No. 12125

Supreme Court of Illinois

Vandruff.

vs.

Whitney.

71641 7

Joshua Vandruff
vs
James Craig &
Daniel H Whitney

Judg in Circ Court
of Jo Davies Co Illinois
June 16th 1842
no debts for $1,999.50
& Costs 14.93 3/4

Execution issued to Boone Co on above judg
July 21st 1842.
Returned not Satisfied. no property
found Oct 19th 1842

Alias Execution issued on said judgment
Feby 18th 1843. to Boone County. from
which there has been no return in my
Office.

Pluries Execution issued on said judg
March 26th 1847. of which there has been
no return in my Office

On the 3d day of June AD 1847. the above
named defendant Whitney filed in my Office
an affidavit & in the words and figures fol-
lowing viz.)

In Jo Davies Circuit Court

Joshua Vandruff
vs
James Craig &
Daniel H Whitney

Debt $1999.50
Int from June 16/42
Costs 14.93

Daniel H Whitney one of the above named defendants
being duly sworn on oath deposeth and saith that a

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Plurus Fi Fa was issued to Joel Flood Sheriff of the County of Boone bearing date the 26th day of March 1847 against the above named defendants for the Debt and costs as above stated. and that the said sheriff by virtue thereof did on the 1st day of May A.D. 1847 make a leavy on the following described lands & premises property of this deponent to wit: All of the south Easterly half of Block No 4. to wit: Lots No 1. 2. 7 & 8 in Block Number 4. in Whitneys addition to the town of Belvidere and also that piece of timber land. commencing at the North East corner of the North west quarter of section Twenty seven. Township 44 North 3 East of the third principal Meridian Running thence west on section line seventy seven rods. thence south twenty rods. thence East seventy seven rods. thence North Twenty rods to the place of beginning containing 9 acres & 100 rods of land and also that piece of Land in said County commencing at the N. E. corner of the E half of the S. E. quarter of section Twenty Eight in Township 44. N of range 4 East of the third principal Meridian thence west forty rods. thence south to the center of the Kishawaky River. thence up the center of said River to the East line of said lot. thence North on said line to the place of beginning containing thirty acres of Land. Also Lots 5 & 6 in Block No 40 in the original plat of Belvidere. And this deponent further saith that on the 27th day of October A.D. 1842 he the said deponent presented his petition to the district Court of the United States holden at Springfield in the State of Illinois praying the said Court to be declared a Bankrupt which said petition was accompanied with a schedule of all of his the said deponents Debts & liabilities together with a just Statement of all property owned by him and in the Statement of said indebtedness was included the aforesaid judgment. This deponent further saith that on the 17th day of June A.D. 1843 the said District Court of the United States for the District of Illinois did decree a final-

discharge of this deponent from all Debts owing by him at the time of the presentation of his said petition for the benefit of said Bankrupt Laws among said Debts were included the judgment upon which said execution has issued and the aforesaid levy has been made.

This deponent further saith that at the time of receiving his discharge under the said Bankrupt laws was not the owner of the property now levied upon by the said Sheriff as above described or any part thereof but to the same had no interest whatever either in law or equity.

Sworn & Subscribed before me this 25th day of May 1847
P P Loop J P

Daniel H Whitney

County of Boone and State Illinois

Sworn to & Subscribed before me this 11th day of October A.D. 1847
Wm H Bradley clerk
circuit court of St Davies Co Ills.

The following entry appears of Record in the Circuit Court aforesaid of the date of October 11th 1847.

Joshua Vandruff
vs
Daniel H Whitney & James Craig
} Motion for Stay &

The defendant D H Whitney by his counsel comes and files his petition verified by affidavit & moves the court therein to direct a stay of further proceedings under and by virtue of an execution issued in this cause from this court on the 26th day of March A.D. 1847.

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which motion is sustained by the court and further proceedings under said Execution are ordered to be stayed until the next term of this court to which filing of said petition as also to the decision and order of the court thereon the Plaintiff by his attorney excepts. and on motion of the defendant Whitney by his attorney leave is granted him by the court to amend his petition.

