

No. 14543

Supreme Court of Illinois

Avery et al

vs.

Babcock

STATE OF ILLINOIS,

April, T, 1864

SUPREME COURT,

THIRD GRAND DIVISION.

No. 132

J. W. Middleton & Co., Stationers, 996 Lake St.

(Reported)

Avery
vs

Robinson
1864

14543

H. T. Abeyital } Supreme Court Apr. 7, 1864
v
Ransom Bobcock }

Per? per H. T. Abey
per H. Tenor \$2.50 each for print
ing abstract of his in this
cause, Apr 20, 1864

J. H. Sherman

N. T. Avery Aug

2 182

R Babcock

STATE OF ILLINOIS,
SUPREME COURT. } ss. The People of the State of Illinois,

To the Sheriff of Knox County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgments of a plea which was in the Circuit Court of Knox County, before the Judge thereof, between

Ransom Babcock

plaintiff, and

H. T. Avery & George D. Ensign

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

Avery & Ensign

as we are informed by their complaint, the record and proceedings of which said judgments 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

Ransom Babcock

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 first Tuesday after the third Monday in April A. D. 1864, to hear the record 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

Ransom Babcock

notice, together with this writ.

Witness, The Hon. Pinkney H. Walker, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this day of Sixth in the year of our Lord One Thousand Eight Hundred and Sixty-four.

S. Island
Clerk of the Supreme Court.



Served the within writ. April 9th 1864 by reading
 the ~~within~~ same to the within named
 Ransom Babcock April 9th 1864

Fees	} J. C. Cover Sheriff Shox Co. Ill
Service 50	
Wages 140	
Return 10	
<u>\$2.00</u>	in Error (By J. D. McIntosh Deputy)

Filed April 16, 1864
 J. Deland Clerk

132
 H. T. Strong and
 at
 Ransom Babcock
 Sec. Jan. 5th 1864

SUPREME COURT OF THE STATE OF ILLINOIS.

APRIL TERM, A. D. 1864.

THIRD GRAND DIVISION.

H. T. AVERY & G. D. ENSIGN,
Plaintiffs in Error,
vs.
RANSOM BABCOCK,
Defendant in Error. } Error from Knox

Brief and Points for Plaintiff in Error.

L. DOUGLASS, Att'y for Pl'ff in Error.

1 This was a motion made in the Knox Circuit Court, 2d of
2 June, 1859, to set aside a sale of land under execution, and
3 continued to the September term, 1859. On the 22d day of
4 October, 1859, the motion was overruled, and exceptions.
5 Bill of exceptions to be filed in 30 days; and bill of exceptions
filed 11th November, 1859.

6 Transcript of judgment shows that suit was commenced
before A. C. Wiley, Police Magistrate of Galesburg, in favor
of Defendant in Error and against H. T. Avery and G. D.
Ensign, on the 25th of February, 1858, returnable March 6,
1858. Summons served March 1, 1858.

7 The transcript of the justice's docket reads as follows:

8 "On the day of trial, suit called. Defendants appeared
9 "and acknowledged the above amount correct. Judgment
10 "is therefore rendered by confession against H. T. Avery
"and G. D. Ensign, and in fa. of Ransom Babcock, for the
"sum 383 18 debt, and 2 39 costs. Ex. issued April 21,
"1858—Siss."

11 Transcript filed in circuit court June 26, 1858.

12 Execution was issued on said judgment Jan. 10, 1859, and
on the 5th day of February, 1859, a quarter section of land
was sold on the same.

10 The certificate of purchase was given to Ransom Babcock as the purchaser at said sale.

The transcript, execution, and sheriff's return, and certificate of purchase were all in evidence.

The sale was in February, 1859, and this motion was entered in the following June, so there are no *laches* by lapse of time.

6 The judgment in this case, on which the sale was made, was void, because there is no dollar mark.

Lawrence vs. Fast; 20 Illinois, 340.

