No. 13030

Supreme Court of Illinois

Holmes

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vs.

Stummel

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 40.

1860

Holmes

vs

[illegible]

12030

State of Illinois Supreme Court,
Third Grand Division April Term 1860.

Samuel Holmes.
vs Appeal from Marshall.
William Stanwood

This suit was commenced in the Circuit Court of Marshall County in 1853. and was continued from time to time, until the October Term of said Court A.D. 1857.- when on application of the Appellant, a rule was entered, requiring the Appellee to give security for all costs that might accrue in said action within thirty days from the adjournment of said Term of said ~~Court~~ Court; And afterwards at the January Term A.D. 1858. of said Court, the Appellant, moved the Court, to dismiss the suit for non-compliance with the rule- but the Court over-ruled said motion and allowed the Appelle to prosecute his suit as a "poor person" in accordance with the provisions of the statute- The first question we propose to consider, is, that of the power of

the Court below, at the time, to control said suit so far as to entertain the application of the Appellee. The rule that had been entered in said cause, had become absolute, and the rights of the parties thereto fixed and determined. The Compliance with the rule was a condition of the existence of the suit in that Court, with its non-Compliance, with it, within the time required, was, ipso facto an end of the Controversy, and the Appellant became entitled to his judgment. That result was but a legitimate consequence, of the entry of said order and until it was annulled or set aside, nothing could change the legal effect of its entry and the non-Compliance with it. At the expiration of the time for Compliance with said rule, the Appellant, had a right, to expect a Confirmation of the Conditional judgment, that had been previously entered - for the entry of the rule, amounted to giving him a Conditional judgment

and if the order remained uncomplied with and had not been set aside he became entitled to it as a matter of right— It is not pretended that said order has ever been annulled or set aside; nor that it does not now stand upon the records of the Court below in full force— If this be true, then there was an entire absence of power in the Court below, to entertain the motion of the Appellee— The conditional judgment that had been previously entered, had ripened, into an absolute, one, and the record furnishes, us with no sufficient reason for setting it aside or, vacating it— Again the appellant had a right to suppose that the suit was at an end, if at the expiration of thirty days, the rule remained uncomplied with. and he must necessarily be surprised, that he is called on to defend the suit— without notice of its existence, or without some notice that it would

be necessary for him, to make preparations to properly present his defence — The Court could only change the terms of the rule before it became absolute — after that time, it lost all power to change the legal effect of it — or to alter its conditions; The Application of the Appellee, then to prosecute his suit as a pour personn, then coming on, as it did after said rule had become absolute, ought to have been disregarded by the Court, because it came too late and the power of the Court to grant it had expired, by virtue of the absolute existence of the order that had been previously entered —

The next point to which we invite your attention — is that of presented, by the Court improperly as we think, sustaining the Challenge for cause, to Aaron Swager, a juror called — to try said Cause — That he was a Competent juror, is evident from his own statements, brought out upon his examination, of

him touching his qualifications as a juror. The Challenge was erroneously sustained, because the person called was not disqualified. The expression of a mere hypothetical opinion is no legal ground for excluding a juror. To constitute a sufficient ground of challenge of a juror, on the ground of pre-conceived opinions, the opinion must be a decided one, and such as would prevent him doing justice between the parties. Admitting then, that the Challenge ~~the Challenge~~ was erroneously sustained, what must be the effect of it upon this verdict in this case. In the Case of Rex vs Edmonds 6th English Common Law Reports. 566. the Court say, "that the improper granting, or the improper refusing of a Challenge, is alike the foundation of a Writ of Error,": and the same doctrine ~~is~~ ~~is to be~~ clearly indicated in the case of "the State vs Benton" 2nd Devereux & Battles. North Carolina Reports 196: So ~~too~~ in the case of Vickers vs Langham, Hobart 235. the same doctrine is held. But it may be insisted, that the sustaining of

the Challenge did not affect or prejudice the rights of the Appellant: how may we know, this? The juror called may have been in every respect unexceptionable, and may have ~~been~~ compelled the Appellant, to accept in the place of the excluded juror, a person not so well qualified to discharge the duties of a juror. Or, again it may compel him to receive in the place of the excluded juror a known, and avowed enemy. this might often happen in Civil cases where the number of peremptory challenges is limited - to the number given by our Statute - But it is to protect against the recognition of a principle, that must be fruitful of pernicious results, that we urge this point for your consideration. Does it seem, that the recognition of such a principle, establishes, the right of a Judge, to exercise unwarrantable authority, in the selection of a jury - Unless a juror, is legally disqualified, a Court has no power to set him aside, or exclude him from a jury - We insist therefore

that the sustaining of said Challenge was such an error, as must render the judgement below a nullity, and insure a reversal of the same.
But there are other, and more fatal errors in the record than these, and, to them we now ask your attention. It is established beyond controversy, that there existed at the time of the commencement of this suit in the Court below, an express written contract, between the parties which had never been violated by the Appellant, or rescinded by the Appellee on account of such violation. If that fact is estoblished as we insist from the evidence that it is, then this action is misconceived and the Appellee may not recover. It is a well established principle, that where parties have made an express Contract they must resort to a suit upon that contract, unless for some sufficient consideration it has been superseded, by some act of the parties. Now we submit that there is nothing in this case to raise even a suspicion, that such

was the fact: indeed, the very witnesses by whom the Appellee makes out his case, clearly establish the existence of an express Contract - and no witness testifies that it was ever abandoned by the mutual Consent of the parties to it - If it was abandoned at all it was an ex parte abandonment to which no one but the Appellee was a party - But if there had been default on the part of the Appellant in performing some of the requirements of the Contract on his part - the Appellee, could not therefore abandon it and have his action upon the quantum meruit - his action for the enforcement of his rights must be on the Contract itself - While therefore the ~~special~~ express contract between the parties remains in force, he cannot recover in this action. If however the Contract has been wholly abandoned by ~~either~~ the parties, or varied by ~~the~~ mutual agreement between them, the law will imply a promise upon which the party may recover

But there is nothing in this case to sustain this view of it -
Again, the Contract, was an entire Contract, and we ask your attention, to the way in which, the ~~was~~ Conditions were complied with, by the Appellee - the Contract was, ~~for~~ - that the appellee was to clear, grub, and fill the brush, all to be done in good order - on all the land specified in the contract and for doing the same, the Appellant was to pay the sum of Two Hundred and Seventy Eight, Dollars - Fifty when the work was half done and the balance when done and completed - The ~~first~~ questions that naturally present themselves here are, 1st did the Appellee, become entitled, to any part of the Consideration of said Contract - and 2nd If he did to how much did he become entitled - how it will readily occur, to any one who carefully examines the evidence in the case - that the appellee never became entitled, to the whole consideration ~~for~~ to be paid under said Contract - The evidence is very clear -

But there is nothing in this case to sustain this view of it -
Again, the Contract, was an entire Contract, and we ask your attention, to the way in which, the ~~was~~ Conditions were complied with, by the Appellee - the Contract was, ~~for~~ - that the appellee was to clear, grub, and fill the brush, all to be done in good order - on all the land specified in the contract and for doing the same, the Appellant was to pay the sum of Two Hundred and Seventy Eight, Dollars - Fifty when the work was half done and the balance when done and completed - The ~~first~~ questions that naturally present themselves here are, 1st did the Appellee, become entitled, to any part of the Consideration of said Contract - and 2nd If he did to how much did he become entitled - how it will readily occur, to any one who carefully examines the evidence in the case - that the appellee never became entitled, to the whole consideration ~~for~~ to be paid under said Contract - The evidence is very clear -

that there was not such a compliance, with the terms of the contract as it was contemplated by the parties making it. The evidence shows that there was a ravine running through the land which the Appellee "did not pretend to grub". Then again the evidence is conclusive as to way in which the work was done; no single witness testifies that it was done in that "good order" which the Contract required. The most that is said for it is that it is "a fair job of grubbing". William White, David Ettinger, Charles Parker Peter Forbes, Henry Ramsey Thomas Thompson, Nathan Shugarts, Thomas Cummings, John Willyard, and Van Buren McKeson, all testify that the work was badly done, and done of it not done at all, and that they would not be willing to pay much for such grubbing. There is no evidence, that the Appellant waived the performance of any part of the work specified in the Contract - or released the Appellee from a compliance, with the Express Terms of it. If this be true, then there can

be no question, about the right of the Appellant to recover, for until there had been a Complete Compliance, with the express Terms of the Contract the appellee, had no right of action at all, But it may be insisted, that the Appellee had a right of action, when he had completed half the work. True he may ~~had~~ have had a right of action, for the sum that became due him upon showing that he had completed that much of the work - unless that sum had been previously paid to him - It is not pretended however, that the appellees right to recover, rests upon this view of the case, for it is not ~~there~~ denied, that Fifty dollars had ~~not~~ been paid him previous to the commencement of the suit in the Court below - In either view of this Contract, then, the appellee Can not recover — because he has failed to show, that any right of action had ever accrued to him -

The next point, to which your attention, is invited, is to the admission of evidence, to show an implied

promise - when an express written Contract, had been shown to exist between the parties - We apprehend that it is hardly necessary to discuss this question at very great lenigth, for it so well settled, both upon principle and by judicial decisions, that where parties have made an express contract, no other can be implied - that it may almost be said to have become an axiom of law. - The evidence of the appellee introduced for the purpose of showing that the work was worth more, than the contract price, was clearly inadmissable - and ought to have been excluded - All the testimony adduced by the appellee, was introduced, for the purpose of doing away with the effect of the express contract - and for that purpose it was clearly inadmissable - - The question as to how much it was worth per acre to do such grubbing as was done by the appellee, was propounded to Thomas Weir, Enoch Sawyer, John Myers, John Foster, John Weir & Henry Weir & Nathan Ramsay, were all exam-

ined to this point and for this purpose. It is it seems not to admit of any argument that the admission of such evidence was unquestionably erroneous and must induce a reversal of the judgment. If evidence of such character may be admitted to evade the express terms of the Contract, or to change its legal effect, or to raise an implied promise, when the law excludes it - then we may safely assume, that all good faith between men will rapidly come to an end - and all confidence in the binding force of express Contracts will be very likely to share the same fate. It was erroneous, too, for the Court to admit the testimony of Pratt, (Abstract pages 5 & 6.) to show the Contents of the Contract. The loss of the original Contract was clearly established, and this being so, a Certified Copy of the original, was the best evidence of what the Contract really was and the Copy having been proven it was clearly erroneous to admit parol testimony, to change its import-

Another question presented by the record is as to the right of the appellee, to recover upon the quantum meruit. It is in evidence that the appellee abandoned the ~~Contract~~ work before its completion - and that he never placed himself in a position, to resort to an action upon the quantum meruit for the work and labor he had performed - The performance of the whole work was a condition, precedent, to the obligation to pay the whole sum, by the Appellant. The appellee must perform the Condition on his part before he has a right of action, and he has no right to renounce the express contract, and if he do so he Cannot recover upon the quantum meruit - All the elementary writers sustain, and lay down this principle and it is fully sustained in this Country by the weight of judicial authority -

The last question, to which we ask your attention, is to the Error assigned for the over-ruling the Appellants motion for a new trial - We insist.

that the verdict is clearly unsustained both by the law and the evidence That it is unwarranted by the law that must govern this case, we apprehend there can be no doubt. If the law is applied to this case as it really is, then the evidence adduced by the Appellee must be excluded, and with that exclusion his right to recover ~~likewise~~ fails — What is the evidence? It is that there was an express written contract between the parties - for the complete performance of certain work specified therein - When he has shown performance on his part, his right of action hath accrued, and not till then - Has he shown such complete performance as the contract specified - an answer to this question must decide this case and we think it can~~not~~ be decided only in the negative - But if we admit, that the Appelle had a right to recover, the Fifty-Dollars which became due him, upon completing half the work, we still insist that this judgement must be re-

versed - because it is excessively unjust - and because to the sum of Fifty dollars had been paid him before the commencement of this suit and before he may demand anything further, he must show a completion of the contract - We insist then, that the verdict is obviously against the law and the evidence and must therefore be reversed - We do not deem it necessary to discuss the several instructions which were refused, or those wrongfully given on the part of the appellee - They involve but the principles we have been discussing ~~[illegible]~~ in former parts of this argument - We therefore submit this case to your Honors, calling your attention to the printed brief on file herewith, wherein the authorities to sustain the positions we have taken are cited - Believing that you will give to the questions presented here that attention which their importance demands, we submit this case to you, Confident that the judgment below must be reversed

A M & D. Reed
Attys for the Appellant

Samuel Holmes

v. 40 ~~40~~ 44

William Stimmel

Argument for the
Appellants

State of Illinois Supreme Court
3d Grand Decision April Term 1860

Samuel Holmes
vs
William Stunnel } Appeal from Marshall

Brief of Richmond & Burns attys for appellee

1st It is good cause for challenge of a juror that he has formed an opinion upon the merits of the cause whether he has Expressed it or not. The juror Seargei stated "if he never heard any thing more about the case he had an opinion" and this was good reason for challenge "for cause"

Smith vs Eams 3d Scam 76
Gardner vs The People " " 83
Vennum vs Harwood 1 Gil 662

2d When a contract has been fully performed and nothing remains to be done under it but to pay the money for its performance, the plaintiff may declare in indebitatus assumpsit

Bank of Columbia vs Patterson adm
7 Cranch 199
Canal Company vs Knap 9 Peters 541
2d Greenleaf Evidence 104
Throop vs Sherwood 4 Gil 98.