And afterwards the following entry appears of Record of the date of March 14. 1848

Joshua Vandruff
vs
James Craig and
Daniel H Whitney

On Motion to Stay Execution

On motion of the Defendant Daniel H Whitney by his attorney the order heretofore entered for leave to amend his affidavit is vacated and the Plaintiff by his attorney moves the court to vacate the order heretofore made staying procedings under the Execution heretofore ifsued in this cause for reasons filed.

And afterwards to wit: on the same day the following entry appears of Record

Joshua Vandruff
vs
James Craig and
Daniel H. Whitney

On Motion to Stay Execution

Now came on to be heard the cross motion heretofore filed by the Plaintiff by his attorney to vacate the order heretofore made staying proceedings under the Execution heretofore ifsued in this cause which motion after argument is overruled by the court to which ruling and decision of the court the Plaintiff by his attorney excepts and the application heretofore made by the Defendant Daniel H Whitney by his attorney for a perpetual stay of the Execution refered to in this application is sustained by the court to which ruling and decision of the court the plaintiff by his attorney excepts

And afterwards to wit: on the 16th of March 1848 the following entry appears of Record

Joshua Vandruff
vs
James Craig and
Daniel H Whitney

On Motion to Stay Execution

By agreement of the Plaintiff by his attorney and with the consent of the Defendant Daniel H Whitney by his counsel that part of the order rendered on the 14th inst directing a perpetual stay of the Execution upon which this procuding is based is ordered by the Court to be vacated and the original order heretofore made suspending the execution, to remain in force until the further order of this court.

And afterwards to wit: on the 17th of March 1848 the following entry appears of Record

Joshua Vandruff
vs
James Craig &
Daniel H Whitney

Procuding to Stay Execution issued on a judgment in this entitled cause

The said Plaintiff Joshua Vandruff by his attorney comes and moves the court on affidavits filed to let the levy & Execution in this case stand as a security for whatever judgment may be obtained against said defendant Daniel H Whitney in an action to be brought against him by the said Plaintiff on the judgment upon which said Execution issued.

And afterwards to wit: on the 20th March 1848 the following entry appears of Record.

Joshua Vandruff
vs
James Craig &
Daniel H Whitney

Motion to stay execution

Now at this day came on to be heard

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the motion heretofore filed by the Plaintiff by his attorney to let the levy & execution in this cause stand as a security for whatever judgment may be obtained against said Whitney in an action to be brought against him by said Plaintiff on the judgment upon which said execution issued which after argument is overruled by the court and the execution is ordered to be set aside to which decision of the court the Plaintiff by his Attorney excepts. It is therefore considered by the court that the defendant Whitney have and recover of the Plaintiff his costs by him in this behalf expended and that he have execution therefor.

State of Illinois
Macoupin County } ss

I, W. H. Bradley Clerk of the Circuit Court in and for said County do hereby certify the foregoing memorandums, and copies from the record of the proceedings of said Court to be truly and correctly transcribed therefrom as the same now appear in my Office. In testimony whereof I have hereunto set my hand and affixed the Seal of said Court at my Office in Carlinville in said County this 11th day of August AD 1857

Attest William H Bradley Clk

John Vandruff
vs
James Craig &
Maria McWhiney

Error to Lee Circuit

And now comes the plaintiff in error and says that in the record & proceedings aforesaid and in the rendition of the Judgment aforesaid ~~and~~ there is manifest error in this to wit

1st The court erred in granting an order to stay the execution in favor of pltff in error against defendant in error mentioned in the record aforesaid ~~the court erred in~~

2d The court erred in overruling the motion of plaintiff to set aside the order staying the execution in favor of plaintiff in error against the defendant in error

3d The court erred in each order and decision made in the case

4th The court erred in rendering the Judgment aforesaid in manner & form aforesaid.

Glover & Cook
attys for pltff in error

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And the said Defendant in Error comes & says, that there is no Error in the record & proceedings aforesaid as the said Plaintiff hath assigned. W. of this &c.

Fullen & Marsh
Ats. Deft in Error

25
Joshua Buckhart
vs
Abraham Wood & ors
Transcript
Court of Appeals

$2.25/100

Record
Filed March 7th 1853.
L. Delaney Clk.

