

14499

No. \_\_\_\_\_

# Supreme Court of Illinois


McLean Co. Bank et al

---

vs.

Flagg

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71641  7

STATE OF ILLINOIS,  
SUPREME COURT,  
Third Grand Division

No. 94

*M. L. ...*

*vs.*

*Slagg*

*1863*

14499

~~Opinion of the Court, delivered by~~

Mr. Justice Walker delivered the opinion of the <sup>Court.</sup>

~~Walker.~~ The execution under which  
 - on the sale was made, was laid  
 upon seven town lots, which were  
 separately offered and sold to plain-  
 - tiff in execution. The evidence dis-  
 - cusses the fact, that on three of  
 them, lying contiguous to each  
 other, a large three story machine-  
 shop had been erected, one hundred  
 and sixty feet in length. In this  
 building, at the time of the sale,  
 there was in use a large quantity  
 of machinery, employed in the  
 various departments of the manu-  
 - facture of reapers, which was driven  
 by an engine, situated at one end  
 of the building. An other building,  
 two stories high, was situated on  
 two other of lots. This latter build-  
 - ing was used as a shop, and for  
 storing machines. A third building  
 is on <sup>three</sup> ~~two~~ <sup>other</sup> ~~lots~~, ~~it is a shop~~, but  
 is not disconnected at the line between  
~~lots~~. The purchase under the execu-  
 - tion was made, by the plaintiffs at  
 - tency of record, on separate bids on  
 each lot, amounting, in the aggregate

to the sum of \$1425, whilst the evidence strongly tends to show, that the property was worth near thirty thousand dollars.

The purchaser was the president of the bank, who owned all of the stock, and who paid nothing on the purchase. Is such a sale warranted under an execution? The tenth section of act, regulating sales on executions at law, provides, that "When any property, real or personal, shall be taken in execution, if such property be susceptible of division, it shall be sold in such quantities as may be necessary to satisfy such execution and costs." Was this property susceptible of a division, in the mode adapted by the officer conducting this sale? It manifestly was not, without great prejudice to the owner. This statutory provision, was not designed to authorize the sheriff to divide ~~either~~ entire parcels of real, or personal property, in such a mode as to become oppressive, or injurious to the parties. It was to require him, to so divide the property, as to satisfy the judgment

\* May property ~~with~~ <sup>with</sup> be divided <sup>by</sup> ~~by~~ <sup>by</sup> such ~~partitions~~ <sup>partitions</sup> as to ~~value~~ <sup>value</sup> it ~~near~~ <sup>near</sup> two ~~thousand~~ <sup>thousand</sup> dollars?

and costs, and at the same time produce the largest price. And he is only authorized to do so, when the property is susceptible of division, without injury.

Many articles of personal property, are not capable of division, without its ~~total~~<sup>total</sup> destruction for the use for which it was designed, yet the material separated as such, would be amply sufficient to pay the debt and costs. In the adoption of such a mode, injury might result to an extent many fold greater than the debt. Such a course would produce one of the injuries designed to be prevented by this enactment.

*J. G.*  
It is the manifest duty of the officer, to so sell the property as <sup>and the least injury to the debtor.</sup> to produce the largest price. If that can be done by a division, such a course should be adapted, but if the sale of entire property would produce that result, it should not be divided. When the articles of property, or the tracts of land, are several, and then the sale should be several. But when several different tracts of land have become one, by extending a

building are portions of <sup>all</sup> ~~each~~ thing  
 by the use to which they have been  
 appropriated, less their ~~dist~~ ~~several~~  
 former several character. The build-  
 ings in this case, extending over sev-  
 eral lots, for the purpose of injur-  
 yment, by the owner, became en-  
 tire, and virtually obliterated the lines  
 separating them. The three lots occupi-  
 ed by the large machine shop, ~~was~~ <sup>were</sup>  
 not capable of division without great  
 injury and loss to the owner. They  
 could only have been offered as one  
 tract and at one bidding. And so  
 of the other lots upon which build-  
 ings were situated. The sale of the prop-  
 erty in the mode adopted, was an  
 abuse of the process of the court,  
 and required the sale to be set aside.

The power over its own process,  
 is possessed by all courts. Such pow-  
 er, is a species of equitable jurisdic-  
 tion, that is inherent in courts of law,  
 as well as those of equity. This court  
 has repeatedly held, as between the pur-  
 chaser and the original parties to the  
 suit, <sup>that</sup> a court of law will not hesitate  
 to exercise the power of setting aside  
 a sale on account of fraud, or mistake

ity. In this case the purchase was made by the attorney of record, and who was the beneficial plaintiff in the case. And he must be held liable for all irregularities in the sale.