3d Even if the work was done under a written contract, Holmes waived the grubbing the Ravine as he had a right to do, And or the law of Special written Contracts does not apply in this case

4. The Common Counts only, are used in the Declaration, that the work was done under a written Special contract was set up as a matter of defense, not an admitted fact, therefore it became a question of fact for the Jury to decide whether there was such a written contract or not, and this being so, it was clearly competent to prove what the grubbing was worth

5th The appellant clearly was not prejudiced by such proof, because it is manifest that the Jury were guided in making their verdict, by the price mentioned in the written Contract, and the amount of land actually grubbed

6th Appellants 7 instruction is clearly wrong. It presupposes that the failure to grub the ravine was such a substantial non-compliance with the contract as to preclude a recovery, when in fact there is no proof that there was any grubs in the ravine, all that is said on the subject is in the testimony of Wm White, page 3 of the abstract and the testimony of Cummins on 4 page of the same

7th There must have been on part of appellee some substantial non-compliance with the contract ~~This is a proposition~~ - not a mere trivial failure, in order to preclude a recovery for the work done. This proposition is too clear to need authorities to support it As to whether appellant waived the grubbing the ravine it is admitted to be a question for the jury (as claimed in appellants 4 point) and the jury having decided it the court will not disturb the verdict for that reason though they decided it wrong

8th The damages found by the jury were not Excessive. from the proof it is a matter of great uncertainty what amount had been paid. While on page 8 of Abstract States that the amount paid may have been $15 or $20. or $25 or $30. The jury allowed a deduction from the Actual price of about $16. But the whole question of what had been paid was Exclusively a question for the jury to decide & any admissions of the appellee ought not to have received much consideration for the reason that he was a German not understanding to any extent English

9. The 7 instruction asked for by, and given for the appellee is the law if we are correct in our positions respecting the waiver of the grubbing the ravine, or a substantial compliance with the contract

10. The 1st, 2d, 3d & 4 instructions refused for appellant are all clearly correct as our authorities cited in support of our 2d point clearly establishes. According to them instructions no doubt can be maintained where a written contract exists, under any circumstances unless the contract is specially declared on. an idea that was exploded

before any of this generation were born.

11th It is a matter of discretion for the Circuit Court to permit a plaintiff to prosecute his suit a poor person, and the granting or refusing leave to do so cannot be assigned for Error
Slater Treat & Co. Statute 244, Sec 8

12th The motion for leave to prosecute the suit as a poor person in the Court below was made upon the determination of the motion to dismiss the suit for want of security for costs

Richmond & Burns
for appellee

Argument of Richmond & Burnes
for Appellee

This is the third time
this cause has been before this court
It has been three times tried by
a jury who each time found for
the appellee, and it has been twice
reversed in this Court - not on
the merits - but on legal questions
The case will be found reported
in 15 Ill 412. and 19 Ill 455. It was
first reversed because the Court
below admitted Evidence to the
jury that "it was not usual in the
neighborhood to grub such ravines."
At the next trial in this court the
judgment was reversed; because
the Court instructed the jury that
the appellee was entitled to pay
for grubbing the ravine whether it
had been grubbed or not provided
he had been released from grubbing
it. It would seem that this
case had been litigated about long
enough, & that the most of men would
be willing to pay the laborer ~~for~~ his
well earned wages without quite
so much litigation and trouble
but it appears that this appellant
is not one of that class of men
Numerous points are now
made by the appellant upon which
he relies to again reverse this judg-
ment.

But we are content to leave the most of these questions upon the points and authorities we have cited.

There is considerable evidence in the record tending to prove that the grabbing was, and was not well done, and all we now have to say upon that question is, that after three verdicts for our client, upon substantially the same evidence, it is pretty clearly established that the merits upon that question, as well as all other substantial questions in the case, are with the appellee.

It seems to us, that this cause as reported in the 17 Ills is really an authority for us on this trial, the only error in the case as then reported was in giving the instruction above referred to. And it would seem that as that is the only error mentioned that it was the only one in the case although the fact that that memorable ravine was not grabbed was as clearly in the record then, as now. Now it seems to be one of the great questions upon which the appellant relies to again the judgment below.

We can see nothing in this record which shows that any imposition has been done the appellant

carry one of his instructions which were refused, go to the extent that our client has no right to recover anything a fact that no court and especially ~~not the~~ this court has never intimated bef. One of our instructions expressly tells the jury that they are not to allow the plaintiff below for grubbing the ravine if it was not grubbed. But we insist that there is no Evidence in the record that shows that there was any grubs in the ravine to take out. if there is any we have overlooked it. And unless there is, the ravine cannot cut any figure in the case

40 - 41
Supreme Court
3d Grand Division

Samuel Holmes
vs
William Thomas

Brief and Argument
of appellee

Filed Apl. 27. 1860
L. Leland Clk.

Richmond & Hames
for appellee

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

SAMUEL HOLMES, Appellant,
vs.
WILLIAM STUMMEL, Appellee.

ABSTRACT OF RECORD.

Page of Rec.

1 THIS was an action of assumpsit, for work and labor done, commenced
16 by the appellee against the appellant, in the Circuit Court of Marshall
17 county. The cause was tried before Hon. M. Ballou, Judge, and a jury, at the May term, 1858, of said Circuit Court, and a verdict and judgment against the appellant, in favor of the appellee, for $262.13, to reverse which judgment the said appellant brings this cause to this Court.

At the October term of said Court, A. D. 1857, the defendant filed his
10 affidavit in said cause, and entered his motion therein for a rule on the
12 plaintiff to give security for costs; and that on the second day of said term, the Court ordered the plaintiff to give security for costs "by the time the same should be reached for trial;" and afterwards, on the sixth day of said term, on application of the said plaintiff, the Court extended the time for complying with said order thirty days, and continued the cause to the next term of said Court; to which decisions of the Court, in extending the time for complying with said order, and in continuing said cause, the said defendant then and there excepted and objected.

13 And afterwards, at the January term, A. D. 1858, of said Court, the defendant moved the Court to dismiss the suit for want of security for costs.

Thereupon came the plaintiff and filed his affidavit and entered his
19 cross-motion therein, for leave to prosecute his suit as a "poor person;"
14 which said motion of the plaintiff having been considered by the Court, was allowed, and said plaintiff permitted to prosecute his suit as a "poor person;" to the overruling of which said motion of said defendant, he, the said defendant, then and there excepted.

25 And afterwards, at the May term, 1858, of said Court, the jury having found the issues for the plaintiff, the defendant thereupon entered and filed his motion for a new trial, for the reasons following, to wit:

1. The verdict is contrary to the law and the instructions of the Court.

2. The verdict is contrary to the evidence.

3. The Court excluded proper evidence upon the part of the defendant, and admitted improper evidence upon the part of the plaintiff.

4. The Court gave improper instructions upon the part of the plaintiff.

5. The Court refused to give proper instructions on the part of the plaintiff.

6. That the damages are excessive.

STATE OF ILLINOIS. SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

WILLIAM STUMMEL, APPELLEE, *vs.* SAMUEL HOLMES, APPELLANT.

ABSTRACT OF RECORD. Bill of Exceptions

~~This was an action of assumpsit commenced in the Marshall Circuit Court, at the October Term, A. D. 1858, for work and labor done. Damages claimed, $300 00.~~

The case was tried at the May Term of the Marshall Circuit Court, A. D. 1858, and a verdict found for the plaintiff, and his damages assessed at $ 262/3

Copy of Bill of Ex.

1 AARON SWEGAR was called as a juror, and upon his examination he stated that he did form an opinion upon the merits of the case, but had never expressed it. Could not say that he had a decided opinion as to which party ought to recover. The opinion might influence him if the evidence was the same as the statement he heard. That he would be governed by the evidence in deciding the case. If he should never hear anything more about it, he had an opinion.

The plaintiff challenged the juror for cause, and the court sustained the challenge and discharged the juror. Defendant excepted.

The plaintiff, to maintain the issues on his part, then called THOMAS WIER, who testified that plaintiff did grubbing for defendant in 1851 or 1852—began in 1852
2 and finished in 1853; thinks he grubbed about 52 acres, and it was worth from eight to ten dollars an acre. Grubbing was done on Holmes' land. Holmes was absent about half the time. About one-half of it was done after Holmes returned. Holmes was absent in California when Stummel commenced grubbing. Holmes knew that Stummel was doing the grubbing. The land was a first rate piece of bottom land, a dense thicket composed principally of sumac and oak *saplings*. That he at one time met Holmes on the land while Stummel was grubbing.

Said witness stated on his cross-examination that it was his impression that the work was done under a written contract. Stummel called witness, Enoch Sawyer, and Jacob Held, on the land to look at the work. They went on and examined the work. There was a contract then produced by Stummel, as near as he re-
3 membered, which was drawn between William White and James Ferguson. Understood from Stummel that the work was done under a contract, and Stum-

mel had the contract there. By the contract Stummel was to do the work. Stummel had signed his name with Ferguson's at the bottom of the paper. The paper was about the clearing of the land, and was the contract under which the work was done, and was in April, 1853. The contract was in the hands of Sawyer. Plaintiff here rested.

TESTIMONY FOR DEFENDANT.

G. L. Fort, being called on behalf of defendant, testified that he was present
4 at the first trial of this cause, and was clerk of the Circuit Court at the time. On that trial there was a contract produced and read in evidence between Stummel and Holmes concerning the grubbing of the land in controversy. It was a written contract, and he copied it in the record sent to the Supreme Court. That he had compared the copy in the record sent to the Supreme Court with the original, and knew it to be correct. He does not know what became of the original contract. He left it on file with the other papers.

On his cross-examination this witness testified that he did not get the contract from the Bill of Exceptions, but got it from the *original*. Thinks the name of Ferguson was in the original contract, and that it had been scratched out, and the name of Stummel inserted. He compared the original agreement with the copy in the record, and is positive it is correct. He knows that Stummel's name was to the contract.

Semuel Holmes testified that he saw a contract or agreement like the one pro-
5 duced by Mr. Fort. He had the original agreement for the purpose of taking a copy of it at the Spring Term next following a former trial of this cause. He obtained the agreement from Mr. Fort, the Clerk, and returned it to him. Does not know what has become of it. Has never seen it since. It is not in his power, possession, or control. It has never been in his possession since the trial, except to copy it. The defendant then proved service of a notice on the plaintiff to produce the agreement.

G. L. Fort, being re-called, testified that he searched a great deal for the agreement among the records and files of the Court, and has been unable to find it. That he had opened nearly all the bundles of papers that were in use at that time, and looked everywhere where such papers are usually kept, and cannot find it.

William White testified that he was present at the first trial of this cause. An
6 agreement was at that time produced like the one now offered in evidence. He drew up the original contract and gave it to Stummel. It was first made between Sarah or Sam'l Holmes and James Ferguson. Gave agreement to Stummel for the purpose of having Ferguson's name scratched out and Stummel's inserted. When next saw contract Stummel's name was affixed to it. He knows the agreement he saw on the first trial was the same one he gave to Stummel, and Ferguson's name was scratched out and Stummel's name substituted. Did not know whether Sarah Holmes' or Sam'l Holmes' name was signed to the contract. Can't say positively whether Stummel's name was in the body of the contract or not.

