No. 14758

Supreme Court of Illinois

Brinkerhoff

---

vs.

Everett

71641 

1865

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

Reported

No. 227

J. W. Middleton & Co., Stationers, 196 Lake St.

9 Ill.

Brinkerhoff
vs
1865
Everett

State of Illinois }
Putnam County } ss

Pleas before the Hon
Jamme L Richmond circuit Judge
sitting in and for the County aforesaid
in the 23d Judicial District of said State
at a Term of the Circuit Court of said
County begun and held at the Court
House in Hennepin in said County
of Putnam on the second Monday
(Thirteenth day) of March A.D. 1865

Present Hon Jamme L Richmond Judge 23 Judicial
A E Stevenson Esq State Attorney
George W Cunningham Sheriff
By Asa Cunningham Deputy
W. H. Carson Clerk

Whereas heretofore to wit On the 28th day of
July A.D. 1864 the following Bill was filed
in the Circuit Court in and for said
County of Putnam in the State of Illinois
which said bill is in the words and fig-
ures following to wit

In Putnam County Circuit Court
October Term A.D. 1864
In Chancery

To the Hon J L Richmond Judge of said
Court in Chancery sitting

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Your Orators Josephus H Everett. James D L Everett. Wilson Everett a minor by William H Brown his next friend. Edwin Everett a minor by said Brown his Guardian. Sarah Augusta Everett a minor by said Brown her guardian. Arturo Everett a minor by said Brown his Guardian and Clara Everett a minor by said Brown her Guardian. Humbly. Complaining would respectfully represent and show unto Your Honor.

That on and for a long time prior to the 5th day of March A.D. 1859 and since then until the time of his death. Jeremiah Everett was the owner in fee ~~simple~~ of Lot No. Two (2) in Block No. one (1) Front Street in The Town of Hennepin Putnam County and State of Illinois and the dwelling house thereon. which said premises were on said day and during all the time since that day. and now of a value not exceeding one thousand dollars ($1000)

That said lot of ground and the building thereon was on the said 5th day of March and for a long prior thereto occupied by said Jeremiah Everett died as a residence he being. ~~so doing~~

during all that time and up to the time of his death a house holder and having a family and residing on said lot with his family as a dwelling and homestead. and the same continued to be so occupied by him and his family up to the time of his decease.

That in the liftime of said Jeremiah Everett a Judgment was obtained against him in favor of John Brinkhoff and Thomas B. Penton before a justice of the Peace in and for said Putnam County for sixty five $^{09}/_{100}$ Dollars which Judgment remaining unsatisfied and execution having been returned Nulla bona. a transcript thereof was on the 5th day of March. A.D. 1859 duly filed in the clerks office of the Circuit Court in and for said County according to the Statute in such case made and provided Which Judgment. so certified being and remaining in full force and effect and unsatisfied on the 28th day of March. A.D. 1864 an execution was issued by the clerk of said Court on said Judgment. and directed and delivered to the Sheriff of Putnam County

Orators further shew. that on the

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14th day of March A.D. 1859 a Judgment was rendered in the Circuit Court of said County in favor of David Jayne. David W Jayne and Eben C Jayne against said Jeremiah Everett for Two Hundred and twenty three $\frac{00}{100}$ Dollars and Costs of suit Which Judgment remaining and being in full force and effect and being unsatisfied on the 28th day of March A.D 1864 an execution was duly issued on said Judgment directed and delivered to the Sheriff of said County

Orators further show that on the 14th day of March A.D. 1859 a Judgment was rendered in the Circuit Court of said County in favor of Augustus F Shapleigh Thomas D Day Woodward Crittenden & Wm H Markham partners under name of Shapleigh Day & Co and against said Jeremiah Everett for Two Hundred and twenty-Nine $\frac{98}{100}$ Dollars and Costs of suit which judgment remaining and being in full force and effect and unsatisfied on the 28th day of March A.D 1864 an execution was issued on said judgment directed

and delivered to the Sheriff of said Putnam County and that notice was given by said Plaintiff in Execution to the Administrator of the Estate of said Jeremiah Everett deceased of the existence of said Judgments at least three months prior to the issueing of such executions.

