

8780

No. _____

Supreme Court of Illinois

Phillip Gaines

vs.

Thomas Selby

71641  7

Pleas and Proceedings held before
The Hon Judge of the Circuit Court of the
4th District ^{of} County of Lawrence and State of Illinois
in the case of Phillip Gaines vs Thomas Selby.

State of Illinois }
Lawrence County, } ss. Lawrence Circuit Court

Be it remembered that
Phillip Gaines on the 3^d day of October 1848, filed
in said Court the following Bill viz—

"To the Hon William Wilson Judge of the Circuit
Court in and for the County of Lawrence and State of Illinois,
in Chancery sitting.

Humbly complaining representeth
unto your Honor, your Orator Phillip Gaines that
about the 18th day of December A.D. 1842, your Orator was
indebted to one Thomas Selby in the sum of two hundred
dollars on which he agreed to pay interest at the
rate of twelve percent per annum, that on the day
and year aforesaid or thereabouts the said Thomas
Selby desired your Orator to give him a Mortgage
the said Thomas Selby a Mortgage on the farm on
which your Orator then resided being the following
described lands viz the West half of the South
West quarter of section Number thirty three
and the North East quarter of the South East quarter
of section thirty in Township four North of Range
Twelve West, except four acres sold by Daniel
Paine out of the last mentioned tract to Honours
Paine. That your Orator then and there agreed

with the said Thomas Selby, to execute to him a mortgage on the premises aforesaid upon these express conditions, that is to say, "that if your (your orator made default in the payment of the said debt to be secured by mortgage as aforesaid and the said Thomas Selby should seek to collect the same by a foreclosure of the mortgage or otherwise and the said land should be sold for the payment of the debt aforesaid, that said land should be first appraised by three disinterested persons and should be sold in a body without division, and unless the same sold for at least two thirds of the appraised value it should not be sold at all"; that it was further agreed by and between you and the said Thomas Selby that said agreement should be inserted in the mortgage about to be executed by your orator to the said Thomas Selby to secure the payment of the debt aforesaid. Your orator would further represent unto your Honor that in pursuance of said agreement they procured the services of one Ebenezer J. Ryan to prepare said mortgage and instructed him to write the said mortgage with the provisions and stipulations aforesaid. That said _____ did prepare said mortgage as your orator supposed in accordance with said agreement aforesaid, as he had been directed; and that your orator signed sealed and acknowledged the same according to law and also procured the relinquishment of the right of dower of his ~~and~~ wife to the premises aforesaid. Your orator would further represent unto your Honor that he is wholly unable to read

writing in the English language except his name
which he has learned to write, and that he had to
rely entirely upon others in the making of the
mortgage aforesaid. Your Orator would further
represent that if he had supposed, known, or believed
that said mortgage did not contain all the agreements
conditions and stipulations before mentioned, being
the terms upon which he agreed to execute said
mortgage, that he never would have signed and
sealed the same; that if the said mortgage deed
aforesaid was read to him before its execution he
wholly mistook and misapprehended its terms, Your
Orator would further state that when he borrowed said
money from the said Thomas Selby and agreed to
pay him twelve percent ~~until~~ interest aforesaid
it was the belief of the said Selby as well as Your Orator
that the act of the Legislature providing for the
valuation and appraisement of property sold under
execution, would affect the contract then made
but the constitutionality of said Law being subsequent-
ly doubted and brought into question in order to
give your Orator the benefit and protection of
said law your Orator and the said Thomas Selby
obtained the advice of Counsel and were advised
that if they made a contract embracing the terms
and provisions of the appraisement law so called
that it would be valid and binding, and that it was
in pursuance of said advice and instruction that
they then and there made the contract aforesaid
and directed the same to be inserted in said
mortgage deed, Your Orator would further represent
~~unto~~ unto your Honor, that he always supposed

and believed that said mortgage contained all the said provisions and stipulations aforesaid, until after the said mortgage debt became due and payable when to his great surprise he learned that a material part of the same was omitted, viz. that part which required the land to be appraised and sold for two thirds of its appraised value, that said Thomas Selby on the first day of April A.D. 1846, filed his Bill in this Court praying a foreclosure of the mortgage which your orator had executed to him and that afterwards on the 14th day of April your orator filed his answer alleging that said mortgage did not contain all the terms and conditions aforesaid and on the hearing of said cause at the next Term of then held the Court ordered that in making the sale of the Land under the decree of foreclosure that said Lands should be sold agreeable to the original agreement, that is, that the same should be appraised by three disinterested ~~hand~~ persons and sold for a sum not less than two thirds of the appraised value and to be sold in a body with division and the surplus of the proceeds of the sale after paying the debts due and costs should be paid to your orator, your orator would further state that after the making of said order or decree and before the entry of the same upon the records of this Court the said Thomas Selby dismissed his Bill praying a foreclosure of the mortgage and afterwards to wit at the Term A.D. 1846 brought his suit at common Law and obtained judgment on said your orators note and for the said debt

