all costs in said cause to the present time; And that he have leave to file his answer therein It is further Ordered that all the costs of said suit be adjudged against said Schurby; and that execution issue therefor as in cases of judgments at Law.

And now afterwards to wit on the Eightth day of May 1856 affidavits were filed in the words and figures following

Schaffler }
 - vs - } Du Chaucery
 Troutman }
 et-al. }

Edward Jones solicitor for David Schurty one of the defendants. bring duly sworn according to law deposes and saith that the defendant to his knowledge & belief never authorized any one to withdraw the answer of said Schurty in this cause and further saith that he does not believe that said answer was withdrawn for the reason that it was as he believes stricken from the files because it did not appear to have been sworn to. Affiant further swears that he believes it was sworn to but the jurat was not signed by mistake or accident on the part of the officer of the court on behalf of said David Schurty. He moves for a rehearing of said cause - He says further that the said Schurty, as he is informed and believes, being of old age & subject to disease has been prevented from attending the court regularly, and that affiant himself has when the said David could attend the court been sick. Further deposes

37

ment saith not but believes that
 end of Justice would be secured
 by a new Trial of said cause
 Subscribed & sworn to Edward Jones
 before me this 3rd
 day of May 1856.

Johna. Jones clerk
 By J. L. McQuarrie
 D.C.

State of Illinois }
 Taylorville County }

David Scherby the
 above named defendant being duly
 sworn according to law deposes and
 saith that the foregoing affidavit has
 been read to him and he believes the
 same to be true. And further deposes
 swears that he has never compromised
 said suit. nor authorized any person
 to withdraw his answer and that
 in fact being old and feeble he was
 attending the court at every term
 at which his health would possibly
 admit and that he could and did
 attend his solicitor was sick.

Subscribed & sworn to before Daniel Scherby
 me this 8th May 1856 J. A. Jones clk
 By S. D. Rulerbaugh
 D.C.

And now afterwards
 to wit at a Term of the Circuit Court
 begun and held at the Court house in
 the City of Peoria on the fifth Monday
 of the month of September in the year
 of our Lord Eighteen hundred and fifty
 six Present the Honorable David Davis
 Judge of the Eighth judicial Circuit
 Anzo McMillan Esq Prosecuting Attor-
 ney Thos L Reens Sheriff and John A.
 Jones Clerk the following proceedings
 were had in said cause

Loring Schaffar	} Oct - 1856
-vs-	
Christian Troutman	
Dand Schurty & others	} In Chancery

And now at
 this day this cause came on and
 was on motion continued generally

And now afterwards to wit
 at a Term of the Circuit Court begun
 and held at the Court house in the
 City of Peoria within and for the County
 of Logansport and State of Illinois on the
 first Monday of the month of April
 the same being the 6th day of said

in the year of our Lord Eighteen
 hundred and fifty seven. Present the
 Honorable Elisha N. Powell Judge of
 16th judicial circuit by interchange
 Hugh M Fullerton Esq Prosecuting
 Attorney Ashapinda Williamson
 Sheriff and Merrill & Young clerks
 the following proceedings were had in
 said cause to wit

April 7th 1857

Henry Schaeffler	{ April Term 1857
=vs=	
Christian Troutman	
Et=als	

Foreclosure

And now on this
 day this cause coming on to be heard
 upon motion to set aside an order
 vacating a decree heretofore rendered
 herein the court considered and order
 that said motion be sustained, and
 that the former decree stand.

