

12341

No. _____

Supreme Court of Illinois

May

vs.

Symms, et al

71641  7

State of Illinois, 3rd Grand Division of
Supreme Court April Term, A.D. 1857.
James May Off in Error, Error to
as } Rockford.
Robert Symonds ad. Defs in Error

And now comes James May
the Plaintiff in Error and says that
manifest injury hath intervened
the record, proceedings and judgment
of which the following is a record
and transcript and for error
therein assigns the following, to-wit:
1. The Circuit Court erred in
sustaining the demurrer to the Com-
plainant's Bill &
2. The Circuit Court should
have overruled the demurrer and
required the defendant to answer.

Wherefore he prays that
the same judgment be reversed
& the cause remanded &c.

Gandy & Judd

Attys for Off in Error.

Defendants in Error say there is no
error in the Record as above alleged
Manning & Dominick
Attys for Defendants

Be it remembered that on the 12th
day of August A. D. 1851, James May
filed his Bill in Chancery in the
Circuit Court of the County of
Rock Island and State of Illinois,
against Robert Symms, Thomas
Symms, and James Symms, which
reads in the words and figures
following, to wit:

State of Illinois Of the November term of
Rock Island County Rock Island County
Circuit Court - A D 1851 —

To the Hon. Jas. C. Wilkinson
Judge of the said Judicial Circuit Court
of the State of Illinois, in Chancery sitting,
Humbly complaining sheweth unto
Your Honor Your Orator James May of
Pittsburgh in the State of Pennsylvania
to wit of the County of Rock Island in
the State of Illinois, that heretofore to wit
on the twenty fourth day of June A. D. 1838,
at the County of Rock Island aforesaid
Your Orator purchased of Robert Symms
& Thomas Symms all their the said Robert
& Thomas, right title claim & improvement
that they then had or thereafter might
have in and to two certain pieces or
parcels of land one being a fractional

Price with improvement-situation and
laying at and near the head of Rock
Island Rapids so called, the other price of
land being the quarter section laying back
of and adjoining said fraction, for the
consideration of three hundred dollars,
and that a deed of conveyance therefor
from them the said Robert & Thomas
duly executed & acknowledged & recorded
in the records office of Rock Island
County aforesaid on the 29th day of June
A.D. 1830, in Book "A" of deeds on pages
two {2} and three {3} as by a copy of said
deed herewith filed marked "Exhibit A"
will more fully appear, and which
Your Orator prays may be taken as part
of this his bill of complaint,

And Your Orator shews that
under the description of lands con-
veyed by the said deed of said
Robert & Thomas to Your Orator it was
intended by the parties thereto in
reference to said "fractional price"
therein mentioned to convey to Your Orator
the south west fractional quarter of
Section twenty five {25} in Township No
nineteen {19} north of the base line of
Range No one {1} east of the 4th P.M.

Which said fractional quarter of section twenty five {25} is situated and lying at and near the head of said Rock Island Rapids on the left bank of the Mississippi River in the County of Rock Island aforesaid, but inasmuch as the description of said South West fractional quarter of Section twenty five {25} according to the government survey at the date and execution of said deed was unknown to Your Orator and the said Robert & Thomas, they could not adopt and embody in said deed a more particular or better description thereof than appears in said deed and is herein before set forth.

And Your Orator further shows that at the time the said Robert & Thomas executed said deed to Your Orator as aforesaid the government title to the lands so conveyed by the said Robert & Thomas to Your Orator, had not been extinguished or purchased, but the said Robert & Thomas by reason of their improvement thereon and particularly on said South West fractional quarter of Section twenty five were entitled to a preemption to the same and a preference to the right of

Purchasing the same from the government of the United States, and accordingly said Robert & Thomas in their said deed of conveyance to Your Orator agreed and bound themselves to Your Orator to secure for him said "fractional price" in the land Office free of expense to Your Orator.

And Your Orator further shows that in pursuance of said last mentioned agreement specified in said deed, the said Thomas some time previous to the 28th day of June A.D. 1842 established and proved his claim to said south west fractional quarter of section twenty five for \$2.50 in the land office when said land was subject to sale, and at the date last aforesaid or soon after {the precise time Your Orator is unable to state} the said Thomas paid for and acquired a title in his own name to said south west fractional quarter of section twenty five.

And Your Orator shows that upon the representation of said Robert & Thomas and particularly of the said Thomas that he had been put to much expense and trouble to obtain a title to said south west fractional quarter of section twenty five and upon his the said

And notwithstanding your Orator had before then fully paid said
Robert Thomas for said fractional quarter agreeable to the stipulations in their
said deed —

Thomas demand and solicitation to
obtain further compensation in respect
thereof. Your Orator through his agent
Nathaniel Belcher paid and advanced
to the said Thomas, on the 12th day of
September A.D. 1842 the further sum of
twenty nine dollars and thirty seven
cents as and for a further consideration
for said South West fractional quarter
and took his the said Thomas receipt
therefor which is in the word Character
& figures following, to wit "Sept-12th 1842
" Received of James May by the hand of
" Nathaniel Belcher twenty nine dollars
" 37/100. Being in full for the entrance
" Money for the South West fractional
" quarter of Section {25} twenty five in
" Township No 19th Nineteen North of the
" Base Line of range No one east of the
" fourth principal Meridian
" Witness B. F. Barrett
Thomas ^{his} Symmes
Went

A copy of which said Receipt
Your Orator herewith files Marked
"Exhibit B" and prays that the same
may be taken as part of this his bill
of Complaint.

