

No. 12824

Supreme Court of Illinois

Puterbaugh.

vs.

Elliott, et al.

71641  7

131-26

Sabin D. Puterbaugh
vs.

Joseph Elliott

131

12824

1859

1 Pleas to a term of the Circuit Court
began and held at the Court house
in the City of Pekin within and for
the County of Tazewell and State
of Illinois on the first Monday of
February A D One thousand eight hundred
and fifty nine before the Honorable
James Harnett Judge of the Twenty
first Judicial Circuit of the State
of Illinois composed of the Counties
of Tazewell Mason

In the Chancery side thereof

Be it remembered that on the Seventh
day of February A D One thousand eight
hundred and fifty nine a bill in
Chancery was filed in the Office of the
Clerk of the Circuit Court of Said
County in the words and figures as follows
To wit: —

State of Illinois } Circuit Court
Jagwell County }

2 To the Honorable
James Keamatt Judge of the 21st
Judicial Circuit of the State of
Illinois

In Chancery
Sitting

Your Orator Sabin D Puterbaugh
of the County of Jagwell and State
of Illinois humbly complaining
Sheweth unto your Honor that Field
Benedict & Co at the April term 1857
of the Circuit Court of Jagwell County
Illinois obtained a judgment against
Joseph Elliott and Rufus Elliott
for the Sum of one thousand and fifty
one $\frac{56}{100}$ Dollars and Costs of suit
upon which judgment an execution
was issued directed to the Sheriff of
Said County to Execute which said
Execution was dated the 13th day of
June 1857 and which Execution
was levied by the Sheriff of said

County upon the following described
real Estate as the property of said
Joseph Elliott to wit:

Beginning Seven (7) Chains and
Sixty two (62) links north of the South
West corner of the North half of the
North East quarter of Section number
Two (2) Township number Twenty four
(24) North of Range Five (5) N. 3 P. M.
thence running North four (4) Chains
and forty Seven (47) links to a post
thence East four (4) Chains and forty
Seven links thence South Six (6)
Chains and forty Seven (47) links
to a post thence North Seventy (70) degrees
West four (4) Chains and Seventy Seven
(77) links to place of beginning in
Jagwell County Illinois. Complainant
avens that Said Rufus Elliott had no
interest in Said premises which said
premises were advertised by said
Sheriff to be sold on the first day of
August A D 1857. a copy of which
advertisement is hereto attached marked
Exhibit "A" and made part of this
bill of Complaint and your Orator
further Shews unto your honor that
at Said Sale on the said 1st day of

4 August A D 1857 the Said Field
Benedict & Co the plaintiff in said
Suit became the purchasers of said
premises under said Sale and that
Said Sheriff executed to the Said
Field Benedict & Co a certificate
of purchase of Said premises
a copy of which certificate of pur-
chase is herewith filed Marked
Exhibit "B" and prayed to be
taken as part of this bill.

Your Orator further represents unto
your Honor that the Said Sheriff
in Making said Certificate of pur-
chase made mistake in giving the
description of said premises leaving
out the North boundary of said
premises which was merely an Error
on the part of Said Sheriff.

Your Orator avers that the land sold
and advertized at the time afore-
said was the same premises as
above described as will more fully
appear to said advertisement
Marked Exhibit "A" and a part
of this bill of Complaint

Your Orator further avers that
one Chapman Williamson

5- Was the Sheriff of Said County at
the time of Said Sale.

Your Orator further Shews unto
your Honor that Said Sheriff com-
mitted an error in Endorsing the
levy on the Said Execution which
Said levy was upon the Same premises
first herein described, that in
making his Said Endorsement he
left out the north boundary as in
his Certificate of purchase which
was also merely a clerical error.

Your Orator further
represents unto your Honor that at the
April Term 1858. of the Circuit
Court of Said Tazewell County Illinois
One Rhoda McIntire administratrix
of the Estate of Joseph S. McIntire
deceased. obtained a judgment
against Joseph Elliott for the
Sum of Two hundred and twenty
49/100 Dollars and costs of Suit,
and that the Said Rhoda McIntire
as judgment Creditor of the Said
Joseph Elliott caused to be sued
out of the Said Circuit Court of
Said County an Execution on said
Judgment and placed in the

hands of Said Sheriff of Said County
which Said Execution was then levied
on the premises first herein described
on the Second day of August A.D. 1858
and the Said Rhoda McIntire then
paid into the hands of the Sheriff aforesaid
the Sum of Six hundred and
twenty two ^{30/100} Dollars in full of the
redemption and interest of the Said
Premises from the Sale made as
aforesaid in favor of Field Benedict
& Co and the Sheriff filed in the
Records office of Said County a certificate
of the redemption made by
the Said Rhoda McIntire as judgment
creditor as aforesaid a copy of
which certificate of redemption is
herewith filed marked Exhibit
"C" and prayed to be taken as part
and parcel of this bill.

Your Orator further represents
unto your Honor that on the tenth
day of September 1858 Said premises
were sold at public Sale after having
been duly advertised according to
law. And at such Sale your
Orator became the purchaser thereof.

hands of Said Sheriff of Said County
which Said Execution was then lived
on the premises first herein described
6 on the Second day of August A.D. 1858
and the Said Rhoda McIntire then
paid into the hands of the Sheriff aforesaid
Said the Sum of Six hundred and
twenty two ^{30/100} Dollars in full of the
redemption and interest of the Said
Premises from the Sale made as
aforesaid in favor of Field Benedict
& Co and the Sheriff filed in the
Records office of Said County a certificate
of the redemption made by
the Said Rhoda McIntire as judgment
creditor as aforesaid a copy of
which certificate of redemption is
herewith filed marked Exhibit
"C" and prayed to be taken as part
and parcel of this bill.