The judgment of the court below is affirmed.

~~Judgment aff'd.~~

~~In this opinion the whole court concurred.~~

Judgment affirmed.

M. L. Co. Bank

94 us 39

W. J. Hagg

Spencer  
Mass.

14499

Recorded

Page 693

Comptroller

Proceedings lately had before the Hon. Circuit Court of the County of McLean in the State of Illinois in a certain cause pending in said Court, wherein William F. Flagg was Plaintiff and the McLean County Bank & Asabel Gridley were Defendants.

State of Illinois } In the Circuit Court of  
McLean County } said County.

William F. Flagg }  
vs }  
The McLean County Bank } Motion to set  
& Asabel Gridley. } aside a Sale.

At a regular term of the Circuit Court held in and for said County on the 30<sup>th</sup> day of December A. D. 1862, this motion came on to be heard before the Hon. Charles Emerson, Judge of the Circuit Court of the 1<sup>st</sup> Judicial Circuit of said State, then presiding over the Circuit Court of said County of McLean, and the following order was made by said Court as appears of record, to wit:

William F. Flagg }  
vs }  
The McLean County Bank } Motion to set aside a  
& Asabel Gridley. } Sheriff's Sale

And now this day comes

the said W<sup>m</sup> F. Flagg by Leonard Swett his  
 attorney, and also come the said Defendants by  
 W<sup>m</sup> H. Hanna their attorney. And the said  
 Plaintiff having filed herein his motion to set  
 aside a sale of Lot six in Block Eighteen  
 in the Durley Addition to Bloomington, and  
 Lots three, four, five, six, seven, & eight in Block  
 two in N. H. Fells 2<sup>d</sup> addition to Bloomington,  
 in McLean County, Illinois, which sale was made  
 by the Sheriff of this County on the 11<sup>th</sup>  
 day of December A. D. 1861, by virtue of an  
 Execution issued out of this Court upon a  
 certain Judgment in favor of the said McLean  
 County Bank and against the said William  
 F. Flagg; and said Motion now coming on to  
 be heard, and the Court having heard the  
 evidence produced and the arguments of Counsel  
 and being fully advised in the premises, doth  
 consider that said motion be sustained. It is  
 thereupon ordered by the Court that the sale  
 of said Real Estate made by the Sheriff  
 of this County on the 11<sup>th</sup> day of December  
 A. D. 1861, under and by virtue of the Exec-  
 ution aforesaid be set aside and wholly null  
 for naught; and that the Plaintiff in said  
 Execution pay the costs of said sale. It is  
 further ordered by the Court that the said  
 McLean County Bank & Asabel Gridley pay the

costs of this motion and that execution issue therefor. =

And thereupon afterwards, at said December term of said Court, to wit: on the 31<sup>st</sup> day of December A. D. 1862 came the said McLean County Bank + Asahel Gridley and filed herein their Bill of Exceptions, which was signed + sealed by the Court and ordered to be made a part of the record of this cause, and said Bill of Exceptions was in words and figures as follows, to wit:

State of Illinois } In the McLean Circuit  
McLean County } Court

William F. Flagg }  
vs } Motion to set  
The McLean County Bank } aside sale  
The said plaintiff  
filed his notice to set aside sale which is as  
follows:

State of Illinois } vs. McLean Circuit Court  
McLean County } September Term 1862.  
William Flagg }

vs  
The McLean County Bank }  
and Asahel Gridley } Motion to set aside

a Sheriff's sale.

You will take notice that on the first day of the next September Term of the Circuit Court in and for said County or as soon thereafter as Counsel can be heard I will cause a motion to be entered and heard by said Court to set aside a Sale made on the 11<sup>th</sup> day of December 1861 by Ex Sheriff William P. Withers of Lots 6 Blk. 18 in Durley addns. and lots 3, 4, 5, 6, 7, 8 in Block 2 of N. H. Fell's 2<sup>d</sup> addition to Bloomington in said County and State to Asahel Gridley, by virtue of an Execution issued on a judgment in said Circuit Court in favor of said McLean County Bank and against me. - When and where you may be present and contest the same if you see proper.

William F. Flagg

by Swett & Orme - Attys

I have duly served the foregoing notice by delivering a true copy thereof to Asahel Gridley for himself, and as President of the McLean County Bank, this 27<sup>th</sup> day of June 1862.

John L. Poutt } S. + Ret. - 60.  
Sheriff } Fee copy 50.

\$ 1.10

The said Flagg filed his motion to set aside the sale which is as follows: -

State of Illinois } McLean Circuit Court  
 McLean County. } of September Term 1862.