The agreement was then offered in evidence, and is as follows, to wit:

"ARTICLE OF AGREEMENT, made and entered into between William Stummel of "the one part and Samuel Holmes of the other part, *witnesseth*, that said William "Stummel has this day agreed to clear, grub and pile the brush, all to be done in
7 "good order, on all the land south of the road running from Sandy Creek bridge "to John Foster's, that William White bought of Edward Evans, to be done and "completed by the first day of April, 1853; and the said Samuel Holmes hath "agreed to pay the said William Stummel two hundred and seventy-eight dollars "for the same—fifty when the work is one-half completed, and the balance when "done and completed. In witness, we, the undersigned, set our hands and seal "this April the 13th, 1852. "WILLIAM STUMMEL,
"SAMUEL HOLMES."

WILLIAM WHITE then testified that he knew about the grubbing done by Stummel. There was 40 acres in the whole field. At the time Stummel commenced, there was 8 acres grubbed, which left 32 acres to be grubbed. The ravine Stummel did not pretend to grub. The ravine is 70 or 80 rods long and some 30 feet wide, and runs diagonally through the land. Has examined the grubbing thoroughly. There are bushes, trees, underbrush and saplings that are not cut down.
8 Does not think one in fifty of the grubs were taken out. Holmes has done a great deal of grubbing on the land since. Last fall Holmes took out as many as *twenty* wagon loads from the land grubbed by Stummel. That the oak, hickory and cherry grubs were cut off and not grubbed out. That he paid Stummel some money and Holmes's wife paid him some before Holmes came home from California. Thinks there was some twenty or thirty dollars paid to Stummel. On cross-examination witness stated that the money paid by himself and Mrs. Holmes may have been $15 or $20, or $20 or $30, he can't remember which. *The plaintiff* here offered the Bill of Exceptions prepared in a former case to witness for examination to refresh his memory on the amount paid Stummel, which Bill of Exceptions on that point is as follows: "That before September, 1852, he paid plaintiff towards said grubbing between $15 and $20." The defendant objected
9 to the introduction of said Bill of Exceptions for the purpose offered; but the court admitted the witness to refer to said Bill of Exceptions for the purpose of refreshing his memory, and defendant excepted.

DAVID ETINGER testified that he has known the ground grubbed by Stummel for eight years. He went on the ground and examined it. Offered to grub it
10 for $4.00 per acre; not worth more; that would be a fair price for it. It is not well grubbed. In some places the stumps left are six inches high. Do not think more than half of the grubs were taken out. It was a very poor job of grubbing. Has helped to grub the land since. He broke eight acres of the land and found it very difficult; it was impossible to plough without hitting the grubs. That on a former trial, when witness was coming to court, Stummel, the plaintiff, got in the wagon and rode with him. Stummel said a good deal of time was lost

coming to court. Holmes, who was in the wagon, replied that he (Stummel)
11 ought to have done his work better and got his money. Stummel replied that it
was too hard work. That he would rather grub one-half the land as it was origin-
12 ally than to grub what is left by Stummel.

Charles Parker testified that he had examined the ground at the request of
13 Forbes. There were plenty of the grubs left, many of them above the surface. He counted, in a circle of one rod, thirty-three grubs above the ground, from the size of his wrist to the size of his leg. Wherever he went it was the same thing.

Peter Forbes testified that he knew the ground grubbed by Stummel. Found plenty of grubs left. In one place he counted, while he stood in his tracks, 40 or 50 stubs. He would not like to pay a man *anything* to grub in that way for him.
14 There was about one and one-half acres in the ravine not grubbed at all.

Henry Benson testified that he knew the land. He went on it 1st of April, 1857; found it rough and poorly grubbed. He stood in one place and counted 35 stubs within a distance of three rods.

Thomas Thompson testified that he had examined the ground, and the grubbing was a poor job. Found a great many grubs.

Nathan Shugarts testified that he examined the grubbing several times. Found the grubbing in a miserable condition. Is acquainted with grubbing, and thinks it worth double to take out a grub after the tree is cut off. It is a very bad job.

15 Thomas Cummings—has known the land 12 or 15 years. Some of the ground is not grubbed at all. The ravine, 1½ acres, is not grubbed at all. There is a three-cornered piece on the west side of the field midway which is not grubbed. The grubbing is a very poor job.

John Willyard testified that he knew the land and grubbed there in the fall of 1856. Found all kinds of grubs. They are very thick on part of the land. Some of the grubs were cut off above the ground, and some below, and some not at all. Could not drive through with a plow. Would rather take out three grubs before the tops were cut off than one afterwards. All grubs should be taken out below the surface. He and David Ettinger and William Ettinger worked on the land, grubbing it for Holmes, from three to four weeks a year ago last fall.

VanBuren McKisson testified that he had been often on the land before and
16 since the grubbing was done by plaintiff, and that there were now left on said land plenty of grubs of all sizes. That he was present at a conversation between Stummel and Holmes that occurred two years ago. David Ettinger was also present. Holmes told Stummel he ought to have finished his work and got his

pay, and told him he didn't think he had done right denying payment. Holmes said, "You know I paid you between $90 and $100," and Stummel said he knew it, and acknowledged he did. That in the spring of 1853 he heard Stummel and Holmes talking about the grubbing, and Stummel said he was going to quit because plenty of farmers told him he hired men and did not pay them. Witness then told Stummel that he had no reason for thinking so; for Holmes had already paid him more than he agreed to. *Stummel said he had, and that Holmes had already paid him near* $100.00. Stummel then said that he would not finish the job. Holmes then told him that what he had done was not done right, and that
17 he had better go on and finish the grubbing and get his pay. That Holmes told Stummel he wanted the *ravine grubbed.*

Defendant then offered to read in evidence a Bill of Discovery filed by him against the plaintiff in the Marshall County Circuit Court, and the answer thereto. The bill amongst other things charges that he paid to the plaintiff, Stummel, the sum of $5.00 on the 1st day of September, 1852, the further sum of $10.00 on the
18 6th of October of said year, and the further sum of $20.00 on the 1st day of November of said year, and that he had no witness by whom he could prove the payment of said several sums of money. Stummel in his answer admits the payment to him by Holmes of $5.00 on 25th of August, 1852, and the further sum of $5.00 on the 6th day of October in said year, and the further sum of $10.00 on the 1st of November in said year, and that the payments admitted are not part or
20 parcel of the payments charged to him by said Holmes on the 12th day of August, 1852, of $5.00, or the payment of December 14th, 1852, of $30.00.

The plaintiff objected to the reading of said Bill and answer in evidence, but the Court overruled the objection and allowed the answer to said Bill to be read in evidence. To which decision of the Court plaintiff excepted.

Here defendant rested.

The plaintiff then called Enoch Sawyer, who testified that he examined the land soon after the grubbing was done. There was a small piece of the south end not grubbed at all. Thomas Wier, Jacob Held and Stummel were with him. Thinks it was a fair piece of grubbing. It was a very heavy job. Had never
21 grubbed much. Thinks it was worth $8 per acre to grub it. He saw the written contract under which it was done. It was handed to him by Stummel. Thinks the same contract was offered on the first trial of this case. There was only one contract used on that trial.

Lorin G. Pratt testified that there was only one contract used on the first trial. He
22 helped Judge Dickey try the case and settle the Bill of Exceptions. Said Bill of Exceptions was then offered in relation to said contract; and that part of said Bill of Exceptions relating to said contract is as follows: "Defendant thereupon proved

that the work was done under a written contract between said parties, of which the following is a copy." (Here follows copy of the agreement between said Stummel and Holmes, copied in the first part of this abstract.) Lorin G. Pratt continued—Stummel's name was not in the body of the agreement, and according to his recollection Sarah Holmes's name was in it. The copy is not a copy of the
23 contract, because Samuel Holmes's name was not signed to the contract. He further stated that William White's name was in the contract. There was an erasure in the contract. Ferguson's name and William Holmes's were at the bottom.—To all of which evidence of the said witness relating to the contents of said contract the defendant then and there objected, but the Court overruled the objection and admitted the evidence, and the defendaut excepted.

Enoch Sawyer, called by plaintiff, testified that he saw the contract. There was an erasure in it, and Fergus's name was erased. William White was a party of the first part, and James Fergus's and Sarah Holmes's names were at the bottom, and thinks Stummel's was there also. Can't say whether it was White's or
24 Stummel's name. "I am talking of the contract as I saw it in the field." I went on the land a year ago, and found a good many grubs left. *It was not a good job of grubbing.*

John Myers—Has never seen the land, only as he rode past it on the road. Thinks from the looks from the road that it was well done. Thinks it would be worth $10 per acre to grub it.

John Foster—Knows the job, and also the ravine. Saw the grubbing, with
25 the exception of half an acre, and considered it a fair job, worth from $7 to $10 per acre. It could not be done for $4 per acre.

John Wier—Has done considerable grubbing. He examined the grubbing done by Stummel two or three years ago, at request of Holmes. Plaintiff then asked witness as follows: "State whether a heavy job or a light job of grubbing." The witness answered, "It was a heavy job." Plaintiff then asked witness, "What was it worth an acre to grub it at the time it was done?" The witness answered, "Ten dollars per acre." The plaintiff then asked witness the following question: "Is it or not difficult to find all the grubs where a portion of the
26 timber has been cut down previous to the grubbing?" To which he answered, "It is difficult, for they rot off under the ground."—To the asking and answering of each of said questions defendant then and there objected; but the Court over ruled the objection, and the defendant excepted.

Thomas Wier testified that he had known plaintiff since he took the job. Stummel did not speak the English language well. He would generally get but one broken English word in a sentence. He had to get him to repeat his words before he could understand him. Evidence of witness objected to, but admitted by the Court, and defendant excepted.

ENOCH SAWYER testified that in the spring of 1853 he could not well understand
27 Stummel, he spoke the English language so badly. In 1855 he could not well understand him, and had to talk to him through an interpreter. The evidence of witness objected to, but admitted by the Court, and defendant excepted.

HENRY WIER—Examined the land and concluded it was an average job of *grubbing*. It was a heavy job, and worth $6 an acre to grub and $2 to pile the brush.

NATHAN RAMSEY—Examined the land, at the request of Holmes, between first and second trial, and thought it a common job. It was worth $8 per acre to grub and pile the brush.

All the evidence offered as to the kind of job and the value per acre for grubbing was objected to at the time by defendant, but the Court overruled the objection, and admitted the evidence, and defendant excepted.

The plaintiff here rested again.

The defendant the re-called VANBUREN MCKESSON, who testified that he was
28 along when Sawyer and others examined the land in 1853. At that time there was but little grubbing done east of the ravine. When I was along with Stummel and Holmes in the wagon, I did understand Stummel perfectly.

WILLIAM WHITE, being re-called, testified that he had known the land since 1834. He had owned it, and bought it in 1850 or 1851. No fire had ever been through it to his knowledge, or that he ever saw, and but few hoop-poles had been cut on it. He might have cut a few where Paul Dods grubbed, but not on the Stummel tract. "My name was not to the contract with Stummel as a party. I am positive of this, because I wrote the contract."

This was all the evidence in the case.

The plaintiff then asked the court to give the following instructions:

1. If the jury believe from the evidence that the plaintiff grubbed fifty acres of
29 land for the defendant, the jury ought to allow to the plaintiff what the jury believe the grubbing was worth, unless the defendant has proved a valid contract for a less sum, or that he (defendant) has paid for said grubbing.

2. If the jury believe from the evidence that the plaintiff did the grubbing in a fair workmanlike manner, and as well as such kind of grubbing is usually done, then the jury ought not to allow plaintiff any less than the contract price, even if a contract price has been proved.

3. If the jury believe from the evidence that under a contract between the parties the plaintiff was bound to grub the *ravine*,—yet if the jury further believe that the defendant released the defendant from grubbing out the *ravine*, then the jury ought to find for the plaintiff the contract price for the work, less a reasonable deduction on account of not grubbing the ravine.

4. Unless the defendant has proved a valid existing contract between the parties, under which the work sued for was done, then plaintiff is entitled to recover from the defendant the value of the work done by him as proved. That to show such valid contract, it must be proved that it was assented and agreed to by both parties, and was for a sufficient consideration.

30 5. If the defendant has shown a written contract, and unless he has proved it, the plaintiff is entitled to recover for the amount he has proved his labor to be worth.

6. If the defendant has shown a written contract for the work done by the plaintiff, the plaintiff is still entitled to recover under such contract, provided he has shown that he has complied with the same.

7. Under the pleadings in this case, if the jury believe that the work was done under a written contract, still the plaintiff is entitled to recover for the work done in proportion to the contract price, if they believe the plaintiff has proved that he did work for the defendant.