Your Orators further show that said Jeramiah Everett died intestate in said Putnam County on the 15th day of July A.D. 1860 leaving him surviving his Widow but Josephus H. Everett. James D. Everett Wilson Everett born the 24th day of January A.D. 1844 Edwin Everett born the 28th day of February 1846 Sarah Augusta Everett born the 11th day of March. A.D. 1848. Alturo Everett born the third day of Sept 1851 and Clara Everett born the 15th day of August 1856 his Children and only surviving heirs at law

Orators show that at the time of the death of said Jeremiah he was residing upon said lot as a homestead together with his younger Children viz Edwin Everett Sarah A Everett, Alturo Everett & Clara Everett and that at the time of the

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death of said Jeremiah. said minor Children having no mother and no housekeper and not being of sufficient age and discretion nor so circumstanced as to occupy said premises themselves. were placed at different places to be cared for by their Guardian. one of them. Edwin. residing with his Guardian. And said premises were leased by their said Guardian for the benefit of said minor Children and continue to be so leased to the present time. they having no other property or means of support. Whatever except their own labor

And Orators show that William R. Brown is the duly appointed Guardian for said Edwin Everett Sarah A Everett Alice Everett & Clara Everett and that Wilson Everett is a minor and without Guardian and that the said Josephus R Everett is the duly appointed ~~Guardian~~ Administrator of the estate of Jeremiah Everett dec'd

And your Orators further show that on the 15th day of April A.D. 1864. the Sheriff of Putnam County to whom said executions were directed and delivered. levied the same upon

the said lot and on the 18th day of May A.D. 1864 and under and by virtue of said executions after having advertised the same as required by law sold said premises at Sheriffs sale to one Thomas Dent for the sum of ~~[illegible]~~ Seven hundred and twenty six Dollars to satisfy said judgments and executions and said Sheriff as your Orators are informed and believe. gave to said Dent a Sheriffs Certificate of purchase thereof in the usual form. and said Dent. threatens intends and will unless restrained by Injunction as hereinafter prayed. proceed in due time to obtain from the Sheriff of said County a deed of Conveyance of said premises in pursuance of said sale & Certificate of purchase and thereupon take possession or attempt to take the possession of said premises under and by virtue of the same and dispossess your Orators thereof and deprive them the said minors of the rents issues and profits thereof and from at any time hereafter occupying the same

And your Orators show upon belief and to charge the fact to be. that said Dent holds said Certificate

in trust or in some way for the benefit or interest of said Judgment Creditors of said Jeremiah Everett or partly in his own right and partly for said Creditors. And your orators further show that said premises were as to the adult heirs of said Jeremiah sacrificed and did not and could not owing to the fact that said premises were at the time of said sale a homested not subject to sale as against said Minor heirs bring a fair and reasonable value: and they are interested in having said sale set aside and the sale thereof restrained until it can be sold according to Law and thus bring its full value. Which is about One thousand Dollars

And your orators show that none of said Judgments were rendered upon debts or liabilities contracted prior to the 4th day of July A.D. 1851 nor were any part of them rendered for debts or liabilities contracted or incurred prior to that time. Nor were any of the debts upon which said Judgments were rendered nor any part thereof incurred for the purchase or improvements of

said premises nor any part thereof

Inasmuch therefore as your Orators are without remedy at law and can only have relief in Equity Your Orators pray that Thomas Dent John Brinkerhoff. Thomas B Penton. David Jayne David W Jayne. Eben C Jayne. Augustus F Shapleigh. Thomas D Day. Woodward Crittenden. William H Markham and Josephus H Everts administrators of the Estate of Jeremiah Everts deceased may be made defendants herein and required to answer the same but not under oath. their answer under oath being hereby expressly waived.

And that upon a final hearing hereof the said sale on execution may be set aside and vacated and said certificate of purchase surrendered and cancelled and said Thomas Dent be forever restrained from obtaining any Deed in pursuance of the same or asserting any title or claim to said premises by reason thereof. and said Judgment Creditors and each of them may be prohibited and restrained from selling or attempting to sell said premises under any execution issued upon any of said Judgments until the

youngest of the Complainants shall become of age

And Orators pray for the People Writ of Injunction issueing out of and under the seal of this Honorable Court and directed to said Thomas Dent enjoining and prohibiting him from selling assigning or in any manner transfering said Certificate and from procuring or accepting any Deed from the Sheriff of said premises in pursuance of said sale and Certificate of purchase. or in any manner disturbing Orators in the possession of said premises until the further Order of the Court.

And your Orators pray for process of Subpena against all of said defendants above named returnable to said term of said Court Commanding and requiring said defendants and each of them personally to be and appear before this Honorable Court and stand to abide by and perform such order and decree as the Court may make in the premises and your Orators pray for such other and further relief as may

be just and equitable. And as in duty bound your Orators will ever pray &c

Bangs & Shaw
Complts Solicitors

State of Illinois }
Putnam County } ss

William H. Brown one of the Complainants in said Bill being duly sworn. on oath saith. that he has Read the foregoing bill of Complaint and understands the contents thereof and the matters and things therein Stated are true except those stated upon upon information and belief. and those he believes to be true

Subscribed & sworn to } W. H. Brown
before me this 28th day }
of July. A.D. 1864 }
John P Gerbench C.R