Wm F. Flagg

vs.  
 The McLean County Bank  
 and Asabel Gridley.

And now comes the  
 said William F. Flagg by his Attorneys, and  
 moves the Court here to set aside a sale by  
 William P. Withers, acting as Sheriff of said  
 County and State, on the 11<sup>th</sup> day of Dec-  
 ember A. D. 1861, by virtue of an Execution is-  
 sued on a judgment in the Circuit Court of  
 said County and State in favor of the McLean  
 County Bank and against William F. Flagg  
 the property sold being Lot 6, Block 18 in the  
 Durley addition, and lots 3, 4, 5, 6, 7, 8 in  
 Block 2 in N. H. Fells 2<sup>d</sup> Addition to  
 Bloomington in said County and State, the pur-  
 chaser, Asabel Gridley; for the causes following:

1<sup>st</sup> The officer making the sale was not authorized  
 by law to make the same, and did not sell for cash.  
 2<sup>d</sup> The Execution had expired before the sale was  
 made.

3<sup>d</sup> The sale was not properly advertised -

4<sup>th</sup> The premises sold are indivisible, by reason of  
 having one large machine shop extending over

1 and upon them all, and the officer making the sale has arbitrarily divided the same and sold the shop and building in separate pieces.  
5<sup>th</sup> The sale was otherwise informal, irregular and void. - And Asahel Gridley the purchaser, is chargeable with notice of the irregularities.

William F. Flagg  
By Swett & Orms - Attys.

Be it remembered that on the hearing of the above motion, the said Flagg appeared by his Atty. Leonard Swett & the said Bank by A. Gridley & W<sup>m</sup> H. Hanna. Said Flagg introduced & read in evidence in his behalf one of the executions and the return thereon, issued Aug. 15. 1859 in the case of the McLean County Bank vs W<sup>m</sup> F. Flagg:

State of Illinois } ss. The People of the State  
McLean County. } of Illinois:

To the Sheriff of said County, Greeting:  
Whereas, By the consideration of our Circuit Court, held at Bloomington, in and for the County of McLean, on the 22<sup>d</sup> day of January, in the year of our Lord one thousand eight hundred and fifty eight, The McLean County Bank recovered judgment against William F. Flagg for the sum of Nine thousand Seven

7 Hundred & Ninety Eight &  $\frac{13}{100}$  Dollars damages sustained by the said McLean County Bank in a certain action of Assumpsit and also for the further sum of Eight Dollars costs of suit and accruing costs as appears of record.

We therefore command you, as we before commanded you That of the Goods and Chattels, Lands and Tenements of the said William F. Flagg you cause to be made the aforesaid sums of money, together with interest on said judgments at the rate of six per Centum per annum, from the time of recovering the same as aforesaid until paid; and that you have the same ready, as soon as may be, to render unto the said McLean County Bank, according to law. Hereof fail not, and make return of this writ, with your doings, endorsed thereon, within ninety days from the date hereof.

Witness, W<sup>m</sup> McCullough,  
Clerk of said Court, and the Seal thereof, at  
Bloomington, this 15<sup>th</sup> day of August in the  
year of our Lord One thousand eight hundred  
and fifty-nine.

LS

W<sup>m</sup> McCullough, Clerk  
By L. Burr, Deputy.

Came to hand Aug. 15<sup>th</sup> 1859 at a clock A.M.  
W. S. Withers Sheriff, By Geo. Parke  
Deputy.

8 By virtue of this Execution I did on this 19<sup>th</sup>  
day of August A. D. 1857 Levy upon Lot  
C in Block 18 in the Durley Addition to Bloomington,  
town, And Lots 3, 4, 5, 6, 7 + 8 in Block 2 in  
N. H. Fells 2<sup>d</sup> addition to Bloomington.  
W. P. Withers, Sheriff  
By Geo. Parke, Deputy.

Supersedeas served October 18<sup>th</sup> 1857.

W. P. Withers, Sheriff.

By Geo. Parke, Deputy.

Received April 17. 1861 on the within Execution  
Twenty four hundred Dollars (\$2400.)

Theron Pardee, Cashier of the  
McLean Co: Bank.

Received August 6. 1861, on the within execution  
One Thousand Dollars (\$1,000.) by hands of  
David Davis.

Theron Pardee, Cashier of the  
McLean Co: Bank.