And Your Orator shews that the said south West fractional quarter of said section twenty five containing twenty three and forty Min on hundredthth acres of land. and that the said Robert & Thomas or either of them from and after the date of this said deed to Your Orator, namely, from ~~the~~ said twenty fourth day of June A.D. 1831 held the same as ~~trusts~~ to Your Orator and to and for his use, and that the said Thomas from and after the said 28th day of June A.D. 1842, and from and after the time that he acquired and purchased the title of the United States to said South West fractional quarter of section twenty five in his own name, held and possessed the same in trust for Your Orator - And further Your Orator shews that from and after the time that said Thomas obtained the government title to said fractional quarter, such title thus obtained by virtue of the said deed from said Robert & Thomas to Your Orator to the use and benefit of Your Orator.

And Your Orator further shews that the said Robert & Thomas on or about

Of them for a long time previous to said
twenty fourth day of Jan A.D. 1838
resided upon and possessed said south
west fractional quarter of Section twenty
five and made permanent and sub-
stantial improvements thereon, which
possession & improvements was visible
& notorious to all the inhabitants of
the Country round about and to all
people passing and repassing upon
the Mississippi River, and which
possession and improvement of the
said Symmes upon said fractional
quarter was of such a character that
according to the custom of the Country
their claim thereto was respected
and entitled them to a presumption
thereof, to the exclusion of all others,
and that from and after said twenty
fourth day of Jan A.D. 1838 the said
Robert and Thomas on or before
continued to occupy & possess and im-
prove said south west fractional
quarter, in subjection to John Orator's
title thereto, in a way and manner
that according to the custom of the Country
& the laws of this state their possession &
occupancy thereof was entitled to respect

And legal protection, and entitled
them, or Your Orator, or Your Orator through
them to a prior right of obtaining the
government title thereto, which last
mentioned possession and
improvement was continued by said
Syrmons one or both subject to Your
Orator's title, up to the time when the
said Thomas obtained the government
title thereto, namely, to the twenty
eighth day of June A.D. 1842 - and that
the said Thomas thereafter continued
to occupy & possess said south west
fractional quarter, subject to Your
Orator's title thereto, until on or about
the twenty second day of September A.D. 1843
when the said Thomas by his deed
fraudulently conveyed ~~twenty~~ two and
forty nine one hundred acres off the
the south end of the said south west
fractional quarter, to one James Syrnny
brother of said Thomas, of Knox County
in this state which said deed to
said James was immediately after
its date recorded in the Records
Office of said Rock Island County.

And Your Orator further shows that
his claim & title to said son's west
fractional quarter after the date and
recording of his ^{said} deed from the said
Robert & Thomas and up to the time that
said Thomas deeded the same to said
James was notorious to the people
resident or passing in the neighborhood
of said fractional quarter and was
evidenced not only by the record of
said deed of said Robert & Thomas
to Your Orator, but also by the posses-
sion of said Robert & Thomas, one or both
in and to said fractional quarter
section, which possession was notori-
ously understood and acknowledged
and proclaimed to be subordinate to
Your Orator well known title and
that the said James at the time he
became a party to said deed from the
said Thomas had due notice of Thomas
Orator's claim and title to said son's
west fractional quarter, and at that
time had due notice that the said
Thomas therefore held and possessed
said fractional quarter in trust for
Your Orator —

And Your Orator further shows ~~that~~
the said James at the time that said
deed was executed to him by said
Thomas paid no consideration for said
twenty two $\frac{49}{100}$ acres off from the south
end of said south west fractional
quarter, and never before or since has
paid any consideration therefor.

And has never agreed or become oblig-
ated so to do. but on the contrary
thereof the conveyance by said deed
from said Thomas to said James of
such portion of said fractional quarter
was and is wholly and entirely without
consideration, and fraudulent as
to Your Orator, and that in equity
and good conscience the said James
now holds said fractional quarter or
so much thereof as remains in him
unconveyed, subject to Your Orators
equitable title and estate therein.

And Your Orator further shews
to Your Honor that the said James Symmes
on or about the seventh day October A.D.
1844 by his certain power of Attorney of
that date authorized and appointed
the said Robert Symmes his the said
James Attorney for him and in his name

To sell, convey and dispose of, at his the said Robert's discretion, all that part of said ~~ponds~~ tract ~~practically~~ quarter, which was conveyed to said James by said Thomas as hereinbefore ~~stated~~, which said power of Attorney was duly executed & acknowledged and was made of record in the Recorder's Office of Rock Island County ~~and~~ the 5th October A.D. 1844, and John Orator further shows that in the Recorder's Office of said Rock Island County there appears of record therein a certain other similar power of Attorney from said James to said Robert executed for like purposes and giving to said Robert the same authority dated — day of February A.D. 1844, duly acknowledged, and recorded therein the thirtieth day of Sept A.D. 1844, & which said two several powers of Attorney so far as shown of record appear to be — and in full force, and so John Orator shows the fact to be —

And John Orator further shows that the said Robert by virtue of and under one or the other of said powers of

Attorney from said James notwithstanding his full knowledge of Your Orator's equitable title to the same, has fraudulently conveyed granted bargained and sold to divers persons nearly all of said fractional quarters so conveyed & deeded by said Thomas to said James as aforesaid and executed & acknowledged duly therefor, and that there now only remain unsold & unconveyed in said James somewhere from two to five acres of said fractional quarters as Your Orator is informed and believe.

