No. 12603

Supreme Court of Illinois

May

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vs.

Symms et al

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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, $100 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, supplemehtal 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 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, aproved 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 cut 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 lein 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 this State that the instrument (Exhibit A.) is 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 accounnt 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 ~~therefore~~ transfer of the *right* of pre-emption" no reference is made to a deed, contract, mortgage, execution or lein. 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 &c p. 591, 605
and et passim.

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

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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 Sovreignty 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 Const Law § 1374
2 Parsons on Contracts 12 & note o.
Ibid 83 & note g.
Archibald vs Thomas 3 Cowen 284
Riley's Adm'r vs Vanhouten 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.

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 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., 141.
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 appearon 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 & the Court should have retained the Bill and decreed a repayment of the money paid for the land, if for no other purpose.

Supreme Court
April Term 1858

James May
vs
Robt Symms & al

Argument

Goudy & Judd
Attys for Plffs in Error

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