State of Illinois } ss.  
McLean County. }

By virtue of this Execution,  
I did, on this 11<sup>th</sup> day of December, A. D.  
1861, after giving three weeks notice of the time,  
and place of sale, and the property to be sold,  
by publication in the Pantagraph a weekly

9 newspaper printed and published in the City of  
 Bloomington, in said county, and of general cir-  
 culation; also by notices posted in three public  
 places in said county, one of which was at the  
 door of the Court House, at which time and  
 place, at public vendue, and between the hours  
 of 9 o'clock in the morning, and the setting  
 of the sun of the same day, expose to sale  
 and did then sell to Asabel Gridley, he  
 being the highest and best bidder therefor, the  
 following described Real Estate, situated in  
 said County and State to-wit:

Lot C in Block 18 in the Durley addition to  
 Bloomington, For the sum of . . . \$ 700.00.  
 And Lot 6 in Block 2 N. H. Falls  
 2<sup>d</sup>. addition to Bloomington, for . . . 300.00.  
 And Lot 7 " " " " " " 300.00.  
 " " 8. " " " " " " 50.00.  
 " " 5. " " " " " " 25.00.  
 " " 4. " " " " " " 25.00.  
 " " 3. " " " " " " 25.00.  
 \$ 1425.00.

Fees: Advt. 3<sup>50</sup>. Makg Prod Cts & Levy & Ret. 5.10.  
 2 Advt. 700. 7.00.  
 Coms. on Sale 24.77.  
 \$ 36.87.  
 1.25.  
 38.12

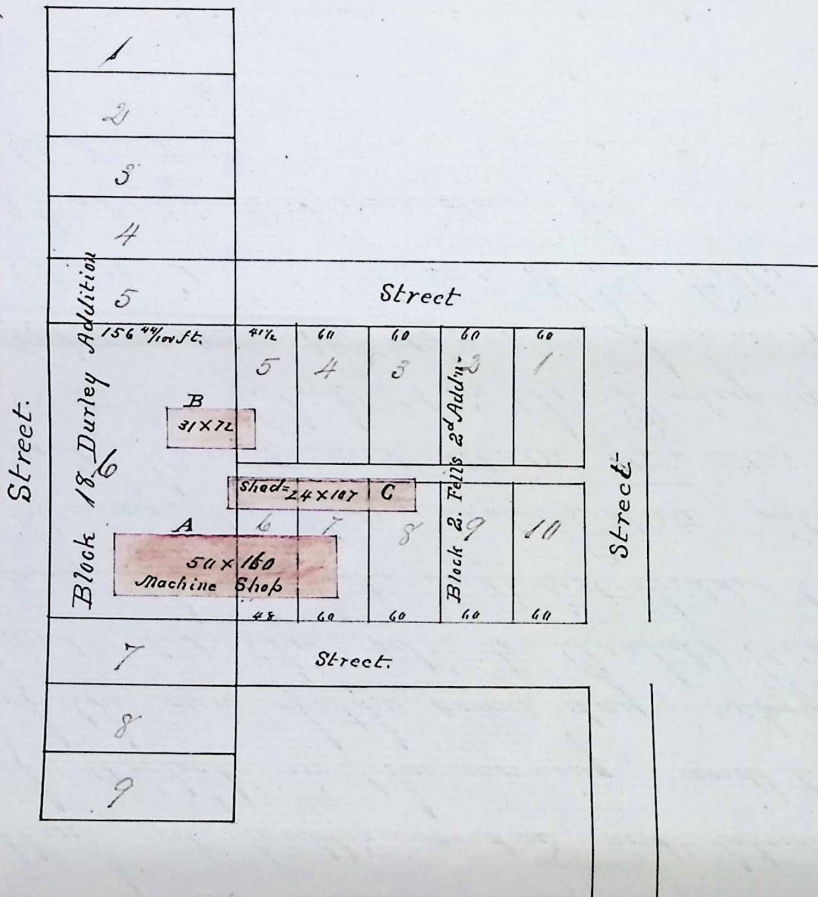
H. P. Wilkins Shff.

The said Flagg then proved that the lots sold as mentioned in the return of the Sheriff on said Execution were at the time of the sale in; proved as shown by the following plat

North.

West

East.



south

11 that one of said buildings on said lots is built of brick, is one hundred and sixty feet long & three stories high, and stands on three lots as shown upon said plat marked "A"; that said building is used for the Manufacture of Reapers & Mowers, is filled with Machinery, <sup>= adapted to their purpose</sup> and said Machinery is attached to said building; one end being occupied for the making, castings & the other for manufacturing those castings into reapers & mowers. That all of said Machinery is connected together and moved by a Steam engine, stationed at one end of said building & that the building is one open building without any division; that the building & machinery cost \$26,000 & at the date of sale was worth 60 per cent upon its cost; that the three lots on which this building was situated were sold separately and brought the amount shown in Sheriff's return.