Your Orator further represents
unto your Honor that on the tenth
day of September 1858 Said premises
were sold at public Sale after having
been duly advertised according to
law. And at such Sale your
Orator became the purchaser thereof.

And that a certificate of purchase
was executed to your Orator by the
Said Sheriff Stating that your
Orator would be entitled to a deed
for said premises in sixty days
from the date of such Certificate
unless the same should be redeemed
in the mean time according to law
a copy of said certificate of purchase
is herewith filed marked Exhibit
"D" and prayed to be taken as part
of this bill of Complaint.

Your Orator further Shews unto
your Honor that the Said Elliott
having failed to redeem said
lands the Said Sheriff did on
the 17th day of December A.D. 1858
Execute acknowledge and deliver to
your Orator a deed for the premises
So Sold according to the Statute
in such case made and provided
a copy of which said deed is herewith
filed and marked Exhibit "E" and
prayed to be taken as part and parcel
of this bill of Complaint.

Your Orator further Shews
that he is now in actual possession
of said premises holding under and

by virtue of his Said Deed from the Sheriff aforesaid =

8 Your Orator further Shews represents unto your Honor that the Mistake made by the Sheriff aforesaid in the Certificate of purchase to the Said Field Benedict & Co. and the Mistake in the Endorsement of the Levy aforesaid does embarrass and Cloud the title in your Orator in Said premises so that he may find it difficult to sell or dispose of the Same

Your Orator further Shews and avers that the Said Joseph Elliott well knew that the Said premises were sold on the first day of August 1857 by virtue of the ^{of} Field Benedict & Co. Execution and knew when the redemption would Expire thereon and that there was an error in the Certificate of purchase from the Said Sheriff to Field Benedict & Co. and that the premises so sold to Field Benedict & Co. were the Same herein described To the End therefore your Orator prays that the Said Joseph Elliott and Chapman Williamson may be

9
Made parties defendants to this bill
and that they be compelled to answer
the same as fully and particularly
as though the same were here again
repeated and they specially interogated
in reference thereto. and upon
their oaths. and your Orator prays
that upon a hearing of this cause
the said mistake in the said
certificate of purchase from said
Sheriff to said Fuld Benedict & Co
may be corrected and that the
error in the endorsement of the
Levy on said Execution may also
be corrected and that your
Honor may grant unto your
Orator a writ of Subpoena directed
to the Sheriff of Tazewell County
and also a writ of Subpoena to
Sheriff of Mason County commanding
them to summon the said Chapman
Williamson and Joseph Elliott
to personally be and appear before
your honor at the next term of this
Court to be held at the Court house
in Pekin in said Tazewell County
then and there to answer the
premises and abide the order and

decree of this Court and may your
Honor grant unto your Orator such
other and further relief as may seem
to your Honor Meet and proper and
as in duty bound your Orator
ever prays &c

S Daterbaugh

Exhibit A

Sheriff Sale

By virtue of a writ of Special Execution to me directed from the Circuit Court of Tazewell County State of Illinois in favor of Field Benedict & Co and against Joseph Elliott and Rufus Elliott I have levied on the following real estate to wit:

Beginning Seven (7) chains and sixty two ⁽⁶²⁾ links north of the South west corner of the North half of the North East Quarter of Section two (2) Township Twenty four (24) Range five (5) West 3 P. M. thence running north four (4) chains and forty seven (47)

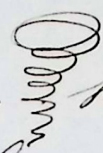
links to a post thence East four (4)
 chains and forty seven (47) links to
 a post thence south Six (6) chains
 and a fourteen (14) links to a post
 thence North Seventy (70) degrees
 West four (4) chains and Seventy Seven
 (77) links to the place of beginning

Also lots one two three four
 five Six and Seven in Block
 twenty nine in Campbells Darley &
 Newhall's addition to Pekin all in said
 Tazewell County which I shall expose
 to public Sale at the front door of
 the the Court House in the City of
 Pekin Tazewell County State of
 Illinois on the first day of August
 1857 between the hours of 9 o'clock
 A M and 4 O'clock P.M. of said day
 to the highest and best bidder for
 cash in hand.

C Williamson Sheriff J.C.
 Pekin July 11th 1857

Exhibit "B"

12

State of Illinois
County of Tazewell  J. C. Williamson
Sheriff of the County
& State aforesaid do hereby certify that
by virtue of an Execution to me directed from the Clerk of the Circuit Court of said County and dated the 13th day of June A D 1857 and in favor of Benjamin W Field Amzi Benedict and Peter H Field under name and style of Field Benedict & Co and against Joseph Elliott and Rufus Elliott I did in pursuance of the Statute in such cases made and provided, on the first day of August A D 1857 between the hours of 9 o'clock a m and 4 o'clock p m offer at public sale the following described real estate as the property of Joseph Elliott to wit:

Beginning Seven (7) chains and fifty two (52) links north of the south west corner of the north half of the

North East quarter of Section Number
 two (2) Township Number Twenty four
 (24) North of Range five (5) West 3 P.M.
 thence running north four⁽⁴⁾ Chains
 and forty Seven (47) links to a post
 thence south Six (6) Chains and forty
 Seven (47) links to a post thence
 North Seventy (70) degrees West four
 (4) Chains and Seventy Seven (77) links
 to the place of beginning and that
 Field Benedict & Co. having bid the
 Sum of five hundred and fifty five
 $\frac{65}{100}$ Dollars and they being the high-
 est and best bidders at said
 Sale the same was struck off to them
 at that price & did at the same
 time and place Separately Expose
 at public Sale the following described
 real Estate to wit:

Lots one (1) Two (2) three (3)
 four (4) five (5) Six (6) & Seven (7)
 in Block twenty nine (29) in Campbell
 Durley & Newhalls addition to Pekin
 and that Field Benedict & Co. having
 Severally bid the Sum of twenty dollars
 for each of the above named lots
 and they being the highest bidders
 at said Sale the same was struck

off to them at those prices respectively
Now if the aforesaid property shall
not be redeemed within fifteen months
from this date according to law
14 the Said Fild Benedict & Co will
be entitled to a deed for the same
Witness my hand and Seal
this 1st day of August 1857
C Williamson Secy
Sheriff S. Co Ill.

