No. 12733

Supreme Court of Illinois

Dickerman et al.

vs.

Burgess et al

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Worcester A. Pierce

vs

William S. Burgess

1859

Filed Apl. 22d 1859.
L. Leland Clerk

In the Supreme Court of the State of Illinois.

DICKERMAN *ET AL.*,
vs.
BURGESS *ET AL.*

Appeal from Winnebago Circuit Court.

To the Honorable Judges of said Court:

Your petitioner, WILLIAM T. BURGESS, one of the Defendants in this cause, respectfully prays to be heard upon a reargument thereof before this Court, satisfied that he will be able to convince this Court that the law and the facts of the case have been misapprehended by it, in its published opinion in 20 Ill. R. p. 266.

The facts *proved* in this case by the record are as follows:

In March, 1850, a judgment was recovered in favor of H. O. Stone against Aldin Thomas, for the balance due him upon two notes made by Thomas. I was, with another witness, introduced by Thomas to prove his defense, that of payment. There had been some conversation between the attorney for the Defendant and either myself or my associate, Mr. Fuller, but which don't appear; that the only matter in controversy was fifteen dollars, for my fees connected with the matter. After the trial was over, which resulted in a verdict of forty-five dollars, he claimed that I was mistaken in my testimony, and I consented [but when—whether before or after the term closed, does not appear] to see Stone and get the judgment corrected, admitting that I was mistaken. As to whether I did or did not, there is no proof. In June following, I issued execution to the sheriff upon that judgment, for the whole amount of it. Thomas paid him upon that

execution, but when does not appear, thirty-one dollars. That was paid to me by the sheriff in November, 1850. The sheriff did not return that execution until November, 1853; and December 28th, 1853, an alias was issued to King H. Milliken, sheriff, who repeatedly called upon Thomas for payment or for property. Thomas, who was abundantly able to pay, neither paid it nor turned out property. The sheriff searches the records for property, finds the lot in question and a farm, and levies on the lot; and after repeated adjournments for want of bidders, is instructed by letter from me, "that if I am not there, to strike it off in the name of John F. Farnsworth." I was not present at the time and place of sale, and on that very day the sheriff writes me a letter, saying he had struck off the property to John F. Farnsworth for $38 33, and requested me to send him the costs—$15 95—and enclosing a certificate of sale to Farnsworth; that certificate was assigned by Farnsworth to J. S. Burgess, which, and striking it off in his name, was done for my accommodation; that, at my request, J. S. Burgess made a deed to S. P. Burgess, I having sold the property to him on time, and took back a mortgage for the amount. These are the main *leading facts proved.* I claimed that I bought the judgment from Stone, after this money was paid, for a good consideration, which is admitted by Stone in his answers, but no proof either way on the subject. And the case is made by the Court to turn entirely upon the fact claimed to be established, but admitted to be mere matter of form, that the sheriff did not cry off the property at the place advertised. Now, is the fact that the sheriff did not cry off the property established by the proof?

This Court says: "The sheriff states that all the sale he made of this property was by sitting in his office, in the east wing of the court house, and there indorsing it on the execution, and making out a certificate of sale; that he did not go to the door of the court house; that there was no public vendue, no outery—nothing transpiring there to arrest the attention of the public, or any indication that a sale of valuable property was going on." This statement of the facts proved follows a paragraph in which the Court says: "It must be confessed the witness on the first point, as to the regularity of the sale, the sheriff himself, is not so positive in his statement as he might be." What does the sheriff say on this point? and as this is the turning point of the case, both as regards the decision of the cause and my conduct con-

nected with it, and in view of the language used by this Court in 19 Ill. R. p. 486, his testimony should be closely scanned word by word, to see whether it is "*testimony of the strongest kind*" *or* not, as required by that case, and he says, "On the day of the sale the property was sold as he, Burgess, directed." "It is my impression that it was not cried off; my impression is not very distinct." "Have not now any recollection of going any nearer than my office." This occurs in his first direct examination. On his cross-examination, he says: "My recollection is not distinct as to my offering the land for sale. I cannot state, from my recollection, that it was not offered for sale." "I have no recollection whether I went to the court house door or not. I will not swear positively that I did not go to the door of the court house and cry the land for sale." "Attention first called to it at time of making sheriff's deed." "I knew my duty as sheriff required me to cry the property for sale at the place advertised therefor; and when I made out the certificate of sale to Farnsworth, I supposed I had complied with the law in that respect." The letter is introduced, and it states: "I this day struck off to John F. Farnsworth," etc. He is now taken over the ground again by the Complainant, and says: "The transaction being some time ago, I have not given the matter much thought. All the sale was the indorsement on the execution and the certificate of sale, but am not positive." Where this Court got the statement "sitting in his office" from I cannot conceive. It is not in the sheriff's testimony. Men sometimes sit and sometimes stand when writing; but there is a peculiarity about this testimony on this point. The sheriff's office is in the court house building—in fact (outside of this record), opens out on the same piazza, extending the whole front, and the door of the court room is not distant twenty feet from the door of the sheriff's office, and so far as the evidence in this cause, might not be one foot.