State of Illinois } ss
Tazewell County }

I Merrill C Young, clerk
of the Circuit Court, within, and for
the said County of Tazewell, do certify
that the foregoing thirty nine pages contain
a true, perfect and complete copy
of the Record of the proceedings had in
the cause therein named, as the same
appears of Record in my office

In Witness whereof, I have hereunto
set my hand and affixed the
Seal of said Court at Pekin, this
20th day of March AD 1860
Merrill C Young Clerk



228⁵¹
Goruz Schaffler

Christian Krautman
et als

Transcript

Filed April 18, 1860
L. Leland
Clerk

39. PP.

B. S. Prethman
att'y.
S. W. Ch.

State of Illinois Supreme Court.
Third Grand Division April Term 1860

Christian Mottman
David Schurty &
Others

vs Error to Lenzell
Sorenty Schaffler,

And now at this day comes
the said Plaintiffs. and say, because
in the record and proceedings
aforesaid and in the rendition of
the decree aforesaid, manifest
error hath intervened to their in-
jury in this:

1st The decree entered herein in
the Court below is void

2nd The Circuit Court erred in
proceedingⁱⁿ said cause after the
decree had been vacated

3rd The Court erred in decreeing the
sale of the S.E. fractional quarter of Section
Twenty Eight in Township Twenty Six North
Range Four West of the 3rd Principal Meri-
dian, there being no allegation in the

Bill or proof that that piece of land was in the mortgage or intended to be

4th The Court erred in rendering a decree against Defendant Shurtz (after the decree previously entered had been vacated) without first entering a rule on him to answer,

5th The Court erred in entering a decree when there was no proof of the loss of the note, nor any proof of the contents of the note

6th The Court erred in confirming the sale, there being no decree to sustain it, the decree having been vacated,

7th ~~ix~~ There was no sufficient allegation in the Bill to sustain the decree and no proof to support the allegations or warrant the decree

For which and for other

errors manifest in the record
and proceedings aforesaid, the
said Plaintiffs in Error pray that
the same may wholly reversed
set aside and for naught held
and esteemed - and they restored
to all their rights in the premises,

R. S. Prettyman &

Wm. J. Speed

Attys for Plaintiffs in Error

defendant comes along & says that
there is no error in said
Record & says that the said
decree ought to be affirmed

A. B. Morrison
atty

~~No 228. 51~~ 11
90 Christian Knutmann
+ others.
No Error to Logwell

Lorentz Schaeffler

Record + Assignment
Of Errors —
J Jordan

State of Illinois, } Third Grand Division,
SUPREME COURT. } APRIL TERM, A. D. 1863.

CHRISTIAN TROUTMAN, ET AL,

vs.

LORENTZ SCHÆFFER.

ERROR TO TAZEWELL.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

In this case, a simple statement of the error apparent of record would seem to be all that is necessary to enable the court to see that the cause should be reversed.

This was a proceeding by bill to foreclose a mortgage on the south half of the *southwest* quarter of section 28, town 26 north, range 4 west 3d P. M., which was the tract mortgaged, as appears of record; and there is no allegation in the bill, and no proof in the record, that any other tract of land was intended to have been mortgaged, or was omitted or left out of the mortgage by accident or mistake. Yet, without any such allegation or proof of record, and while the answer of the defendant Schurtz was on file, denying notice and calling for proof, the court rendered a decree against the defendants, directing the foreclosure and sale of their interest in the south half of the *southeast* quarter of section 28, town 26 north, range 4 west 3d P. M., on which there was not then, and never had been, a mortgage given by defendants, or any of them, at any time; and none such was alleged or produced in evidence. The decree for this cause alone is manifestly erroneous, and should be reversed.

But the bill alleges that the note described in the mortgage was not paid, and was lost. Schurtz, by his answer, calls for the proof, and no proof was given of the loss of the note named in the mortgage; no note was produced in evidence, nor was there a copy of the same shown, nor was there any proof of the existence or contents of such note given in the case. This would seem to be imperatively required, before a decree could be had upon it. See *Palmer vs. Logan*, 3 Scam., R. 56; *Norris vs. Kellogg*, 2 Eng., 112. For these and other reasons apparent of record, this cause should be wholly reversed.

B. S. PRETTYMAN,
Attorney for Plaintiff.

11 90

Troutman 8102

108

Schaeffer

Petzl heißt ayt.