Lane vs. Bonnuelma; 21 Ill., 146.

Bailey vs. Doolittle; 24 Ill., 577.

Our court has so often decided that such a judgment was void, it would seem supererogation to argue that point, and I therefore leave it.

If the judgment was void, then it is the same as though there was no judgment at all; and if there was no judgment, then of course the execution was unauthorized, and the sale of the land was unauthorized, and the execution and sale, on motion made in this cause, should have been set aside. The sale, and the sheriff's deed when executed thereon, would be a cloud on the title, against which the parties had a right to be relieved, and in this way, if made in time, a motion is the proper remedy to be relieved against an unauthorized sale of real estate.

Day and others vs. Graham; 1 Gilman, 445.

In this case the purchaser is the plaintiff in the execution, and is a purchaser with notice of the defect in the judgment, and as the land has not been conveyed to an innocent purchaser, this is the proper remedy.

Day et al. vs. Graham; 1 Gil., 445.

6 The transcript of the police magistrate does not show where the judgment was rendered. It only shows that "on day of trial defendants appeared," &c., but there is no date to the judgment, and it does not appear when judgment was rendered; therefore the judgment is void for uncertainty, for this as well as the reasons above stated.

L. DOUGLASS, Att'y for Pl'ff in Error

132 25
H. J. Avery & Co
Puff-Tunn
✓

Ransom Babcock
Left-Tunn
— — — — —

Briggs Puff-Tunn

Filed April 22. 1864
J. L. Leland CWR

STATE OF ILLINOIS.

S U P R E M E C O U R T ,

RANSOM BABCOCK,
vs.
H. T. AVERY & G. D. ENSIGN. } Error from Knox.

Abstract of Record.

1 A motion was made in Knox Circuit Court, on the 20th
2 day of June, A. D. 1859, to set aside an execution issued in
3 the above intitled cause, and to set aside the sale of real
4 estate made on said execution. The motion was made by
H. T. Avery and G. D. Ensign, the above named defend-
ants.

1 On the 22d day of October, 1859, said motion was over-
2 ruled, with leave to file bill of exceptions in thirty days, and
defendants excepted.

4 On the 20th day of June, 1859, both parties appealed to
said motion and the same was continued to the next term.

Bill of exceptions filed 11 November, 1859.

2 Bill of exceptions so filed.

3 Notice of motion and proof of service.

4 Motion entered in court June 20th, 1859, to set aside sale
of the land and set aside execution. Parties appeared to the
motion and continued the motion to the next term. On the
5 22d of October, 1859, said motion came on to be heard
Defendent offered in evidence and read transcript from
docket of A. C. Wiley; summons in due form, dated 25th
February, 1858, returnable before A. C. Wiley, Police Magis-
trate of Galesburg, Ill., March 9, 1858, and against H. T.

Avery and G. D. Ensign, and in favor of Ransom Babcock, in due form. Summons served March 1st, 1858.

6 Transcript from justice's docket:

"On the day of the trial, suit called. Defendants appeared and acknowledged the above amount correct. Judgment is therefore rendered by confession against H. T. Avery and G. D. Ensign, and in fa. of Ransom Babcock for the sum 383 18 debt and 2 39 cost. Ex. issued April 21, 1858.—Siss." Certified properly.

6 Execution in due form. Return, *nulla bona*.

7 Transcript filed June 29, 1858. C. Arms, Clerk.

Execution issued on said transcript, dated January 10, 1859, and is in due form.

9 Sheriff's return, received fi. fa. January 10, 1859. Same day levied upon S W 12, T 11 N R 1 E. That he advertised according to law, and on 5th February, 1859, sold the land to Ransom Babcock for \$350.

10 Certificate of purchase in due form to Babcock.

This was all the evidence.

Motion overruled, and execution. *caption*

ASSIGNMENT OF ERRORS.

The court erred in refusing to set aside execution.