And Your Orator shows that the said Robert has appropriated to his own use all moneys or other property, avails of the sales made by and under said power of Attorney, the said James claiming and taking no part thereof, and Your Orator shows that he is under great apprehension and has good reason to believe and does believe that the said Robert or the said James will sell dispose of and convey what now remains in them or either of them unsold of said quarter

With fractional quarter and execute
deeds ~~therefor~~ unless restrained by the
injunctive of this Honorable Court.
That the said Robert refuses to convey to
Your Orator what remaining unsold
of said fractional quarter conveyed
by said Thomas to said James as afore-
said and threatening to dispose of the
same or parts thereof to other persons -

Wherefore and forasmuch
as Your Orator is without adequate
remedy at and by the strict rules of
law, and is only relievable in this
Honorable Court, when matters of fraud
trust and confidence are properly
cognizable and relievable, Your
Orator respectfully prays Your Honor
that the said Robert Symmes Thomas
Symmes and James Symmes be
made defendants to this Your Orators
bill of Complaint, and that they
and each of them be required to make
full true, and perfect answer to all
and singular the statements, allegations,
charges and averments therein contained
and under their several and respective
oaths, and that upon a hearing of

This cause Your Honor will be pleased
to order and ~~that~~ the said
Robert Thomas and James convey to
John Orator all the title vesting in ~~them~~
or any of them in and to so much
thereof of said south west fractional
quarter section as remains in them
or some one or more of them unconveyed
and that they be perpetually enjoined
& prohibited from setting up any
claim or demand there to.

And meanwhile that Your
Honor will grant to John Orator the
~~said~~ writ of Injunction issuing out
of this Honorable Court and under the
seal thereof commanding restraining
enjoining & prohibiting the said Robert
and the said James or either of them
from making or executing any deed
or deeds of conveyance so as to pass the
title from them or either of them to any
part or parcel of said South West
fractional quarter section, and
also restraining and prohibiting
them the said Robert & James or either of
them from making or entering into any
contract or agreement for the sale of any
part thereof. And that Your Honor

Will also grant unto Your Orator such
other and further relief as the premises
as to equity and good conscience may
appertain. And finally that Your Honor
will grant to Your Orator the writ of
Summons in Chancery, issuing out
of and under the seal of this Court
against the said defendants

Commanding &c requiring &c and
as in duty bound Your Orator will
ever pray &c
J. J. Beardsley } James May
Solicitor for Orator

State of Illinois }
Rock Island County } James May the Com-
plainant in the foregoing Bill of Complaint
being duly sworn on oath states that he
has heard the foregoing bill of Complaint
read and read the same himself
and knows the contents thereof, and that
the statements therein made upon the
knowledge of Complainant are true. and
that the statements made therein upon the
knowledge and belief of Complainant he
believes to be true. James May

Sworn and subscribed to before me this 12th day of
August A.D. 1881. Ezra Wilson Clerk Circuit Court
Rock Island County Illinois

And that at the same time the following
Exhibit marked A was filed therewith
which reads as follows, to wit;

This Memorandum of
agreement made and entered into on
Rock Island the twenty fourth day of June
A.D. eighteen hundred & thirty five by and
between Robert and Thomas Symmes of
Rock Island County State of Illinois of the
one part, and James May of Pittsburgh
Pennsylvania Merchant of the other part,
Witnesseth that the said Robert & Thomas
Symmes has conveyed and sold in fee
simple to said May all their right-
title interest claim & improvement-
that they now have or hereafter may have
in two certain pieces or parcels of land,
One being a fractional piece with improve-
ment, lying at and near the head of
the Rock Island Rapids, The other is the
quarter section back adjoining said fraction
in consideration of which said May
agrees to pay to said Symmes or assigns
three hundred dollars in three payments
The first of which is hereby acknowledged
by said Symmes, One hundred & fifty dollars
in Cash, fifty dollars in twelve months.
And the remaining one hundred dollars

When the Patent from the Land Office is delivered
which said R & T. Symmes bind themselves
to secure and pay for in the Land Office
free of any expense to said May on the said
proceeds. Said May is to pay to the Land -
Office the government price for the said
Quarter Section. On witness whereof we

Witness

Jas M Bowling

Geo L. Davenport

Robert ^{his} Symmes Seal

Thomas ^{his} Symmes Seal

Jamus May Seal

State of Illinois
Rock Island Rapids
State of Illinois
Rock Island County } set

This day personally
appeared before me Joseph Conway Clerk of
the Circuit Court in and for the said
County of Rock Island James M. Bowling
and Geo L. Davenport who is personally
known to me to be the subscribing witnesses
to the foregoing instrument of writing, and
who being by me duly sworn on their oaths
do say that Robert. Symmes, Thomas Symmes
and Jamus May whose names appear
subscribed to the foregoing instrument of
writing are the real persons who

Executed the same and that they
subscribed their names as witnesses to the
said instrument of writing in the presence
of the request of the said Robert Symmes
Thomas Symmes and James May for the use
and purposes therein mentioned. Given under
my hand this 29th day of June 1888.

Joseph Conway.

State of Illinois }
Rock Island County } I, J. Frazer Wilson Clerk of
the Circuit Court and Ex Officio Recorder in
and for the County of Rock Island and State
of Illinois, do certify that the within deed is a
true and perfect copy of the original deed
and acknowledgment. R + T. Symmes to
James May as recorded in Book A of deeds
on pages two (2) and three (3) I further certify
after comparing this with the original Deed as
recorded find it a correct copy -

L.S.

Given under my hand and the seal
of said court at Office in the City of
Rock Island this 12th day of August
A.D. 1888. J. Frazer Wilson Clerk &
Ex Officio Recorder

And also that at the same time the following exhibit marked D was filed therein which reads as follows to wit:-
Sept 12th 1842..

Receipt of James May by the hands of Nathaniel Belcher Twenty Nine Dollars 37 being in full for the entrance money for the South West fractional Quarter of Section 20 Township five in Township No. 19 Ninteen North of the base line Range No one east of the fourth principal Meridian..