Geled Ak 27. 1863

Selawa

OK

STATE OF ILLINOIS,
SUPREME COURT.

} ss. The People of the State of Illinois,

To the Sheriff of Jazewell County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgments of a plea which was in the Circuit Court of Jazewell County, before the Judge thereof, between

Lorentz Schaffer

plaintiff, and Christian Troutman, David Shurtz, Michael Lohr, Michael Baker, Matthias Dunning, Benjamin Barthelow & Charles Andrews

defendants, it is said that manifest error hath intervened, to the injury of the said Christian Troutman, David Shurtz,

Michael Lohr, Michael Baker, Matthias Dunning, Benjamin Barthelow & Charles Andrews as we are informed by their complaint ~~that~~ the record and proceedings of

which said judgments 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

Lorentz Schaffer

that he 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 record and proceedings aforesaid, and the errors assigned, if

he 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 Lorentz Schaffer

notice, together with this writ.

Witness, The Hon. John W. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 24th day of February in the year of our Lord One Thousand Eight Hundred and Sixty-two

L. Island

Clerk of the Supreme Court.

The Pitkin Named Lorentz Schaeffer
cannot be found in this county
March 19th 1862 C. Williamson

Trk for Return 10/15

1862 C. Williamson
Shff Joz Cotz
for J. M. G. Sauter Deputy

Sagewell
Christian Graduation
Class
No. VS.
Lorenz Schaeffer

SCIRE FACIAS.

FILED. *clerk*, 22^d... A. D. 1862

L. Deland Clerk.

State of Illinois, } Third Grand Division,
SUPREME COURT. } APRIL TERM, A. D. 1863.

CHRISTIAN TROUTMAN, ET AL,

vs.

LORENTZ SCHÆFFER.

ERROR TO TAZEWELL.

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B. S. PRETTYMAN,
Attorney for Plaintiff.

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Troutman et al

vs

Schaffer —

Peoff. Buis & apt.

Filed Apr 27. 1863
 L. Leland
 CLK

State of Illinois, } Third Grand Division,
SUPREME COURT. } APRIL TERM, A. D. 1863.

CHRISTIAN TROUTMAN, ET AL,

vs.

LORENTZ SCHÆFFER.

ERROR TO TAZEWELL.

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B. S. PRETTYMAN,
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Troutman et al

^{vs}
Schaeffer

Plffs Brief Arg.

Filed Apr 27, 1863

LS Lane clk

SUPREME COURT OF ILLINOIS.

At Ottawa—April Term, 1860.

LORENTZ SCHAEFFER

vs.

CHRISTIAN TROUTMAN,

DAVID SHURTZ,

MICHAEL LOHR,

MICHAEL BARKER,

MATHIAS DENNING,

BENJAMIN BARTELOW,

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Error—Tazewell County.

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3. Sets out the mortgage *hic verbae*, on the south half of the southwest quarter of section twenty-eight, township 26, N. R. 4 W, 3d principal meridian, containing 80 acres.

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5. Acknowledgment.

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6. Allegation of the money being due, and the non-payment thereof, and charged that David Shurtz has some interest in the premises.

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On motion of the defendant Shurtz, the default set aside.

Shurtz's answer, alleging a mistake in sale—the same land sold by description of sec. 8, having purchased the same under execution by that description, against Troutman, and affidavit of the non-residence of Christian Troutman, and notice of publication. Certificate of the Printer.

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The bill as to Christain Troutman at the June Term, 1851, taken as confessed, and at April Term, 1852, this cause continued.

The proceeding of the Court held Sept. Term, 1852—this cause, by agreement of parties, was continued.

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26 Decree for Six Hundred and Fourteen Dollars and Twenty-Five
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 29 sold, and it appearing by proof, and exhibits, &c.