Rev Stamp 5¢

Upon which said bill was an indorsement in the words and figures following to wit;

State of Illinois }
Putnam County } ss

On the filing of the within bill the clerk issued an Injunction writ in pursuance of the prayer of

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said bill. the Judge of the Cir Court being absent from the County

To Jno P Gerberich clk Cir Court said Co. } John P Gerberich Master in Chancery of said County

July 28. 1864

And afterwards to wit on the 24th day of October A.D. 186[illegible] the following answer was filed in said Court. viz

State of Illinois }
Putnam County }

Circuit Court of said County
In Chancery

The joint and several answers of Thomas Dent. John Bonickerhoff. Thomas B. Penton. David Jayne David H Jayne. Eben. C. Jayne. Augustus F Shapleigh. Thomas D Day. Woodward Leritten den and Wm C. Markham to the bill of Complaint of Josephus C Events and others against these respondents impleaded &c

These respondents saving all benefit of exceptions to the manifest errors imperfections and uncertainties in said bill. for answer to so much and to such parts of said bill as they are advised it is mate-

ial or necessary for them to answer.

answering say: That they admit that Jeremiah Everett before and on the 5th day of March A.D. 1859 and thereafter until his death was a householder having a family and with his family resided on the lot of land in the bill described and occupied the dwelling house thereon as the residence of himself and family. and as these respondents believe was the owner of said Lot in fee simple. They also admit the recovery of the several Judgments in the bill mentioned. and that the proceedings thereon and by virtue thereof to which the bill refers have been had and taken. all which proceedings including the sale of said property under the execution issued on said Judgments respectively these respondents insist were strictly regular and proper

These defendants believe it to be the fact that said Jeremiah Everett died intestate on or about the 15th day of July A.D. 1860 leaving no widow. but leaving his Children named in the bill his sole

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heirs at law

That at his death which accured while he was so occupying said premises. there were living with him four of said Children as Stated in said bill. These defendants are not informed as to the ages of said Children save by said bill and cannot either admit or deny that the said bill truly stats the same.

These defendants admit that said Children ceased to live upon the premises upon the death of their father and have not any of them since resided thereon. These defendants suppose it to be true as the bill affirms that it was not convenient for said four Children or any of them to continue to occupy said premises at least the same have not, as these defendants are informed and believe, been so occupied by said Children or any of them nor by any of the family of said Jeremah Everts since on or about the 15th day of July A.D. 1865

These defendants are unable to state whether William

He Brown is Guardian as the bill alleges. but believe he has acted as such. Whether however he has let said premises as such Guardian or for the benefit of the Minor Children these respondents cannott say. They on information and belief deny however. that he has been or is living on said premises.

These defendants further state that the said Jeremiah Everett was at his death insolvent so that nothing could have been realized therefrom by having the amount of said Judgments or either of them probated. and that the only way to obtain satisfaction of said Judgments or either of the same or any part thereof was to have said lot sold on execution. as was done.

These defendants further say that said Thomas Dent was attorney for the Judgment Creditors in said three Judgments. and by reason of occupying this relation. bid off said property at the Sheriffs sale and holds the Certificate of purchase in trust for said Judgment Creditors. subject to his lien as attorney for fees

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disbursements. and intends to procure a Sheriffs Deed on said Certificate unless redeemed according to law

These defendants further answering say that the Judgment aforesaid in favor of said David Jayne David W Jayne & Eben C. Jayne was for Medicine furnished by them to said Jeremiah Everett to be sold by him for said David Jayne. David W Jayne & Eben C Jayne. under an agency on his part for them assumed by him on or about the 8th day of November A.D. 1860. at which time some of the Medicines were furnished to him. And these defendants insist that said lot was not exempt from levy or sale under execution as is intimated by said bill of Complaint

These defendants deny that said premises were sacrificed or that the sale was in any respect unfair but say that the same brought a good & fair price at said sale and as much at least as is usual ~~at~~ in respect to forced or judicial sales of property

These defendants

further say. that the said plaintiffs if entitled to relief (as is denied) Have a plain and adiquate remedy at law & that the said bill joins together separate & distinct matters in one of which there is not a joint interest in the complainants. and the other of which Constitutes no ground for equitable relief. and that the said bill is demurrable. and these defendants pray that they may have the benefit of these objections as if they had taken by a separate demurrer

And now having fully answered. the defendants pray to be hence dismissed &c

Thomas Dent pro se
John Brinkerhoff. Thomas B Benton. David Jayne. David W Jayne. Eben C Jayne Augustus F Shapleigh. Thomas W Gray Woodward Crittenden & Wm B Markham
by T Dent. Solr

And afterwards. to wit on the 25th day of October 1864. the same being one of the days of the October Term A.D 1864 of the Circuit Court of said Putnam County. the following order was entered in the following

entitled cause

Josephus McEwen et al
vs
Thomas Dent et al
} Bill for Injunction
} Motion by

Thomas Dent to dissolve the Injunction herein which Motion being duly considered by the Court overrules the same

And afterwards to wit on the 27th day of October A.D. 1864 the following Bill of Exceptions was filed in said Court.