Witness
B. A. Bennett, H. M. X Symmes
Warrant

And thereupon the clerk of said Circuit Court issued his writs of summons against the said defendants to the Counties therein named and which were afterwards returned by the Sheriffs of said Counties and which said summonses with the returns thereon endorsed read as follows. to wit:-

State of Illinois }
Rock Island County } To the people of the State of
Illinois. To the Sheriff of Knox County
We command You to summon Robert Symmes
& James Symmes and Thomas Symmes
if to be found in Your County, personally

To be and appear before the
Circuit Court of said County on
the first day of the next term thereof to
be holden at the Court House in Rock Island
on the first Monday in the Month of November
next to answer a certain bill of Complaint
filed in our said Circuit Court on the
Chancery side thereof against thee by
James May, And have you then the due
writ and make return thereon in what
manner You execute the same

Witness Myself Judge Wilson Clerk of our
said Court at Rock Island this 14th day
of August 1881

Frederic Wilson Clerk

I have this 17th day of October A.D. 1881 served
the within writ on the within named
James Symmes by leaving "at his usual
place of abode" a true copy of said writ
with a white Member of the family over the
age of ten years and informing said person
with whom the copy of the said writ was left
of the contents thereof, Samuel W. Brown,
Shff

State of Illinois
Rock Island County } The People of the state
of Illinois, To the Sheriff of said County
Greeting, We command You to summon
Robert Symmes, James Symmes, and

Thomas Symmes, if to be found in
Your County personally to be and appear
before the Circuit Court of said County
on the 1st day of the next term thereof
to be holden at the Court House in Rock
Island on the first Wednesday in the
Month of November next to answer a
certain Bill of Complaint filed in our
said Circuit Court on the Chancery
side thereof against, then by
James May. And have you the
the this Writ and make return thereon
in what Manner you execute the
same. Witness my hand Clerk of
our said Court at Rock Island this 14th
day of August 1851
Frazier Wilson Clerk

I have executed this summons by
reading the same and handing a
true copy to Robert Symmes and
Thomas Symmes this 15th day of
August A.D. 1851 J. B. Gorton
Shriff R. I. County

And afterwards, to wit, on the 23d day
of January A.D. 1852 the said defendants
filed their demurrer to said Bill in

Chancery, which reads as follows.
State of Illinois }
Rock Island County } In Circuit Court on the
Chancery side.

The disclaimer of Robert Symmes
Thomas Symmes & James Symmes
to the bill of James May Complainant.
These defendants by protestations not
confessing or acknowledging all or any
of the matters and things in the said
Complainant's bill contained to be
true in such manner and form as
the same are therein and thereby
set forth and alleged do deny
to the said bill. And for cause of
disclaimer show that the said Com-
plainant has not by his said bill
made such a case as entitles him
in a Court of Equity to any
from these defendants respectively or
any of them, or to any relief against
them. As to the matters contained
in the said bill or any of such
matters, and that any which
can be made by these defendants
or any of them touching the matters
complained of in the said bill or any
of them, cannot be of any avail to the

Said Complainant, for any of the
purposes for which a ^{is} is sought
against the defendants by the said
bill. Nor entitle the said Complainant
to any relief in this Court touching
any of the matters therein complained
of. Wherefore and for divers other
good causes of demurrer appearing
in the said bill the defendants
do demur thereto, and they pray
the judgement of this honorable Court
whether they or either of them shall be
compelled to make any further or
other answer to the said bill, and
they humbly pray to be hence dismissed
with the reasonable costs in this behalf
sustained.

Know & Demand
Solicitors for Def^{ts}

And be it further remembered
that at a term of the Circuit Court
sitting as a Court of Chancery began
and held in the Court House in the
city of Rock Island within and for the
the County of Rock Island and State of
Illinois on the first Monday the third
day of November A.D. 1885 present

Hon Ira O. McKenim Judge of
the sixth Judicial circuit of the
State of Illinois.

Samuel B. Gordon Shiff
Frazar Wilson Clerk

That the following among other
proceedings now had, to wit:

Bill for specific performance

James May

v. s.

Robert Symmes, Thomas Symmes
and James Symmes

This day came Harp & Drury
Solicitors for Respondents and enter Respondents
appearances herein and Thompson came Bladely
Complainant Solicitor and on his Motion and
by agreement of Respondents it is ordered by the
court that Respondents be ruled to answer by
the first day of March next.

And afterward, to wit: at a term
of the Circuit Court of Rock Island County
sitting as a Court of Chancery, began
and held at the Court House in the
city of Rock Island within the County
aforesaid and state of Illinois on the
second Monday the Tenth day of ^{May} 1852

Present Hon Ira O. McKenim
Judge of the sixth Judicial circuit - ~~court~~ of the State
of Illinois. R. B. Gordon, Shiff Frazar Wilson Clerk

That the said cause not being
disposed of otherwise was continued by
operation of law.

And afterwards, to wit, at a term of
Pleas before Hon. Ira C. McKinison Judge of the
sixth Judicial Circuit ~~Court~~ of the State
of Illinois sitting as a Court of Chancery
again and held at the Court House in
Rock Island on the Monday the
day of November 1852

Present Hon. Ira C. McKinison
Judge &c

Leman B. Gorton, Shff
Foster Wilson, Clerk

That the said cause not being disposed
of otherwise was continued by operation
of law.

And afterwards, to wit, at a term
Pleas in Chancery before Hon. H. M. Ward
Judge of the tenth Judicial Circuit of the
State of Illinois sitting in exchange with
Hon. Ira C. McKinison Judge of the sixth
Judicial Circuit of said State at a term
of the Circuit Court again and held at the
Court House in the City of Rock Island

Within and for the County of Rock Island
and State of Illinois on the second day
Monday the Ninth day of May
A.D. 1883. Present Hon & M. Wood Judge &c

Alexander F. Brander. Shff
Frazar Wilson. Clerk

That the said cause not being
disposed of otherwise was continued by
operation of law..