30 Decree alleges Shurtz having withdrawn his answer.

31 Court held 1st Monday in May, 1854. On motion of plaintiff cause
 32 continued.

33 Court held on 12th October, 1853. On motion of complainant this
 34 cause continued.

35 April Term, 1854, this cause, on motion, is continued.

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 37 south half of east half s. e. quarter sec. 28, town 26 N. R. 4 west, 3d
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 41 Merriman.

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47 Leave to file his answer thereon.

48 David Shurtz files his affidavit on 8th May, 1856. One of Edward
 49 Jones denying authority to withdraw answer, and the answer was sworn
 50 to, but by mistake the jurat was not attached—and one of his (Shurtz's),
 51 alleging that he never authorized any person to withdraw his answer,
 52 nor did he ever compromise said suit.

53 Preceding at the Sept. term, 1847; the cause was continued.

54 Proceeding of the court held April Term, 1857.

39 Motion to set aside an order heretofore made, vacating a decree rendered herein, and order said motion be sustained, and said order decreeing former decree to stand, be reinstated.

ASSIGNMENT OF ERRORS :

The decree is void.

1 The decree having been vacated, all proceeding under it is void.

2 The decreeing of the sale of the s. half s. E. fr. sec. 28, T. 26 N., R. 4 W. 3 P. M. there being no allegation in the bill, or proof that that piece of land was in the mortgage, or calculated to be so.

3 Vacating a decree places the parties in *statu quo*, and no decree could be properly had until Rule had been made on the defendant Shurtz to answer.

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5 The sale is void, as made to complainant, not having a decree to sustain it, and decree being vacated.

6 There was no sufficient allegation in bill to sustain the decree, and no proof to support the allegations or to warrant such decree.

B. S. PRETTYMAN, Attorney.

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SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term, 1860.

LÖRENTZ SCHAEFFER

vs.

CHRISTIAN TROUTMAN, DAVID SHURTZ, MI-
CHAEL LOHR, MICHAEL BAKER, MATHIAS DEN-
NING, BENJAMIN BARTHELOW, CHARLES AN-
DREWS.

ERROR FROM TAZEWELL COUNTY.

ABSTRACT.

Filed Apr. 18. 1860

G. Leland

Clerk

State of Illinois, } Third Grand Division,
SUPREME COURT. } APRIL TERM, A. D. 1863.

CHRISTIAN TROUTMAN, ET AL,

vs.

LORENTZ SCHÆFFER.

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B. S. PRETTYMAN,
Attorney for Plaintiff.

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Troutman et al

vs

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Plffs. Resp'ts & c.

Filed April 27, 1863
S. Ireland
Mr

State of Illinois, } Third Grand Division,
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Given At 27, 1863
 J. L. Leland M.R.

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State of Illinois, } Third Grand Division,
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Gilead April 27. 1843
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State of Illinois, } Third Grand Division,
SUPREME COURT. } APRIL TERM, A. D. 1863.

CHRISTIAN TROUTMAN, ET AL,

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by

Schaeffer

Pf. brief & ayt.

Hills Apr. 27. 1863
Leland
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SUPREME COURT OF ILLINOIS.

At Ottawa—April Term, 1860.

LORENTZ SCHAEFFER

vs.

CHRISTIAN TROUTMAN,

DAVID SHURTZ,

MICHAEL LOHR,

MICHAEL BARKER,

MATHIAS DENNING,

BENJAMIN BARTELOW,

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Error—Tazewell County.

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3. Sets out the mortgage *hic verbæ*, on the south half of the southwest quarter of section twenty-eight, township 26, N. R. 4 W, 3d principal meridian, containing 80 acres.

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On motion of the defendant Shurtz, the default set aside.

Shurtz's answer, alleging a mistake in sale—the same land sold by description of sec. 8, having purchased the same under execution by that description, against Troutman, and affidavit of the non-residence of Christian Troutman, and notice of publication. Certificate of the Printer.

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The proceeding of the Court held Sept. Term, 1852—this cause, by agreement of parties, was continued.

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³⁹ Motion to set aside an order heretofore made, vacating a decree rendered herein, and order said motion be sustained, and said order decreeing former decree to stand, be reinstated.