Exhibit "C"
State of Illinois
Tazewell County
Rhoda McIntire
administratrix of the Estate of Joseph
McIntire deceased
vs
Joseph Elliott
C. J. Williamson
Sheriff of Said County do hereby
certify that Rhoda McIntire adminis-
tratrix of the Estate of Joseph McIntire
deceased as Judgment Creditor of
Joseph Elliott did on this 2^d day

of August AD 1858 under and by
 virtue of a certain Execution bearing
 date August 2nd 1858 Sued out
 of the Circuit Court of Said County
 on a certain Judgment recovered
 in her favor against the said
 Joseph Elliott at the April term
 AD 1858 of said Court has paid
 into my hands the Sum of Six hundred
 and twenty two $30/100$ dollars, the same
 being the full amount necessary to
 redeem the following described Real
 Estate to wit: Beginning Seven (7)
 Chains and Sixty two (62) links North
 of the South West Corner of the North half
 of the North East quarter of Section
 Number two (2) Township Number
 Twenty four (24) North of Range five
 (37 West of 3^d P M thence running
 North four (4) Chains and forty seven
 (47) links to a post thence East four
 (4) Chains and forty seven ⁽⁴⁷⁾ links thence
 South Six (6) Chains and forty seven
 (47) links to a post thence North Seventy
 (70) degrees West four (4) Chains and
 Seventy Seven (77) links to place of
 Beginning Situated in Said County
 and State

16 the said amount being in full for the redemption of said land from a certain sale made on the first day of August AD 1857 by C Williamson Sheriff of said County under and by virtue of a certain Execution to him directed from the Clerks office of the Circuit Court of said County dated June 13th 1857 in favor of Benjamin W Field Amzi Benedict and Peter W Field partners under name and style of Field Benedict & Co and against Joseph Elliott and Rufus Elliott and which said sum of money has been so paid into my hands for the purposes of redeeming said premises and for the use of the purchasers at said sale their Executors administrators or assigns under the provisions of the 57th Chapter of the Revised Statutes of Illinois of 1845 entitled Judgment and Executions

Witness my hand and seal
this 2^d day of August AD 1858

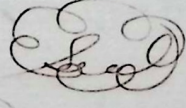
C Williamson 
Sheriff of Saywell County
Illinois

Exhibit "D"

17

State of Illinois }
Jagwell County } S. C. Williamson
Sheriff of the County
and State aforesaid do hereby certify
that by virtue of a writ of one execution
to me directed from the clerk of the
Circuit Court of Said County
and dated the second day of
August A.D. 1858 and in favor of
Rhoda McIntire administratrix of the
Estate of Joseph S. McIntire deceased
and against Joseph Elliott I did in
pursuance of the Statute in such case
made and provided on the 10th day of
September A.D. 1858 between the hours
of 9 o'clock a.m. and 4 o'clock p.m.
offer at public sale the following
described real Estate to wit:

Beginning Seven (7) Chains and
Sixty two (62) links north of the South
West corner of the north half of the North
East quarter of Section number Two (2)
Township Number Twenty four (24) North
of Range five 5 West of 3^d P.M.

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thence running North four (4) Chains
 and forty Seven (47) links to a post
 thence East four (4) Chains and forty
 Seven (47) links thence South Six (6)
 Chains and forty seven ⁽⁴⁷⁾ links to a post
 thence North (70°) Seventy degrees West four
 (4) Chains and Seventy seven links to
 place of Beginning And Sabin D
 Paterbaugh having bid the sum of
 Eight hundred and fifty five ¹⁵/₁₀₀
 Dollars (\$855 ¹⁵/₁₀₀) for said tract (the same
 having been redeemed by said Rhoda
 McIntire as judgment Creditor of
 Joseph Elliott under the provisions
 of the revised Statutes of Illinois
 of 1845 entitled Judgment & Executions
 and she having paid into my hands
 Six hundred twenty two ³⁹/₁₀₀ Dollars
 for the use of Field Benedict & Co the
 the purchasers at the Sale made
 August 1st 1857 (Case Field Benedict & Co
 vs Joseph Elliott et al) and he
 being the highest bidder at said
 Sale the same was struck off to him
 at that price. Now if the aforesaid
 property shall not be redeemed
 within sixty days from this date

19
According to law the Said John D
Pulterbaugh or his assigns will be
entitled to a deed for the Same

Witness my hand and Seal this
10th day of September A D 1858

E Williamson
Sheriff Tazewell County Illinois

Exhibit "E"

Whereas Rhoda McIntire
administratrix of the Estate of Joseph
S McIntire did at the term of the
Circuit Court for the County of Tazewell
and State of Illinois the April term
A D 1858 recover a judgment against
Joseph Elliott for the Sum of two
hundred and twenty ⁴⁰/₁₀₀ dollars
and costs of Suit upon which
Judgment an Execution was issued
dated on the 2^d day of August A D
1858 directed to the undersigned then
Sheriff of said County to execute
and by virtue of Said Execution the
undersigned as Sheriff aforesaid

Lived upon the lands hereinafter described and the same were struck off and sold to S D Patenbaugh he being the highest and best bidder therefore and the time and place of the Sale thereof having been duly advertised according to law.