This sheriff, who knows his duty, and supposed at the time he was doing it, might have gone outside of his office door, stood "no nearer than my office," and gone through with the mere form of crying off this property. If he did it in the ordinary tone of voice, he could be heard distinctly at the door of the court house, and if any persons were there waiting to bid, they must have heard him. This may be the ingenious dodge of this "obliging sheriff," as this Court styles him. If he had been called forgetful,

it would have described him more truly. But to recur to his testimony. If there ever came upon the stand a witness who proved nothing, this sheriff did. His testimony is a mere *non mi recordor.* He swears to the documents produced, but forgets everything else, and states distinctly that *he will not swear to the very state of facts that this Court has said he did swear to.* Is it at all strange that he cannot recollect, and will not swear to the facts one way or the other? Hardly a week has rolled by since he was in office but he has made a sale of real estate. They are of almost daily occurrence. His attention is not called to the fact for fifteen months—not until the sheriff's deed is given. His attention is then and afterwards repeatedly called to it by a person whom he knew was acting upon the faith of his statements, and he says the sale is regular, so far as I know, and his examination takes place three years after the transaction. And this is the witness of whom this Court says his testimony "is not so *positive* as it *might* be." Should it not be said as *uncertain* as it *can* be? And now I quote the language used by this Court in 19 Ill. R. p. 495:

"It is not to be presumed that the officer making this certificate stated an untruth. Under his official oath, he certifies that the deed [sale] was properly recorded [made], giving the date when and the place in which [where] it was recorded" [done]. "Against this certificate of the officer there must be testimony of the strongest kind to destroy its effects." Have we that testimony in this case? We have to sustain the certificate of the officer's evidence, "made so by statute," his letter, written at the same time, saying: "I this day struck off," etc., and his repeated statements that the sale was regularly made, and to contradict it, what? "I will not swear that I did not go to the court house door and cry the land for sale"—the mere impressions of the officer, unsupported by any reasons or any circumstances whatever, which impressions he will not vouch to be correct, and distinctly, over and over again, says he will not swear to the truth of. Admitting now that he had sworn to the fact this Court imputes to him—that of not crying off the property—does he not stand impeached and unworthy of credit? Is his statement under his official oath of no weight? Is his letter of no consequence? Are his repeated statements to the contrary, when, if ever, he was bound to disclose the truth, to be treated as mere bagatelle? Is every rule of law and common sense, in reference to weight and probability of evidence, to be lost sight of in this case?

"But the sheriff obeyed not the law, but the directions of the Plaintiff's attorney, who, it is very evident, had matured his plans to possess himself of this property for the little trifle due on the execution, and which he had induced the Complainant to believe no longer existed against him."

Now, if I can show that this Court has, by the record (and this Court should look not outside of it), no warrant whatever for any assertion contained in this paragraph, may I not ask for an opportunity to be heard?

As to the first point—"the sheriff obeyed not the law"—I have already shown, by the rule of this Court, as laid down in 19 Ill. R. p. 485, that the mere want of recollection of the sheriff, unsupported by any single fact or circumstance suggested by himself, or proved by any other witness, cannot outweigh his certificate, and for this I am not without authority from other Courts—4 Paige R. p. 485, *Bartlett* v. *Gale*. A sheriff had given a certificate of sale by him under an execution; the deputy who made the sale was brought on the stand in a suit in chancery, to show that something occurred at the sale different from his certificate. He swore that he *thought* that Gale supposed the prior incumbrances were to be paid, and the Court remarks: "The certificate is the only legal evidence which has been given in the present case as to the time of the sale, or the actual amount bid. *And the sheriff's present supposition as to what the purchasers there thought, cannot now be received to falsify his official certificate, given at the time of the sale.*"

Now, mark the language used by the witness, the deputy sheriff. He *thinks* the thing is so; but in this case it is, I *will not swear* either way. I have an impression, but so faint that I cannot state that I have any recollection whether I went to the court house door and cried the premises for sale or not.

"The directions of the Plaintiff's attorney"—what were they? The only *proof* is the sheriff's recollection of the contents of a letter. What does he say? "I wrote to W. T. Burgess and received a line from him. I wrote, in the first place, the day to which I had adjourned it, and received a line from him, *if he was not there, to strike it off* in the name of John F. Farnsworth, and to send him *a certificate of sale* to Farnsworth." Is that directing him to sit in his office and indorse a sale on an execution that did

not take place, and send a certificate of falsehoods to me, and place them upon record, and reiterate them from time to time? Can language be used more definite to an officer than I used—"strike off" the property? How can a man strike off property unless he sells by public outcry? and how can any sane man misunderstand such a direction? My instructions might have been evaded by this "obliging sheriff, *but were not obeyed.*

"Who, it is *very evident*, had matured his plans to possess himself of this property."

What proof is there that I knew of this property, or of any plans laid by me in regard to it? The Court here must have read the bill and mistook it for the evidence in the cause. The sheriff makes his levy on his own search of the record, without any advice from me. "I examined the record to find property to levy on, and found a farm and this lot. I wrote to W. T. Burgess, and received a line from him," etc.

Aside from this, what acts have I done? I issued execution, gave it to the sheriff, and he repeatedly called on the defendant for pay or property. The sale is made six months after execution issued. Now, does this look like a plan? What! send the sheriff to the man whose property I was going to possess myself of with the very execution under which it was going to be done? How willing this sheriff was to be used by me. My plan was to give him notice of the execution, and not to sell under it until six months after execution issued; and the sheriff follows out this plan. He goes to the Defendant and calls upon him for property; lets him know he he has got the execution, under which he is going to be deprived of his property by me, secretly and covertly.

It is idle to talk of my laying plans to deprive this man of his property in any other way than by due course of law, in the face of the fact that the sheriff put it in the power of Thomas to defeat it, by either paying the money or staying the execution, if he had good cause for it. The bill charges that Thomas arranged with the sheriff that he would wait until he, Thomas, could write to me; and the fact that he did write, and I did not answer, is charged as part of this plan. But if so, why did they not prove this agreement by this same "*willing*," "obliging" sheriff. The means of proving it was in their power had such a fact existed. The sheriff is on the stand, why not ask him the question? May

be he had forgotten that, as he did the sale, and so poor a memory might break down upon such continuous drafts upon it, so they forebore.