ASSIGNMENT OF ERRORS :

The decree is void.

¹ The decree having been vacated, all proceeding under it is void.

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³ Vacating a decree places the parties in *statu quo*, and no decree could be properly had until Rule had been made on the defendant Shurtz to answer.

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B. S. PRETTYMAN, Attorney.

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SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term, 1860.

LORENTZ SCHAEFFER

vs.

CHRISTIAN TROUTMAN, DAVID SHURTZ, MICHAEL LOHR, MICHAEL BAKER, MATHIAS DENNING, BENJAMIN BARTHELOW, CHARLES ANDREWS.

ERROR FROM TAZEWELL COUNTY.

ABSTRACT.

Filed April 18, 1860
L. Leland
Clerk

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At Ottawa—April Term, 1860.

LORENTZ SCHAEFFER

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25 Court holden first Monday Oct. 1853—decree made in the cause.

26 Decree for Six Hundred and Fourteen Dollars and Twenty-Five
Cents, and decree for the payment of said sum in sixty days, & in default
the land, to wit: south half s. e. quarter sec. 28, T 26 N. R. 4 W., be
sold, and it appearing by proof, and exhibits, &c.

26 Decree alleges Shurtz having withdrawn his answer.

25 Court held 1st Monday in May, 1854. On motion of plaintiff cause
continued.

29 Court held on 12th October, 1853. On motion of complainant this
cause continued.

30 April Term, 1854, this cause, on motion, is continued.

30 Court at the Oct. Term, 1855, the master makes his report. Sale
south half of east half s. e. quarter sec. 28, town 26 N. R. 4 west, 3d
31 principal meridian, and sale of the premises to A. L. Merriman, for the
sum of Seven Hundred and Thirty-Nine Dollars and Forty-Eight Cents,
32 and the master thereupon delivers a certificate of purchase to said
Merriman.

33 Master's report of the sale of said land.

34 Certificate of publication.

35 April Term, 1856—motion and leave for David Shurtz to open decree
and upon hearing affidavits it is, on agreement of the parties, ordered
by the Court decree be opened, upon Shurtz paying all costs.

Leave to file his answer thereon.

36 David Shurtz files his affidavit on 8th May, 1856. One of Edward
Jones denying authority to withdraw answer, and the answer was sworn
37 to, but by mistake the jurat was not attached—and one of his (Shurtz's),
alleging that he never authorized any person to withdraw his answer,
nor did he ever compromise said suit.

38 Preceding at the Sept. term, 1847; the cause was continued.

29 Proceeding of the court held April Term, 1857.

- 39 Motion to set aside an order heretofore made, vacating a decree rendered herein, and order said motion be sustained, and said order decreeing former decree to stand, be reinstated.

ASSIGNMENT OF ERRORS :

The decree is void.

- 1 The decree having been vacated, all proceeding under it is void.

- 2 The decreeing of the sale of the s. half s. E. fr. sec. 28, T. 26 N., R. 4 W. 3 P. M. there being no allegation in the bill, or proof that that piece of land was in the mortgage, or calculated to be so.

- 3 Vacating a decree places the parties in *statu quo*, and no decree could be properly had until Rule had been made on the defendant Shurtz to answer.

- 4 There was no proof of the loss of the note, nor was there any copy of the same pretended to be given, nor any proof of the contents of the note.

- 5 The sale is void, as made to complainant, not having a decree to sustain it, and decree being vacated.

- 6 There was no sufficient allegation in bill to sustain the decree, and no proof to support the allegations or to warrant such decree.

B. S. PRETTYMAN, Attorney.

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SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term, 1860.

LORENTZ SCHAEFFER

vs.

CHRISTIAN TROUTMAN, DAVID SHURTZ, MI-
CHAEL LOHR, MICHAEL BAKER, MATHIAS DEN-
NING, BENJAMIN BARTHELOW, CHARLES AN-
DREWS.