One of the other buildings was two stories high which stood upon two of the lots sold. This building is marked B, upon said plat. This building was one used in said Manufactory being used in winter for storing machines & in summer to work in. The third building, marked on said plat "C" stands upon three of the lots sold and is a shed used for storing Machines. The two latter buildings were open buildings & not separated by the line of the lots. All of these buildings

were of the value of \$2000 divided by the line of the lots & were worth \$30,000, each building tax then entire.

That the following advertisement of said Sale was published in the Weekly Pantagraph a Newspaper published in said County of McLean on the 13<sup>th</sup> day of Nov. 1861:

Sheriff's Sale.

By virtue of an Execution to me directed, and from the Clerk's office of the Circuit Court of McLean County, Illinois; wherein the McLean County Bank is plaintiff, and W<sup>m</sup> F. Flagg is defendant, I shall, between the hours of nine o'clock in the morning and the setting of the sun of the same day, sell at the court house door, in Bloomington, in said County,

On Wednesday, the 4<sup>th</sup> day of December, 1861, the following described Real Estate to wit:  
 Lot 6 in Block 18 in the Darley addition to Bloomington, and Lots 3, 4, 5, 6, 7 & 8 in Block 2 in K. H. Fell's second addition to Bloomington.

Taken as the property of Williams F. Flagg to satisfy said execution in favor of the McLean County Bank.

W<sup>m</sup> P. Withers

Sheriff of McLean Co. Ill.

Bloomington, Nov. 11. 1861.

And corresponding notices of said Sale posted

up in three public places, according to law; That afterwards the President of the Bank, A. Gridley who was also Attorney for said Bank of record, finding what he supposed to be an error in said advertisement caused to be inserted in three consecutive numbers of said Weekly Postograph the first of which insertion was published on the 20. day of November 1861, the following advertisement:

### Sheriff's Sale

By virtue of an Execution to me directed, and from the Clerk's office of the Circuit Court of McLean County, Illinois, wherein the McLean County Bank is plaintiff, and William F. Flagg is defendant, I shall between the hours of nine o'clock in the morning and the setting of the sun of the same day, sell at the Court house door, in Bloomington, in said County:

On Wednesday, the 11<sup>th</sup> day of December, 1861, the following described Real-Estate, to wit:

Lot 6 in block 18 in the Durley addition to Bloomington, and lots 3, 4, 5, 6, 7, + 8 in Block 2 in K. H. Fell's second addition to Bloomington,

Taken as the property of William F. Flagg to satisfy said execution in favor of the McLean County Bank.

Wm. P. Withers

late Sheriff of McLean Co. Ill.

Bloomington, Nov. 18. 1861.

That the Sheriff made the sale in pursuance of these last advertisements. Said Flagg proved by George Park that at the time of this levy and sale he was Deputy Sheriff of McLean County & as such did all the office work of said office & did all the advertising of lands that he put up no posted notices of the sale for the 11<sup>th</sup> of November and know of none being put up. That W. P. Withers the former Sheriff was at that time out of office, his term of office having expired in 1860, & was stationed at Camp Butler but he occasionally came home & whether he posted any notices or not he did not know. That W. P. Withers the former Sheriff made this sale, but was then out office when the sale was made & in office when the levy was made & might have posted said notices.

It was also proved by said Flagg that A. Gridley was President of the McLean Co: Bank and owned the entire stock of said Bank & was also attorney of record in the original suit upon which the judgment, on which the Ex. in this case was issued, was obtained.

It was also proved that no money was paid by A. Gridley for said property, but said Gridley directed the Sheriff to place a credit of the amount of his various bids upon said

original judgment, which was done.

The foregoing was all the evidence given in the case, & thereupon the Court granted said Motion & ordered that said sale be set aside & held for naught.

In which opinion of the Court in granting said motion & setting said sale aside said McLean County Bank by its Counsel accepted, & now here tenders this bill of exceptions, & prays that the same may be signed & sealed & made part of the record, which is done.

Chas. Emerson, Judge (Seal)

State of Illinois

McLean County.

vs.

L. Luman Burr, Clerk of the Circuit Court in and for said County do hereby certify, that the foregoing is a true and complete Transcript of the records and files of said Court, pertaining to the motion therein set forth.

Given under my hand and seal of office at Bloomington, this 9<sup>th</sup> day of January A.D. 1863.