and interest and now seeks to evade the effect of his agreement made with your orator as aforesaid by seizing the said Lands by an execution on said judgement aforesaid and directing them to be sold without an appraisement of the same in manner aforesaid. Your orator would therefore pray your Honor to cause the said Thomas Selby to be made a party to this Bill of Complaint, that he be compelled to answer all and singular the allegations herein contained and that your Honor would grant the peoples writ of Injunction restraining the said Thomas Selby his agents or attorney, as also the Sheriff into whose hands the execution in favor of ^{the} said Thomas Selby and against your orator on the judgement aforesaid, may be placed, from selling the said Lands aforesaid unless the same are first appraised by three disinterested persons and unless the whole are sold in a body without division and for a sum not less than two thirds the appraised value upon the appraisement made in manner aforesaid and that on a final hearing that your Honor would order said injunction to be made perpetual and that your Honor would grant such other and further relief as is just and consonant to Equity and as in duty bound your orator will ever pray. J. J. Bourman Sol^r

State of Illinois

Lawrence County } 55

Phillip Geines being first duly sworn saith that the matters & things alleged in the foregoing Bill as of his own knowledge are true and those alleged on the information of others he believes to be true

Phillip Geines

subscribed and sworn to the 20th day of October A.D. 1848

The Clerk of the Circuit Court will ~~possess~~ an injunction
restraining Thomas Selby his agents & attorney, as also the
sheriff of Lawrence ^{County}, from selling upon execution on the
judgement in favor of Thomas Selby, and against
Phillip Gimes rendered at the April Term of the Circuit
Court in and for the County of Lawrence for the
year of our Lord one thousand eight hundred and
forty seven, the following Lands of said Phillip
Gimes viz (West half of the South West quarter of
section number thirty three and the North East
quarter of the South East quarter of section number
thirty in Township four North of Range twelve,
excepting four acres sold by Daniel Paine out of
the last mentioned tract to Honourous Pence, unless
the said lands are first appraised by three disin-
terested persons and unless the whole are sold
in a body without division, and for a sum not less
than two thirds of the appraised value. This
injunction to issue if the said Phillip Gimes shall
enter into a bond in the sum of six hundred
dollars with Esau, P. Tyffe as his security,
conditioned to pay to the said Thomas Selby all
damages which he may sustain by reason of the
issuing of the said injunction should the same
be dissolved.

J. G. Bowman
Master in Chancery "

To which said Bill The defendant Thomas Libby
on the 11th day of February A.D. 1850 filed in our
said Court the following answer, viz.

Thomas Libby }
 eto } Injunction
Phillip Gines }

Laurance C C April Term 1850

The answer of Thomas Libby defendant
in the above entitled cause which is now pending
in the Laurance Circuit Court in the State of Illinois,

The said Thomas Libby, after saving and
reserving to himself all manner of advantage and
exception to the many errors and defects in said
Complainants Bill of Complaint, contained, for
answer therunto or unto so much and such parts
thereof as this defendant is advised is material
for him to answer, He answers and says;

That so much of said Complainants Bill admits
the borrowing money by said Complainant of this
defendant, and so much as admits the indebtedness
of said Complainant therefor, and so far as it is stated
and admitted that this defendant has recovered
a judgment at Law in said Court for the same
and that he has been endeavoring to collect the
same by execution the said Complainants Bill is
true, And so far as the said Complainants hath
stated and admitted that he gave this defendant
a mortgage to secure the payment of said borrowed
money, and that this defendant still holds that
mortgage is also true. But so far as the said
Complainant in his said Bill hath alleged
that at the time of his borrowing the money and

and at the time of his ~~borrowing~~ receiving it, and becoming indebted to this defendant for it, that this defendant then or at any other time in consideration of the said loaning or by any other consideration agreed and engaged with the Complainant that if the debt should not be paid and defendant should resort to law to collect it that then the lands of the said Complainant mentioned in his Bill should be appraised and offered for sale for the debt, and unless bid off all together without division for two thirds of the appraised value all and every portion of said Complainant's Bill to that effect is untrue. Inid for further and more specific denial of all and every allegation in said Complainant's Bill which pretends or alleges any contract agreement or promise of this defendant at the time of the loaning the money or at any other time to look to the sale of Complainant's lands, or the foreclosure of the mortgage or any other disposition whatever of said Land as the only source and remedy this defendant would seek if said ^{Complainant} should fail to pay said debt. This defendant begs leave to state the following facts and history of said transaction.