ERROR FROM TAZEWELL COUNTY.

ABSTRACT.

Filed Apr. 18. 1860

L. Leland

Clerk

SUPREME COURT OF ILLINOIS.

At Ottawa—April Term, 1860.

LORENTZ SCHAEFFER

vs.

CHRISTIAN TROUTMAN,

DAVID SHURTZ,

MICHAEL LOHR,

MICHAEL BARKER,

MATHIAS DENNING,

BENJAMIN BARTELOW,

CHARLES ANDREWS.

Error—Tazewell County.

- Page, 1. Bill to foreclose mortgage filed on the 6th day of November, 1850. Lorentz Schaeffer against Christian Troutman and David Shurtz.
2. Bill charges that Christian Troutman was justly indebted to the complainant in the sum of three hundred and fifty dollars, and that he executed his note therefor, bearing date 25th February, 1840, and that the note was lost, or destroyed, so that it was impossible for the complainant to produce it on trial, and requiring said Troutman to produce it at the trial.
 3. Sets out the mortgage *hic verba*, on the south half of the southwest quarter of section twenty-eight, township 26, N. R. 4 W, 3d principal meridian, containing 80 acres.
 4. Condition of said mortgage to pay the sum of three hundred and fifty dollars due on said note, together with interest, which mortgage was acknowledged 27th February, 1840.
 5. Acknowledgment.
 6. Recording mortgage.
 6. Allegation of the money being due, and the non-payment thereof, and charged that David Shurtz has some interest in the premises.
 7. Prayer of process, and that the defendants be required to answer, &c. Prays a decree for the payment of the money, and upon default the equity be foreclosed.

Bill sworn to by the complainant, jurat. Affidavit of non-residence of Christian Troutman.

Proceeding at the November Term, 1850.

Security for costs, and summons against David Shurtz and Christian Troutman, dated 6th November, 1850.

Sheriff's return, dated 20th December, 1850.

Proceeding of the Court, April Term, 1850. The cause continued. An alias summons for Troutman—David Shurtz being summoned and makes default, and the bill taken as confessed against Shurtz.

On motion of the defendant Shurtz, the default set aside.

Shurtz's answer, alleging a mistake in sale—the same land sold by description of sec. 8, having purchased the same under execution by that description, against Troutman, and affidavit of the non-residence of Christian Troutman, and notice of publication. Certificate of the Printer.

Proceeding of the Special Term Circuit Court, on the second Monday September, 1851.

The bill as to Christain Troutman at the June Term, 1851, taken as confessed, and at April Term, 1852, this cause continued.

The proceeding of the Court held Sept. Term, 1852—this cause, by agreement of parties, was continued.

On the 17th Sept., 1852, the complainant filed his amended bill, making Christian Troutman, David Shurtz, Michael Lohr, Michael Baker, Mathias Denning, Benjamin Barthelow and Charles Andrews, defendants.

Affidavit of non-residence of Michael Lohr & al.

Summons dated 4th Oct., 1852, issued against defendants.

Summons served on Chas. Andrews, 14th Oct., 1852, by delivering him a copy. The other defendants, viz: Michael Lohr, Michael Baker, Mathias Barthelow, not found.

Notice of publication against the non-resident defendants.

Certificate of Publication.

Amended bill filed to make parties as above, May 4th, 1853, and cause continued

24 'Exceptions to answer of David Shurtz for reasons the answer does not
answer allegations in the bill, and the said bill attempts to set up a sale
of different land than land described in bill, and the answer not sworn
to, and no date in which he claims the land by attachment.

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Cents, and decree for the payment of said sum in sixty days, & in default
the land, to wit: south half s. E. quarter sec. 28, T 26 N. R. 4 W., be
sold, and it appearing by proof, and exhibits, &c.

26 Decree alleges Shurtz having withdrawn his answer.

28 Court held 1st Monday in May, 1854. On motion of plaintiff cause
continued.

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cause continued.