A charge made so distinctly as that was, and used by this court as if proved, at least an offer should have been made to prove it, and am I asking at the hand of this Court too much, when I claim that the absence of any attempts to prove a fact so unequivocally asserted as this was, and so material to the relief, amounts to an admission that it is not true. Again, if such an agreement existed, it was probably made when the Sheriff first called with the execution. The Sheriff afterward calling upon him for property, put an end to any agreement of that kind, and he swears distinctly, that he did so several times; did not that call upon him to the use of some diligence in the matter, and would not the use of any such diligence have blown my plan if any such existed, to the winds, "For the little trifle due on this execution, and which he had induced the complainants to believe no longer existed." I ask, where is there any evidence in this record, that I used any means to induce Thomas to believe anything of the kind, is there any communication directly between him and me on the subject proved; not an iota, all there is is the testimony of J. Marsh, that after the trial was over, (very definite as to time,) Thomas explained to him (not to me) how the mistake had occurred, and Marsh explained it to me and I told him (Marsh) I would see Stone and try to have him deduct it from the judgment, (see his cross-examination.) This is not promising I would pay it myself, but it is, that I would see Stone about it. As I said before, there is no proof whether I did or not, but as Stone sold me the judgment for a valuable consideration, it may be fairly presumed that he would not deduct anything. What is the next act done after this. In June following, three months afterwards, I take out execution; this would convey to any ordinary man the idea that any deduction would not be made, either that I had applied to Stone and he would not do it, or that I had refused to do so. The next act proved, is that in November the Sheriff pays me thirty-one dollars, for which I gave a receipt to apply on execution, when this was paid by Thomas to the Sheriff, does not appear, but if paid as he claims in November, then the execution had run out and the Sheriff had no power to act, and the payment was purely a voluntary one on his part—why did he pay more than he claimed to be due, if he relied on my promise to pro-

cure Stone to reduce the amount. That fact alone stamps the whole as pretense got up as an excuse to charge me with bad faith towards him so as to screen himself from the charge of gross *laches*; had he paid just the amount, it might give some color to his assertion, but under the circumstances can any other conclusion be arrived at than that Thomas then knew that I was insisting upon the whole amount. What farther, another execution is issued by me and put in the hands of the sheriff, no proof that I interfered in any with it until advised of a levy and day of sale, no communications between me and Thomas or Marsh his attorney, in fact from the conversation I had with Marsh, which occurred soon after this trial and before this money was paid to the filing of the bill, there is not a *scintilla* of evidence of a single word passing between me and either of them on any subject whatever, now where is the inducement that I held out to him?

Probably it may be suggested that the delay in the return of the execution was an inducement. If so, then the execution in the hands of the sheriff, was as decided a notice as I could give that he must rely on that no longer. It then became his duty to act. I had sufficiently indicated what my course was going to be. He says that he wrote to me and received no reply; if that were true it is a singular way to hold out an inducement, to decline replying to such a letter and sending the sheriff with an execution for the money or property—Inducement. I can suggest one that was the true one. He refused to pay the balance that was then due on the judgment, and compelled me to advance $16 to collect the "trifling sum due on the execution," $22. He knew I must sell real estate to collect, and he could take his year to redeem in, I would then have laid out the money for that time to get it back with, ten per cent., while he could be making on the whole amount in the mean while, his three or four per cent. amonth. And I am censured because that, when a judgment debtor who unblushingly asserts that he was at all times abundantly able to pay, will take the law's delay—risk the title to his property for the "little trifle due on this execution," and allow the law to close down on him and vest me with that title, I am not willing to accept merely my money and interest, and see fit to insist on my legal rights.

And here another remark of the Court in its opinion, should be compared with the *testimony*. "The direction to the sheriff "if there are no bidders strike it off to Farnsworth," was a sufficient

intimation to an obliging sheriff," etc. Where does this Court get the words quoted by them "if there are no bidders strike it off to Farnsworth"—not in the evidence. The words of the sheriff are, "I received a line from him, (Burgess,) if he was not there to strike it off in the name of John F. Farnsworth." Place the two quotations side by side and see how great the change is, "if I was not there," used by me, instead of "if there are no bidders," used by the Court. But how useless such an omission for any purpose whatever. Had the sheriff and I colluded together to defraud this man, would such a mere formality as going a few feet from his office and crying the property be omitted. How easy for the sheriff to have cried it off so as not to attract attention. But to put beyond cavil or doubt, that this was not intended by either of us, within one week after, (on the 17th of June, 1854,) he put on the public records of the county, a certificate of the sale—this has been held to be merely directory 5, *Cow.* 270—and the title good though not recorded. Now if any collusion was on foot why is the most certain and lasting means adopted, of giving it notoriety, short of going to the party and advising him of it. Again, the law presumes, notice from the record in such cases, and it must be disproved, that is not done nor attempted to be done. And as a fact outside of the record, a near relative of Thomas was the recorder of the county, recorded that very paper, and the fact of such relationship within the knowledge of all parties. To talk about any attempt at collusion or concealment, and by a lawyer whom the Court is pleased to style "astute" and "practiced" and "sagacious,"—under such circumstances is violating every rule of reasonable intendment.

The Court dwells with much stress upon the fact of the different transfers made by me and imputes them to a fraudulent motive. At the time of this sale I had no assignment of the judgment from Stone to me, I deemed proper to avoid question as to the certificate of sale and the money that might be paid to redeem it, or the land if not redeemed to place the certificate in the name of Farnsworth. That was done as the proof is, by my admission, and the direction given before any sale took place; had I taken the certificate of sale to myself having no assignment from Stone, if the property was not redeemed, he might claim he held upon the face of the record to be the *cestuique* trust, and the property purchased for him. 1 *Gil.* 453, 9 *Paige* 663. And I must apply to him for a deed—and if I took the certificate from Farnsworth to me I was

afraid of the same result, therefore to avoid any question of the kind I placed the deed when I got it in my brothers name—this was all done for my benefit, when I got the conveyance from him to S. P. Burgess I surrendered to him his note. The answers they put in are merely formal ones, drawn up in the smallest compass to save the rights of the Defendant and put the Complainant to his proofs—and the bill not calling for a discovery on oath, I don't know any other reply to make unless it is intended to let it go by default. Is not the above statement of my reasons for what I did and caused to be done at and after the sale, consistent with well known principles of the law, and exculpate me from any fraud so far as Thomas is concerned; and so far as Stone is concerned he admits that I owned the judgment, and therefore as to him I could do as I pleased. And as to sale to S. P. Burgess, I took that course to realize on the property, as the notes secured by the real estate were of value, and the money could be raised on them.