The court gave all of the instructions asked for by the plaintiff, and defendant excepted.

Defendant then asked the court to instruct the jury as follows, to wit:

1. If the jury believe from the evidence that the grubbing for which the plaintiff has sued was done under a written special contract, then the plaintiff cannot
31 recover in this action unless it has been proved to the satisfaction of the jury that the contract has been violated by the defendant, and that in consequence of such violation the same has been rescinded by the plaintiff; and it makes no difference whether or not such contract was made by Stummel with Holmes, or with other parties for Holmes.

2. That if the jury believe from the evidence that there was a written special contract under which the grubbing was done, the plaintiff can only recover upon such written contract, unless the same has been violated by the defendant and rescinded by the plaintiff.

3. That where there is a written contract in relation to work or any other matter, *the parties must sue on such* written contract, and cannot sue in the present

form of action unless such contract has been violated by one party and rescinded by the other, or rescinded by mutual agreement of the parties, founded upon a valid consideration.

4. That there is no evidence before the jury that the written contract under which the work was done (if any such contract was made) has been violated by the defendant or rescinded by the plaintiff on account of any such violation.

5. If the work was done under special contract stating the price to be paid for the grubbing and the *time* when it was to be paid, and the manner of doing the work, the plaintiff cannot recover unless he has performed the contract on his part, or unless it has been rescinded by the plaintiff in consequence of the default of the defendant.

32 6. If plaintiff made a contract with Holmes, or with his wife for him, to clear and grub the brush on the land, such contract means such underbrush as ought to be grubbed; and if he was not to have his pay until such work was done, he cannot recover in this case until he has *done the work according to the contract*, or unless it was violated by Holmes and rescinded by plaintiff.

7. If the jury believe from the evidence that the grubbing in question was done under a contract like the one offered in evidence, then Stummel was bound to grub, cut and pile the brush on all the land, as well that in the ravine as the other, and that unless the performance of that portion of the work was *waived* by the defendant, then the plaintiff cannot recover in this case.

But the court refused to give the first, second, third, fourth and seventh instructions, and defendant excepted.

The jury found a verdict for plaintiff.

The defendant then filed his motion for a new trial, but the court over-ruled the motion and defendant excepted. The defendant then filed his motion in arrest of judgment, but the court over-ruled the motion and defendant excepted.

H. M. & J. J. WEAD, Attorneys for Appellant.

No 40 — 44.

Holmes

vs

Stunmell

Abstract

Filed April 27-1860

G. Leland

Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

SAMUEL HOLMES, Appellant,
vs.
WILLIAM STUMMEL, Appellee. } *Appeal from Marshall.*

BRIEF OF H. M. & J. J. WEED, ATTORNEYS FOR APPELLANT.

I. If there was an express contract between the parties, then a suit must be instituted upon such contract. While it is true that either party may abandon a contract for *fraud*, it is equally true that if either party sues the other on the contract at all, *it must be upon the express contract.*

Chitty on Contracts, P. 25.
Story on Contracts, Sect. 15.
Rees vs. *Lines*, 8 Carr & Payne, 126.
Fergusson vs. *Carrington*, 9 B. & C. 59.
Smith vs. *Smith*, 1 Sandford. Sup't Ch. R. 206.
Warthern vs. *Stevens*, 4 Mass. 448.
Whiting vs. *Sullivan*, 7 Mass. 107.

II. The contract proven between the parties was an entire contract. The completion of the whole work, was the essential consideration of it, and was a *condition precedent* to the liability of the appellant to pay the money specified in the contract. If this be so, there can be no question as to the *time* when the appellee's right of action accrued. He has a right of action when he has complied with the conditions of the contract on his part, and not before. No proposition of law is better settled than this. If then the appellee has failed to comply with the conditions of the contract on his part, he has no right of action, and cannot recover.

Story on Contracts, Sect. 22.
Parsons on Contracts, Vol. 2, P. 29.
Cunningham vs. *Morrell*, 10 Johns. 203.
Stark vs. *Parker*, 2 Pick, 267.
Olmsted vs. *Beale*, 19 Pick. 528.
Thayer vs. *Wadsworth*, 19 Pick. 349.
Eldridge vs. *Rowe*, 2 Gil. 91.
Badgely vs. *Heald*, 4 Gil. 67.
Lantry vs. *Parks*, 8 Cowen 63.

III. The contract between the parties having been clearly established, it was erroneous for the Court below, to admit evidence tending to show that the work done was worth *more* than the contract price. The rule that where parties have made an express contract, no other can be *implied*, has existed so long and been so repeatedly recognized by judicial decisions, that it has become an *axiom* of law, and authorities need not be cited in support of it.

IV. The *seventh* instruction asked by the appellant in the Court below is clearly the law, and should not have been refused. The question as to whether the appellee had waived the performance of any portion of the contract by the appellant, was proper for the consideration of the jury. The authorities cited in support of our second proposition, fully sustain said instruction.

V. The contract between the parties having been established, the appellee had no

right to abandon it unless for good cause shown, and having done so he cannot now recover upon the *quantum meruit*.

Story on Contracts, Sect. 15 and 22.
Chandler vs. *Thurston*, 10 Pick. 209.
Shaw vs. *Turnpike Co.*, 2 Penn. 454.
Stark vs. *Parker*, 2 Pick. 26.

VI. The court should have granted a new trial.

1. The evidence clearly does not authorize or support the verdict. The contract price (which must be the measure of damages in this action) for doing the whole work, was only $278,00, and the appellee admits payment of nearly *fifty dollars* to him under said contract, and the judgment is therefore excessive.

2. The original contract between the parties was proven beyond controversy, and if the appellee had any right of action at all, he had only a right to recover the sum that became due to him, upon showing performance on his part of *half* the work to be done under the contract.

3. Admitting that the appellee had a right of action for the *fifty* dollars, that became due upon completing *half* the contract, then the judgment must be reversed, because *that sum* had been paid him before the suit was commenced, and the damages assessed are therefore obviously excessive, unjust and oppressive.

4. The *seventh* instruction given for the appellee by the Court below is not the law. It *assumes* an entirely different state of facts from those established, and directed the jury to find for the appellee for the value of the work done by him, although it was done under a written and express contract, and for a stipulated price.

5. The first, second, third and fourth instructions asked by the appellant, are clearly correct and ought not to have been refused.

VII. The Court should have dismissed the suit, for non-compliance with the rule to give security for costs.

VIII. It was erroneous for the Court below to sustain the Challenge for cause, of Aaron Sweager called as a juror. His own statement upon Examination, shows that he was a competent juror, and the Court erred in setting him aside.

Rex vs Edmonds 6th E.C.L.R. 566.
States Benton 2 Devereux + Battle 196

Samuel Holmes

vs 40 – 44

William Stimmel

Brief.

Filed April 27-1860

Lo Leland

Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

SAMUEL HOLMES, Appellant,
vs.
WILLIAM STUMMEL, Appellee.

ABSTRACT OF RECORD.

Page of Rec.

1 This was an action of assumpsit, for work and labor done, commenced
16 by the appellee against the appellant, in the Circuit Court of Marshall
17 county. The cause was tried before Hon. M. Ballou, Judge, and a jury, at the May term, 1858, of said Circuit Court, and a verdict and judgment against the appellant, in favor of the appellee, for $262.13, to reverse which judgment the said appellant brings this cause to this Court.

At the October term of said Court, A. D. 1857, the defendant filed his
10 affidavit in said cause, and entered his motion therein for a rule on the
12 plaintiff to give security for costs; and that on the second day of said term, the Court ordered the plaintiff to give security for costs "by the time the same should be reached for trial;" and afterwards, on the sixth day of said term, on application of the said plaintiff, the Court extended the time for complying with said order thirty days, and continued the cause to the next term of said Court; to which decisions of the Court, in extending the time for complying with said order, and in continuing said cause, the said defendant then and there excepted and objected.

13 And afterwards, at the January term, A. D. 1858, of said Court, the defendant moved the Court to dismiss the suit for want of security for costs.

Thereupon came the plaintiff and filed his affidavit and entered his
19 cross-motion therein, for leave to prosecute his suit as a "poor person;"
14 which said motion of the plaintiff having been considered by the Court, was allowed, and said plaintiff permitted to prosecute his suit as a "poor person;" to the overruling of which said motion of said defendant, he, the said defendant, then and there excepted.

25 And afterwards, at the May term, 1858, of said Court, the jury having found the issues for the plaintiff, the defendant thereupon entered and filed his motion for a new trial, for the reasons following, to wit:

1. The verdict is contrary to the law and the instructions of the Court.

2. The verdict is contrary to the evidence.

3. The Court excluded proper evidence upon the part of the defendant, and admitted improper evidence upon the part of the plaintiff.

4. The Court gave improper instructions upon the part of the plaintiff.

5. The Court refused to give proper instructions on the part of the plaintiff.

6. That the damages are excessive.

STATE OF ILLINOIS. SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

WILLIAM STUMMEL, APPELLEE, *vs.* SAMUEL HOLMES, APPELLANT.

ABSTRACT OF ~~RECORD~~ Bill of Exceptions—

~~This was an action of assumpsit commenced in the Marshall Circuit Court, at the October Term, A. D. 1858, for work and labor done. Damages claimed, $300 00.~~

Page of Bill of Ex

The case was tried at the May Term of the Marshall Circuit Court, A. D. 1858, and a verdict found for the plaintiff, and his damages assessed at $ 262.13.

1 AARON SWEGAR was called as a juror, and upon his examination he stated that he did form an opinion upon the merits of the case, but had never expressed it. Could not say that he had a decided opinion as to which party ought to recover. The opinion might influence him if the evidence was the same as the statement he heard. That he would be governed by the evidence in deciding the case. If he should never hear anything more about it, he had an opinion.

The plaintiff challenged the juror for cause, and the court sustained the challenge and discharged the juror. Defendant excepted.

The plaintiff, to maintain the issues on his part, then called THOMAS WIER, who testified that plaintiff did grubbing for defendant in 1851 or 1852—began in 1852
2 and finished in 1853; thinks he grubbed about 52 acres, and it was worth from eight to ten dollars an acre. Grubbing was done on Holmes' land. Holmes was absent about half the time. About one-half of it was done after Holmes returned. Holmes was absent in California when Stummel commenced grubbing. Holmes knew that Stummel was doing the grubbing. The land was a first rate piece of bottom land, a dense thicket composed principally of sumac and oak *saplings*. That he at one time met Holmes on the land while Stummel was grubbing.

Said witness stated on his cross-examination that it was his impression that the work was done under a written contract. Stummel called witness, Enoch Sawyer, and Jacob Held, on the land to look at the work. They went on and examined the work. There was a contract then produced by Stummel, as near as he re-
3 membered, which was drawn between William White and James Ferguson. Understood from Stummel that the work was done under a contract, and Stum-

mel had the contract there. By the contract Stummel was to do the work. Stummel had signed his name with Ferguson's at the bottom of the paper. The paper was about the clearing of the land, and was the contract under which the work was done, and was in April, 1853. The contract was in the hands of Sawyer. Plaintiff here rested.

TESTIMONY FOR DEFENDANT.

G. L. Fort, being called on behalf of defendant, testified that he was present
4 at the first trial of this cause, and was clerk of the Circuit Court at the time. On that trial there was a contract produced and read in evidence between Stummel and Holmes concerning the grubbing of the land in controversy. It was a written contract, and he copied it in the record sent to the Supreme Court. That he had compared the copy in the record sent to the Supreme Court with the original, and knew it to be correct. He does not know what became of the original contract. He left it on file with the other papers.

On his cross-examination this witness testified that he did not get the contract from the Bill of Exceptions, but got it from the *original*. Thinks the name of Ferguson was in the original contract, and that it had been scratched out, and the name of Stummel inserted. He compared the original agreement with the copy in the record, and is positive it is correct. He knows that Stummel's name was to the contract.

Semuel Holmes testified that he saw a contract or agreement like the one pro-
5 duced by Mr. Fort. He had the original agreement for the purpose of taking a copy of it at the Spring Term next following a former trial of this cause. He obtained the agreement from Mr. Fort, the Clerk, and returned it to him. Does not know what has become of it. Has never seen it since. It is not in his power, possession, or control. It has never been in his possession since the trial, except to copy it. The defendant then proved service of a notice on the plaintiff to produce the agreement.

G. L. Fort, being re-called, testified that he searched a great deal for the agreement among the records and files of the Court, and has been unable to find it. That he had opened nearly all the bundles of papers that were in use at that time, and looked everywhere where such papers are usually kept, and cannot find it.