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nor did he ever compromise said suit.

38 Preceding at the Sept. term, 1847; the cause was continued.

39 Proceeding of the court held April Term, 1857.

³⁹ Motion to set aside an order heretofore made, vacating a decree rendered herein, and order said motion be sustained, and said order decreeing former decree to stand, be reinstated.

ASSIGNMENT OF ERRORS :

The decree is void.

¹ The decree having been vacated, all proceeding under it is void.

² The decreeing of the sale of the s. half s. E. fr. sec. 28, T. 26 N., R. 4 W. 3 P. M. there being no allegation in the bill, or proof that that piece of land was in the mortgage, or calculated to be so.

³ Vacating a decree places the parties in *statu quo*, and no decree could be properly had until Rule had been made on the defendant Shurtz to answer.

⁴ There was no proof of the loss of the note, nor was there any copy of the same pretended to be given, nor any proof of the contents of the note.

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B. S. PRETTYMAN, Attorney.

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SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term, 1860.

LORENTZ SCHAEFFER

vs.

CHRISTIAN TROUTMAN, DAVID SHURTZ, MI-
CHAEL LOHR, MICHAEL BAKER, MATHIAS DEN-
NING, BENJAMIN BARTHELOW, CHARLES AN-
DREWS.

ERROR FROM TAZEWELL COUNTY.

ABSTRACT.

Filed Apr-18-1860

L. Garland
Clerk

State of Illinois, } Third Grand Division,
SUPREME COURT. } APRIL TERM, A. D. 1863.

CHRISTIAN TROUTMAN, ET AL,

vs.

LORENTZ SCHÆFFER.

ERROR TO TAZEWELL.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

In this case, a simple statement of the error apparent of record would seem to be all that is necessary to enable the court to see that the cause should be reversed.

This was a proceeding by bill to foreclose a mortgage on the south half of the *southwest* quarter of section 28, town 26 north, range 4 west 3d P. M., which was the tract mortgaged, as appears of record; and there is no allegation in the bill, and no proof in the record, that any other tract of land was intended to have been mortgaged, or was omitted or left out of the mortgage by accident or mistake. Yet, without any such allegation or proof of record, and while the answer of the defendant Schurtz was on file, denying notice and calling for proof, the court rendered a decree against the defendants, directing the foreclosure and sale of their interest in the south half of the *southeast* quarter of section 28, town 26 north, range 4 west 3d P. M., on which there was not then, and never had been, a mortgage given by defendants, or any of them, at any time; and none such was alleged or produced in evidence. The decree for this cause alone is manifestly erroneous, and should be reversed.

But the bill alleges that the note described in the mortgage was not paid, and was lost. Schurtz, by his answer, calls for the proof, and no proof was given of the loss of the note named in the mortgage; no note was produced in evidence, nor was there a copy of the same shown, nor was there any proof of the existence or contents of such note given in the case. This would seem to be imperatively required, before a decree could be had upon it. See *Palmer vs. Logan*, 3 Scam., R. 56; *Norris vs. Kellogg*, 2 Eng., 112. For these and other reasons apparent of record, this cause should be wholly reversed.

B. S. PRETTYMAN,
Attorney for Plaintiff.

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Troutman et al

^{vs}
Scharffen

Pltffs. Brief + agt.

Filed Apr 27. 1863

L. Selane *cm*

SUPREME COURT OF ILLINOIS.

At Ottawa—April Term, 1860.

LORENTZ SCHAEFFER

vs.

CHRISTIAN TROUTMAN,

DAVID SHURTZ,

MICHAEL LOHR,

MICHAEL BARKER,

MATHIAS DENNING,

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CHARLES ANDREWS.

Error—Tazewell County.

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B. S. PRETTYMAN, Attorney.

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SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term, 1860.

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ERROR FROM TAZEWELL COUNTY.

ABSTRACT.

Filed Apr. 18, 1860

L. Leland

Clerk