State of Illinois
Putnam County } Circuit Court
October Term A.D. 1864

Josephus McEwen et al
vs
Thomas Dent et al
} In Chancery
} Bill to set aside
} sale on execution

On this day come the defendants by Burns & Cummins their solicitors as well the complainants by Bangs & Shaw and the defendants move the Court to dissolve the Injunction

herein for want of Equity apparent upon the face of the bill. and the Court after argument of Counsel & due consideration doth consider that said Motion be overruled. Whereupon the defendants. Except to the opinion of the Court in overruling said Motion. and pray the Court to allow sign and seal this their bill of Exceptions which is done in open Court
October 27th, 1864

S L Richmond (Seal)
Judge

And afterwards to wit: on the 14th day of March A.D. 1865. the same being one of the days of the March term A.D. 1865. of the Circuit Court of said Putnam County. the following replication was filed in said Court in the cause therein named

Josephus H Everett et al
vs
Thomas Dent et al
} Bill for Injunction

And now comes said complainants and by protestations &c. not confessing &c. for replication to the answer of

difendants herein saith that their said bill is true certain sufficient in law to be answered unto and that said answer except in sofar as it agrees with and admits the allegations in bill is untrue insufficient and insufficient in Law to be replied unto all of which Complainants are ready to maintain over and prove as this honorable Court shall direct &c

Bangs & Shaw
Sols for Compl'ts

And afterwards on the same day, to wit March 14, 1865 the following was entered of record in said Putnam County Circuit Court in the following entitled Cause

Josephus H Everett et al
vs
Thomas Dew et al
} Bill for Injunction

The death of William H Brown suggested to the Court and leave given to prosecute this suit in the name of Williamson Dewey the present next friend of the minors

This Cause is submitted to the Court for hearing

And afterwards on the 4th day of said term to wit March 16th 1865. the following decree was rendered and entered of record in said Court.

Josephus C Everett. James M C Everett
Wilson C Everett. a minor by Williamson
Durley his next friend Edwin Everett
a minor by said Durley his next friend.
Sarah A Everett a minor by said Durley
her next friend. Alfred Everett a minor
by said Durley his next friend & Clara
Everett a minor by said Durley her
next friend &c
Thomas Dent. John Brinkerhoff Thomas
B Renton. David Jayne. David W Jayne Eben
C Jayne. Augustus F Shapleigh. Thomas
D Day. Woodward Cortlendex. Wm
C Markham & Josephus C Everett
administrator of the Estate of Jeremiah
Everett deceased

} In Chancery Injunction

And now on this day this cause coming on to be heard upon Bill. answer. replications and proofs herein. and the Court doth find that all the allegations in said complainants bill are true and the equity of this cause is with complainants. and Bill taken pro Confesso as to defendant

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(22)

Everett administrator

It is ordered adjudged and decreed that the sale on execution mentioned in said bill be and the same are hereby set aside and cancelled. and defendant Thomas Dent is ordered and required to surrender the certificate of purchase mentioned in bill to be cancelled. and that all of said defendants respectively be and they are enjoined and restrained from proceeding to sell said premises mentioned in bill on any execution or executions to be issued or now issued on their said judgments respectively. until the youngest of the said Minor Children ~~become of age~~, of said Jeremiah Everett shall become of age and it is further ordered that defendants pay the costs hereof

S L Richmond
Judge

And afterwards on the same day. to wit March. 16. 1865. the following Bill of exceptions was filed in said. Putnam County Circuit Court

Josephus H Everett. James D L Everett
Wilson H Everett a minor by said
Williamson Darley. his next friend
Edwin Everett a minor by said
Darley. his next friend. Sarah
Augusta Everett a minor by said
Darley her next friend. Alterse
Everett a minor by said Darley
his next friend & Clara Everett
a minor by said Darley her next
friend
vs
Thomas Dent. John Brinkerhoff. Thomas
B. Renton. David Jayne. David W
Jayne. Eben C Jayne. Augustus S
Shapleigh. Thomas A Day. Woodward
Wattenden & W H Marshall &
~~Josephus H Everett Administrator~~
~~of the Estate of Jeremiah Everett deceased~~

for Chancery

Be it
remembered that on this day this cause
came on to be heard upon the bill
answers replication and the evidence.
and the complainants to maintain
the issue on their part called as
a witness. Matthias Shilg. who.
being duly sworn. testified as
follows: I know complainants who
are called minors in the bill of
complaint & believe they are

under 18. years of age. I rented house in question four years ago last fall of William Brown. occupied house as a tenant of Brown till his death. which was a short time ago. Brown said when he came to collect rent. said he wanted it to pay taxes and insurance for the chidren the complainants.