Luman Burr. Clerk



State of Missi  
 Supreme Court, 2<sup>nd</sup> term divided } Error from McLean  
 The McLean County Bank & }  
 Asahel Gridley } p<sup>l</sup>ffs in error }  
 vs }  
 William F. Flagg } d<sup>ft</sup> }  
 in error. } And now comes

the said plaintiffs in error by W.A. Hanna their atty  
 And assigns the following errors on this record  
 1<sup>st</sup> The court below erred in sustaining the motion  
 of the defendant-in error, & in entering the order  
 setting aside said sale, because 1<sup>st</sup> The sale  
 was made according to law, and there is no  
 fraud complained of or shown by the record,  
 2<sup>nd</sup> The said having been purchased by a person  
 not a party to the execution & the judgment having  
 been credited by the amount of the bids, the remedy  
 of the defendant-in error, if he has any, is in chancery,  
 and not in a summary proceeding, by motion, as  
 in this case,  
 3<sup>rd</sup> That the order of the court below is erroneous  
 in any event, because it does not restore the p<sup>l</sup>ffs  
 in error to their original rights, by erasing the  
 credit entered on the judgment for the amount of  
 the bids, and for the errors aforesaid the said p<sup>l</sup>ffs  
 in error say that said order & judgment of the court  
 should be reversed, W.A. Hanna atty for p<sup>l</sup>ffs in  
 error

Aut non comms said defecant  
in error and say in nullo est  
erulum

B. B. B.  
for def

39 94  
The McLean County Bank - et al  
Plaintiffs in Error.

vs  
William F. Flagg.  
Defendant in Error

Transcript =

Filed Jan'y. 14. 1863.  
L. Seland Clk.

Fees for Transcript \$4.00 =

McLean County Bank and A. Gridley }  
vs  
William F. Flagg. }

Supreme Court, Ottawa,  
April Term 1863.  
Brief by C. H. Moore.

The McLean county Bank has a judgement against Flagg in the circuit court of McLean county, for \$9798,13, upon which an execution was legally issued Aug. 15, '59, to the sheriff of McLean county, and by him levied Aug. 19, '59, on lot 6, block 18, Durly's Addition to Bloomington, and on lots 3, 4, 5, 6, 7 and 8 in block 2, K. H. Fell's 2nd Addition to Bloomington; Sheriff Withers, being enjoined, did not sell until Dec. 11 '61. (see pp 7, 8 & 9 of record.) When the sale was made Withers was not the sheriff, but he still retained this execution, and made this sale, in person. (see p 14) Withers had the right to do this; he was the sheriff who made the levy, and he could sell after his term expired. (See 3rd Gil. 481.)

There were seven lots in two different blocks, and in different additions to Bloomington, each sold separately, and bid off by A. Gridley. [see p 9.] Upon five of these lots, were parts of valuable buildings; [see plat, p 10.] but upon lots 3 & 4, in block 2, Fell's Addition, there were no improvements. As to those lots, there should be no complaint about the discretion used by the sheriff. He sold these lots by their least legal sub-division, and it was a fair presumption, that they would bring more than when sold together, or in half, or quarter lots; yet the sale of these two lots is set aside. In this, we say, there is manifest error. (16 Ill., 22.)

The remaining five lots, on which were situated the buildings, were legally subdivided. True, the lines were imaginary, but just as much lines, as section or meridian lines. Section 10 of our statute of judgements, mortgages and executions, leaves it to the discretion of the officer, how he will divide the the property, and the quantities in which he will sell.

The general tenor of the decisions in this State, is in favor of sales by the smallest legal sub-divisions. Where the defendant has the time to redeem, as long as in this State, can he be injured by a sale in separate lots? He can redeem part, or all, (see 20 Ill., 314) he has the use of the lots, and if they did not bring their full value, it takes less money from defendant, or creditors who may desire, to redeem them. In the exercise of this discretion, the officer is not bound to know the lines of the buildings, but he is presumed to know the legal sub-division of the lots. For ought that he knows, these buildings may all have been on one—lot 6, block 18, Durley's addition. A sheriff is not presumed to see the real estate he levies on, or know its lines, or improvements. The rule is otherwise in levy and sale of personal property. It was proper for him to sell by lots separately. [see 16 Ill., 23.] Again, if the property was as valuable as defendant contends, what sheriff would, on the sale of the first lot, have supposed it would have taken all to satisfy this execution?

The sheriff, in the exercise of this discretion, had a right to take into consideration all these facts and circumstances, the ability and desire of defendant and his other creditors, to redeem the lots, and the further liability and risk of said buildings to be destroyed by fire. This chance alone was for the 15 months defendant could occupy them about one in twelve on such buildings. Most insurance companies would have refused to insure the buildings for the purchaser while Flagg retained possession.

