

Case No. 17392.  
WELLS v. DALRYMPLE.  
[15 Int. Rev. Rec. 59; 4 Chi. Leg. News, 156, note.]

Circuit Court, W. D. Ohio.

Jan., 1872.

CREDITORS' BILL—SALE OF REAL ESTATE—SUIT TO SET ASIDE—TITLE OF PLAINTIFF.

- [1. In a proceeding to set aside a sale of real estate, the plaintiff must possess a judgment lien, or a lien by levy.]
- [2. The objection that he has no lien is waived, unless taken in the answer.]
- [3. To authorize an appellate court to reverse a decree on a question of fact, it should be able to say that, were the case reargued in the court below, that court would reconsider its own judgment.]  
[Appeal from the district court of the United States for the Northern district of Ohio.]  
Hutchins & Ingersoll, for petitioner.  
Mr. Stewart, for defendant.

EMMONS, Circuit Judge, held: That in proceeding to set aside a sale of real estate there must exist a judgment lien by statute, in which case the title must be in the judgment debtor, or a lien by levy, neither of which is here set up. That if this had been a plenary bill in equity it would be dismissed on that ground. But two cases [Day v. Washburn, 24 How. (65 U. S.) 352; Adler v. Fenton, Id. 407] hold that unless this objection is taken in the answer, it will be held to be waived. The answer does not raise the question. If proceedings were remanded for amendment to petition, the answer could then also be amended so as to raise this question, which would be fatal to the petition, the fact being that no lien existed before this petition was filed. Proceeding to review the case on its merits, EMMONS, Circuit Judge, held, that an appellate court, before reversing a decree on a question of fact, should be able to see some plain mistake, some misapprehension of the fact, so, plain a misapprehension, so evident an error, as to warrant the appellate court, with much confidence, in saying that were the case reargued in the court below, that court would reconsider its own judgment.