William White testified that he was present at the first trial of this cause. An
6 agreement was at that time produced like the one now offered in evidence. He drew up the original contract and gave it to Stummel. It was first made between Sarah or Sam'l Holmes and James Ferguson. Gave agreement to Stummel for the purpose of having Ferguson's name scratched out and Stummel's inserted. When next saw contract Stummel's name was affixed to it. He knows the agreement he saw on the first trial was the same one he gave to Stummel, and Ferguson's name was scratched out and Stummel's name substituted. Did not know whether Sarah Holmes' or Sam'l Holmes' name was signed to the contract. Can't say positively whether Stummel's name was in the body of the contract or not.

The agreement was then offered in evidence, and is as follows, to wit:

"ARTICLE OF AGREEMENT, made and entered into between William Stummel of "the one part and Samuel Holmes of the other part, *witnesseth*, that said William "Stummel has this day agreed to clear, grub and pile the brush, all to be done in
7 "good order, on all the land south of the road running from Sandy Creek bridge "to John Foster's, that William White bought of Edward Evans, to be done and "completed by the first day of April, 1853; and the said Samuel Holmes hath "agreed to pay the said William Stummel two hundred and seventy-eight dollars "for the same—fifty when the work is one-half completed, and the balance when "done and completed. In witness, we, the undersigned, set our hands and seal "this April the 13th, 1852. "WILLIAM STUMMEL,

"SAMUEL HOLMES."

WILLIAM WHITE then testified that he knew about the grubbing done by Stummel. There was 40 acres in the whole field. At the time Stummel commenced, there was 8 acres grubbed, which left 32 acres to be grubbed. The ravine Stummel did not pretend to grub. The ravine is 70 or 80 rods long and some 30 feet wide, and runs diagonally through the land. Has examined the grubbing thoroughly. There are bushes, trees, underbrush and saplings that are not cut down.
8 Does not think one in fifty of the grubs were taken out. Holmes has done a great deal of grubbing on the land since. Last fall Holmes took out as many as *twenty* wagon loads from the land grubbed by Stummel. That the oak, hickory and cherry grubs were cut off and not grubbed out. That he paid Stummel some money and Holmes's wife paid him some before Holmes came home from California. Thinks there was some twenty or thirty dollars paid to Stummel. On cross-examination witness stated that the money paid by himself and Mrs. Holmes may have been $15 or $20, or $20 or $30, he can't remember which. *The plaintiff* here offered the Bill of Exceptions prepared in a former case to witness for examination to refresh his memory on the amount paid Stummel, which Bill of Exceptions on that point is as follows: "That before September, 1852, he paid plaintiff towards said grubbing between $15 and $20." The defendant objected
9 to the introduction of said Bill of Exceptions for the purpose offered; but the court admitted the witness to refer to said Bill of Exceptions for the purpose of refreshing his memory, and defendant excepted.

DAVID ETINGER testified that he has known the ground grubbed by Stummel for eight years. He went on the ground and examined it. Offered to grub it
10 for $4.00 per acre; not worth more; that would be a fair price for it. It is not well grubbed. In some places the stumps left are six inches high. Do not think more than half of the grubs were taken out. It was a very poor job of grubbing. Has helped to grub the land since. He broke eight acres of the land and found it very difficult; it was impossible to plough without hitting the grubs. That on a former trial, when witness was coming to court, Stummel, the plaintiff, got in the wagon and rode with him. Stummel said a good deal of time was lost

coming to court. Holmes, who was in the wagon, replied that he (Stummel)
11 ought to have done his work better and got his money. Stummel replied that it was too hard work. That he would rather grub one-half the land as it was originally than to grub what is left by Stummel.
12

Charles Parker testified that he had examined the ground at the request of
13 Forbes. There were plenty of the grubs left, many of them above the surface. He counted, in a circle of one rod, thirty-three grubs above the ground, from the size of his wrist to the size of his leg. Wherever he went it was the same thing.

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14 There was about one and one-half acres in the ravine not grubbed at all.

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15 Thomas Cummings—has known the land 12 or 15 years. Some of the ground is not grubbed at all. The ravine, 1½ acres, is not grubbed at all. There is a three-cornered piece on the west side of the field midway which is not grubbed. The grubbing is a very poor job.

John Willyard testified that he knew the land and grubbed there in the fall of 1856. Found all kinds of grubs. They are very thick on part of the land. Some of the grubs were cut off above the ground, and some below, and some not at all. Could not drive through with a plow. Would rather take out three grubs before the tops were cut off than one afterwards. All grubs should be taken out below the surface. He and David Ettinger and William Ettinger worked on the land, grubbing it for Holmes, from three to four weeks a year ago last fall.

VanBuren McKisson testified that he had been often on the land before and
16 since the grubbing was done by plaintiff, and that there were now left on said land plenty of grubs of all sizes. That he was present at a conversation between Stummel and Holmes that occurred two years ago. David Ettinger was also present. Holmes told Stummel he ought to have finished his work and got his

pay, and told him he didn't think he had done right denying payment. Holmes said, "You know I paid you between $90 and $100," and Stummel said he knew it, and acknowledged he did. That in the spring of 1853 he heard Stummel and Holmes talking about the grubbing, and Stummel said he was going to quit because plenty of farmers told him he hired men and did not pay them. Witness then told Stummel that he had no reason for thinking so; for Holmes had already paid him more than he agreed to. *Stummel said he had, and that Holmes had already paid him near* $100.00. Stummel then said that he would not finish the job. Holmes then told him that what he had done was not done right, and that
17 he had better go on and finish the grubbing and get his pay. That Holmes told Stummel he wanted the *ravine grubbed.*

Defendant then offered to read in evidence a Bill of Discovery filed by him against the plaintiff in the Marshall County Circuit Court, and the answer thereto. The bill amongst other things charges that he paid to the plaintiff, Stummel, the sum of $5.00 on the 1st day of September, 1852, the further sum of $10.00 on the
18 6th of October of said year, and the further sum of $20.00 on the 1st day of November of said year, and that he had no witness by whom he could prove the payment of said several sums of money. Stummel in his answer admits the payment to him by Holmes of $5.00 on 25th of August, 1852, and the further sum of $5.00 on the 6th day of October in said year, and the further sum of $10.00 on the 1st of November in said year, and that the payments admitted are not part or
20 parcel of the payments charged to him by said Holmes on the 12th day of August, 1852, of $5.00, or the payment of December 14th, 1852, of $30.00.

The plaintiff objected to the reading of said Bill and answer in evidence, but the Court overruled the objection and allowed the answer to said Bill to be read in evidence. To which decision of the Court plaintiff excepted.

Here defendant rested.

The plaintiff then called Enoch Sawyer, who testified that he examined the land soon after the grubbing was done. There was a small piece of the south end not grubbed at all. Thomas Wier, Jacob Held and Stummel were with him. Thinks it was a fair piece of grubbing. It was a very heavy job. Had never
21 grubbed much. Thinks it was worth $8 per acre to grub it. He saw the written contract under which it was done. It was handed to him by Stummel. Thinks the same contract was offered on the first trial of this case. There was only one contract used on that trial.

Lorin G. Pratt testified that there was only one contract used on the first trial. He
22 helped Judge Dickey try the case and settle the Bill of Exceptions. Said Bill of Exceptions was then offered in relation to said contract; and that part of said Bill of Exceptions relating to said contract is as follows: "Defendant thereupon proved

that the work was done under a written contract between said parties, of which the following is a copy." (Here follows copy of the agreement between said Stummel and Holmes, copied in the first part of this abstract.) Lorin G. Pratt continued—Stummel's name was not in the body of the agreement, and according to his recollection Sarah Holmes's name was in it. The copy is not a copy of the
23 contract, because Samuel Holmes's name was not signed to the contract. He further stated that William White's name was in the contract. There was an erasure in the contract. Ferguson's name and William Holmes's were at the bottom.—To all of which evidence of the said witness relating to the contents of said contract the defendant then and there objected, but the Court overruled the objection and admitted the evidence, and the defendaut excepted.

Enoch Sawyer, called by plaintiff, testified that he saw the contract. There was an erasure in it, and Fergus's name was erased. William White was a party of the first part, and James Fergus's and Sarah Holmes's names were at the bottom, and thinks Stummel's was there also. Can't say whether it was White's or
24 Stummel's name. "I am talking of the contract as I saw it in the field." I went on the land a year ago, and found a good many grubs left. *It was not a good job of grubbing.*

John Myers—Has never seen the land, only as he rode past it on the road. Thinks from the looks from the road that it was well done. Thinks it would be worth $10 per acre to grub it.

John Foster—Knows the job, and also the ravine. Saw the grubbing, with
25 the exception of half an acre, and considered it a fair job, worth from $7 to $10 per acre. It could not be done for $4 per acre.

John Wier—Has done considerable grubbing. He examined the grubbing done by Stummel two or three years ago, at request of Holmes. Plaintiff then asked witness as follows: "State whether a heavy job or a light job of grubbing." The witness answered, "It was a heavy job." Plaintiff then asked witness, "What was it worth an acre to grub it at the time it was done?" The witness answered, "Ten dollars per acre." The plaintiff then asked witness the following question: "Is it or not difficult to find all the grubs where a portion of the
26 timber has been cut down previous to the grubbing?" To which he answered, "It is difficult, for they rot off under the ground."—To the asking and answering of each of said questions defendant then and there objected; but the Court over ruled the objection, and the defendant excepted.

Thomas Wier testified that he had known plaintiff since he took the job. Stummel did not speak the English language well. He would generally get but one broken English word in a sentence. He had to get him to repeat his words before he could understand him. Evidence of witness objected to, but admitted by the Court, and defendant excepted.

ENOCH SAWYER testified that in the spring of 1853 he could not well understand
27 Stummel, he spoke the English language so badly. In 1855 he could not well understand him, and had to talk to him through an interpreter. The evidence of witness objected to, but admitted by the Court, and defendant excepted.

HENRY WIER—Examined the land and concluded it was an average job of *grubbing*. It was a heavy job, and worth $6 an acre to grub and $2 to pile the brush.

NATHAN RAMSEY—Examined the land, at the request of Holmes, between first and second trial, and thought it a common job. It was worth $8 per acre to grub and pile the brush.

All the evidence offered as to the kind of job and the value per acre for grubbing was objected to at the time by defendant, but the Court overruled the objection, and admitted the evidence, and defendant excepted.

The plaintiff here rested again.

The defendant the re-called VANBUREN MCKESSON, who testified that he was
28 along when Sawyer and others examined the land in 1853. At that time there was but little grubbing done east of the ravine. When I was along with Stummel and Holmes in the wagon, I did understand Stummel perfectly.

WILLIAM WHITE, being re-called, testified that he had known the land since 1834. He had owned it, and bought it in 1850 or 1851. No fire had ever been through it to his knowledge, or that he ever saw, and but few hoop-poles had been cut on it. He might have cut a few where Paul Dods grubbed, but not on the Stummel tract. "My name was not to the contract with Stummel as a party. I am positive of this, because I wrote the contract."

This was all the evidence in the case.

The plaintiff then asked the court to give the following instructions:

1. If the jury believe from the evidence that the plaintiff grubbed fifty acres of
29 land for the defendant, the jury ought to allow to the plaintiff what the jury believe the grubbing was worth, unless the defendant has proved a valid contract for a less sum, or that he (defendant) has paid for said grubbing.

2. If the jury believe from the evidence that the plaintiff did the grubbing in a fair workmanlike manner, and as well as such kind of grubbing is usually done, then the jury ought not to allow plaintiff any less than the contract price, even if a contract price has been proved.

3. If the jury believe from the evidence that under a contract between the parties the plaintiff was bound to grub the *ravine*,—yet if the jury further believe that the defendant released the defendant from grubbing out the *ravine*, then the jury ought to find for the plaintiff the contract price for the work, less a reasonable deduction on account of not grubbing the ravine.

4. Unless the defendant has proved a valid existing contract between the parties, under which the work sued for was done, then plaintiff is entitled to recover from the defendant the value of the work done by him as proved. That to show such valid contract, it must be proved that it was assented and agreed to by both parties, and was for a sufficient consideration.

30 5. If the defendant has shown a written contract, and unless he has proved it, the plaintiff is entitled to recover for the amount he has proved his labor to be worth.

6. If the defendant has shown a written contract for the work done by the plaintiff, the plaintiff is still entitled to recover under such contract, provided he has shown that he has complied with the same.