Assignment of Errors.
Filed June 15th 1853.
L. Delaney Clk.
By P. R. Delaney Dep.

In Supreme Court

Joshua Vandruff
vs
A. H. Whitney impleaded with James Craig

Error to Sc Davis

Among the reasons why the judgment in this Cause should not be reversed are the following;

There is no Record, (such as the law Contemplates) of any judgment in the Court below. The paper on file, which is dignified by the name of Record, appears to be a mere Memorandum of the Clerk of steps taken in the Court below. It is clearly informal in its Commencement and manifestly insufficient in its Conclusion, being improperly attested and not showing whether it contains or not a Statement of all the proceedings in the Court below. And it is now too late to change or amend it there being a joinder in Error.

But suppose it is a Record it shows that alias & plurias Execution were irregularly issued by the Clerk without a return of the alias first Execution, and the Plaintiff

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Execution should for that reason if non other have been set aside.

It shows no evidence in the Court below nor does it show there was none. It being then silent on that point the legal presumption is that the Court below decided upon proper & sufficient proof.

There is no Bill of Exceptions and the Record does not show the reasons for Exceptions mentioned in Record.

Sec 46 Practice Act (I quote from recollection) shows the Cir Court may in its discretion stay or set aside proceedings under Ex and it is submitted whether the exercise of this discretion is subject to review in this Court

The party by the decision of Cir Court is not prevented from applying & the Court below permitting if it deems it proper, the issuing of another Execution — the Execution under consideration being only temporarily stayed

The original affidavit referred to in Record shows that after Whitney's discharge in Bankruptcy the

[13125-L]

It in question was issued and levy made, whereupon W. in one sense of the terms, pleads his discharge in bar of further proceedings by issuing execution. Such a discharge is final & binding upon every body until either set aside in U.S. Court granting it or by affirmatively showing it was obtained in fraud of creditors which might perhaps be done by suing upon the judgement where an issue could be made up and tried. And this was the question I supposed until I averred here the record merely presents. But as it does not I will not discuss it.

Now while the Record shows no evidence upon which the Court below stayed proceedings under execution, I repeat it does not show either that there was no evidence or insufficient evidence the intendments and presumsions of law are in support of decision of Court below, & the Plaintiff in Error cannot upon such a Record say there is the contrary

This Case as it now stands as I understand it, presents no questions but those of the practice

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of this Court and it is of course unnecessary to cite authorities on questions which cannot possibly arise now

July 8/53

Allen C. Muller
Atty for Deft in Error

To the foregoing I beg leave to add on the part of Deft in error that the power of the Court to stay or set aside executions, as provided for in the 46 Sec of the Practice Act is incidental to the general power of the Court over its process, is a discretionary power, its exercise is in the nature of a mere interlocutory order, not subject to a writ of Error —

The order of the Court setting aside the execution is not a judgment on which a writ of error will lie.

Brooks vs Hunt. 17 John. 484-6.
Gra Pr. 706. —

Without a bill of exceptions containing the evidence, & all the evidence before the Court on the motion, this Court cannot see that there was any error in the ruling of the Court below.

J. Marsh
for Deft in Error

No 28.

Joshua Vandenoff
vs
D. H. Whitney
"
Paint

Filed July 12, 1853.
L. Leland Clk.

Belvidere 15 May 1853

Norris & Eaton

Dear Sir:

I take the liberty to enclose to you a stipulation in a case on Error from Jo Daviess which I wish you to hand to the Clerk for filing.

This is a matter in which my partner, Mr Burgess, who is now at Ottawa is not engaged. Mr Hallett, who is the attorney for Plffs in Error, informs me that Mr Glover Cook has the case temporarily in charge for him. The title of the case may not be exactly correct but I presume there is no other suit from Jo Daviess that will prevent my identifying the case when reached on the call of the docket.

I expect to be at Ottawa during a part of the term unless my business, which is now very important at home, prevents. In case I am not, Mr Marsh of Rockford will take charge of this case for me.

Very Respectfully
Yours &c
Allen C Fuller.