The court erred in refusing to set aside said sale.

¹³²
H Tabery Nat,
Prof. iur
2

Russm Babcock
Sept. iur

Abstract

Filed April 22. 1864
L. L. Landa CWR

RECEIVED IN DEPOSIT
The court clerk in reference to the above examination
The clerk of the court in reference to the above examination

S U P R E M E C O U R T .

APRIL TERM, A. D. 1864.

H. T. AVERY & G. D. ENSIGN,
Plaintiffs in Error,

VS.

RANSOM BABCOCK,
Defendant in Error,

POINTS OF DEFENDANT IN ERROR.

T. G. FROST, Att'y for Def't in Error.

The objection that the dollar mark is wanting on the record of the judgment cannot be sustained.

I. Because it sufficiently appears from the accompanying papers, which by the statute make a part of the record, that the amount was specified in dollars and cents, and the entire transcript and record is open to the inspection of the court.

II. The same rule which applies in tax cases, ought not to be applied here, because, for peculiar reasons applicable to that class of cases alone, no presumptions are indulged in favor of the proceedings, and the most rigid rules are adopted in testing the regularity and validity of the proceedings, and which do not apply to ordinary judgments and proceedings thereunder.

III. A writ of error does not lie from the order of the Circuit Court.

First. Because such an order is not a final judgment and decree within the meaning of the statute.

Second. The order in no respect concludes the parties or prevents raising the same objections as were made in the Circuit Court to the validity of the judgment in any proper proceeding hereafter. Its reversal does not materially change the relations of the parties, or affect their rights. It is merely an order refusing to interfere with the judgment on a summary application.

5 Gilman, 33.

13 Ill., 31, 635.

21 Ill., 207.

The case, 1st Scammon, was in effect an appeal from the "judgment," itself, not merely from the order made in overruling the motion.

Third. The refusal of the court to interfere on a summary application in the case, was a mere matter of discretion, which is not subject to review by the Supreme Court.

1st Scam., 341.

1st Scam., 250, 542.

2d Scam., 65.

Ill. Digest, 165, 195, 197.

Fourth. It is too late to take a writ of error from the judgment, as more than five years have elapsed since the transcript was filed and the judgment was entered, and no appeal has in fact been taken from the judgment.

T. G. FROST, Att'y for Def't in Error.

H. J. Wray
Esq

27

Ransom Babcock

4
Depts Brief

Filed April 28, 1864

L. L. Canaan

1
State of Illinois }
Knox County } ss

Pleas before the Honorable
John Thompson Judge of the Tenth Judicial
Circuit of the State of Illinois at a Court
began and held at the Court house in the
City of Knoxville on the fourth Monday
of September in the year of our Lord one
thousand eight hundred and fifty nine
it being the Twenty sixth day of Septem-
ber. aforesaid

Present Honorable John S. Thompson ^{Judge}

James H. Stewart States atty
Cephas Arms Clerk

Andrew Thomson Sheriff

Ransom Butcock

vs

H. S. Avery & G. D. Ensign

3
3
3 Transcript

Be it remembered that at the
above term of said Court the above suit
was pending on defendants motion to set
aside the Sheriff sale therein and that
on the 22^d day of October 1859. the Court
made an order therein the Record of
which is in the words and figures
as follows to wit

Ransom Butcock

vs

H. S. Avery & G. D. Ensign

3
3 On Transcript
3

2

This day came on this cause for hearing on the defendants motion to set aside sale on execution and after hearing the same it is ordered by the Court that the motion be overruled to which decision of the Court the defendant by his Attorney except Bill of exceptions to be filed in 30 days.

And afterwards to wit of the 11th day of November A.D. 1859. the defendant filed his bill of exceptions herein which is in words and figures as follows to wit

State of Illinois

Knox County

3rd Knox Circuit Court
September Term A.D. 1859.