We say, if the sale was made without redemption, sound discretion would be sorely troubled to decide which was the best way to sell, in gross or separately; if offered separately, the competition would be strong, for the first lot; and the chagrin of the unsuccessful bidders on that lot would prompt them to make the first purchaser pay for the others, or let them in as joint owners.

This was a sale from which any person owning the fee, could redeem for twelve months after the same, and judgment creditors, for three months longer; and it is notorious that none but interested parties bid at such sales. The defendant's theory is, that if the seven lots had been put up together, they would have brought more. Does he prove that there was any man who bid on any lot, or was even there for the purpose of bidding. Unless he does this, how was he injured, or in what manner the sale be fraudulent? Let a fire sweep over those lots, (no remote contingency) and the bid is more than their value.

The difference between these lots and that of improved land with the usual fences built over parts of the whole, is simply one of degree. The principle is the same. Yet who will say that the whole farm must be sold as one tract because two men could not occupy the same field? The officer holding the execution had the right to make the sale; the bidder paid the costs to the sheriff, and the remainder of his bid to plaintiff; and the judgment was credited.

But defendant says sale was not properly advertised. No proof of this. [see p 14] Parks did not see them; but he says Withers may have put them up. The mistake in the first notice, was "Darly's Additon," instead of "Durly's Addition".— Gridley made the change in the papers, and the sheriff selling, adopted the act by selling under the second notice, and made it his. The other notices he and Gridley put up; the presumption is, that the officer did his duty, put up the proper notices, or caused it to be done; and that presumption is not to be overthrown, simply by Park saying he did not see them.

The sale was made according to law; and no fraud is shown. The sale was made to a person not a party to the judgment or execution; and the judgment having been credited with amount of bid, defendant's remedy is in chancery, where, only, the money can be restored, and full relief given.

The order for setting aside sale was further erroneous, because plaintiff's judgment is now credited with \$1425,00, amount of all the bids on these lots, which sum the plaintiff, or the purchaser, by this error, is compelled to lose. Until the order of the court setting aside the sale is reversed, no execution can be issued for amount of this credit. It is paid. For these reasons, we say, the order of the setting aside said sale, should be reversed.

39 no 94

M Linn & Bank et al  
vs

Wm F. Flagg

Brief for plff in error

Filed May 6, 1862,  
Leland  
Ct.

# Supreme Court of Illinois,

THIRD GRAND DIVISION.

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APRIL TERM, A. D. 1863.

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McLEAN COUNTY BANK,

vs.

WILLIAM F. FLAGG.

} ERROR FROM McLEAN.

I insist, in the first place, that no writ of error will lie from this decision of the Circuit Court, because,

- Ist. It is not a final judgment, but merely an interlocutory order.
- Fleece v. Russell, et al.*, 13 Ill., 32.
  - Hays v. Caldwell*, 5 Gilm., 33.
  - Penticost v. Magaha*, 4 Scam., 326.
  - Woodside v. Woodside*, 21 Ill., 207.

It was a matter wholly within the discretion of the Circuit Court, and therefore cannot be assigned for error.

If the whole matter can be reviewed in this Court, still the decision is just and should be affirmed.

The evidence clearly shows the following facts :

One of the buildings standing on the premises is 160 feet long, 3 stories high, and standing on 3 of the lots sold, and is filled with machinery, and the machinery is attached to the building, all connected together and moved by a steam engine.

It is absurd to say that the best way to sell a building is to sell it in divisions. The house and machinery, when so divided, were useless and valueless. This is also proven by another fact, these buildings and lots, worth \$30,000, as proven, were sold for \$1,400. The manner of sale prevented, of course, all *holding* ~~building~~. Who would buy one-third of a machine shop, or the east sixty feet of a steam engine?

But to place the matter beyond dispute, it was proven that these buildings and this machinery, if divided by the line of the lots, in the manner in which it was sold, was worth only \$2,000, and if sold entire were worth \$30,000.

This must be decisive of the question, for this Court can never hold that it is just to take \$30,000 worth of property, and sell it in such shape that it shall be worth only \$2,000.

The sale was not properly advertised, but I am content to leave the case upon the gross injustice of the sale, as above shown.

B. C. COOK.

87 94

McClellan Co Bank

vs

Flagg

Depts Points

Filed May 16. 1863.  
Shelton  
EVR

It is hereby certified that the sum of one hundred and fifty thousand dollars has been paid to the order of the McClellan Co Bank for the sum of one hundred and fifty thousand dollars. The balance of the amount of one hundred and fifty thousand dollars is hereby certified to the order of the McClellan Co Bank for the sum of one hundred and fifty thousand dollars. The sum of one hundred and fifty thousand dollars is hereby certified to the order of the McClellan Co Bank for the sum of one hundred and fifty thousand dollars.