And afterwards, to wit: at a term
pleas before the Hon Ira O. Williamson Judge
of the Sixth Judicial Circuit of the State
of Illinois - sitting as a court of Chancery
at a term of the Circuit Court began
and held at the City of Rock Island
within and for the County of Rock Island
and State aforesaid - on the first Monday
the seventh day of November 1883

Present Hon Ira O. Williamson

Judge &c

Alexander F. Brander Shff

Frazar Wilson Clerk

That the following among other
proceedings were had, to wit:

James May

^{v.s.}
Robert Symmes Thomas Symmes } Bill for a
and James Symmes } specific
performance

On this 14th day of November 1808
came the parties by their Solicitors and
Respondent files his demurrer, and this
cause coming on to be heard upon the said
demurrer, and the Court having heard
the arguments of Solicitors, and being
sufficiently advised in the premises
sustains the said demurrer, and
thereupon Complainant enters his
motion to amend his said bill and by
agreement of the parties it is ordered and
adjudged that the Complainant amend
the bill herein filed by the next term of
this court and that this cause be
continued.

And afterwards to wit,
At a circuit Court, sitting as a Court
of Chancery, begun and held at the
Court House in the City of Rock Island
within and for the County of Rock Island
and State of Illinois on the second
Monday & the 19th day of May in the
Year of our Lord One thousand eight hundred

And fifty from.

Present Hon Jas O Williams, Judge
of sixth Judicial circuit Ills
Alexander B. Branden Sheriff
Frazier Wilson Clerk

That the following among other
proceedings were had to wit:

James May Complainant

v. s.

Robert Symmes Thomas Symmes } Bill for -
and James Symmes Defendants } specific -
performance ..

On the 12th day of May
1854 came the parties by their solicitors
and the demurrer to complainants
bill having heretofore been sustained by
the court, and the Complainant now
electing to abide by the said bill of
complaint, it is thereupon ordered
and decreed by the court that said
Complainants bill of Complaint be
dismissed, to which the Complainant
by his Solicitor excepts, it is thereupon
ordered adjudged and decreed
that the defendants have and recover
of complainant their costs in this
behalf expended, and that execution
issue therefor as on a judgment at
law "

And afterwards, to wit: at a
Term of Pleas before the Hon Ira O. Wilkinson
Judge of the sixth judicial Circuit - of the
state of Illinois, sitting as a court of
Chancery at a term of the Circuit
Court of Rock Island County began and
held at the Court House in said County
on the first Monday in November 1854

Present Hon Ira O. Wilkinson, Judge

Alex P. Shumaker Shuff

Frazier Wilson Clerk

What the said cause not being
disposed of otherwise was continued
by operation of law.

And afterwards, to wit: at a
Term of Pleas before the Hon Ira O. Wilkinson
Judge of the Sixth Judicial Circuit Court
of the state of Illinois, sitting as a court of
Chancery, at a term of said Court began
and held at the Court House in the City
of Rock Island within and for the County
of Rock Island and State of Illinois
on the third Monday the 19th day of
March A.D. 1855.

Present Hon Ira O. Wilkinson Judge

Thomas P. Gorton Shuff

Frazier Wilson Clerk

That the said cause not being
disposed of otherwise was continued by
operation of Law—

And afterwards to wit: at a
Term of Pleas before the Hon. Ira C. Wilkinson
Judge of the sixth Judicial Circuit of
the State of Illinois sitting as a court
of Chancery: at a term of the Circuit Court
begun and held at the City of Rock Island
in and for the County of Rock Island and
State aforesaid on {the second Monday}
the eleventh day of June A.D. 1855.

Present Hon. Ira C. Wilkinson
Judge &c

Ed. Gorton Sheriff
George Wilson Clerk

That the said cause not being
disposed of otherwise was continued
by operation of Law—

State of Illinois }
Rock Island County } I Quincy Wendell clerk
of the Circuit Court for said county do
certify that the foregoing is a true transcript
of the above entitled case.

Witness my hand and the
seal of said court this first
day of April 1887

Quincy Wendell

¹⁸⁶⁸
James May
vs
Robert Symms & others

Transcript

Filed Apr. 2, 1887,

L. Leland
Clerk

Filed May 2, 1887,

L. Leland
Clerk

STATE OF ILLINOIS--Third Grand Division.

SUPREME COURT.---April Term, A. D. 1858.

JAMES MAY vs. ROBERT SYMMS, et al.

ERROR TO ROCK ISLAND.

Argument for Plaintiff in Error,

By GOUDY & JUDD his Attorneys.

May it please Your Honors:

A preliminary question arises in this case as to the character of the instrument of writing filed as exhibit A, and made part of the Bill.

If it is a deed of conveyance, then Chancery will take jurisdiction for the purpose of perfecting the deed by a proper description of the land; if it is merely an agreement, then a specific performance will be enforced by a Court of Chancery. It is, hence, immaterial which view the Court may take in order to decide upon the sufficiency of the Bill.

At the time of the execution of exhibit A., 24th of June, 1835, Robert and Thomas Symmes had a settlement and improvements upon the tract of land described in the Bill, whereby they had a right of pre-emption and a preference as purchasers from the United States. They sold the land to the Plaintiff in Error and executed the instrument, a copy of which is exhibit A; in it they were to obtain the Patent and pay for the same at the land office, and the Plaintiff in Error paid \$150 cash, was to pay \$50 in twelve months, \$1.00 when the Patent was delivered, and the government price for the quarter section, but was *not by the agreement* to pay the entrance money for the fractional tract described in the Bill, and which is the only tract in controversy in this suit.