I did not deem it necessary to go into an explanation of these matters before. I may have erred in this respect, and this Court has acted upon the idea that no possible motive could have existed for what I did, but to cover up and conceal some fancied or real defect in the sheriff's proceedings. The proof is clear that I was not present at the sale; that up to that time everything was regular; that the only communication I had afterwards with the sheriff, was a letter enclosing a certificate of sale, and advising me of a sale in pursuance of it; that the duplicate certificate was filed as required by law, and no communication passed between me and the sheriff until the deed was made; that he was the only person at the sale, and always told me that it was regular. Can proof be made to show clearer, that I was not in fact advised of any defect whatever, and had no reason to believe there was any until after the bill was filed, which charges indiscriminately every possible defect.

But the Court will probably say, then you intended to keep the land. Does not every man intend the legal natural result of his own acts? I did intend to acquire the legal title to that land by that sale, if not redeemed. It was the natural, unavoidable and legal result of what I did, in case Thomas did not redeem—and an act forced upon me by his refusal to pay the "little trifle due on this execution." It is the natural, legal and unavoidable result of all such sales of real estate.

I have often, for myself and for my clients, in order to collect a debt of a few dollars, been obliged to bid off property worth many times the amount; if the Defendant had not redeemed, the inevitable result would have been, to give me the title, whether I shall keep it afterwards or not, is for me to say, and that entirely depends upon the whole circumstances of the case, but that question would then be one that, with all deference to this Court is out of its jurisdiction and not subject to its animadversion. I had a right by the law of the land to become the purchaser of this property for the "little trifle due on the execution," if not redeemed I had a right to hold it. And I have got to find it laid down anywhere that it is the duty of the Plaintiff"s attorney to guard the interests of the Defendant because he may some day die and leave minor heirs—so far from this being the case, the courts have said: 4 *Cowen* 733, *Hawley* v. *Cramer*—"But these reasons cannot apply to the Defendant in the execution. *The Plaintiff"s attorney owes no allegiance and is under no obligation of duty to take care of his interests, neither is there any confidential connection existing between them.*"

This whole controversy commenced and ripened into the present law suit while Thomas was alive. He died, and I am told it was my duty, acting as attorney for the Plaintiff, against him as Defendant, to "have exercised my talents and sagacity" not for my client or for myself, but for minor heirs, who then had no title or claim to the property; I can freely say, I don't understand my duty as a professional man in that light, and I never saw it so laid down before.

I have not as yet relied upon the bar created by lapse of time, against any inquiry into this judgment. It was set up by the Defendant in the Court below, and was disregarded by it in admitting evidence, and has been by this Court, in commenting upon that evidence. This judgment was rendered in March, 1850; the bill was not filed until December, 1855, over five years after its rendition and the issuing of the first execution upon it; this Court has gone at length into the justice of that judgment, in other words, in face of the bar, plead by the defendants; has re-tried that case. As a bill filed for a new trial of the case or to reverse the judgment of a Court of law, it was too late, and the bar concludes the parties and the Court.

This rule is settled by a list of authorities, formidable in point of

numbers, and of the highest Courts known in our system of jurisprudence.

In *Cholmonly* v. *Clinton*, 2 *Jac.* & *Walker* 141, Sir Thomas Plumer said, in Courts of equity of this county, the principle always has been as I shall show, strongly enforced. They have refused relief to state demands, were in cases where no statuteable limitation existed, and whenever any statute has fixed the period of limitations by which the claim, if it had been made in a Court of law, would have been barred, the claim, has by analogy been confined to the same period in a Court of equity." Again he added, (page 151) after citing the cases: "These cases show first that Courts of equity have at all times upon general principles of their own even where there was no statutable bar, refused relief to stale demands where the party has slept upon his rights, and acquiesced for a great length of time—and secondly, that whenever a bar has been fixed by statute to the legal remedy in a court of law the remedy in a court of equity has in the analogous cases been confined to the same cases."

I quote this from the text and notes of 2 *Story eq., Juris.* § 1520 and note. In this case as a motion for a new trial, no Court would listen to it for a moment, and supposing that all the facts charged appeared of record, and judgment had passed against the party the statute has limited his right to a writ of error, to five years, R. S. p. 42 and he would have lost that remedy.

Now, when this Court, on page 277, go behind that judgment, and to exculpate Thomas from blame, inquire into and settle the fact that that judgment should have been opened and the deduction made that Thomas had a right to rely upon my promise to that effect, they disregard the rule of law as laid down in the case above alluded to.

And I desire to call the Court's attention to the mixture of a little of the proof in the cause with much of the bill that occurs on page 277. There is no proof whatever that the complainant ever wrote a letter to me. He says he did in pursuance of an agreement with the Sheriff. He neither proves the agreement nor the letter. The promise that I made to him was made before any execution was issued. Years after, it is true, I sent an execution to him for the balance. *Have I not proved a notice to him* that my promise was unavailing—that he must rely upon it no longer? Yet this Court says that "without communicating with him in any

way he becomes the purchaser of the judgment and enforced the collection of the whole of it by sale of valuable property." Does not the Sheriff say that before making this levy he called upon him repeatedly with the execution? The whole of the facts stated upon that page, with the single exception of my promise to see Stone to have the judgment corrected, upon which this Court has indulged in severe strictures on my conduct, are not supported by a single iota of proof; and the most material of all, that of my not communicating with the complainant *in terms disproved by it.* They are taken either from the statements of the bill or those of the counsel whose arguments I did not hear and could get no opportunity to reply to—owing to a misunderstanding on my part, very generally shared in by the bar, as to the time of the adjournment of this Court.