R. O. COOK

# SUPREME COURT, STATE OF ILLINOIS.

OTTAWA, APRIL TERM, 1863.

McLEAN CO. BANK & A. GRIDLEY, }  
vs. } ERROR FROM McLEAN Co.  
WM. F. FLAGG. }

## ABSTRACT OF RECORD—ASSIGNMENT OF ERRORS— MOTION TO SET ASIDE SALE--AND SUSTAINED.

1st—Error. The sale was made according to law, and there is no fraud complained of or shown by the evidence.

2d.—The land having been purchased by a person not a party to the Execution, and the judgment having been credited with amount of bids, defendant's remedy is in chancery, not at law.

3d.—Order of Court erroneous in any event, because it does not return plaintiffs in error to their original rights by erasing the credits on the judgment for amount of bids.

2 Dec. Term, 1862—order of Court setting aside sale made by Sheriff of McLean, Dec. 11, 1861, to A. Gridley, of lots 6, block 18, Durley's addition to Bloomington, and Lots 3, 4, 5, 6, 7 and 8, Block 2, K. H. Fell's 2d addition to Bloomington.

### BILL OF EXCEPTIONS—NOTICE OF MOTION AND SERVICE OF NOTICE—CAUSES.

3+4 1st.—Officers making same was not authorized by law to make sale, and did not sell for cash.

5 2d.—Execution had expired before sale was made.

3d.—Sale not properly advertised.

4th.—Premises sold are indivisible, by reason of a large machine shop on all the lots.

6 5th.—Sale otherwise informal, of all of which Gridley had notice.

7  
8 Copy of Execution, dated Aug. 15, 1859, for \$9,798 13-100 and costs levied by Sheriff of McLean, Aug. 19, 1859, upon lot 6, block 18, Durley's addition, and lots 3, 4, 5, 6, 7 and 8, block 2, K. H. Fell's 2d addition, all in Bloomington, Ills. Record says, supercedeas, served Oct. 18, 1859—mistake, it was an injunction to stay sale, which was afterwards dissolved. Credits \$3,400, paid Sheriff on Execution, as per return.

9 Lots sold Dec. 11, 1861, for following prices :

Lot 1, bl'k 18, Durley ad. to Bloomington, to A. Gridley,	for	\$700
Lot 6, block 2, K. H. Fell's 2d ad. to	“ “ “	300
Lot 7 “ “ “ “ “ “ “	“ “ “	300
Lot 8 “ “ “ “ “ “ “	“ “ “	50
Lot 5 “ “ “ “ “ “ “	“ “ “	25
Lot 4 “ “ “ “ “ “ “	“ “ “	25
Lot 3 “ “ “ “ “ “ “	“ “ “	25

10  
11 Flagg then proved that a three story brick shop was erected on three of the lots above described, as described in plat “A.” and used for manufacturing reapers, one end for casting with the usual machinery, &c., and all run by one engine, stationed at one end; that building has no partition walls, and cost, with machinery, \$26,000. Those three lots were sold separately. One of the other buildings was two stories high, and stood on two lots which were sold separately. This building is marked B. on the plat, and used for a shop

and to store machines in. The 3d building, marked C., stands on two of the lots, and is a shed used for storing machines, not separate at line of lots.

12 Notice of sale in PANTAGRAPH, dated Nov. 11, 1861, and changed by Gridley, and dated Nov. 18, 1861.

13 Copy of second notice in PANTAGRAPH, and published three times. Gridley was President of McLean County Bank, and Attorney of Record for Bank. Sale made at the time specified in last notices, by Wm. P. Withers, who was Sheriff when Execution was levied. 14 Geo. Park sworn—was Deputy Sheriff at the time of levy and sale, did all the office work of advertising of sale of lands—that he put up no notices of the sale of the 11th of Nov. Knows of none being put up. Sheriff Withers was out of office at date of sale, and was stationed at Camp Butler, and come home occasionally. Sheriff Withers made the sale himself, and might have posted the notices of second sale. It was also proven that Gridley was President of the McLean County Bank, owned the entire stock, and was the original Attorney of Record for the Bank, in this cause. That Gridley paid no money for said property, but that the amounts of his bids were credited on the original judgment motion, granted sale set aside, and that the Bank pay the cost of sale and of this motion—to all of which plaintiff excepted.

39 94

McLean Co Bank

vs

~~Wm~~ Dr Sulayf

Abstract

Filed April 22 - 1863

Go. Lorland

clerk

J. H. Hamaker  
Hamaker  
Hamaker  
Hamaker  
Hamaker