The fractional piece was not entered for some reason until 28th June 1842, when Thomas Symms obtained the title in his name.

It does not appear under what law of Congress the defendants were entitled to pre-emption. The claim might at that period of time have been under a law approved May 29, 1830, or one approved April 5, 1832.

Pt. 1, Pub. Lands, Laws, Instructions, &c., 473; Ib. 493.

An act approved July 14, 1832, supplemental to the act of May 29, 1830, extended the time for making proof and payment until one year after the plats of the surveyed lands were filed in the proper land office.

Pt. 1, Pub. Lands, Laws, &c., 511.

An act approved March 2, 1833, supplemental to the act of April 5, 1832, made like provisions for persons entitled under that act.

Pt 1, Pub, Lands, Laws, &c., 521.

" 2d, Ib. Nos. 518, 522, 530,

The act of May 29, 1830 was revived by an act approved June 19, 1834, and provided for settlers on the land in the year 1833.

Pt. 1, Pub. Lands, Laws, &c., 525.

These were the only laws in existence providing for pre-emption right at the time of the execution of exhibit A. The demurrer admits the allegation that Symms had such a right and claim, and by reference to the public laws it follows that it accrued under one of these two acts of Congress. It is true that another act, approved June 22d, 1838, and still another, approved September 4th, 1841, were afterwards passed; but the provisions of such laws could not and did not confer any right in the year 1835.

The fifth section of the act of May 29, 1830, contains the following provision: "All assignments and transfers of the right of pre-emption given by this act, prior to the issuance of patents, shall be null and void."

A supplemental act was passed and approved January 23d, 1832 [Pt. 1. Pub. L., L., &c., 492.] which holds the following language touching the provision of the fifth section of the act of 1830:

"All who have purchased * * * * * may assign and transfer their certificates of purchase, or final receipts, and patents may issue in the name of such assignee, anything in the act aforesaid to the contrary notwithstanding."

The revival of the act of May 29, 1830 by the act of June 19, 1834, also revives the supplemental acts of January 23d 1832 and of July 14, 1832, whereby under the act of June 19, 1834, the original law and both supplements thereto were revived and in force when the instrument described in the Bill in this case was executed.

Pt. 2, Pub. Lands, Laws, &c., 196, 114, 605. 606.

A fair construction of the provision prohibiting the assignment and transfer of the right of pre-emption of the Law of May 29, 1830 and the supplement of January 23, 1832, would prevent the assignment before a substantial purchase and entry of the land, but permit it afterwards. See the Circular from the General Land Office of March 9, 1835, where this construction is given and a form for agreement given. A similar construction was made by the Department on a stronger provision in the act of June 22, 1838, as will be seen by reference to the Instructions.

Pt. 2, Pub. Lands, Laws, &c., 605, 1021, 1024. 1026

It will be observed that the act of April 5, 1832 and the supplement of March 2, 1833, contains no prohibition on the right of the claimant to dispose of his right of pre-emption at any period of time. A conveyance of a claim executed before entry of the land under these laws was held good and that the title subsequently acquired would enure to the benefit of the grantee by this Court.

Phelps et al, vs Kellogg, 15 Ill., 137.

The Defendants maintain in support of their demurrer to the Bill that the contract made by Robert and Thomas Symms with the Plaintiff in Error was void by the provisions of the fifth section of the act of May 29, 1830, and hence cannot be enforced; and if the instrument be a deed, that it cannot be reformed. If the right existed under the act of April 5th, 1832, the objection is based on false premises. The contract would be valid—the deed would be binding and the Court will not presume the parties were under the prohibition in order to defeat a fair agreement.

If the Complainant purchased of the Defendants a pre-emption right accruing under that law, then there was no prohibition which would affect the contract, and he would be entitled to relief upon the state of facts set out in the Bill.

If this position is correct, and we rely on it as such, the decree of the Court below must be reversed on this ground alone

II. We now propose to enquire if the transaction between the parties would be within the prohibition of the fifth section of the act of May 29, 1830, if that law with its supplements and the act of revival of June 19, 1834, were the only laws in existence, and the right of pre-emption flowed from these acts.

This Court has decided that a settlement and improvements on public lands and the right of pre-emption thereon by the laws of Congress are property, and constitute an estate that can be sold under process of law, to which a Mechanic's lien will attach, that will pass by an assignment in Bankruptcy, will pass by deed, and that they constitute a good consideration for a contract or promise.

Laws of 1831, p. 82.

Turner vs Sanders, 4 Scam., 527.

French vs. Carr, 2 Gil., 664.

Delanny vs. Burnett, 4 Ib., 492.

Phelps, vs. Smith, 15 Ills., 572.

It is well settled then by the law of the state of Illinois, that the instrument (Exhibit A.) would be a valid deed or contract, tested by the laws and decisions of this state.

It therefore follows that Symms could sell his land to May and agree to convey, or execute a deed, unless prohibited by the act of Congress.

What was prohibited? It was the "assignment and transfer of the RIGHT OF PRE-EMPTION" before the entry. Did Congress intend by this language to declare void any deed or contract made by the pre-emptor by which he would sell the land? Or was the intent to establish a rule that an assignee would not be recognized by the government and that the proof must be made by, and the certificate of entry issue to, the original settler?

We do not propose to discuss the question as to the constitutional right of Congress to make a provision declaring void a contract which would be valid by the laws of Illinois, but would beg leave to refer to the able argument of C. J. SCATES, in his dissenting opinion in the case of Rose vs. Buckland. 17 Ill., 309.