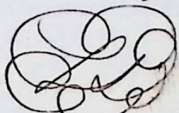
Now therefore know all by this deed that I Chapman Williamson late Sheriff of Said County of Logansport in consideration of the premises have Granted bargained and Sold and do hereby convey to the said S D Patenbaugh his heirs and assigns the following described tract or parcel of tracts of Land to wit:

Beginning Seven (7) Chains and Sixty Two (62) links North of the South West Corner of the North half of the North East quarter of Section No Two (2) Township No Twenty four (24) North Range five (5) West of the 3d P.M. thence running North four (4) chains and forty Seven links to a post thence East four (4) chains and forty Seven (47) links Thence South Six (6) Chains and forty Seven links to a post thence North Seventy (70)

Degrees West four & Chaise and
Seventy Seven (77) links to the place
of Beginning.

L/ To have and to hold the said
described premises with all the
appurtenances thereto belonging
to the said S D Paleybaugh his
heirs and assigns forever

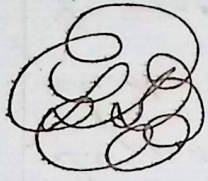
Witness my hand and seal
this 14th day of December in the
year of our Lord one thousand
Eight hundred and fifty
Eight

L Williamson 
Late Sheriff Lapeere Co Ills

State of Illinois }
Lapeere County } Be it remembered
That on this 14th day of
December A D 1858 before me Merrill
C Young Clerk of the Circuit Court
of said County came the within
late Sheriff of said County whose
signature appears to the foregoing deed
and who is personally known
to me to be the person who subscribed
and executed the same and
acknowledged the same to be

his free act and Deed in his
said Capacity of Sheriff

22



In Testimony of which I
the Clerk said Merrill
& Young Clerk of said
have hereunto set my hand
and affixed the Seal of the
said Court at Perth the
day and year aforesaid

Merrill & Young Clerk

his free act and Deed in his
Said Capacity of Sheriff

22

22

In Testimony of which I
the Clerk Said Merrill
& Young Clerk of said
have hereunto set my hand
and affixed the Seal of the
Said Court at Rockinthe
day and year aforesaid

Merrill & Young Clerk

State of Illinois } C
Jugwell County }

And Now comes the Appellant and
says that in the Record and Decree
of the Circuit Court there is Error in
this. to wit

1. St The Court Erred in not deciding
the Demurr to Complainants bill
2. In dismissing the said bill upon
the hearing on the demurr -

He therefore prays that the decree may
be reversed

W B Pope
for Appellant

And now comes the appellee and say
that there is no error in the record
and proceedings aforesaid there is no
Error. And therefore prays that the same
thun rendered may affirmed

B S Putnam &
James Roberts for appellee

13 - ~~126~~
Sabin D. Putbaugh

15

Joseph Elliott

Chapman Williamson

Transcript of
Records

Filed March 9. 1858
L. Leland
Clerk.

And Now on the Twenty fifth day of
February and Seventeenth day of the Term
came the defendants by their solicitors
Roberts & Kettigmen & filed their demurrer
in the words and figures following to-wit:

23

State of Illinois } In the Sagwell County
Sagwell County } Circuit Court
February Term AD 1859

S D. Puterbaugh }
vs }
Chapman Williamson }
& Joseph Elliott } Chancery

The Several demurrers
of Joseph Elliott one of the defendants
to the Bill of complaint of Sabin D
Puterbaugh

This defendant by
protestation not confessing any of the
matters in and by said Bill
complained of to be true in manner
and form as the same are set
forth severally say that he is
advised that there is no matter
or thing in said Bill good and
sufficient in law to call this defendant
to answer unto this Honorable Court

24 But there is good cause of demurr
~~say that said bill~~ therunto and he
does demur accordingly and
for causes of demurrers say that
said Bill in case the same were
true contains no matter of Equity whereon

this Court can ground any decree
or give complainant any relief as
against these defendants wherefore
and for divers other errors in said
Bill contained and appearing on
the face thereof these defendants
does demur thereto and humbly
crave the judgment of this Honorable
Court whether he is compellable or ought
to make any answer therunto other-
wise than as aforesaid and this
Defendant humbly prays to be hence
dismissed with his costs and
Charges in this behalf most
wrongfully sustained

Roberts & Pettyman

Know all men by these presents that we
Sabin D Puterbaugh and Thomas
St Gill are held and firmly bound
unto Joseph Elliott and Chapman
Williamson in the penal sum of two
hundred and fifty dollars law-
ful money of the United States for
the payment of which well and truly
to be made we bind ourselves our
heirs and administrators jointly
severally and firmly by these presents.

Witness our hands and seals this
25th day of February A D 1859

The condition of the above obligation is
such that whereas the said Joseph
Elliott and Chapman Williamson
did on the 24th day of February 1859
in the Circuit Court of Luzerne County
Illinois recover a judgment against
the above bounden Sabin D Puterbaugh
for costs,

from which judgment the said Sabin D
Puterbaugh has taken an appeal to the
Supreme Court of the State of Illinois.
Now if the said Sabin D Puterbaugh
shall prosecute his appeal with effect
and shall pay whatever judgment
may be rendered by the court upon

Dismissal or trial of said appeal
then the above obligation to be void
otherwise to remain in full force
and effect

J D Puterbaugh
Thomas & Gill



In Circuit Court February Term
1859

¹⁴February 25th 1859

Sabin D Palenbaugh }

vs,

Joseph Elliott and
Chapman Williamson }

25-

This cause coming on on
to be heard upon demurr to the
bill and then to wit: having
now fully advised said court
and decree that said bill be
dismissed and that the com-
plainant pay the cost of this
suit

James Harrell.