Again, this Court says, "We hold that there must be entire conformity in all these proceedings,—in the return, the certificate, and the deed,—and if they do not possess it they will be invalid." *Davis* v. *McVickers*, 11 *Ill.* 329. In this case there is not one word said about a return; but the case was where in a plea it was alleged "that James McVickers purchased the land at a Sheriff's sale and received a certificate of purchase; and that subsequently and while the purchaser was alive the Sheriff conveyed the land to the plaintiff as the sole heir of the purchaser." The Court say, "If these allegations are true no title passed by the conveyance. The grantee of a Sheriff does not make out title by the mere production of the Sheriff's deed. He must, in addition, show a judgment and execution that authorized the Sheriff to make the sale and conveyance. The deed passes no title unless it is based on a judgment and execution." As I said before, the case makes not the slightest allusion to any return being necessary. But as the case cited by the Court says nothing about the return, let us see what cases in courts of other States say on the subject: *Wheaton* v. *Sexton, Lessee*, 4 *Wheaton United States Supreme Court Reports, page* 503: Ejectment for a tract of land sold by the Marshal under an execution; a levy made before the return day, and sale afterwards; just as in the present case. At the trial of that case an exception was taken whether a sale by the Marshal after the return day of the writ was legal. The Court charged that it was, provided the levy was made before the return day, "and on this point the Court can only express its surprise that any

doubt could be entertained. The purchaser depends upon the judgment, the levy and the deed; all other questions are between the parties to the judgment and the Marshal. Whether the Marshal sells before or after the return—*whether he makes a correct return or any return at all to the writ*—is immaterial to the purchaser, provided the writ was duly issued and the levy made before the return."

1 *Johns. Cases, page* 153. "But the Sheriff's return in my opinion was not essential to the title of the purchaser. That title was not created by nor dependant on the return, but was derived from the previous sale made by the Sheriff by virtue of his writ. It was sufficient for the purchaser that the Sheriff had competent authority and sold and executed a deed to him." "The sale and the Sheriff's deed are sufficient evidence of the title, and if the purchaser can show that the Sheriff has authority to sell, it is enough, *and he need not look further.*"

2 *Pick. Mass. Reports*, 279, 280.

It is objected, that admitting the certificate of the Sheriff is equivalent under the circumstances to a return made by Bill (a deputy who executed it) himself, yet the mere non-return by him into the clerk's office on or before the return day of itself vacates the title of the purchaser. This however cannot be maintained, there being nothing in the statute which makes such a return essential to the validity of the proceedings, *and the common law deeming such a return wholly immaterial if the process be final, upon which no judgment or other process is to be had*, as a *fieri facias, capias ad satisfaciendum* or *facias habere seisinan. Com. Dig., F.* 1. In Fulwood's case, 4 Co., 67, it was resolved that the execution of a *liberate* was well enough, although the writ was not returned. So of *habere facias seisinan*, and generally of all writs of execution, which are mere final process; and further, when no inquest was to be taken, but only land to be delivered or seizin had or *goods sold*, which are but matters in fact, these are good *although the writ is not returned.*

The same doctrine is held in 8 *Yerger, Tenn.*, 179, *Mitchell* v. *Lipe.*

In *Whiting* v. *Bradley*, 2 *N. H.* 82, the Court says, "The only remaining inquiry is, whether persons who claim under a return, or who procured it to be made, can either contradict, amend or avoid it. The better opinion seems to be, that a purchaser of per-

sonal property sold under execution may prove the levy and sale to have been in fact legal, and will then be permitted to retain the property, whether the officer's return be true or false, formal or informal.."

In 1 *Harris & Gills rep.* 174, *Fenwick v. Floyd*, the Court says that "in ejectment by a purchaser under a sheriff's sale against the debtor who refuses to give up the possession of the land, it is incumbent on the plaintiff to produce the judgment the *fieri facias* and to prove the sale of the land which may be done either by a deed from the sheriff be a return to the *fieri facias*, and if these proceedings are correct they are sufficient to entitle him to recover." And this case is of more significance, when it will be seen that in that state they have a proceeding by statute on motion for *haben facias possessionem*, to put the party in possession upon the return of the officer, then in the language of the Court in 2 *Pick.* 279, above quoted, further process is had upon the writs and then the return must be correct—see *Clark* v. *Belmar*, 1 *Gill. & Johns* 447.

And now to recur to the common sense of this thing, the sheriff by his writ levies upon land, just as at common law he levies on goods, the purchaser for cash (should such an unheard of case happen) makes his bid, the property is cried off to him, he pays his money and receives his certificate of sale to him—then the sheriff behind his back without his knowledge, returns that some body else bid it off—the redemption runs out, and he takes his deed, brings his suit in ejectment for the property, and when he introduces his judgment and execution to show the authority to sell, the Defendant reads the return to show it was sold to another person—can any reason be assigned why so gross a wrong should be done to him; is there any rule of law violated in holding that the certificate of purchase is the best evidence in such cases; upon the faith of that, the purchaser pays his money or the creditor bids off the land: is he afterwards by the act of a third person, done after his rights had become perfect, to be deprived of his title.