Ransom Babcock

vs

George D Ensign
and He S Avery

Be it remembered that at the June Term of this Court held at the Court House in the City of Knoxville in said County & State on the 20th day of June A.D. 1859. the Defendants in the above entitled cause came and filed in Court a motion with the proof of service in the following words & figures

9

State of Illinois }
Knox County }^{ss}

Ransom Babcock

vs

He J Avery & G D Ensign

} Transcript of Judgment

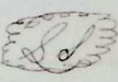
You will please take notice
that on the 20th day of June A.D. 1859 or as
soon thereafter as counsel can be heard a
motion will be made at the Court House
at Knoxville at a Term of the Knox Circuit
Court then to be held for an order setting
aside the Execution issued on the judgment
rendered in the above entitled cause & also
to set aside the sale of real estate made in
said Execution

To Ransom Babcock

Douglas & Craig

Attys for Defts

State of Illinois }
Knox County }^{ss}

Marion Bundy 

being duly sworn says that on the 15 day
of June A.D. 1859. he gave to Ransom Babcock
personally a true copy of the above notice
Subscribed and sworn before me this
18th day of June A.D. 1859.

L C Conger Police Magistrate



And on the same 20th day of June A.D. 1859

in the motion book in said Court caused to be returned his motion which is in the following words and figures

June 20th 1859

Ransom Babcock

vs

H. J. Avery and
G. D. Ensign

Transcript Judgment

And now comes the defendants and moves the Court to set aside the execution issued on the judgment rendered in the above entitled cause & to set aside the sale of Real Estate made upon said execution

Douglas & Craig

Attys for Defts

And at said Term the parties plaintiff & defendants appeared to said motion & said motion was continued until the next Term of said Court, and that afterwards to wit at the next term of said Court to wit on the 22^d day of October A.D. 1859 said motion came on to be heard & the Plaintiff & defendants ^{appeared} there to by their respective counsel And the defendants in support of said motion introduced in evidence a Transcript in the following words and figures to wit

8- Ransom Babcock } Action on Note
vs Demand 383.¹⁸

vs
H. J. Avery &
G. D. Ensign

Summons issued Feb'y 25th 1858

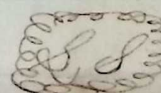
State of Illinois

Monroe County ss

City of Galisburg

The People of the State of Illinois to the marshal of said City or any Constable of said County. Greetings we command you to summon H. J. Avery & G. D. Ensign to appear before me at my office in Galisburg on the 6 day of March 1858 at 10 o'clock A.M. to answer the complaint of Ransom Babcock for a failure to pay him a certain demand not exceeding \$500. and thereof make due return as the law directs.

Given under my hand and seal this 25 day of February A.D. 1858

A. C. Wiley 

Police Magistrate

Summons return by Constable Session — served by reading the same to H. J. Avery and G. D. Ensign March 1st 1858. fees 1.20

J. P. Sisson

On day of trial suit called defendants appeared and acknowledged the above amount.

correct. judgment is therefore rendered by confusion
against H. S. Avery & E. D. Censign and in fav of
Ransom Babcock for the sum of 383¹⁸ debt and
2³⁹ cost. Ex issued April 21st 1858

State of Illinois
Knox County
City of Galesburg

The People of the State of
Illinois To the Marshal of said City or any
Constable of said County greeting we com-
mand you that of the goods and chattels
of H. S. Avery and E. D. Censign in your
County you make the sum of 383 dollars
and 18 Cents debt and 2 Dollars and
64 cents cost with interest at the rate of
six per cent. per annum from the 6 day of
March 1858 when judgment was rendered
which Ransom Babcock lately recovered
before me in a certain plea against the
said Avery & Censign and thereof make
return to me within Seventy days from
this date.