25 February 1859

Now afterwards to
wit, on the day and year aforesaid, at
the Term of the Court aforesaid, came
the Plaintiff and prayed an appeal
from the decision of said Court to
the Supreme Court of the State of Illinois
and said prayer is granted by the
Court, conditioned, that the said complain-
ant file a bond with Thos H Gile for
security in the sum of Two hundred
and fifty dollars, whereupon came the
Complainant and filed his bond in the amount
and figures as following to wit:

State of Illinois
Logan County

I, Merrill & Young Clerk of the
Circuit Court, within and for said County,
do hereby certify the foregoing to be
true and authenticated copy of the
papers and proceedings of the case
therein named, as fully as the same
remain of file and record in my
office.

Witness Merrill & Young
Clerk of the said Circuit
Court and the seal thereof
hereto affixed at Pekin
this 4th day of March
A.D. 1859

Merrill & Young
Clerk

State of Illinois } April Term 1859
Supreme Court } 2nd Grand Division

Cabine & Puterbaugh }

vs. } Appell
Joseph Elliott } from
Chapman Williamson } Lagunell
Argument for appellee

The Complainant has most evidently
misconceived his remedy in this case
When this bill is viewed in its true
light it is nothing more than
an application to a Court of Equity
to correct the ministerial mistakes
of the officers of a Court of law, a
Court of law is perfectly competent
and is the proper forum to apply
to have the levy and sale set
aside, as a review to the decisions
of our own Court will show.
Warner vs. Holm 1 Gilb. Rep. 234
Evans vs. Landon 1 Gilb. Rep. 308.
The cases show that when property
has been sold that does not belong to
the debtor, or when property has been
wrongly sold on the execution that
the proper course is to apply to the
Court from which the execution is

med to have it set, ^{aside} and when property
has been sold that does not belong
to the debtor, a bill in equity will lie
to compell him to refund the money.
1 Gilin 234.

The mistakes that a court of equity
will correct are not the ministerial
mistakes of officers, but the mistakes
of contracting parties in contracts or
agreements. The principle upon which
a court of equity proceeds, was correctly
and clearly stated by C. J. Catron in
the case of Ward vs. Brewer 19 U.S. Rep
291. in that case he said, "Here is
no mistake in any deed, or contract
or writing between any contracting
parties, which a court of equity can
reform or correct." Just so is the case
here. the court is not asked to rectify
by a contract, but is asked to substitute
a different tract of land from what
the purchaser (Puterbaugh) knew when
he examined the Certificate of purchase,
was contained in the Certificate of
purchase, and in the levy returned
by the sheriff. But the authorities
are full and abundant on the point

that such a mistake as this cannot be corrected.

In the case of *Fitch v. Pinkard* 4 Seam. Rep. 84, it was held that the levy must be certain and that when the levy is uncertain a sale made in pursuance of it is void. This is in fact decisive of this case, the levy and certificate of purchase are so uncertain in description as ^{to} render them wholly void.

where the proceedings under an execution are wholly void a Court of equity will not interfere, *Hamilton v. Shrusbury* 4 Randolph Rep. 427. The sale in ^{this} case being void as decided by the Court in 4 Seam. Rep. 84, a Court of equity has no power to make a void act valid, no case has ever yet gone so far as ~~that~~ to make that valid which the law makes void.

In the case of *Waters v. Dwell* 11 Gill & Johnson Rep. 37, it was held that the principle is well established, that to enable the Sheriff to sell land, and vest

a valid title in the purchaser, a seizure is indispensable and that when the land is not specifically levied ^{upon} the sale is void. This was a case in chancery.

In the case of Cooper vs. Butterfield & Porter Indiana Rep. 423, the Court held, that equity would not correct a clerical mistake of a clerk in entering up a judgment, and held that it was not proper to grant an injunction to restrain the enforcement of the judgment. The same point was decided in the case of the State Bank vs. Young & Carter Indiana Rep. 171, and had been previously decided by Chan. Kent in the case of Shottinbark vs. Wheeler & Johnson Chan. Rep. 275. The case of the Bank of Tennessee & Humphrey Rep. 363, is to the same effect.

The case made by this bill is not at all different from ^{those} ~~this~~ cases. It is to correct a mere ministerial act of the Sheriff.

If such a precedent as this is established it will lead to fearful consequences.

and the perpetration of the most
outrageous frauds. As a matter
of practice and every days experience
no person but the creditor pretends
to attend a sale of land subject to
~~execution~~ redemption, and when
the certificate of purchase is filed
the debtor is governed by it in regard
to redeeming his land. Now in
this case both the return and cer-
tificate of purchase show a different
tract of land from the one set forth
in the bill, and the time for redempti-
on has expired, who then shall
suffer in this case. The debtor
had no guide to go by but the
return of the officer and the certifica-
te of purchase, then was nothing
that he could redeem, when the
purchaser himself knows by the
certificate of purchase and says that
the Sheriff has given Mrs. Elletts
a certificate of redemption of a dif-
ferent tract of land than was set
forth in the certificate of Field Bur-
dicts & Co. In order to know that he
would be entitled to a deed in 60
days he would have to know that

that there had been a former sale
and that a certificate of purchase had
been given he then purchased with
his eyes open, and he must be content
to wait until the fifteen months
has expired from the late Integers
Sale before he will be entitled to
reclaim his deed, if not redeemed.