The certificate is a paper not known to the common law, and made under the provisions of the statutes subjecting real estate to levy and sale by execution, as goods and chattels were. Now, admitting that at common law the return of the officer would have been evidence of the person to whom property was sold, when the statute prescribes something additional, and declares that shall be

evidence of the facts stated in it touching the sale, and *required a deed to be made to the person named in it as purchaser* or his assigns, saying not a word about the return to the execution which shall control the official certificate required by the statute, or the return of the officer as required by common law. If the certificate, "made evidence by the statute," is not to control, is it not making the statute subservient to the rule of the common law, instead of holding that it dispenses with its requirement whenever it conflicts with it, or acts done under it.

The Court lays down the proposition that a party shall not claim a benefit or the aid of a Court of equity who has been guilty of *laches* in protecting his rights, unless that *laches* may be imputable to the party claiming against him.

Now the point of the rule in this case is to impute to me that *laches*, and on 277, this Court comes to the conclusion that it may be, and for these reasons:

1st. That I agreed to see Stone about it and have it rectified.

2d. That on the first execution he paid $31, remonstrating against paying any more.

3d. That he heard nothing more of the case till Jan. 1854.

4th. That the sheriff consented to wait until he could write to me.

5th. That he heard no more of it until he heard the deed was made.

As to the first, I will not stand about words, let the agreement stand as the Court says it is. Is there any one of the other four points proved—not one. It is for Thomas to show here that his neglect is to be imputed to me, and whatever reasons he assigns he must prove. Is there any proof that he remonstrated against paying any more; if so, to whom, and when, and what was the reply; upon that the evidence is silent. If the sheriff was his agent to pay me that money in full, my receipt to apply was notice to him and through him to his principal, Thomas, that I would not receive it as such; but why remonstrate, why pay more than he claimed was due, if no call was made upon him for it.

As to the 3d., that he heard no more of the case until January, 1854. What evidence is there of that; the mere fact that no process was taken out, and none could be taken out until the sheriff returned the writ.

As to the 4th, that the sheriff consented to wait until he could write to me, no evidence that he did write and no evidence that I received it.

5th, That he heard no more of it until he heard of the deed. This is absolutely contradicted dy the sheriff—he say she called repeatedly on him for property—and is it upon a case so bald of proof, that this Court has deemed it proper to say that I have sought to wrong this man out of his property—and dismisses me with an admonition to watch the interests of minors who might some time in the future be litigating a case with me.

I recovered a judgment—placed an execution openly in the hands of the sheriff—no proof that I gave him directions to do aught contrary to his duty. He calls on a Defendant, able to pay, who refuses to do so, he without my direction levies on real estate to accommodate me, it is struck off in the name of a friend, the time of redemption runs out, and I take the deed to a brother, I am repeatedly told by the sheriff that his proceedings are regular, I do not live in the place and cannot superintend them, and must trust to the officer, and the only thing in the whole case proved, where the Complainant has sworn indiscriminately to every irregularity, is the want of recollection of the sheriff, whether he cried off the property, a matter of the merest form, and so expressly admitted by this Court, and upon that and that only, happening without and against my directions, as proved by the sheriff himself, am I to be rebuked by this Court as having exercised a power my position gave me, for a bad purpose. I respectfully insist to this Court as that it is censuring me without cause, and in the face of the record, that to insist upon my legal rights, as I have done in this case, may be morally wrong—but having the legal right, it was for me to say how they should be yielded—that the parties could not agree upon, and therefore this litigation.

The irritation and aggravation attending the prosecution of the original suit are not before the Court, those who know me and know Thomas, know full well that they were not few, or I should not have been compelled to defend this law suit, but that is not on the record.

One more suggestion upon presumptions. It may be said the law presumes that I knew the property, and the value of it, when I directed it to be sold. Granted. The law equally presumes

that Thomas, when that certificate was filed, knew of the sale. Give each of us the benefit of all legal presumptions, and where would his case be. Knowing of a sale, liable to pay the money (for so this Court holds by directing its payment), and neglecting to redeem, and utterly failing to prove that he has even offered to pay the money. That fact is necessary to his relief, for he that asks the aid of a court of equity should, at least, show that he has offered to do equity. Has that been done? No evidence in the record not admitted by the answers and charged in the bill. Here is a clear failure to prove his case, and this Court should have sent the case back for proof on this point before granting any relief.

As I was not present at the argument of this case, and do not know what oral statements touching the judgment of *Stone* v. *Thomas* may have been made by the counsel, I desire to state, as nearly as I now can recollect, the circumstances under which the judgment was recovered.

About a year before, Stone had placed in my hands the two notes sued on, without any payments indorsed on them, and some collaterals, which were then in the hands of B. Shaw, a justice of the peace, and the other witness sworn on the trial, at the time stating to me that Thomas had agreed to pay the commissions, etc., for collecting these collaterals. I stated this fact to Thomas, who admitted that that was the case, and agreed to pay them, the nett proceeds to be applied on the notes, as is quite obvious was nothing but right. I collected what I could, not enough to pay the notes. Called on Thomas for the balance, and he would not pay. He then denied that the commissions, etc., were to be deducted. There being on the face of the notes about one hundred dollars due, suit was commenced in the Circuit Court. While the suit was pending, Thomas tendered to Fuller what he claimed was the balance due, and it was received by Fuller as a tender, but I was not present, and from this, I suppose, Marsh got his idea that Fuller or I had agreed that the fifteen dollars was all there was in controversy. At the trial I introduced the notes, and Thomas, to prove his payments under his plea, put me and Shaw on the stand. The notes had never been indorsed, and are not now, with any payments. I stated what I knew about it—the moneys I had received, and the agreement about the commissions. The balance left was the amount of the judgment.