The said Complainant having applied to this defendant several times previously to borrow money on the 16th day of December 1842 he loaned to said Complainant \$300, at 12 per cent interest and took his note for the same bearing that date, this defendant has no distinct recollection of any thing being said at that time about a mortgage, but he is of opinion that the said

Complainant then agreed to give him a mortgage at some future day to secure the note for said \$300, if defendant should desire it. No mortgage was then entered into, and this defendant expressly denies that there was then any contract agreement or understanding that a mortgage was to be given unless he should afterwards call for it, nor was there any agreement or understanding then as to what should be the terms or conditions of any mortgage which might be afterwards called for nor was there then or at any other time any agreement or understanding that this defendant should waive or release any legal right, remedy or power he might or could have for the collection of the said debt if unpaid when due, by judgment at law and execution against the effects of said Complainant, and by any other powers or remedies recognized by law.

This defendant some time after the 10th day of December 1842, to wit about the _____ day of _____ called upon the said Complainant for a mortgage to secure the said debt, and after some considerable delay and dispute about the terms of the mortgage the said Complainant and wife executed to this defendant the mortgage mentioned which instead of bearing the date of its then execution was dated back to correspond with the note which ^{had} then for some time drawing interest. At the time of the making of said mortgage the ^{appraisement or} valuation laws of Illinois were regarded as in force by some

(these facts however by others was doubted) The complainant seemed anxious to incorporate the terms of that law into his mortgage and having been advised by some one that his farm might be divided and sold in parts for the said debt if unpaid he was anxious to provide in his ^{said} mortgage that in case of foreclosure the lands should all be sold together without division, and for these reasons the terms and conditions in said mortgage contained were agreed upon, and the said mortgage this defendant insists contains the whole agreement then made. This defendant expressly denies that at the time of the making said mortgage there was any agreement or understanding by which he was to look to a foreclosure of said mortgage and a sale of said lands as his only remedy and mode of collecting said debt in default of its payment, nor was there any agreement or understanding that the said defendant, had, should or would in anywise relinquish any right to suit at Law on the note or to execution in proper form against any goods or chattels, lands or tenements of the complainant liable to execution; if this defendant should choose to sue at Law instead of proceeding in Chancery for a foreclosure of said mortgage. It is true this defendant did recover and now has judgment at Law on said note, and that he has had execution on the same, but it is not true that this defendant is especially willing to sell the said ~~land~~ complainant's lands

The levy of the execution on said Lands has not been done by order of this defendant, but by the direction of said the Complainant himself who refuses to give up other property, although he has ample. This defendant having now answered fully all that he is advised is necessary concludes with the humble prayer that the Complainants Bill of Infamation may be dismissed and dissolved and that this defendant may be allowed to proceed without further hindrance or restraint in the collection of his said debt.

I Thomas Selby being duly sworn do say that the matters and things in the above answer set forth are true to the best of my knowledge and belief so helps me God.

Thomas Selby

I C. R. Derring one of the Justices of the Peace in and for the County of Ashland in the State of Ohio do hereby certify that Thomas Selby did this day before me take and subscribe the above affidavit. In witnesses whereof I have hereunto set my hand and seal this twenty eighth day of January A.D. 1850.

C. R. Derring

State of Ohio }
Ashland County } ss. I J. O. Jennings Clerk of the Court of Common Pleas of said County do hereby certify that Chas. R. Derring Esq. whose signature appears to the foregoing Certificate was at the date thereof a Justice of the Peace in and for said County duly commissioned and qualified and as such had full power and authority to administer oaths and full faith and credit

should be given to his official acts.

Given under my hand and seal
of office this twenty eighth day
of January A.D. 1850

J. O. Surring Clk

State of Ohio }
Ashland County }

I Edmund Engeman Judge of the
Court of Common Pleas in and for the aforesaid
county do hereby certify that Jacob O. Surring
whose signature appears to the foregoing certificate
was on the day of the date thereof the Clerk of
the Court of Common Pleas in and for said County
duly commissioned and qualified and that his
said certificate is in due form of Law and
full faith and credit should be given to his Offi-
cial Acts. Witness my hand this twenty ninth
day of January A.D. 1850,

E Engeman

Associate Judge

The said defendant having sued out a writ
of Habeas Corpus on the 11th April 1850 filed ~~in~~ in our
said Court the following deposition
which was used and read in evidence on the
trial of said cause viz -

" Deposition of Euclid G. Silby taken by
me in pursuance to the order of the Circuit
Court at Lawrenceville in the State of Illinois
hereto attached this 9th day of March A.D. 1850
at my Office in the Town of Ashland Ashland
County & State of Ohio.