[P125-9]

Dixon March 5th 1853

Dear Sir

Enclosed please find a transcript in case of Joshua Vandruff vs James Craig & Daniel Whitney which you will please file forthwith and issue writ of error thereon. The defendant Whitney lives in at Belvedere Boone County and the deft Craig lived in Joe Davies Co but is now deceased. I enclose you five dollars to pay Clks fees with and will from time to time forward fees as due or required.

I have written to Cook & Sloven this day to attend to the argument upon the writ of error and in order to make sure that they will attend to it please speak to them to attend to it.

As the case is important to me I hope you will not neglect filing the transcript & attending to it. The time for

prosecuting writ of error has nearly expired.

Yours Truly
E. Bonthwick

Filed March 7. 1859.
Adelaide Ohio.

Vandruff
vs
Whitney
Parish

State of Illinois, sct.

WRIT OF ERROR—FREE TRADER PRINT.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Boone — **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 Jo Daviess county, before the Judge thereof, between —

Joshua Vandruff

plaintiff and Daniel A. Whitney

defendant 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, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distintly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint 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 2d Monday in June — 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. SAMUEL H. TREAT, Chief Justice of our said Court, and the seal thereof, at Ottawa, this 7th day of March in the year of our Lord one thousand eight hundred and fifty three.

L. Leland *Clerk of the Supreme Court.*

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Joshua Vandruff

vs

Daniel D. Whitney

Writ of Error

Filed March 7. 1853.

S. Leland Clk.

STATE OF ILLINOIS, } The People of the State of Illinois,
Supreme Court.

To the Sheriff of the County of Boone — Greeting:

BECAUSE in the record and proceedings, and also in the rendition of the judgment of a plea which was in the circuit court of JoDaviess — county, before the Judge thereof, between Joshua Vandruff — plaintiff & Daniel A. Whitney impleaded with James Craig —

defendant, it is said that manifest error hath intervened, to the injury of the said — Vandruff —

as we are informed by his complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the state of Illinois, at Ottawa, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Daniel A. Whitney —

that he be and appear before the justices of our said supreme court, at the next term of said court, to be holden at Ottawa, in said state, on the 2nd Monday in — June next, to hear the records and proceedings aforesaid, and the errors assigned, if he — shall see fit; and further to do and receive what said court shall order in this behalf; and have you then there the names of those by whom you shall give the said Whitney — notice, together with this writ.

Witness, the Hon. **SAMUEL H. TREAT**, Chief Justice of our said Court, and the seal thereof, at Ottawa, this seventh day of March in the year of our Lord one thousand eight hundred and fifty three.

L. Leland Clerk of the Supreme Court.

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28

Joshua Vandruff
vs
Daniel A. Whitney

Sci. Fa. to Whitney
Boone County.

Filed March 17th 1853.
L. Leland Clk.

Came the within by warrant to me
the within named Daniel A. Whitney
this 15th day of March 1853
Fees taxed $0
Pd
Cost $0

Chas. Whitney
Sheriff of Boone County

In Supreme Court

John P Vandruff
vs
Daniel H Whitney
impleaded with Craig

Jno Pen
A D 1853

Error from Jr
Dais

It is hereby stipulated that this Cause shall not be taken up for argument until 2 weeks from this day unless by consent and that either party shall then be at liberty to apply for a continuance of the same without prejudice

Dated June 13. 1853

A. C. Fuller
Atty for Deft
S. A. Hurlbut
for Pltff in error

[21185.13]

28.

Supreme Court

J. P. Vandruff
Plff in Error

vs

Whitney & Craig

Stipulation

Filed June 16th 1853.
L. Leland Clk.
By P. K. Leland Dep.

Vandruff
vs
Daniel H Whitney
impleaded with Craig

Supreme Court
Error to the Davies
Circuit Court

It is further stipulated that this cause shall not be taken up before the ~~Sixth~~ Seventh day of July next

June 24th 1853

S. A. Hurlbut
for Plff in Error
A. C. Haller
for Defts in Error

Mr. Clerk
Please file this stipulation
A. C. Haller

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28

Vandruff

vs

Whitney

Stipulation

Filed June 28. 1859.

L. Leland Clk.

28

Joshua Vanderpool
vs
Daniel H. Whitney

28

Filed

Defaulted

1853

J. J. & Hucks & Co.