Given under my hand and seal
this 21 day of April A.D. 1858

A. C. Wiley
Police Magistrate

Ex returned by Const Sison no property
found in this County June 5th 1858
J. P. Sison
Const

7

State of Illinois
County of Knox

I A. C. Wiley a police magistrate
for said County certify that the foregoing trans-
cript is a truly copied from the books
and files of my office. Witness my hand
and seal this 14th day of June A.D. 1858,
A. C. Wiley

Police Magistrate

Which Transcript had the following filing
thereon

Filed June 26 1858, & Recorded in
Transcript No 2 on Page 14

Albion C. K.

And the defendants introduced in evidence
the execution issued on said Transcript
which Execution is in the following words
& figures

State of Illinois 3
Knox County 3²⁰

The People of the State of
Illinois To the Sheriff of said County Greeting
Whereas, by the consideration of A. C. Wiley Police
Magistrate Esq. of said County on the 6th
day of March A.D. 1858, Ransom Babcock
recovered judgment against J. I. Avery &
G. D. Ensign for the sum of Three hundred
& Eighty three & 100/100 Dollars debt and Five
and 64/100 Dollars costs of suit as appears by the

8

Transcript of the said judgment duly certified
and filed in the office of the Clerk of the Circuit
Court for the said County on the 26th day of
June A.D. 1858. We therefore Command you
that of the good and Chattels lands and
tenements of the said M. J. Avery & G. O.
Ensign you cause to be made the said sum
of Three hundred & Eighty three & 1/2⁰⁰ Dollars
deb. as aforesaid together with interest there
on from the said 6th day of March A.D.
1858. and the sum of \$5.64 costs as aforesaid
and also the further sum of \$3.00
additional costs and that you have the
same ready as soon as may be to render
unto the said Plaintiff according to law
Hereof fail not and make return
of this writ within ninety days from
the date hereof with an endorsement
know of the manner in which you shall
have executed the same

Witness my hand and seal of said Court at
Knoxville in said County this
9th day of January A.D. 1859
C. Arms Clerk

Seal
Court

Bill of Costs

Justice's fees A. C. Wiley P.M. Justice	2.44
Constable fees J. P. Lison Constable	3.20
Clerks fees C. Arms Clerk	

§ 9 Filing papers. 5 Entering judgment on Docket. 25 30
 Record Transcript from Jt. 100 File precept for Execution 5 1 05
 Issue Execution 40 Filing do. 5 Docket do 10 33
 Enter Sheriff's return to Docket. 10 Enter satisfaction 15 25
 Make and Enter Bill of Costs 30 Copy Bill Costs 20 50
 Certificate and Seal 35 35
 State of Illinois }
 Knox County } 20

I Lephas Arms Clerk of
 the Circuit Court within and for said County
 do hereby certify that the above bill of Plaintiff's
 Costs and Charges in the above recited Cause
 is truly copied from my Cost. Docket and
 is included in an Execution herewith
 issued against the said Defendant

Witness my hand and
 the Seal of said Court at Knoxville
 this 10th day of January A.D. 1859
 Lephas Arms Clerk

And the Sheriff's return upon said Execution
 which was in the following words and fig-
 ures

Recd this 10th Jan January 10th A.D. 1859.
 9 o'clock A.M. and by virtue of the command
 therein I did on the Tenth day of January A.D.
 1859 Levy upon the following described Real
 Estate To wit The South West quarter of
 Section twelve (12) Eleven (11) North, One
 East undivided interest of George D. Ansign

10 in said land Sale on the 5th day of February A.D. 1859. according to law & due notice I did on the 5th day of February A.D. 1859 sell the above described real estate to Ransom Babcock Plaintiff in Execution for the sum of three hundred and fifty dollars it being the highest and best bid he Ransom Babcock Plaintiff in Execution paying to me all costs I return this writ Retaining my fees \$ 13.10 A. C. Wiley fees \$ 2.44 J. P. Sissons fees \$ 3.20 Paying to C. Arms Clerk his fee \$ 3.00 And cannot find any other property to make the balance of the within debt this 5th day of February A.D. 1859