One of chidren while I occupied house lived with Brown. one with his brother & others at others places in this Community. they have not lived on property since the death of their father.

Complainants called Wilson Everett who being sworn testified that he is a party to this suit and is brother to minor complainants. Whereupon the defendants objected to said witness testifying on account of his interest in the event of the suit & for the reason that he is a party. but the Court overruled the defendants objections & allowed said Witness to testify.

Whereupon defendants excepted to the decision of the Court in

deciding that said witness might testify. And said witness then testified that William Brown acted in renting said house & property described in the bill as guardian of the minor complainants that he got part of the rent of said Brown. While he was a minor. that he is now 21 years of age. that he received the money last spring and before he was of age. Since he become of age he gets no part of it

The complainants then called George Dent. who. being sworn. says. the consideration for the notes sued on in the Cases at law wherein said property was sold on execution complained of in the bill of complaint was goods and medicines sold to the father of the minor complainants.

This was all the evidence in the case. the Court then found for complainants upon the issues. whereupon the defendants moved the Court to set aside the finding & grant a new hearing herein. which motion was overruled by the Court. & the Court thereupon rendered a decree for complainant

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(25)

as follows. —

Whereupon defendants except to the opinion of the Court in overruling said Motion for a new hearing & rendering said decree. and pray. that this their bill of exceptions be allowed signed & sealed. Which is done in open Court

March. 14, 1865

S. L. Richmond
Judge

State of Illinois }
Putnam County }

I W. H. Casson clerk of the circuit Court in for the said County in the State aforesaid. do certify that the foregoing is a true & correct copy of the proceedings in the Cause therein named. so far as required by the precipe. for this purpose filed

Witness my hand and the seal of said Court at Hennepin in said Putnam County this 4th day of April A.D. 1865

W. H. Casson
clerk



And the said John Brinkerhoff, Thomas B. Renton, David Jayne, David W. Jayne, Eben C. Jayne, Augustus P. Shaplegh, Thomas D. Day, Woodward Whitehead, Wm H. Markham and Thomas Dent,

Plaintiffs in error,

come, by their atty, and say that in the record, proceedings and decree aforesaid, there is manifest error, in this, to wit:

That said Court ~~Heard~~ erred in rendering a decree for the complainants.

Said court erred in admitting incompetent testimony for complainants.

That said court erred in not dismissing the Bill, and in not dissolving the Injunction.

That said court erred in granting the several matters of relief to the complainants mentioned in the decree.

Wherefore, for other errors, these plaintiffs in error pray that said decree be reversed, that said Bill be dismissed, that they be restored to what they have lost, &c.

Thomas Dent

Sol for plfs in Error

And the said Defendants in Error come

And the said Defendants in Error come and say that there is no such record and proceedings as are above assigned for error, and pray that the decree aforesaid may be affirmed with damages and costs.

Benjo W. Brewer

Sol for Defts in Error

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Brinkerhoff et als

v

Everett et als.

Record

Filed April 7. 1865.

J. Leland

Clk.

John Brinkerhoff,
Thomas B. Penton,
David Jayne,
David W. Jayne,
Eben C. Jayne,
Augustus F. Shapleigh,
Thomas D. Day,
Woodward Brittenden,
Wm H. Markham, & and
~~Josephus H. Everett,~~ &
Thomas Dent,

Error to Putnam.

vs.

Josephus H. Everett, individually & as admr. of the estate of Jeremiah Everett, deceased, James D. L. Everett, Wilson H. Everett, who sued by Williamson Durley his next friend, & Edwin Everett, Sarah H. Everett, Alafie Everett & Clara Everett, respectively minors who sued by said Durly as their next friend, - defts. in error.

The appearance of the defendants in error is hereby ~~entered~~ given, with consent to file the record this day, and that the case may be heard at this term of the Supreme Court at Ottawa.

Dated this 6th day of Sept. A.D. 1865.

Barry & Green
atys for defts in Error

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Brinkhoff etals

vs

Exacto etals

Stipulation

Filed April 7. 1865

L. Stilson

Clk.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1865, AT OTTAWA.

JOHN BRINKERHOFF et al.,
Plaintiffs in Error,
vs.
JOSEPHUS H. EVERETT et al.,
Defendants in Error.
} *Error to Putnam.*

ABSTRACT OF RECORD.