Question first,

Are you acquainted with the parties
& how long have you known them.

Answer. I have been acquainted with Thomas
Selly since I was old enough to know any person &
with Phillip Geines fifteen or sixteen years.

Question, Do you know anything of the Plaintiff
Borrowing money from the defendant in the County
of Lawrence and State of Illinois about the 10th of Decemb
1840. If so state it, state particularly all you know
or recollect about the occasion of his borrowing
the money, at whose house it was done, who
wrote the note for it, who were present, and
all you know or recollect about the terms
or agreement of the parties as to the payment
of it.

Answer - I do, and it was through my influence
with Thomas Selly, that he got it. It was at
the house of Thomas Selly in Lawrence Co. Illinois
and on the 10 of Dec 1840. Plaintiff first
came to me on the 10 of Dec 1840 and wanted
to borrow two hundred dollars I told him
that as I did not know how long I should
stay in the County I could not let him have
it, he then asked me to intercede with
Thomas Selly (my father) for the amount. I told
him that I thought that I could assist him
in getting it from my father. I spoke to Thomas
Selly about getting it, Geines was present. I advised
the debt. to let him have it, He left then let

him have two hundred dollars. Jeff handed me
the money to count, which I done, and counted out
and delivered to Geines two hundred dollars
which Geines and then wrote a note for two
hundred dollars, which Geines signed. I think the
note was payable in one year from date. I gave
the note to Jeff. There was present at the
time the money was paid & note made, Thomas
Selby, Phillip Geines, Matilda Ann Selby, Thomas
Selby, wife & myself & no others. Geines was
to pay the Jeff the money at the expiration
of one year. Geines said to Jeff that he
would give him a note mortgage on his
farm to secure him. That they would go
to Lawrenceville in a day or two and there
make the mortgage, observing at the same time
that Real Estate in Illinois was the same as
chattel property in Ohio, that it could be
sold for anything that was bid for it.

Question 3^d State if you know anything about
The plaintiff giving a mortgage for the security
of said borrowed money. State whether any contract
or agreement was made at the time of
loaning the money about a mortgage & state
particularly about any mortgage made by the
plaintiff to secure. The payment of said
money, when it was first spoken of, and
when it was made, and at whose request
and what were the terms and conditions
of the mortgage.

~~Answer~~, I know nothing more about giving the mortgage that I have already answered, except I heard the parties agree that it was to run one year and was to be for the security of the money loaned. There was no other contract made at the time of loaning the money than the agreement to make the mortgage as I already stated. The mortgage was first spoken of at the time I just mentioned the matter of Deft loaning the money to plaintiff & on the same evening that the money was loaned which was at Deft's dwelling, Grines made the proposition to secure to Deft the payment by mortgage, which mortgage as before stated was to run one year.

Question 4. State whether at the time of loaning the money or anything was said by the parties or any arrangement made that the Deft should buy the plaintiff's land or take his land at any price, if the borrowed money should not be paid when due.

Answer, At the time the money was loaned there was no conversation or understanding nor arrangement whereby the Deft should buy the plaintiff's land or take it at any price nor did I ever hear of any such conversation or understanding between them, but Grines said to Deft after getting the money and while yet in the room that Deft could have a mortgage on some twelve hundred dollars worth of lands & chattels & that it would at any time sell for enough to pay Deft's debt, observing at the same time that

with the money which he had then rec^d he would pay off all of his small debts, that he would then only owe this debt of Two hundred to Dept

Question 5 State all other facts or information you have in regard to the transactions of the parties about the loaning said money and taking a mortgage.

Answer, I believe ^{that} I have told all I know about the matter, E. G. Selby "

The following several orders were entered of Record in said cause as follows viz-

At April Term of said court AD 1849, to wit on the 12th day of April 1849

" And now at this day comes the complainant herein by J. G. Bowman his solicitor, and the defendant by Alfred Mitchell Esq his solicitor, and the Defendant herein by his solicitor moved the court to dissolve the injunction herein, and after argument the court overruled the motion

And afterwards, to wit, at the September Term AD 1849 of said court, to wit, on the 30th day of September AD 1849

" On motion this cause is continued.