7. Under the pleadings in this case, if the jury believe that the work was done under a written contract, still the plaintiff is entitled to recover for the work done in proportion to the contract price, if they believe the plaintiff has proved that he did work for the defendant.

The court gave all of the instructions asked for by the plaintiff and defendant excepted.

Defendant then asked the court to instruct the jury as follows, to wit:

1. If the jury believe from the evidence that the grubbing for which the plaintiff has sued was done under a written special contract, then the plaintiff cannot
31 recover in this action unless it has been proved to the satisfaction of the jury that the contract has been violated by the defendant, and that in consequence of such violation the same has been rescinded by the plaintiff; and it makes no difference whether or not such contract was made by Stummel with Holmes, or with other parties for Holmes.

2. That if the jury believe from the evidence that there was a written special contract under which the grubbing was done, the plaintiff can only recover upon such written contract, unless the same has been violated by the defendant and rescinded by the plaintiff.

3. That where there is a written contract in relation to work or any other matter, *the parties must sue on such* written contract, and cannot sue in the present

form of action unless such contract has been violated by one party and rescinded by the other, or rescinded by mutual agreement of the parties, founded upon a valid consideration.

4. That there is no evidence before the jury that the written contract under which the work was done (if any such contract was made) has been violated by the defendant or rescinded by the plaintiff on account of any such violation.

5. If the work was done under special contract stating the price to be paid for the grubbing and the *time* when it was to be paid, and the manner of doing the work, the plaintiff cannot recover unless he has performed the contract on his part, or unless it has been rescinded by the plaintiff in consequence of the default of the defendant.

32 6. If plaintiff made a contract with Holmes, or with his wife for him, to clear and grub the brush on the land, such contract means such underbrush as ought to be grubbed; and if he was not to have his pay until such work was done, he cannot recover in this case until he has *done the work according to the contract*, or unless it was violated by Holmes and rescinded by plaintiff.

7. If the jury believe from the evidence that the grubbing in question was done under a contract like the one offered in evidence, then Stummel was bound to grub, cut and pile the brush on all the land, as well that in the ravine as the other, and that unless the performance of that portion of the work was *waived* by the defendant, then the plaintiff cannot recover in this case.

But the court refused to give the first, second, third, fourth and seventh instructions, and defendant excepted.

The jury found a verdict for plaintiff.

The defendant then filed his motion for a new trial, but the court over-ruled the motion and defendant excepted. The defendant then filed his motion in arrest of judgment, but the court over-ruled the motion and defendant excepted.

H. M. & J. J. WEAD, Attorneys for Appellant.

Ab 40-44

Holmes
vs
Stunnell

Abstract

Filed April 27-1860
L. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

SAMUEL HOLMES, Appellant,
vs.
WILLIAM STUMMEL, Appellee. } *Appeal from Marshall.*

BRIEF OF H. M. & J. J. WEED, ATTORNEYS FOR APPELLANT.

I. If there was an express contract between the parties, then a suit must be instituted upon such contract. While it is true that either party may abandon a contract for *fraud*, it is equally true that if either party sues the other on the contract at all, *it must be upon the express contract.*

Chitty on Contracts, P. 25.
Story on Contracts, Sect. 15.
Rees vs. *Lines*, 8 Carr & Payne, 126.
Fergusson vs. *Carrington*, 9 B. & C. 59.
Smith vs. *Smith*, 1 Sandford. Sup't Ch. R. 206.
Warthern vs. *Stevens*, 4 Mass. 448.
Whiting vs. *Sullivan*, 7 Mass. 107.

II. The contract proven between the parties was an entire contract. The completion of the whole work, was the essential consideration of it, and was a *condition precedent* to the liability of the appellant to pay the money specified in the contract. If this be so, there can be no question as to the *time* when the appellee's right of action accrued. He has a right of action when he has complied with the conditions of the contract on his part, and not before. No proposition of law is better settled than this. If then the appellee has failed to comply with the conditions of the contract on his part, he has no right of action, and cannot recover.

Story on Contracts, Sect. 22.
Parsons on Contracts, Vol. 2, P. 29.
Cunningham vs. *Morrell*, 10 Johns. 203.
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Olmsted vs. *Beale*, 19 Pick. 528.
Thayer vs. *Wadsworth*, 19 Pick. 349.
Eldridge vs. *Rowe*, 2 Gil. 91.
Badgely vs. *Heald*, 4 Gil. 67.
Lantry vs. *Parks*, 8 Cowen 63.

III. The contract between the parties having been clearly established, it was erroneous for the Court below, to admit evidence tending to show that the work done was worth *more* than the contract price. The rule that where parties have made an express contract, no other can be *implied*, has existed so long and been so repeatedly recognized by judicial decisions, that it has become an *axiom* of law, and authorities need not be cited in support of it.

IV. The *seventh* instruction asked by the appellant in the Court below is clearly the law, and should not have been refused. The question as to whether the appellee had waived the performance of any portion of the contract by the appellant, was proper for the consideration of the jury. The authorities cited in support of our second proposition, fully sustain said instruction.

V. The contract between the parties having been established, the appellee had no

right to abandon it unless for good cause shown, and having done so he cannot now recover upon the *quantum meruit*.

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Chandler vs. *Thurston*, 10 Pick. 209.
Shaw vs. *Turnpike Co.*, 2 Penn. 454.
Stark vs. *Parker*, 2 Pick. 26.

VI. The court should have granted a new trial.

1. The evidence clearly does not authorize or support the verdict. The contract price (which must be the measure of damages in this action) for doing the whole work, was only $278,00, and the appellee admits payment of nearly *fifty dollars* to him under said contract, and the judgment is therefore excessive.

2. The original contract between the parties was proven beyond controversy, and if the appellee had any right of action at all, he had only a right to recover the sum that became due to him, upon showing performance on his part of *half* the work to be done under the contract.

3. Admitting that the appellee had a right of action for the *fifty* dollars, that became due upon completing *half* the contract, then the judgment must be reversed, because *that sum* had been paid him before the suit was commenced, and the damages assessed are therefore obviously excessive, unjust and oppressive.

4. The *seventh* instruction given for the appellee by the Court below is not the law. It *assumes* an entirely different state of facts from those established, and directed the jury to find for the appellee for the value of the work done by him, although it was done under a written and express contract, and for a stipulated price.

5. The first, second, third and fourth instructions asked by the appellant, are clearly correct and ought not to have been refused.

VII. The Court should have dismissed the suit for non-compliance with the rule to give security for costs,

VIII. It was erroneous for the Court to sustain the Challenge for cause of Aaron Swearger, called as a juror, his own statement upon examination shows that he was a competent juror and the Court erred in setting him aside —

Rex vs Edmonds 6th E.C.L.R. 566.
State vs Benton 2 Devereaux & Battles, 196

Samuel Holmes
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BRIEF OF RICHMOND AND BURNS, ATTORNEYS FOR APPELLEE.

1. It is good cause for challenge of a juror that he has formed an opinion upon the merits of the cause whether he has expressd it or not.

The juror Scoager stated, "if he never heard any thing more about the case he had an opinion," and this was good reason for challenge "for cause."

Smith vs. *Eames*, 3d Scam. 76.
Gardner vs. *The People*, 3 Scam. 83
Vennum vs. *Harwood*, 1 Gil. 662.

2. When a contract has been fully performed and nothing remains to be done under it but to pay the money for its performance, the plaintiff may declare in *indebitatus assumpsit.*

Bank of Columbia vs. *Patterson's Adm'rs.*, 7 Cranch, 199.
Canal Company vs. *Knap*, 9 Peters, 541.
2 Greenleaf's Evidence, 104.
Throop vs. *Sherwood*, 4 Gil. 98.

3. Even if the work was done under a written contract, Holmes waived the grubbing the ravine as he had a right to do, and so the law of special written contracts does not apply in this case.

4. The common counts only are used in the declaration. That the work was done under a *written special* contract, was set up as a matter of defence, not an *admitted* fact; therefore it became a question of fact for the jury to decide whether there was such a written contract or not, and this being so, it was clearly competent to prove what the grubbing was worth.

5. The appellant clearly was not prejudiced by such proof, because it is manifest that the jury were guided, in making their verdict, by the price mentioned in the written contract and the amount of land *actually* grubbed.

6. Appellant's 7th instruction is clearly wrong. It presupposes that the failure to grub the ravine was such a substantial non-compliance with the contract as to preclude a recovery, when in fact there is no proof that there was any grubs in the ravine; all that is said on the subject is in the testimony of Wm. White, page 3 of the Abstract, and the testimony of Cummins on 4 page of the same.

7. There must have been, on part of appellee, some *substantial* non-compliance with the contract; not a mere trivial failure, in order to prevent a recovery for the work done. This proposition is too clear to need authorities to support it. As to whether appellant waived the grubbing the ravine, it is admitted to be a question for the jury, (as claimed in appellants 4 point. And the jury having decided it, the Court will not disturb the verdict for that reason, though they decided it wrong.

8. The damages found by the jury were not excessive. From the proof it is a matter of great uncertainty what amount had been paid. White, on page 3d of Abstract, states that the amount paid may have been $15 or $20, or $20 or $30. The jury allowed a deduction from the contract price of about $16. But the whole question of what had been paid was exclusively a question for the jury to decide. Any admission of the appellee ought not to have received much consideration, for the reason that he was a German, not understanding to any extent English.

9. The 7 instruction asked for by, and given for, the appelle is the law, if we are correct in our positions respecting the waiver of the grubbing the ravine or a substantial compliance with the contract.

10. The 1st, 2d, 3d, and 4th instructions refused for appellant are all clearly wrong, as our authorities cited in support of our 2d point clearly establishes. According to these instructions no suit can be maintained *where* a written contract exists, under any circumstances, unless the contract is specially declared on, an idea that was exploded before any of this generation were born.

11. It is a matter of discretion for the Circuit Court to permit a plaintiff to prosecute his suit a poor person, and the granting or refusing leave to do so cannot be assigned for error.

Scates, Treat., and B. Statute, 244, Sec. 3.

12. The motion for leave to prosecute the suit as a poor person, in the Court below was made before the determination of the motion to dismiss the suit for want of security for costs.

RICHMOND & BURNS,
For Appellee.

40-44

Holmes

Stanwick

Appellees brief

Filed May 19, 1880

D. Selden

Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

SAMUEL HOLMES
vs.
WILLIAM STUMMEL. } *Appeal from Marshall.*

BRIEF OF RICHMOND AND BURNS, ATTORNEYS FOR APPELLEE.

1. It is good cause for challenge of a juror that he has formed an opinion upon the merits of the cause whether he has expressd it or not.

The juror Scoager stated, "if he never heard any thing more about the case he had an opinion," and this was good reason for challenge "for cause."

Smith vs. *Eames*, 3d Scam. 76.
Gardner vs. *The People*, 3 Scam. 83
Wennum vs. *Harwood*, 1 Gil. 662.

2. When a contract has been fully performed and nothing remains to be done under it but to pay the money for its performance, the plaintiff may declare in *indebitatus assumpsit.*

Bank of Columbia vs. *Patterson's Adm'rs.*, 7 Cranch, 199.
Canal Company vs. *Knap*, 9 Peters, 541.
2 Greenleaf's Evidence, 104.
Throop vs. *Sherwood*, 4 Gil. 98.

3. Even if the work was done under a written contract, Holmes waived the grubbing the ravine as he had a right to do, and so the law of special written contracts does not apply in this case.

4. The common counts only are used in the declaration. That the work was done under a *written special* contract, was set up as a matter of defence, not an *admitted* fact; therefore it became a question of fact for the jury to decide whether there was such a written contract or not, and this being so, it was clearly competent to prove what the grubbing was worth.

5. The appellant clearly was not prejudiced by such proof, because it is manifest that the jury were guided, in making their verdict, by the price mentioned in the written contract and the amount of land *actually* grubbed.

6. Appellant's 7th instruction is clearly wrong. It presupposes that the failure to grub the ravine was such a substantial non-compliance with the contract as to preclude a recovery, when in fact there is no proof that there was any grubs in the ravine; all that is said on the subject is in the testimony of Wm. White, page 3 of the Abstract, and the testimony of Cummins on 4 page of the same.

7. There must have been, on part of appellee, some *substantial* non-compliance with the contract; not a mere trivial failure, in order to prevent a recovery for the work done. This proposition is too clear to need authorities to support it. As to whether appellant waived the grubbing the ravine, it is admitted to be a question for the jury, (as claimed in appellants 4 point. And the jury having decided it, the Court will not disturb the verdict for that reason, though they decided it wrong.