This was a suit in chancery, in which, on the 28th of July 1864, Josephus H. Everett and James D. L. Everett, and also Wilson, Everett, Edwin Everett, Sarah A. Everett, Altesse Everett and Clara Everett, minors, by next friend, filed their bill, averring that for a long time before March 5th, 1859, and thenceforth until his death, Jeremiah Everett was the owner in fee of a certain lot of land situated in Hennepin, in the county of Putnam, together with a dwelling-house thereon, the whole of which premises then and still were of a value not exceeding $1,000, and which he at that date, and continuously thereafter until his death, occupied as a resi- dence for himself and family.

That in the life-time of said Jeremiah Everett, Brinkerhoff and Penton, two of the plaintiffs in error, recovered a judgment against him before a justice of the peace of said county, and after an execution thereon had been returned *nulla bona*, caused a transcript of said judgment to be filed in the office of the clerk of the circuit court of said county, whereby said judgment, under the statute in such case provided, took effect like a judgment of said court from the time of filing said transcript, viz: March 5th

1859, and on the 28th day of the same month an execution was issued on the same, from the clerk's office of said court to the sheriff of said county.

4 That on the 14th of March 1859, David Jayne, David W. Jayne and Eben C. Jayne, other of the plaintiffs in error, recovered judgment in said court against said Jeremiah Everett, on which execution was duly issued on the 28th day of the same month, to the sheriff of said county.

That on the 14th day of March 1859, Augustus F. Shapleigh, Thomas D. Day, Woodward Crittenden and William A. Markham, other of the defendants herein, recovered judgment in the same court against said Jeremiah Everett, on which said judgment execution was, on the 28th day of March 1859, duly issued to the sheriff of said county.

5 That said Jeremiah Everett died intestate, July 15th, 1860, leaving no widow, but leaving him surviving his children, viz.: Josephus H. Everett and James D. L. Everett, Wilson Everett, born Jan. 24th, 1844; Edwin Everett, born February 28th, 1846; Sarah A. Everett, born March 11th, 1848; Altesse Everett, born September 23d, 1851; and Clara Everett, born February 15th, 1856, his only heirs-at-law.

That at his death said Edwin Everett, Sarah A. Everett, Altesse Everett and Clara Everett, were living with him on the said premises, but that on the happening of that event, they,
6 having no mother and no house-keeper, and not being of sufficient age and discretion, nor so circumstanced as to occupy said premises, were put at different places to be cared for by their guardian; one of them (Edwin) living with said guardian, William H. Brown; and that the premises were leased by said guardian for the benefit of said minor children, and continued to be so leased up to the filing of this bill. Also, that they had no other property or means of support save their own labor. That said Brown was guardian for all of said minor children except Wilson Everett, who was without guardian, and that said Josephus H. Everett was administrator of the estate of said Jeremiah Everett, deceased.

4 That three months' notice of the existence of said judgments

having been given by said judgment creditors to said administrator, so that they became entitled to executions thereon after the death of said Jeremiah Everett, deceased, and said judgments being still unsatisfied, the said judgment creditors respectively sued out from said court, on the 28th day of March 1864, an execution upon each of said judgments, to the sheriff of said
6 county, which executions the said sheriff, on the 15th of April 1864, levied on said lot of land, and on the 18th day of May 1864, after having duly advertised the same, sold said premises to
7 Thomas Dent for $726, and issued to him a certificate of purchase therefor, in pursuance of the statute in such case provided, on which certificate he intended to take a deed for said lot of land, and thereupon to dispossess said complainants and deprive said minors of the rents, issues and profits of said premises; and that said Dent held said certificate for said judgment-creditors, or partly in his own right, and partly for them.

That as to said adult heirs, viz: Josephus H. Everett and James D. L. Everett, the said premises were sacrificed by said sale, for the reason that, being a homestead, and not subject to sale as against said minors, they would not, and did not, upon such sale, bring a fair and reasonable price, wherefore said adults claimed that they were interested in having said sale set aside, and in restraining any sale until such sale could be made according to law, so that the premises would bring their full value, which was about one thousand dollars.

That the debts for which said judgments were recovered were not contracted prior to July 4th, 1851, and were not incurred for the purchase or improvement of said premises, or any part thereof.

1 9 Said complainants joined as defendants the said judgment-creditors, said Thomas Dent, and said Josephus H. Everett as such administrator, and prayed that said sale, so made on the 18th day of May 1864, should be vacated, that said certificate of purchase should be surrendered and cancelled, that said Dent should be restrained from obtaining any deed or asserting any title by reason of such certificate, and that said judgment-creditors should be prohibited from selling or attempting to sell said premises, under any execution issued upon either of said judgments until the youngest of the complainants should become of age.

11 The bill waived the oath of the defendants, and was verified by the affidavit of said Brown, and an injunction thereon was ordered and issued, in accordance with the prayer of the bill.