If it is the law that the Sheriff may
endorse a levy upon his execution
and execute a certificate of purchase
partly in accordance with the levy
and then wait until the time of
redemption has expired, and have
a court of equity endorse a different
levy and make a new certificate
of purchase, in order that his deed
may have a foundation upon
which to rest, a creditor or purchaser
may at any time ^{yet} this debtors most
valuable land for a nominal
price, all that he has to do is to
have the Sheriff endorse some piece
of land on the execution that the
debtor has no interest in, make
the certificate of purchase conform
thereto, wait until the time of

redemption has past, and then come into a court of equity and have another piece of land endorsed upon his execution another certificate of purchase made and the fraud is complete. In the case in 19 Illinois 291, the court refused to substitute another piece of land sold from the one mentioned in the petition and decree of the administrators sale and in the case of Forquer vs. Forquer 19 Ill. Rep. 68. it was held by this court that a court of equity could not count a mistake in a partition. And in the case of Dickman vs. Burgess 20 Illinois Rep. 280, Justice Bruce says "We hold that there must be entire conformity in all these ~~pro~~ proceedings, in the return, the certificate and the deed, and if they do not possess it they will be invalid.

In the case of Chas. B. Moore vs. Overstreet 8 B. Moore Rep. 304, it was held that the officer should ~~not~~ either go upon the premises or apprise the defendant of the land he

it
is going to levy upon, and that the
levy must be specifically indorsed
and that it is not to be left in
the breast of the officer what
the levy shall be.

In Massachusetts, Maine and
Connecticut it has been held that
the return of the sheriff must show
a sufficient return and that the
validity of the title depends upon
the sufficiency of the return.

Porter v. Bean 3 C. H. Rep 366

Sibby v. Copp 3 C. H. Rep. 46

Whitler v. Barney 10 C. H. Rep 294

2 C. Maine Rep. 277; 2d 411.

4 Massachusetts Rep 402

17 D. 243.

Summers v. Lyon 7 Conn. Rep 281

In those states the return is regu-
ired to be recorded just as an
certificate of purchase is, and by
that the purchase must stand
or fall. This rule is supported by
reason and justice, and should
be adopted.

James Roberts

The following cases also show that
the levy must be certain or it will be
void. *Lafferty v. Conn.* 3 Ormea. (Term)
rep. 221.

Sabin & Putnam

^{vs}
Joseph Elliott
v. Williamson

Argument for
appellee

Filed April 22, 1859

A. Leland
Clerk

STATE OF ILLINOIS,
SUPREME COURT,

To the Clerk of the Circuit

ss. The People of the State of Illinois,

Court for the County of Tazewell Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Tazewell County, before the Judge thereof, between Sabin D. Peterbaugh

plaintiff, and Joseph Elliott & Chapman Williamson

defendants, it is said manifest error hath intervened, to the injury of the aforesaid plaintiff

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

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this ninth day of March in the Year of Our Lord one thousand eight hundred and fifty-nine.

H. Leland

Clerk of the Supreme Court.
By J. B. Rice Deputy

Sabin D. Puterbaugh
131 or
Joseph Elliott and
Chapman Williamson
Went of Enos

Filed March 7, 1859
S. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

S. D. PUTERBAUGH *vs*, JOSEPH ELLIOTT and CHAPMAN
WILLIAMSON.

BRIEF, POINTS, &c., OF PLAINTIFF.

1. UPON an examination of the Record, it will be found that the Court below made no decision upon the demurrer. It was neither overruled nor sustained; but, upon argument thereon, the Court dismissed the complainant's bill.

This alone is good cause for reversing the decree.

It is improper and irregular to dismiss a bill upon the hearing of a demurrer. If the demurrer is good and the bill defective, the complainant ought to have an opportunity to amend. He was deprived of this right by the decision of the Court below.

2. There is equity in the bill, and the complainant below was entitled to the relief prayed for.

Field, Benedict & Co. had recovered a judgment against Joseph and Rufus Elliott. Upon this judgment certain lands had been sold to the plaintiffs in the suit. The land was properly and legally advertised for sale. But in his levy and certificate of purchase, the Sheriff made a clerical error, by omitting, in the description, the north boundary of the land.

The levy constituted a part of the Sheriff's return. He could have amended it at any time, either before or after the return of his writ. It was a matter which by no possibility could operate to the prejudice of the judgment debtor. The advertisement for the sale being correct, no person was deterred from bidding at the sale, and none of course knew but that the levy was correct in matter of description.

The Sheriff ought to have amended his return before he returned the writ.

A Court, on motion, would grant or even compel such amendment, when the interests of third persons were concerned.

A Court of Chancery will always decree the performance of a duty when an officer refuses its execution, and most especially when it does not appear that the rights of third persons have intervened.

3. The same rules apply in regard to the certificate of purchase. As soon as the officer discovered that he had not inserted therein a correct description of the land advertised and sold, it became his duty at once to make a new certificate corresponding with the facts and with the advertisement and sale.

As between the parties, it is not at all material whether there was or was not any levy made and entered upon the execution.

It is not for the purchaser at a sheriff's sale to enquire whether a levy has been regularly entered upon an execution. If the officer has the execution authorizing him to sell land, and under it makes a sale, the purchaser will be protected.

4. The plaintiff being a purchaser under a subsequent judgment—redeeming from the first sale—having obtained his deed under the Statute, and taken possession of the land under his deed, has a clear right to have the cloud removed from his title, and to the relief prayed for by this bill.