In that case the majority of this Court held that Congress had the power to make void a contract for the sale of land granted as a *bounty*, made while the title remained in the United States. In the laws reviewed in that case, Congress had directly and expressly declared that "all sales, mortgages, contracts or agreements, of any nature whatever, made prior thereto, for the purpose or with intent of alienating, pledging, or mortgaging any such claim are hereby declared null and void; nor shall any tract of land granted as aforesaid, be liable to be taken in execution or sold on account of any such sale, mortgage, contract, or agreement, or on account of any debt contracted prior to the date of the patent." There can be no doubt but that Congress intended the law to act upon the contract and hence the only question was as to the constitutional power.

In the case now under consideration the language is confined to the "assignment and ^{transfer} ~~therefore~~ of the right of pre-emption" no reference is made to a deed, contract, mortgage, execution or lien. In the various instructions of the Government and opinions of the Attorney General upon this restriction, the construction given the law does not extend to the validity of contracts made between individuals, but merely to the recognition of assignees of the "right of pre-emption," or preference of purchasers.

*2 Land Laws re. p. 591, 605 et
passim.*

Exhibit A. is not "an assignment or transfer of the right of pre-emption" but purports to sell the land & provides that the right of pre-emption shall remain in and be completed by Symms at his own costs, thereby negatives the idea of an attempted alienation or assignment of the right of preference.

Although Congress may have the power to make prohibitions that would render void contracts valid by the laws of a State, it may well be supposed that they will not exercise that power except in extraordinary cases, and then where public policy clearly requires it. The usual course is to leave all contracts to be governed and interpreted by *lex loci*.

If a speculator could buy up these *preferences* before a sale of public lands and as assignee attend the land office armed with the assignments, drive away competition and obtain the land at Congress price, while he would in fact pay three or four times that sum to the settler, the United States would be defrauded. By the provision in question, they intended to prevent difficulties of this kind, but not to prohibit the party from selling this land to whom he pleased; still less to infringe upon State Sovereignty and impair the obligation of contracts, otherwise binding.

A reasonable construction of the language used will not cover a case of the kind set forth in the Bill; and it does not appear even to come within the spirit of the prohibition.

An abridgment of common-law rights, a prohibition that impairs contracts made in good faith, a restriction of the right of a party to deal in such manner as he sees fit with his property, and upon trade, will not and ought not to be extended beyond the letter of the law.

Story Court. Law § 1374

2 Parsons Contract 12 & note o

Ibid 83 & note g.

Archibald vs Thomas 3 Cowen 284

Rileys Adm'r vs Vanhousen 4 How. (Miss) 428.

III. The right of the complainant to relief by his bill does not depend on the views the Court may take of the validity of the transaction between the parties while there was merely a preference of purchase in favor of the pre-emptor. *After the land had been entered by Thomas Symms, on the 12th September 1842, the Plaintiff in Error agreed with Thomas Symms to pay him the sum of \$29 37 in addition to what had been before paid, and thereupon did pay this sum and took a written memorandum or receipt in writing, signed by Thomas Symms, in which he acknowledged the receipt of the money in full for the entrance money for the S. W. fr. quarter of 20, 19 N., 1 E. of the fourth principal meridian, that being the fractional piece described in the Bill.*

It will be observed that by the deed or contract set out as exhibit A, there was an obligation to pay the entrance money for the "quarter section," but none for the "fractional piece;" so that this agreement made after the fractional tract was entered was a *new contract* founded on a *new consideration*.

Disregarding the former transaction between the parties thereto, here was a contract made by the Defendant, who held the legal title with the Plaintiff in Error, made after a substantial purchase of the land from the Government, by which the Defendants would be bound. Looking at the Laws of Congress, the Instructions from the General Land Office, and the opinions of the Attorney General, (before cited,) we find that an assignment made at this period of time would be strictly legal.

There being no prohibition that could apply to this transaction, on the part of Congress, our own State laws would be resorted to in determining and construing the contract.

See Record for copy receipt.
This ~~There~~ was an instrument of writing that would take the transaction out of the Statute of Frauds; the money was the exact amount paid to the Government and is to be considered a fair price for the legal title to the land; it was paid for the land. These facts would raise an implied obligation to convey the land on demand. It is substantially though not literally a *resulting trust*. If the Plaintiff in Error had advanced the money and Symms had used it at the Land office, it would have been strictly a resulting trust. Instead, however, Symms used his own money or procured it elsewhere, and a few days afterwards was re-imbursed by the Plaintiff in Error.

A fair price was paid, and the price agreed, for the improvements; thus all equitable claim for compensation for labor and improvements was discharged. Then in addition, by a new agreement, the Plaintiff paid the price that Symms had paid, so that the equity was with the Complainant.

It is a part of the ground for relief that the title was held in trust.

It was undoubtedly the understanding of the parties that the land had been conveyed by Exhibit A, and that when the title was acquired by Symms from the United States, and the money had been paid by May to Symms, that the transaction was complete, and nothing was left to be done by the parties.

Subsequently Symms fraudulently designing to defeat the title of May, conveyed to his brother.

There is no kind of equity in favor of the defendants: they are guilty of actual fraud.

IV. It is claimed that the title obtained by the entry of the land enured to the use of the Plaintiff in Error. This is however only upon the hypothesis that the instrument of June 24th, 1835, is a deed, and is not void by the acts of Congress. That such would be the law is established by this Court.

Phelps, et al. vs. Kellogg, 15 Ill., 137.
Ballance vs. Frisby et al., 2 Gil., 14.
Frink, et al. vs. Darst. 14, Ill. 304.

The language of the deed, exhibit A, is as follows: "In fee simple all their right, title, interest, claim and improvement that they now have or hereafter may have."