Thomas then claimed that was not right; that it was thirty dollars too much. I examined my books and could not make it any less. After the term was over, Marsh told me that Thomas said a payment had been made to Stone by Thomas before the notes came to my hand, and should have been indorsed. I replied that might be so, and Stone might have told me of it, and I forgotten it, and so I be mistaken in my testimony; that I would see Stone and get it corrected, if he said it was so; that I had advised him of the amount, and any way could not act without seeing him; that, in the meantime, I would not take out any execution. Accordingly, I did see Stone, and he said the judgment was right, and would consent to no deduction. I advised Thomas of it and took out execution.

The injustice that is done me in refusing me the benefit of the bar pleaded is this: Stone and I are the only witnesses by whom this thing can be proved, and both of us interested in the result, and, therefore, incompetent as witnesses. Marsh, who knows nothing about the details, merely says that I admitted that I was mistaken, but cannot explain how.

Stone could not be sworn, being liable over to me, and I could not, because holding the mortgage, I had a direct interest in the result.

It is true these might have been obviated by releases, but the examination was oral. Stone resided in Chicago, and, I believe, was then absent; and if the Complainant designed to test the judgment, he could have examined Stone, while I could not; and the notes which were produced on the trial of this cause, without indorsements, sustain the judgment.

The first I saw of the bill was a copy I obtained from the clerk, about the 7th of February, 1856. I drew my answer, and filed it before the motion to dissolve the injunction, which was made the 18th of February, 1856. My answer was drawn up in Chicago, according to my then recollection of the facts, and without recurring to the files of the Court for information. I had then forgotten much of the details of transactions that occurred six years and upwards before, which have since occurred to me from examination of the files of the Court and other papers.

I, therefore, ask this Court for a re-hearing. 1st. Because the Court, in holding that the return controlled the certificate, have

overruled the decisions of the Supreme Court of the United States, and of the States of Tennessee, New York, Maryland, New Hampshire and Massachusetts. 2d. Because the Court, in examining into the validity of the judgment of Stone against Thomas, have, in like manner, overruled well settled principles of a court of equity, in examining into the validity of a judgment when a writ of error would not lie to reverse it. 3d. Because the Court has overruled its own decision in 19 Ill. R. p. 485, in the character of the testimony which they hold, in this case, to be sufficient to overcome the legal presumptions arising from the sheriff's official certificate. 4th. Because the Court has charged me with misconduct in my profession, when there is no proof in the record on the subject.

Which is respectfully submitted, etc.

W. T. BURGESS.

NOTE. I append the testimony of the two witnesses, Marsh and Milliken:

Testimony of *King H. Milliken:*

I was sheriff of this county at date of execution; I have seen this execution; I remember the transaction referred to by the execution and its indorsements. The property described in the levy on the execution is on the east side of the river, south side of State street.

The Complainants propose to witness this question: What was the value of the property in September, 1855?

To which the Defendants object, but the Court allows the same to be put and answered.

And the witness says: I think the buildings were on that time; was then worth three thousand dollars, with the buildings on front width twenty-two feet; and in June, 1854, the property was worth fifty dollars per foot front.

The property was advertised under this execution; it was adjourned several times—don't know how often—for want of bidders. I wrote to W. T. Burgess, and received a line from him. I wrote, in the first place, the day to which I had adjourned it, and received a line from him—if he was not there, to strike it off in the name of John F. Farnsworth. On the day of sale, the property was sold as he directed. He wished me, in his line to me, to send him a certificate of sale to Farnsworth, and I did so.

My recollection is not distinct about it, nor whether there was any person present or not. But a gentleman by the name of Leavitt, an attorney, had an office in mine; if he was not there, I do not know of any one that was. No one was present to make any bids. It is my impression that it was not cried off. My impression is not very distinct. The place of sale was at the court house door; my office was in the east wing of the court house. Have not now any recollection of going any nearer than my office.

Cross-Examined. My recollection is not distinct as to my offering the land for sale. I cannot state, from my recollection, that it was not offered for sale. I recollect making out and sending a certificate of sale to W. T. Burgess, but have no recollection whether I went to the court house door and cried the premises for sale or not. I will not swear positively that I did not go to the door of the court house and cry the land for sale. My attention was first called to the sale at the time the sheriff's deed of the same was executed. My attention had not been called to it from the time of the sale up to the making of the sheriff's deed of the same.

I did call on Alden Thomas, the Defendant in the execution, for property on the execution, and asked him to turn out property on the execution; so asked him several times. He did not turn out any property on the execution. I examined the record to find property to levy on, and found a farm and this lot.

I knew my duty as sheriff required me to cry the property for sale at the place advertised therefor, and when I made out the certificate of sale to Farnsworth, I supposed I had complied with the law in that respect.

The Defendants here introduced and read the certificate of sale, which, with their indorsements, are as follows:

STATE OF ILLINOIS, } ss.
Winnebago County, }

I, King H. Milliken, sheriff of the county and State aforesaid, do hereby certify that, by virtue of an execution and fee bill to me directed, dated the 28th day of December, A. D. 1853, and delivered in favor of Horatio O. Stone, and against Alden Thomas, I did, in pursuance of the statute in such case made and provided, on the 10th day of June, 1854, between the hours of ten o'clock A. M. and five o'clock P. M., offer, at public sale, the following described property, to wit: (here follows description of land); and John F. Farnsworth having

bid the sum of $38\frac{33}{100}$ dollars, he being the highest and best bidder at sale, became the purchaser. Now, if the aforesaid property shall not be redeemed within fifteen months from this date, according to law, then the said John F. Farnsworth will be entitled to a deed therefor.

Witness my hand and seal, at Rockford, this 10th day of June, A. D. 1854. K. H. MILLIKEN. [SEAL.]

Sheriff of Winnebago County.

September 12, 1855. Deed executed on the within to John S. Burgess, September 12, 1855.

An assignment from Farnsworth to John S. Burgess.

Another certificate of the same tenor, and indorsed. Recorded June 17, 1854.

The witness further said: These certificates of sale were executed by me as sheriff of Winnebago county.