And afterwards, to wit, at the April Term AD 1850 of said court, to wit, the 10th day of April AD 1850

" On motion leave is granted to open the def-
ositions taken herein

And that afterwards to wit at the Septth Term of
said Court A.D. 1850, the said Cause coming on to
be heard the ~~the~~ said Plaintiff produced and
swore Joseph G. Bourmain and Ebenezer J. Ryan as witnesses
is who delivered the following testimony in said
Cause as appears from the statements written out
and filed herein as such evidence viz -

"Guines;

is } Injunction.

Selby } E. J. Ryan being duly sworn, gave
the following evidence viz. That when Guines
and his wife came with Selby to execute the mort-
gage, there was considerable conversation and
some difference of opinion as to what the contract
was at the ^{time} Guines consented or agreed to give
Selby a mortgage on his farm, Guines contended
that if he gave a mortgage and he should be
unable to meet the payment as stipulated, that
his farm was to be sold under foreclosure all-
together, after being valued as required under
the valuation law as then in force, Selby differed
with him as to that being the agreement,
yet Guines refused to execute a mortgage unless
it contained a condition to sell the whole of the
lands mortgaged and under that provision
of the law requiring a valuation.

I am not certain whether the mortgage contained
precisely that kind of a condition, but Guines
contended that it should and that being his
understanding he and his wife executed the
same and Selby received the mortgage.

E. J. Ryan

Grimes

vs

Selby

Injunction

J. G. Bourman being first duly sworn testified as follows, that at about the time the mortgage was executed the Complainant and defendant came to his (deponent's) house to consult him as to the effect of a provision or stipulation in a mortgage embracing the terms of the appraisement or valuation law which was then either declared by the Federal Court to be unconstitutional or doubts of its constitutionality had been expressed, deponent does not recollect which, that deponent gave his opinion that such a stipulation in either note or mortgage or mortgage would be valid and binding on the parties, that said Grimes & Selby then left deponent who was confined by sickness to get Mr Ryan to write the mortgage for them, J. G. Bourman.

That afterwards to wit at the said Term of Court last named the following final order and decree was rendered in said cause viz.

Philip Grimes

vs

Thomas Selby

In Chancery

Now at this day the court being advised what decree to render herein upon motion to dissolve the injunction submitted at the last term of this court, upon bill, answer and proofs exhibited, it is finally ordered and decreed that

State of Illinois }
Laurence County } ss.

I Frederick A. Thomas
Clerk of the Circuit Court in and for the
County aforesaid do hereby Certify That the
foregoing pages contain a full and perfect
Transcript of the Record in the Cause of
Phillip Geinss vs Thomas Selby, as also a true
full and perfect Copie of the Bill answer
Disposition, written evidence, and Bill of
Exception in said Cause, as appears from the
records and files in my office. Given
under my hand and seal of Office this 10th
day of November A.D. 1850 at my office in
Lawrenceville

F. A. Thomas Clerk

And the said J^r Thomas Selby
by his Counsel, saith there is manifest error in the
above record in the following particulars viz -
1st The Court erred in not dismissing complain
ants Bill for want of equity on its face.
2^d The Court erred in trying the cause without a replication to depts answer.
3^d The Court erred in not dissolving the injunction
and dismissing said Bill upon trial.
4th The Court erred in rendering the final decree
that was rendered in the cause.

Plff says there is no error in the record
for, Plff in error.
Swell for plff -

Phillip Geines

^{vs}
Thomas Selby

Filed the 25th day
of November A.D.
1850 —

F. D. Weston

Att

8780

State of Illinois, }
SUPREME COURT. } ss.

The People of the State of Illinois,

To the Sheriff of the County of *Lawrence* GREETING:

We command you that of the goods and chattels, lands and tenements of *Philipp*
Gienes in your County

you cause to be made the sum of _____

Dollars and _____

Cents damages, and

the sum of *Seven*

Dollars and *Twenty five*

Cents

costs in the said Supreme Court, which

Thomas Selby

lately recovered against *him* before the Justices of our said Supreme Court, as appears
to us of record, and make return hereof in ninety days.

Witness, the Hon. *Vannell H. Peak* Chief

Justice of the Supreme Court, and the seal thereof, at *Spring-ctd*

Vernon ~~field~~, this *21st* day of *February*

in the year of our Lord, one thousand eight hundred and
fifty two

Henry D. Preston
Clerk of the Supreme Court.

This Execution came to hand March 8th/52
at 8 O'clock A.M.

J. Potts Sheriff

April 17th 1852, This Execution returned
Satisfied, and the money sent by mail to
J. N. Preston, Clerk Supreme Court at Mt Vernon
Ms. herewith enclosed,

J. Potts Sheriff

Supreme Court.

Thomas Shelby

vs

Philip Green

Execution

Damages

Costs

\$ 765

8780

Filed

1852