8. The damages found by the jury were not excessive. From the proof it is a matter of great uncertainty what amount had been paid. White, on page 3d of Abstract, states that the amount paid may have been $15 or $20, or $20 or $30. The jury allowed a deduction from the contract price of about $16. But the whole question of what had been paid was exclusively a question for the jury to decide. Any admission of the appellee ought not to have received much consideration, for the reason that he was a German, not understanding to any extent English.

9. The 7 instruction asked for by, and given for, the appelle is the law, if we are correct in our positions respecting the waiver of the grubbing the ravine or a substantial compliance with the contract.

10. The 1st, 2d, 3d, and 4th instructions refused for appellant are all clearly wrong, as our authorities cited in support of our 2d point clearly establishes. According to these instructions no suit can be maintained *where* a written contract exists, under any circumstances, unless the contract is specially declared on, an idea that was exploded before any of this generation were born.

11. It is a matter of discretion for the Circuit Court to permit a plaintiff to prosecute his suit a poor person, and the granting or refusing leave to do so cannot be assigned for error.

Scates, Treat., and B. Statute, 244, Sec. 3.

12. The motion for leave to prosecute the suit as a poor person, in the Court below was made before the determination of the motion to dismiss the suit for want of security for costs.

RICHMOND & BURNS,

For Appellee.

40 — 44

Holmes

v

Stimmell

Appellee's brief

Fld May 19, 1860

L. Lilienthal

Clk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

SAMUEL HOLMES, Appellant,
vs.
WILLIAM STUMMEL, Appellee.

ABSTRACT OF RECORD.

Page of Rec.

1 THIS was an action of assumpsit, for work and labor done, commenced
16 by the appellee against the appellant, in the Circuit Court of Marshall
17 county. The cause was tried before Hon. M. Ballou, Judge, and a jury, at the May term, 1858, of said Circuit Court, and a verdict and judgment against the appellant, in favor of the appellee, for $262.13, to reverse which judgment the said appellant brings this cause to this Court.

10 At the October term of said Court, A. D. 1857, the defendant filed his affidavit in said cause, and entered his motion therein for a rule on the
12 plaintiff to give security for costs; and that on the second day of said term, the Court ordered the plaintiff to give security for costs "by the time the same should be reached for trial;" and afterwards, on the sixth day of said term, on application of the said plaintiff, the Court extended the time for complying with said order thirty days, and continued the cause to the next term of said Court; to which decisions of the Court, in extending the time for complying with said order, and in continuing said cause, the said defendant then and there excepted and objected.

13 And afterwards, at the January term, A. D. 1858, of said Court, the defendant moved the Court to dismiss the suit for want of security for costs.

19 Thereupon came the plaintiff and filed his affidavit and entered his cross-motion therein, for leave to prosecute his suit as a "poor person;"
14 which said motion of the plaintiff having been considered by the Court, was allowed, and said plaintiff permitted to prosecute his suit as a "poor person;" to the overruling of which said motion of said defendant, he, the said defendant, then and there excepted.

25 And afterwards, at the May term, 1858, of said Court, the jury having found the issues for the plaintiff, the defendant thereupon entered and filed his motion for a new trial, for the reasons following, to wit:

1. The verdict is contrary to the law and the instructions of the Court.

2. The verdict is contrary to the evidence.

3. The Court excluded proper evidence upon the part of the defendant, and admitted improper evidence upon the part of the plaintiff.

4. The Court gave improper instructions upon the part of the plaintiff.

5. The Court refused to give proper instructions on the part of the plaintiff.

6. That the damages are excessive.

STATE OF ILLINOIS. SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

WILLIAM STUMMEL, APPELLEE, *vs.* SAMUEL HOLMES, APPELLANT.

ABSTRACT OF ~~RECORD~~ Bill of Exceptions

~~This was an action of assumpsit commenced in the Marshall Circuit Court, at the October Term, A. D. 1858, for work and labor done. Damages claimed, $300.00.~~

The case was tried at the May Term of the Marshall Circuit Court, A. D. 1858, and a verdict found for the plaintiff, and his damages assessed at $ 262,13

Abstract Bill of Ex

1 AARON SWEGAR was called as a juror, and upon his examination he stated that he did form an opinion upon the merits of the case, but had never expressed it. Could not say that he had a decided opinion as to which party ought to recover. The opinion might influence him if the evidence was the same as the statement he heard. That he would be governed by the evidence in deciding the case. If he should never hear anything more about it, he had an opinion.

The plaintiff challenged the juror for cause, and the court sustained the challenge and discharged the juror. Defendant excepted.

The plaintiff, to maintain the issues on his part, then called THOMAS WIER, who testified that plaintiff did grubbing for defendant in 1851 or 1852—began in 1852
2 and finished in 1853; thinks he grubbed about 52 acres, and it was worth from eight to ten dollars an acre. Grubbing was done on Holmes' land. Holmes was absent about half the time. About one-half of it was done after Holmes returned. Holmes was absent in California when Stummel commenced grubbing. Holmes knew that Stummel was doing the grubbing. The land was a first rate piece of bottom land, a dense thicket composed principally of sumac and oak *saplings*. That he at one time met Holmes on the land while Stummel was grubbing.

Said witness stated on his cross-examination that it was his impression that the work was done under a written contract. Stummel called witness, Enoch Sawyer, and Jacob Held, on the land to look at the work. They went on and examined the work. There was a contract then produced by Stummel, as near as he remembered, which was drawn between William White and James Ferguson.
3 Understood from Stummel that the work was done under a contract, and Stum-

mel had the contract there. By the contract Stummel was to do the work. Stummel had signed his name with Ferguson's at the bottom of the paper. The paper was about the clearing of the land, and was the contract under which the work was done, and was in April, 1853. The contract was in the hands of Sawyer. Plaintiff here rested.

TESTIMONY FOR DEFENDANT.

G. L. Fort, being called on behalf of defendant, testified that he was present
4 at the first trial of this cause, and was clerk of the Circuit Court at the time. On that trial there was a contract produced and read in evidence between Stummel and Holmes concerning the grubbing of the land in controversy. It was a written contract, and he copied it in the record sent to the Supreme Court. That he had compared the copy in the record sent to the Supreme Court with the original, and knew it to be correct. He does not know what became of the original contract. He left it on file with the other papers.

On his cross-examination this witness testified that he did not get the contract from the Bill of Exceptions, but got it from the *original*. Thinks the name of Ferguson was in the original contract, and that it had been scratched out, and the name of Stummel inserted. He compared the original agreement with the copy in the record, and is positive it is correct. He knows that Stummel's name was to the contract.

Semuel Holmes testified that he saw a contract or agreement like the one pro-
5 duced by Mr. Fort. He had the original agreement for the purpose of taking a copy of it at the Spring Term next following a former trial of this cause. He obtained the agreement from Mr. Fort, the Clerk, and returned it to him. Does not know what has become of it. Has never seen it since. It is not in his power, possession, or control. It has never been in his possession since the trial, except to copy it. The defendant then proved service of a notice on the plaintiff to produce the agreement.

G. L. Fort, being re-called, testified that he searched a great deal for the agreement among the records and files of the Court, and has been unable to find it. That he had opened nearly all the bundles of papers that were in use at that time, and looked everywhere where such papers are usually kept, and cannot find it.

William White testified that he was present at the first trial of this cause. An
6 agreement was at that time produced like the one now offered in evidence. He drew up the original contract and gave it to Stummel. It was first made between Sarah or Sam'l Holmes and James Ferguson. Gave agreement to Stummel for the purpose of having Ferguson's name scratched out and Stummel's inserted. When next saw contract Stummel's name was affixed to it. He knows the agreement he saw on the first trial was the same one he gave to Stummel, and Ferguson's name was scratched out and Stummel's name substituted. Did not know whether Sarah Holmes' or Sam'l Holmes' name was signed to the contract. Can't say positively whether Stummel's name was in the body of the contract or not.

The agreement was then offered in evidence, and is as follows, to wit:

"ARTICLE OF AGREEMENT, made and entered into between William Stummel of "the one part and Samuel Holmes of the other part, *witnesseth*, that said William "Stummel has this day agreed to clear, grub and pile the brush, all to be done in
7 "good order, on all the land south of the road running from Sandy Creek bridge "to John Foster's, that William White bought of Edward Evans, to be done and "completed by the first day of April, 1853; and the said Samuel Holmes hath "agreed to pay the said William Stummel two hundred and seventy-eight dollars "for the same—fifty when the work is one-half completed, and the balance when "done and completed. In witness, we, the undersigned, set our hands and seal "this April the 13th, 1852. "WILLIAM STUMMEL,
"SAMUEL HOLMES."

WILLIAM WHITE then testified that he knew about the grubbing done by Stummel. There was 40 acres in the whole field. At the time Stummel commenced, there was 8 acres grubbed, which left 32 acres to be grubbed. The ravine Stummel did not pretend to grub. The ravine is 70 or 80 rods long and some 30 feet wide, and runs diagonally through the land. Has examined the grubbing thoroughly. There are bushes, trees, underbrush and saplings that are not cut down.
8 Does not think one in fifty of the grubs were taken out. Holmes has done a great deal of grubbing on the land since. Last fall Holmes took out as many as *twenty* wagon loads from the land grubbed by Stummel. That the oak, hickory and cherry grubs were cut off and not grubbed out. That he paid Stummel some money and Holmes's wife paid him some before Holmes came home from California. Thinks there was some twenty or thirty dollars paid to Stummel. On cross-examination witness stated that the money paid by himself and Mrs. Holmes may have been $15 or $20, or $20 or $30, he can't remember which. *The plaintiff* here offered the Bill of Exceptions prepared in a former case to witness for examination to refresh his memory on the amount paid Stummel, which Bill of Exceptions on that point is as follows: "That before September, 1852, he paid plaintiff towards said grubbing between $15 and $20." The defendant objected
9 to the introduction of said Bill of Exceptions for the purpose offered; but the court admitted the witness to refer to said Bill of Exceptions for the purpose of refreshing his memory, and defendant excepted.

DAVID ETINGER testified that he has known the ground grubbed by Stummel for eight years. He went on the ground and examined it. Offered to grub it
10 for $4.00 per acre; not worth more; that would be a fair price for it. It is not well grubbed. In some places the stumps left are six inches high. Do not think more than half of the grubs were taken out. It was a very poor job of grubbing. Has helped to grub the land since. He broke eight acres of the land and found it very difficult; it was impossible to plough without hitting the grubs. That on a former trial, when witness was coming to court, Stummel, the plaintiff, got in the wagon and rode with him. Stummel said a good deal of time was lost

coming to court. Holmes, who was in the wagon, replied that he (Stummel)
11 ought to have done his work better and got his money. Stummel replied that it was too hard work. That he would rather grub one-half the land as it was originally than to grub what is left by Stummel.
12

Charles Parker testified that he had examined the ground at the request of
13 Forbes. There were plenty of the grubs left, many of them above the surface. He counted, in a circle of one rod, thirty-three grubs above the ground, from the size of his wrist to the size of his leg. Wherever he went it was the same thing.

Peter Forbes testified that he knew the ground grubbed by Stummel. Found plenty of grubs left. In one place he counted, while he stood in his tracks, 40 or 50 stubs. He would not like to pay a man *anything* to grub in that way for him.
14 There was about one and one-half acres in the ravine not grubbed at all.

Henry Benson testified that he knew the land. He went on it 1st of April, 1857; found it rough and poorly grubbed. He stood in one place and counted 35 stubs within a distance of three rods.

Thomas Thompson testified that he had examined the ground, and the grubbing was a poor job. Found a great many grubs.

Nathan Shugarts testified that he examined the grubbing several times. Found the grubbing in a miserable condition. Is acquainted with grubbing, and thinks it worth double to take out a grub after the tree is cut off. It is a very bad job.

15 Thomas Cummings—has known the land 12 or 15 years. Some of the ground is not grubbed at all. The ravine, 1½ acres, is not grubbed at all. There is a three-cornered piece on the west side of the field midway which is not grubbed. The grubbing is a very poor job.

John Willyard testified that he knew the land and grubbed there in the fall of 1856. Found all kinds of grubs. They are very thick on part of the land. Some of the grubs were cut off above the ground, and some below, and some not at all. Could not drive through with a plow. Would rather take out three grubs before the tops were cut off than one afterwards. All grubs should be taken out below the surface. He and David Ettinger and William Ettinger worked on the land, grubbing it for Holmes, from three to four weeks a year ago last fall.