5. The authorities cited by the defendants have no application to this case.

W. H. Pople

*A Court will compel a Sheriff
to amend his certificate of Sale*

Smith & Hudson

1 Crown 430

181-26

Peterborough or Elliott

Pliff's Rules

SUPREME COURT.

ANNA B. FOOTE,
Appellant,
vs
WILLIAM E. FOOTE,
Appellee. } IN CHANCERY.

BRIEF.

L. Smith

The Bill in this cause was filed by the Appellant to obtain a Divorce.

The Court made a decree dissolving the marriage, gave the appellant the custody of their two children, and decreed that the defendant should pay her as alimony \$500 per year, to be paid quarterly. To so much of the decree as relates to the alimony, the complainant excepted, as being inadequate in amount.

The only question here is, as to how much was necessary to support her, and her children, and as to the ability of the husband to pay what shall be fit and reasonable.

1 *Scam* 242—246.

It is difficult if not impossible to adopt any general rule as to the amount of alimony to be allowed, but it is submitted that the husband, in a case like this, should be decreed to pay a sufficient amount to support the complainant and her children, if he has the ability to do so. If she had remained his wife, the law would have compelled him to support her, the law also would compel him to support his children. If he so conducts himself as to compel the wife to seek for a divorce, and the court grants such an application, ought his misconduct to release him from an obligation that would otherwise exist? In other words, is an allowance which is insufficient to support her and her children, just, when he has the ability to pay sufficient for a decent support? Such a decree would permit the offending husband to profit by his own misconduct.

In this case \$500 is allowed for the support of the wife and her two children, the entire family of the defendant, except himself. All the witnesses upon the subject testify that \$1200 to \$1400 per year would be necessary for their support.

*See Testimony of Thos. Lonergan.
John S. Auley,
Robert Hill.*

The appellant is a practical printer.

His printing establishment, from his own account, as given to the insurance agent, was worth at least \$14,000.

*See Testimony of William Thomas.
E. H. Rood.*

His bills receivable due the office were,.....	\$12,000 00
He owed Bills payable.....	\$4,790 96
Two School Notes	860 00
Debts about town.....	600 00
Notes to Merriman.....	800 00
Note to Holmes.....	500 00
	<u>\$7,050 96</u>
	\$4,949 04

He also owed \$1500 to Gridley, and \$500 to Holmes. Both these debts, however, were for real estate, and leave a balance in his favor.

The Holmes lot is estimated at.....	\$1,000
Deduct Holmes' claims.....	500
	<u>\$ 500</u>

Leaves Balance,.....\$ 500
*See Testimony of R. O. Warriner,
W. H. Holmes.*

His Residence Property was estimated at.....	\$2,000
Incumbrance to Gridley.....	1,500

Balance,.....	\$ 500	\$500
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Balance due Defendant.....	\$1000
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See Testimony of D. T. Worrel and Gridley.

RECAPITULATION.

Printing Establishment, say.....	\$14,000 00
Debts due him.....	\$12,000 00
Debts owing in all.....	<u>7,050 06</u>

Balance due him.....	\$ 4,949 04	4,949 04
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Value of Real Estate over and above all incumbrances.....	<u>1,000 00</u>
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Amount of Defendant's Property.....	\$19,949 04
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It will be remembered that a large amount of the indebtedness is the Bills payable, that is, *the current expenses of the business*, and which have doubtless been paid.

Again. The fairest test of a man's ability to pay, is his income. Upon that subject there is no conflict of evidence. The only evidence is the testimony of George W. Shepherd, who says the *net* proceeds of the office is about \$2,500 per annum. That is the profits of the establishment, after paying all the expenses, including those bills payable, above spoken of, (for those bills payable are part of the expenses). Now, then, if the annual net income of the defendant is \$2,500, he certainly should pay towards the support of the complainant and their children more than *one-fifth of his income*, and especially when that one-fifth is not sufficient by one half to pay for their support.

It is therefore submitted "that the allowance of alimony is inadequate, and not so much as should be allowed by the evidence."

BRIER & BIRCH,
Solicitors for Appellant.
E. VAN BUREN,
Of Counsel.

Sup. Court - 27-132

Anna B. Fols
appellant

vs
William B. Fols
appellee

Prin & Fols

Prin & Birch
Atty. for Appell.

E. Van Buren
counsel

Exp. inc. case
rec. & allu?

with instructions to
allow \$600 for
living + \$400 per child in

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

S. D. PUTERBAUGH *vs*, JOSEPH ELLIOTT and CHAPMAN
WILLIAMSON.

BRIEF, POINTS, &c., OF PLAINTIFF.

1. UPON an examination of the Record, it will be found that the Court below made no decision upon the demurrer. It was neither overruled nor sustained; but, upon argument thereon, the Court dismissed the complainant's bill.

This alone is good cause for reversing the decree.

It is improper and irregular to dismiss a bill upon the hearing of a demurrer. If the demurrer is good and the bill defective, the complainant ought to have an opportunity to amend. He was deprived of this right by the decision of the Court below.

2. There is equity in the bill, and the complainant below was entitled to the relief prayed for.

Field, Benedict & Co. had recovered a judgment against Joseph and Rufus Elliott. Upon this judgment certain lands had been sold to the plaintiffs in the suit. The land was properly and legally advertised for sale. But in his levy and certificate of purchase, the Sheriff made a clerical error, by omitting, in the description, the north boundary of the land.

The levy constituted a part of the Sheriff's return. He could have amended it at any time, either before or after the return of his writ. It was a matter which by no possibility could operate to the prejudice of the judgment debtor. The advertisement for the sale being correct, no person was deterred from bidding at the sale, and none of course knew but that the levy was correct in matter of description.

The Sheriff ought to have amended his return before he returned the writ.