12 Said judgment creditors and said Thomas Dent filed their joint and several answer, whereby they admitted that Jeremiah
13 Everett, before and on the 5th of March, 1859, and thenceforth until his death, was a householder, having a family, and with his family resided on said lot, occupying the dwelling-house thereon as the residence of himself and family, and that he was the owner of the premises, in fee simple; that the proceedings in respect to the judgments and executions thereon, stated in the bill, were had and taken; which proceedings, including the sale of said property, these respondents insisted were strictly regular and proper.

That said Everett died intestate, leaving no widow, but leaving his said children named in the bill his only heirs at-law,
14 four of whom were living with him at his death, as the bill alleged, but as to the ages of these, respondents were unadvised, save by the bill.

That said children, on the death of their father, viz., July 5th, 1860, ceased to live upon said premises, and have not any of them since resided thereon; and the respondents suppose it to be true that it was not convenient for said four children, or any of them, to continue to occupy said premises, and state that none of the family of the said Jeremiah Everett, deceased, have occupied said premises since on or about July 15th, 1860.

The defendants were unable to state whether William H.
15 Brown was guardian, as the bill alleged, yet believed he had acted as such, but whether he had let said premises as such guardian, or for the benefit of said minor children, the said defendants were unadvised. They denied that he had been living on said premises, and further stated that said decedent was, at his death, insolvent, so that nothing could have been realized from his estate, and so that the only way to obtain satisfaction of said judgments, or either of them, or any part thereof, was to have said premises sold on execution, as was done.

That said Dent, as attorney for said judgment creditors, bid

16 off said property, and thus held said certificate of purchase, on which he intended to procure a sheriff's deed, unless redemption should be made according to law.

That the judgment in favor of David Jayne, David W. Jayne, and Eben C. Jayne, was for medicines furnished by them to said decendent, for sale in their behalf, under an agency on his part for them, assumed on or about November 8th, 1850, at which time some of the medicines were furnished to him.

The defendant denied that the premises were sacrificed, or that the sale was, in any respect, unfair, but said that the amount of the sale was as much as is usual in respect to forced or judical sales of property of like value.

17 The answer further alleged that if the plaintiffs were entitled to any relief, (as was denied,) they would have a plain and adequate remedy at law.

Also, that the bill joined together separate and distinct matters, in which there was not a joint interest in the complainants, &c.

19 After filing this answer, said defendants moved for a dissolution of the injunction, and the motion was overruled.

18 The complainants filed a replication to said answer.

Afterwards, on the same day, March 14th, 1865, the death of
20 William H. Brown, whom the bill had named as the next friend of the minors, was suggested, and the name of Williamson Durley was suggested and substituted as next friend. The cause was thereupon set down for hearing.

23 Matthias Shilz testified on behalf of the complainants, that he was acquainted with said Sarah A. Everett, Altesse Everett, and Clara Everett, and believed them to be under eighteen years of age; that he rented said premises in the fall of 1864, of William H. Brown, and occupied the same as the tenant of said Brown,
24 until said Brown died, a short time before said 14th day of March, 1865; that Brown, on collecting rent, said he wanted the same to pay taxes and insurance, and for the children, the complainants, one of which children, while Shilz occupied the house, lived with Brown, while another lived with a brother, and the others at other places in the community at Hennepin,

none of them living on the property, since the death of their father.

WILSON EVERETT, one of the complainants, was then called and
25 sworn as a witness on their behalf. The defendants objected to his competency as a witness, but the Court overruled the objection, and permitted him to testify. He testified that Brown, in renting the property, acted as guardian of the minor complainants; that the witness, while a minor, and last spring, before he was of age, received part of the rent, but since he became twenty-one years of age gets no part of it.

GEORGE DENT was also sworn on behalf of the complainants, and testified that the notes whereon said judgments at law were obtained, were given for goods and medicines sold said Jeremiah Everett, deceased.

The Court upon said bill, answer, replication and proofs, thereupon rendered a decree, declaring that the allegations in the
21 bill were true, and that the equity of the cause was with the complainants; and the bill being taken *pro confesso* as to said
22 administrator, the Court decreed that said sale on the executions last aforesaid should be set aside and cancelled; that said Thos. Dent should surrender, to be cancelled, the certificate of purchase so issued to him, and that all the defendants should be enjoined and restrained from proceeding to sell the said premises on any execution or executions upon said judgments respectively, until the youngest of said minor children should become of age, and that the defendants should pay the costs of said suit.

The cause being brought to this Court on writ of error, by said judgment creditors, and the said Thomas Dent, they assign the following errors:

That the Circuit Court erred in rendering a decree for the complainants.