And Thomson Sheriff

And the Defendants introduced the Certificate of purchase given by the Sheriff upon sale of Real Estate upon said Execution which Certificate is in the following words & figures

I Andrew Thomson Sheriff of the County of Knox and State of Illinois do hereby certify that by virtue of a writ of Transcript Fi Fa dated the Ninth day of January A.D. 1859 to me directed from the clerk of the Circuit Court of the County of Knox and State of Illinois issued upon a certain judgment rendered by A. C. Wiley Police Magistrate of Knox County & State of Illinois a Transcript of said judgment duly certified & filed in the Clerk

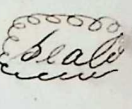
11

Office of the said Court on the 26th day of June A.D. 1858 in favor of Ransom Babcock against D. L. Avery & G. D. Ensign I did on the Fifth day of February A.D. 1859 expose to public sale in the City of Knoxville a certain tract or lot of land lying being and situate in the County and State aforesaid to wit the South west quarter of Section twelve (12) Township Eleven (11) North of Range One (1) East of the fourth principal meridian the interest of G. D. Ensign in said land and that Ransom Babcock Plaintiff in Execution bid the sum of Three hundred and fifty dollars and no Cents therefor which being the highest and best bid the said tract or lot of land was struck off to him the said Ransom Babcock and that the said Ransom Babcock will be entitled to a Deed for the premises so sold to him on the sixth day of May A.D. 1860 unless the same be redeemed according to law.

GIVEN under my hand and seal
this Fifth day of February A.D. 1859
Andrew Thomson *Seal*
Sheriff of Knox County, Illinois

This was all the evidence in said motion
and after the hearing of said evidence &
the argument of Counsel the Court at

the September Term of this Court A.D. 1859, over-
ruled said motion and the defendants then
& there at the time of overruling said motion
to the decision of the Court in overruling
said motion Excepted & objected that the
matters aforesaid might be made a part
of the Record in said Cause I have caused
this bill of exceptions to be signed & sealed
this 29th day of October A.D. 1859.

John S. Thompson 

State of Illinois }
Knox County } ss

I Cephas Armes Clerk of
the Circuit Court within and for said
County & State do certify that the fore-
going is a true and correct transcript
of said cause, and of all proceedings
therein as the same remains of record
and on file in my office.



Witness my hand and
the seal of said court at
Knoxville this 24th day of
March A.D. 1860

Cephas Armes
Clerk

Supreme Court of the State of Illinois
Of the April Term A.D. 1864

H. T. Avery &
G. D. Ensign

Plaintiffs in Error

Ransom Babcock

Defendant in Error.

Afterwards tried
on the 3^d Monday of April in this same
Term before the Justices of the Supreme
Court of Judicature of the People of the
State of Illinois at the Court House
in the City of Ottawa comes the
said H. T. Avery & G. D. Ensign by
L. Douglass their Attorney & say that
in the Record & proceedings aforesaid
said & also in giving the judgment
aforesaid there is manifest error
in this Court That the Court erred
in the refusing of the Motion of the
said H. T. Avery & G. D. Ensign
& set aside said execution
Secondly in refusing their Motion
& set aside the bill of said real estate
And the said H. T. Avery & G. D.
Ensign pray that the judgment
aforesaid for the errors aforesaid

other errors in the record and
proceedings of the said May be
revised arranged & together
held for naught & that they may
be returned to all things which
they have lost by the occasion
of said revision & specimens.

In Mule ~~Est. Erratum~~
April 23rd 1864 V.G. Frost
A. T. Atony & G.D. Ewing

L. Dwyer
Atty for Atty
in error

V. Potts & Error

Rasmus Babcock

Left in error.

issue writ of error & return to
Munro's

& Dwyer

Ed. Leland Clerk

Atty for Atty

132 25
Rasmus Babcock

A. T. Atony & G.D. Ewing

Russell

Filed April 6th 1864

L. Leland
Clerk