A Court, on motion, would grant or even compel such amendment, when the interests of third persons were concerned.

A Court of Chancery will always decree the performance of a duty when an officer refuses its execution, and most especially when it does not appear that the rights of third persons have intervened.

3. The same rules apply in regard to the certificate of purchase. As soon as the officer discovered that he had not inserted therein a correct description of the land advertised and sold, it became his duty at once to make a new certificate corresponding with the facts and with the advertisement and sale.

As between the parties, it is not at all material whether there was or was not any levy made and entered upon the execution.

It is not for the purchaser at a sheriff's sale to enquire whether a levy has been regularly entered upon an execution. If the officer has the execution authorizing him to sell land, and under it makes a sale, the purchaser will be protected.

4. The plaintiff being a purchaser under a subsequent judgment—redeeming from the first sale—having obtained his deed under the Statute, and taken possession of the land under his deed, has a clear right to have the cloud removed from his title, and to the relief prayed for by this bill.

5. The authorities cited by the defendants have no application to this case.

J. M. P. Co.
Smith vs Hudson & Co. 430

181-28

Peterborough vs Elliott
Puff's. Ring

Filed April 27 1859
L. Leland
Clerk

STATE OF ILLINOIS,
SUPREME COURT.

} THIRD GRAND DIVISION,
} APRIL TERM, A. D. 1859.

SABIN D. PUTERBAUGH,
vs.
JOSEPH ELLIOTT,
CHAPMAN WILLIAMSON,

} ABSTRACT OF RECORD.

ERROR TO TAZEWELL.

- Page 2. This was a bill in chancery to correct an indorsement of levy, and certificate of purchase given by a Sheriff.
- Page 3. The bill alleges that Field, Benedict & Co. recovered a judgment against Joseph Elliott and Rufus Elliott at the April Term, 1857, of Tazewell Circuit Court; and that, by virtue of an execution issued on said judgment, the Sheriff of said County *duly advertised, and sold*, the following premises, on the 1st day of August, A. D. 1857, as the property of said Joseph Elliott, to wit:
- Page 3. "Beginning seven (7) chains and sixty-two (62) links north of the southwest corner of the north half of the northeast quarter of section number two (2), township No. twenty-four (24) north, of range five (5), west of 3d p. m.; thence, running north four (4) chains and forty-seven (47) links, to a post; thence east four (4) chains and forty-seven (47) links; thence south, six (6) chains and forty seven (47) links to a post; thence north, seventy (70⁰) degrees, west four (4) chains and seventy-seven (77) links, to place of beginning, in Tazewell County, Illinois."
- Page 4. And that Field, Benedict & Co. became the purchasers of the same; and that the Sheriff executed to them a certificate of purchase; but that the Sheriff, in describing the premises sold, made a clerical error in said certificate, by leaving out the north boundary of the same.
- Page 4. The bill further alleges that the premises were correctly advertised and sold; that Chapman Williamson, one of the defendants, was Sheriff of said County at the date of said sale; and that the Sheriff committed a clerical error in making the indorsement of the levy on said execution, leaving out the north boundary as in his certificate of purchase.
- Page 5. The bill further states that, at the April term, 1858, of the Circuit Court of said Tazewell County, one Rhoda McIntire obtained a judgment against Joseph Elliott, one of the defendants to the bill; and that said Rhoda McIntire, as judgment creditor of said Joseph Elliott, caused to be sued out of said Court an execution founded on said judgment, and placed the same in the hands of the said Sheriff; and that the same was levied on the said premises on the 2d day of August, 1858; and that she then paid into the hands of said Sheriff \$620 30-100 in full of the redemption of said premises from the sale made in favor of Field, Benedict & Co., on 1st August, 1857; and that a certificate of redemption was duly filed; and that, in pursuance of law, said Sheriff advertised said premises for sale, and sold the same on the 10th day of September, 1858; and that complainant, Puterbaugh, became the purchaser thereof; and that a certificate of purchase was executed to him, stating that he would be entitled to a deed in 60 days unless the same were redeemed in the mean time.
- Page 6. The bill states that said premises were not redeemed; and thereupon the Sheriff executed to said Puterbaugh a deed for the premises so sold, in pursuance of the statute in such case made and provided.
- Page 7. The bill further alleges that the said complainant is in actual possession of said premises, holding under and by virtue of said Sheriff's deed.
- Page 8. The bill alleges that the clerical errors above mentioned cloud the title of said premises; and that complainant, by reason thereof, might find it difficult to sell or dispose of the same; and also alleges that said Joseph Elliott well knew that the said premises were sold on the 1st day of August, 1857, to Field, Benedict & Co; and knew when the redemption would expire thereon; and knew of the errors aforesaid.
- Page 9. The bill asks for a correction of the errors aforesaid.
- Page 22. The defendant, Joseph Elliott, filed a general demurrer to the bill; in which complainant joined. The demurrer was sustained, and bill dismissed.
- Page 23. The complainant assigns for error, the ruling of the Court below on the demurrer, and contends that the demurrer ought to have been overruled; and that the Court erred in dismissing the bill.
- A. L. DAVISON, for Appellant.
B. S. PRETTYMAN and J. ROBERTS, for Appellee.

131-26

Porterbaugh
vs

Elliott & al

Abstract

Filed March 9, 1859

L. Leonard
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

S. D. PUTERBAUGH *vs*, JOSEPH ELLIOTT and CHAPMAN
WILLIAMSON.

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M. E. P.

Smith v. Hudson & Crown 430

131-26
Ruttenburgh vs Elliott

Plff's, Brief

Filed April 27/1857
L. Leland,
Clerk