26 That said Court erred in admitting incompetent testimony for the complainants.

That said Court erred in not dismissing the bill, and in not dissolving the injunction.

Also, that said Court erred in granting the several matters of relief, to the complainants, specified in the decree.

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Brinkerhoff et al.

vs.

Everett.

Abstract of Record.

Filed April 27, 1815

L Lecompte Clk

Supreme Court, State of Illinois,

THIRD GRAND DIVISION,

APRIL TERM, 1865, AT OTTAWA.

JOHN BRINKERHOFF *et al.*,
Plaintiffs in Error,
vs.
JOSEPHUS H. EVERETT *et al.*,
Defendants in Error.
} *Error to Putnam.*

DEFENDANTS' BRIEF.

The only point on which plaintiffs rely to reverse the decree below is, that the minors did not continue to occupy the premises, or, in other words, that the homestead was *abandoned* by them.

The minors, being in custody of their guardian, could do no act amounting to a voluntary abandonment of the premises, and they are prevented from a personal occupation of the premises by circumstances over which they have no control, and their occupancy by tenants is sufficient.

Walters vs. People, &c, 21 Ill. 178.

BANGS & SHAW,

Counsel.

No 227

Brinkerhoff
vs
Everett

Defts Brief filed
May 29. 1865

L Lecand Clk

SUPREME COURT OF ILLINOIS,

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POINTS OF PLAINTIFFS IN ERROR.

This case presents the question, whether property constituting the homestead of a defendant in execution continues to be exempt from sale on execution after the death of such defendant, leaving no widow, and when none of his family or children continue to occupy the same.

Jeremiah Everett, the judgment debtor, held a homestead on which certain of the plaintiffs in error had judgment liens, by virtue of judgments recovered against him. He died July 5th, 1860, while residing upon the premises, having previously had living with him thereon four of his children, who were then minors, and three of whom have not yet attained their majority. Upon his death, the children all ceased to live upon the premises, and went to different places to reside; and no member of the family, at any time after the death of said Jeremiah Everett, resided on the premises.

In this state of case, on the 15th of April 1864, more than three years after the premises had ceased to be occupied as a homestead by the debtor or any of his family, the judgment creditors sued out executions and had the premises sold on the same; whereupon all the children of the decedent, both the adults and the minors, joined in a bill in equity, under which the court below set aside the sale, decreed a cancellation of the certificate of purchase, and enjoined the sale of the property under any execution upon either of such judgments, until the younger of said children should become of age.

I.

The Statute (§ 1 of the act of February 11th, 1851, to exempt homesteads, &c., p. 650 of Purple's Comp.,) defines the conditions on which a homestead shall continue exempt after the death of a judgment debtor, which terms are that,—

"Such exemption shall continue after the death of such householder for the benefit of the widow and family, some or one of them continuing to occupy such homestead until the youngest child shall become twenty-one years of age, and until the death of such widow."

In this case there was no widow and none of the family continued to occupy the homestead.

The children all left it, taking up homes elsewhere; and had resided elsewhere almost four years after the death of their father, before the executions on which the property was sold were sued out; and there is no averment of any intent or expectation on the part of any of them to resume a residence upon the premises.

It would be a direct violation of the statute to extend the exemption to this case; for it is the plain requirement of the law that some or one of the family must continue to occupy the premises. The statute annexes the condition to the exemption, that some of the family shall continue to occupy the homestead, and it is not for the court to dispense with that condition.

It is not a case of a mere *temporary* removal from the premises, with an intention presently to return to the same; but it is one in which no intention to return is averred, or can be predicated.

II.

The judgment creditors were authorized to have the property sold under the general law concerning judgments and executions, because the special exemption ceased when the occupation of the premises as a homestead was abandoned. The premises were only exempt while they continued to be a homestead.

The law would not have protected them in favor of the judgment debtor, if he had actually removed from them, without having any

intent to return to the same; but, in such case, they would have been subject to sale, however necessary it might have been esteemed to suffer him to receive the rents and profits, with a view to supporting him in infirmity, old age, or otherwise; and this is that case varied only by the substitution of another claimant, and the same result happens under circumstances equally favorable for the judgment creditors, when, upon the debtor's death, all the surviving members of his family left the premises without any intent to resume a residence thereon.

It is not a case for equitable construction to relieve the complainants. Their appeal should have been to the *law-making* power. Legislative action would be necessary to entitle persons situated like them to the relief which they sought, and which was granted in the court below. Such action would have to obliterate, in its course, a plain provision of existing law, and, *secondly*, carve out a remedy for a case now without remedy by judicial action.

ARRINGTON & DENT,

Attorneys for Plaintiffs in Error.

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Brinkerhoff et al

v.

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Mfr. Brief.

Filed A/U. 27, 1865

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