The Defendants here moved the Court to exclude the testimony of said Milliken given in the trial of this cause, tending in any wise to conflict with said certificates, or the facts therein stated.

The Court refused to exclude the same, and the Defendants excepted.

The Defendants then showed the witness a paper writing, purporting to be a copy of a letter written by the witness, and witness says:

I think the copy of the letter now shown me is a copy of a letter I wrote and sent to W. T. Burgess. I don't recollect comparing it with the original with Orren Miller.

For the purpose of introducing said copy, the Defendants here produced *Orren Miller*, who was sworn, and says:

I got the original, of which the one produced (the one above alluded to) is a copy, from W. T. Burgess. I had the original in the court room during one of the terms since this suit was pending. Milliken, myself and Burgess looked over original, and Burgess and I compared it with this, and this is a true copy of the original. The original was in the hand-writing of said Milliken. I wanted to use the original in another suit. I took the original away with me. I have searched for it during this term of the Court; I had it in my office, but I am unable to find it; it is lost.

The cross-examination of K. H. Milliken was then continued by Defendants.

I wrote a letter of the purport of this to W. T. Burgess at the time I sent him the certificate of sale to John F. Farnsworth.

Witness reads the copy through, and then says it contains, in substance, a statement of what I wrote William T. Burgess in regard to the sale of said land.

The said copy is here read to the Court by the Defendants, as follows:

ROCKFORD, June 10, 1854.

MR. BURGESS—SIR:—I this day struck off to John F. Farnsworth, Esq., a part of a city lot belonging to A. Thomas, on the execution in favor of H. O. Stone, for the amount of damages and costs, $38 33, as per order from you. The costs (clerk and sheriff) are $15 95. You can remit the same, and I will forward you the certificate of sale; also, a receipt to attach to the writ.

Yours respectfully,

K. H. MILLIKEN, *Sheriff of Winnebago Co., Ill.*

Reëxamined by complainant. Witness' attention called to the return on the execution, says:

That is the return I made at the time, according to the best of my recollection, the transaction being some time ago, and I have not given the matter much thought. All the sale was the indorsement on the execution and the certificates of sale, but am not positive. I think the indorsement of payment of fees was made a few days after; the other indorsement was made at the time of sale. I recollect W. T. Burgess calling my attention to the return, and saying he wanted me to alter it; that the sale was made to Farnsworth; but as the matter was in court, I deferred to do it.

Cross-examined by Defendants. W. T. Burgess said to me that the sale was made to Farnsworth, and I ought to alter it. I agreed with him that it was made to Farnsworth, but said I would not correct it. I then told W. T. Burgess that the sale was regular, so far as I knew. I think I have so told Mr. Burgess several times.

Reëxamined by Complainants. The sale was made to Farnsworth by the direction of W. T. Burgess, by his letter. I considered the sale made to Farnsworth; my reasons for it were the directions that I had from W. T. Burgess. I think no bidders were there at the sale.

Jason Marsh. I was acquainted with Alden Thomas, and had been since I can remember. I have known W. T. Burgess since 1841. I was the attorney for A. Thomas in the suit of H. O. Stone against him, in which the execution in this cause was issued. Previous to the trial of this cause, W. T. Burgess, or myself, or both, or which I am not positive, talked about the question that was to be tried.

The Defendants here object to any evidence been given either as to what occurred at the trial of said cause, or going behind, or dehors the record of the judgment therein; but the Court overruled the objections severally, and allowed the evidence to be proceeded with touching the said trial as hereinafter given.

The understanding between us in the case was, that the only thing in controversy was the amount of fees to Burgess, as attorney, which he claimed Thomas had to pay him. That was understood to be the question in controversy. At the trial, Mr. Burgess was the only witness sworn. Mr. B. Shaw was also sworn as to the state of the account, both by the Defendant, Thomas. At the trial a certain charge came up that Thomas claimed had been settled; but on the testimony of W. T. Burgess—I can't say how it came up—that item was made a part of the judgment. My recollection is not now very distinct as to what did occur on the trial.

Some time after judgment, execution being out, I talked with W. T. Burgess in relation to it. We talked considerable. W. T. Burgess admitted that he was mistaken in his testimony, and held out the idea that he or Mr. Stone, or that he would get Mr. Stone, to relinquish that portion of the judgment.

I should think the amount was from eighteen to thirty dollars. Don't recollect anything about the amount, but think it would range somewhere along there. I communicated the fact to Thomas that Burgess would communicate with Stone to procure him to reduce the amount of the judgment.

On Cross-Examination. The money that was paid and indorsed on the execution was paid after the conversations referred to by me with Burgess about the reduction of the payment. I think Burgess said that he would try to get Stone to make a deduction on the judgment. After the trial was over, Thomas explained to me how the mistake had occurred, and I explained it to W. T. Burgess, and he said he would consult Stone, and try to have Stone deduct the same from the judgment. I was a brother-in-law of A. Thomas, deceased.

Reëxamination. Burgess also admitted that Farnsworth had no interest in the matter, and that no consideration passed between them—was a mere matter of accommodation to Burgess. Thomas had possession of the premises until his death; since then his heirs have had possession.

In the Supreme court

Dickerman et al
Appellants
vs
Bruyn et al
Appellees

Appeal from
Winnebago

To the said Appellants—

You are hereby notified that a petition for a rehearing in this cause a copy whereof is hereto annexed was on the day of April last filed in & presented to said court— & is now pending before it—

May 3 1859—

Yours &
W. Y. Bruyn
for Appellees—

A notice of which the above is a copy & the Petition accompanying the same was this day served by me May 3: 1859.

Jason Marsh
Atty for Appellants

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Dickinson et al
vs
Bryson et al

Notice -

Filed May 5th 1859
L Leland
Clerk