V. We are well aware that a court hesitates to enforce a contract of this age, lest rights accruing under the legal title may be unsettled. There being no answer to the Bill it does not fully appear what rights do exist. But enough does appear on the face of the Bill to show, what is the fact, that no possessory rights exist. The land claimed in the Bill is vacant and unoccupied and has no improvements. The first improvements were suffered to run down. The Plaintiff in Error does not pursue the whole fractional tract—a part has been conveyed—the purchasers are not made parties. Thomas Symms obtained the legal title; he conveyed without consideration and in fraud of the rights of the Plaintiff in Error, and as we insist, to avoid them, to James Symms, who had actual notice. James Symms then executed a power of attorney to Robert Symms, who also had notice.

The Defendants have shifted the title to prevent the Plaintiff in Error from obtaining his property. No possessory rights have accrued. The title remains substantially in the original parties.

The facts disclosed present a strong claim on the equity of the Court; and a Court of Chancery should exercise its powers for the relief of the Plaintiff in Error, unless the contracts and agreements of the parties are clearly prohibited by the law of Congress. We think that such is not the case, and hence that the Circuit Court of Rock Island erred in sustaining the demurrer and dismissing the Bill of Complaint.

GOUDY & JUDD,

Attorneys for Pl'ff in Error.

There is a general prayer for relief and the Court should have retained the Bill and decreed the repayment of the purchase money paid for the land if for no other purpose.

Robt Symms is a Resident of Henry Co Illinois
Thos Symms " Rock Island Co "
James Symms " Gove to California
Respectfully
G. M. E.

Supreme Court
April Term 1858

James May —
vs
Robert Symmes & al

Respondents

Gould & Judd
Attys for Plff in Error

GOULD & JUDD,

Attorneys for PLAINTIFFS.

and the defendant and dismissing the Bill of Complaint.

The facts disclosed present a strong claim on the equity of the Court; and a Court of Chancery should exercise its rights have secured. The title remains substantially in the original parties.

The Defendants have applied the title to prevent the Plaintiff in Error from obtaining his property. No bona fide purchaser, who also had notice.

Robert Symmes, who also had notice. James Symmes has exercised a power of attorney as we intend to avoid them to James Symmes, who had actual notice. James Symmes has exercised a power of attorney as Symmes obtained the legal title; he conveyed without consideration and in fraud of the rights of the Plaintiff in Error, and as we intend to avoid them to James Symmes, who had actual notice. The fact of improvement was well reflected to him. The Plaintiff in Error and his wife, who were the original parties, had a long and open possession of the land, and the improvements were not made by them. The Plaintiff in Error and his wife, who were the original parties, had a long and open possession of the land, and the improvements were not made by them. The Plaintiff in Error and his wife, who were the original parties, had a long and open possession of the land, and the improvements were not made by them.

mean themselves now have or hereafter may have.

The language of the deed, exhibit A, is as follows: — In testimony all their right title, interest, claim and improve-

James May vs Robert Symmes & al
Docket of the Supreme Court of the United States
April Term 1858, is a deed, and is not void for the reason of Congress.
This is

STATE OF ILLINOIS, }
SUPREME COURT, }

ss. The People of the State of Illinois,

TO THE SHERIFF OF THE COUNTY OF *Knox* — 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 *Rock Island* county, before the Judge thereof, between *James May* plaintiff and *Robert Symmes, Thomas Symmes & James Symmes*

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

James May —

as we are informed by *their* 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 *Robert Symmes, Thomas Symmes, & James Symmes* —

that *they* 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, ^{*first Tuesday after the*} on the *third* Monday in *April A.D. 1857*. ~~next~~, to hear the records and proceedings aforesaid, and the errors assigned, if *they* 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 *Robert Symmes, Thomas Symmes & James Symmes* — notice, together with this writ.

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof at Ottawa, this *2nd* day of *April* — in the Year of Our Lord One Thousand Eight Hundred and Fifty-Seven.

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

State of Illinois ss of County of Cook
 I do hereby certify that the within
 named Robert Symmes
 Thomas Symmes & Anna Symmes
 in my County April 11th 1857
 G. W. Leland

Shurt

James May
 vs
 Robert Symmes & others

Scire facias

Filed April 18, 1857

L. Leland
 Clerk

Not in the County



WALTER B. SCATES Chief
 Justice of our said Court and the Seal thereof at
 the day of the month of the year of our Lord One Thousand Eight Hundred and
 Fifty and seven.

Chief of the Supreme Court

STATE OF ILLINOIS,
SUPREME COURT,

ss. The People of the State of Illinois,

TO THE SHERIFF OF THE COUNTY OF

Rock Island

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 *Rock Island* county, before the Judge thereof, between *James May* plaintiff and

Robert Symmes, Thomas Symmes & James Symmes—

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

James May—

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 *Robert Symmes,*

Thomas Symmes & James Symmes—

that *they* 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. 1857* ~~next~~, to hear the records and proceedings aforesaid, and the errors assigned, if *they* 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 *Robert Symmes, Thomas Symmes & James Symmes*— notice, together with this writ.

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof at Ottawa, this *2nd* day of *April* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*seven*.

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

State of Illinois, B^d Grand Division
James May
vs
Robert Symms & al } Error to Rock Island
Supreme Court April Term 1857

We hereby enter ourselves security
for costs in this cause and acknowledge
ourselves bound to pay or cause to be
paid all costs that may accrue in
this case either to the opposite parties
or to the officers of this Court in pur-
suance of the laws of this State.

Dated this day of April 1857
Gordy & Gidd

James May
vs
Robert Symonds & Co

Bond for Costs,
Error to Rock Wand

Filed March 2, 1887
L. Leland
Clerk

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James May

vs

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Robert Symmes et al

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Prepared