VanBuren McKisson testified that he had been often on the land before and
16 since the grubbing was done by plaintiff, and that there were now left on said land plenty of grubs of all sizes. That he was present at a conversation between Stummel and Holmes that occurred two years ago. David Ettinger was also present. Holmes told Stummel he ought to have finished his work and got his

pay, and told him he didn't think he had done right denying payment. Holmes said, "You know I paid you between $90 and $100," and Stummel said he knew it, and acknowledged he did. That in the spring of 1853 he heard Stummel and Holmes talking about the grubbing, and Stummel said he was going to quit because plenty of farmers told him he hired men and did not pay them. Witness then told Stummel that he had no reason for thinking so; for Holmes had already paid him more than he agreed to. *Stummel said he had, and that Holmes had already paid him near* $100.00. Stummel then said that he would not finish the job. Holmes then told him that what he had done was not done right, and that
17 he had better go on and finish the grubbing and get his pay. That Holmes told Stummel he wanted the *ravine grubbed.*

Defendant then offered to read in evidence a Bill of Discovery filed by him against the plaintiff in the Marshall County Circuit Court, and the answer thereto. The bill amongst other things charges that he paid to the plaintiff, Stummel, the sum of $5.00 on the 1st day of September, 1852, the further sum of $10.00 on the
18 6th of October of said year, and the further sum of $20.00 on the 1st day of November of said year, and that he had no witness by whom he could prove the payment of said several sums of money. Stummel in his answer admits the payment to him by Holmes of $5.00 on 25th of August, 1852, and the further sum of $5.00 on the 6th day of October in said year, and the further sum of $10.00 on the 1st of November in said year, and that the payments admitted are not part or
20 parcel of the payments charged to him by said Holmes on the 12th day of August, 1852, of $5.00, or the payment of December 14th, 1852, of $30.00.

The plaintiff objected to the reading of said Bill and answer in evidence, but the Court overruled the objection and allowed the answer to said Bill to be read in evidence. To which decision of the Court plaintiff excepted.

Here defendant rested.

The plaintiff then called Enoch Sawyer, who testified that he examined the land soon after the grubbing was done. There was a small piece of the south end not grubbed at all. Thomas Wier, Jacob Held and Stummel were with him. Thinks it was a fair piece of grubbing. It was a very heavy job. Had never
21 grubbed much. Thinks it was worth $8 per acre to grub it. He saw the written contract under which it was done. It was handed to him by Stummel. Thinks the same contract was offered on the first trial of this case. There was only one contract used on that trial.

Lorin G. Pratt testified that there was only one contract used on the first trial. He
22 helped Judge Dickey try the case and settle the Bill of Exceptions. Said Bill of Exceptions was then offered in relation to said contract; and that part of said Bill of Exceptions relating to said contract is as follows: "Defendant thereupon proved

that the work was done under a written contract between said parties, of which the following is a copy." (Here follows copy of the agreement between said Stummel and Holmes, copied in the first part of this abstract.) Lorin G. Pratt continued—Stummel's name was not in the body of the agreement, and according to his recollection Sarah Holmes's name was in it. The copy is not a copy of the
23 contract, because Samuel Holmes's name was not signed to the contract. He further stated that William White's name was in the contract. There was an erasure in the contract. Ferguson's name and William Holmes's were at the bottom.—To all of which evidence of the said witness relating to the contents of said contract the defendant then and there objected, but the Court overruled the objection and admitted the evidence, and the defendaut excepted.

Enoch Sawyer, called by plaintiff, testified that he saw the contract. There was an erasure in it, and Fergus's name was erased. William White was a party of the first part, and James Fergus's and Sarah Holmes's names were at the bottom, and thinks Stummel's was there also. Can't say whether it was White's or
24 Stummel's name. "I am talking of the contract as I saw it in the field." I went on the land a year ago, and found a good many grubs left. *It was not a good job of grubbing.*

John Myers—Has never seen the land, only as he rode past it on the road. Thinks from the looks from the road that it was well done. Thinks it would be worth $10 per acre to grub it.

John Foster—Knows the job, and also the ravine. Saw the grubbing, with
25 the exception of half an acre, and considered it a fair job, worth from $7 to $10 per acre. It could not be done for $4 per acre.

John Wier—Has done considerable grubbing. He examined the grubbing done by Stummel two or three years ago, at request of Holmes. Plaintiff then asked witness as follows: "State whether a heavy job or a light job of grubbing." The witness answered, "It was a heavy job." Plaintiff then asked witness, "What was it worth an acre to grub it at the time it was done?" The witness answered, "Ten dollars per acre." The plaintiff then asked witness the following question: "Is it or not difficult to find all the grubs where a portion of the timber has been cut down previous to the grubbing?" To which he answered,
26 "It is difficult, for they rot off under the ground."—To the asking and answering of each of said questions defendant then and there objected; but the Court over ruled the objection, and the defendant excepted.

Thomas Wier testified that he had known plaintiff since he took the job. Stummel did not speak the English language well. He would generally get but one broken English word in a sentence. He had to get him to repeat his words before he could understand him. Evidence of witness objected to, but admitted by the Court, and defendant excepted.

ENOCH SAWYER testified that in the spring of 1853 he could not well understand
27 Stummel, he spoke the English language so badly. In 1855 he could not well understand him, and had to talk to him through an interpreter. The evidence of witness objected to, but admitted by the Court, and defendant excepted.

HENRY WIER—Examined the land and concluded it was an average job of *grubbing*. It was a heavy job, and worth $6 an acre to grub and $2 to pile the brush.

NATHAN RAMSEY—Examined the land, at the request of Holmes, between first and second trial, and thought it a common job. It was worth $8 per acre to grub and pile the brush.

All the evidence offered as to the kind of job and the value per acre for grubbing was objected to at the time by defendant, but the Court overruled the objection, and admitted the evidence, and defendant excepted.

The plaintiff here rested again.

The defendant the re-called VANBUREN MCKESSON, who testified that he was
28 along when Sawyer and others examined the land in 1853. At that time there was but little grubbing done east of the ravine. When I was along with Stummel and Holmes in the wagon, I did understand Stummel perfectly.

WILLIAM WHITE, being re-called, testified that he had known the land since 1834. He had owned it, and bought it in 1850 or 1851. No fire had ever been through it to his knowledge, or that he ever saw, and but few hoop-poles had been cut on it. He might have cut a few where Paul Dods grubbed, but not on the Stummel tract. "My name was not to the contract with Stummel as a party. I am positive of this, because I wrote the contract."

This was all the evidence in the case.

The plaintiff then asked the court to give the following instructions:

1. If the jury believe from the evidence that the plaintiff grubbed fifty acres of
29 land for the defendant, the jury ought to allow to the plaintiff what the jury believe the grubbing was worth, unless the defendant has proved a valid contract for a less sum, or that he (defendant) has paid for said grubbing.

2. If the jury believe from the evidence that the plaintiff did the grubbing in a fair workmanlike manner, and as well as such kind of grubbing is usually done, then the jury ought not to allow plaintiff any less than the contract price, even if a contract price has been proved.

3. If the jury believe from the evidence that under a contract between the parties the plaintiff was bound to grub the *ravine*,—yet if the jury further believe that the defendant released the defendant from grubbing out the *ravine*, then the jury ought to find for the plaintiff the contract price for the work, less a reasonable deduction on account of not grubbing the ravine.

4. Unless the defendant has proved a valid existing contract between the parties, under which the work sued for was done, then plaintiff is entitled to recover from the defendant the value of the work done by him as proved. That to show such valid contract, it must be proved that it was assented and agreed to by both parties, and was for a sufficient consideration.

30 5. If the defendant has shown a written contract, and unless he has proved it, the plaintiff is entitled to recover for the amount he has proved his labor to be worth.

6. If the defendant has shown a written contract for the work done by the plaintiff, the plaintiff is still entitled to recover under such contract, provided he has shown that he has complied with the same.

7. Under the pleadings in this case, if the jury believe that the work was done under a written contract, still the plaintiff is entitled to recover for the work done in proportion to the contract price, if they believe the plaintiff has proved that he did work for the defendant.

The court gave all of the instructions asked for by the plaintiff. and defendant excepted.

Defendant then asked the court to instruct the jury as follows, to wit:

1. If the jury believe from the evidence that the grubbing for which the plaintiff has sued was done under a written special contract, then the plaintiff cannot
31 recover in this action unless it has been proved to the satisfaction of the jury that the contract has been violated by the defendant, and that in consequence of such violation the same has been rescinded by the plaintiff; and it makes no difference whether or not such contract was made by Stummel with Holmes, or with other parties for Holmes.

2. That if the jury believe from the evidence that there was a written special contract under which the grubbing was done, the plaintiff can only recover upon such written contract, unless the same has been violated by the defendant and rescinded by the plaintiff.

3. That where there is a written contract in relation to work or any other matter, *the parties must sue on such* written contract, and cannot sue in the present

form of action unless such contract has been violated by one party and rescinded by the other, or rescinded by mutual agreement of the parties, founded upon a valid consideration.

4. That there is no evidence before the jury that the written contract under which the work was done (if any such contract was made) has been violated by the defendant or rescinded by the plaintiff on account of any such violation.

5. If the work was done under special contract stating the price to be paid for the grubbing and the *time* when it was to be paid, and the manner of doing the work, the plaintiff cannot recover unless he has performed the contract on his part, or unless it has been rescinded by the plaintiff in consequence of the default of the defendant.

32 6. If plaintiff made a contract with Holmes, or with his wife for him, to clear and grub the brush on the land, such contract means such underbrush as ought to be grubbed; and if he was not to have his pay until such work was done, he cannot recover in this case until he has *done the work according to the contract*, or unless it was violated by Holmes and rescinded by plaintiff.

7. If the jury believe from the evidence that the grubbing in question was done under a contract like the one offered in evidence, then Stummel was bound to grub, cut and pile the brush on all the land, as well that in the ravine as the other, and that unless the performance of that portion of the work was *waived* by the defendant, then the plaintiff cannot recover in this case.

But the court refused to give the first, second, third, fourth and seventh instructions, and defendant excepted.

The jury found a verdict for plaintiff.

The defendant then filed his motion for a new trial, but the court over-ruled the motion and defendant excepted. The defendant then filed his motion in arrest of judgment, but the court over-ruled the motion and defendant excepted.

H. M. & J. J. WEAD, Attorneys for Appellant.

No 40 - 44

Holmes

vs

Stummell

Abstract

Filed April 27 - 1860

L. Leland

Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

SAMUEL HOLMES, Appellant,
vs.
WILLIAM STUMMEL, Appellee. } *Appeal from Marshall.*

BRIEF OF H. M. & J. J. WEED, ATTORNEYS FOR APPELLANT.

I. If there was an express contract between the parties, then a suit must be instituted upon such contract. While it is true that either party may abandon a contract for *fraud*, it is equally true that if either party sues the other on the contract at all, *it must be upon the express contract.*

Chitty on Contracts, P. 25.
Story on Contracts, Sect. 15.
Rees vs. *Lines*, 8 Carr & Payne, 126.
Fergusson vs. *Carrington*, 9 B. & C. 59.
Smith vs. *Smith*, 1 Sandford. Sup't Ch. R. 206.
Warthern vs. *Stevens*, 4 Mass. 448.
Whiting vs. *Sullivan*, 7 Mass. 107.

II. The contract proven between the parties was an entire contract. The completion of the whole work, was the essential consideration of it, and was a *condition precedent* to the liability of the appellant to pay the money specified in the contract. If this be so, there can be no question as to the *time* when the appellee's right of action accrued. He has a right of action when he has complied with the conditions of the contract on his part, and not before. No proposition of law is better settled than this. If then the appellee has failed to comply with the conditions of the contract on his part, he has no right of action, and cannot recover.

Story on Contracts, Sect. 22.
Parsons on Contracts, Vol. 2, P. 29.
Cuyningham vs. *Morrell*, 10 Johns. 203.
Stark vs. *Parker*, 2 Pick, 267.
Olmsted vs. *Beale*, 19 Pick. 528.
Thayer vs. *Wadsworth*, 19 Pick. 349.
Eldridge vs. *Rowe*, 2 Gil. 91.
Badgely vs. *Heald*, 4 Gil. 67.
Lantry vs. *Parks*, 8 Cowen 63.

III. The contract between the parties having been clearly established, it was erroneous for the Court below, to admit evidence tending to show that the work done was worth *more* than the contract price. The rule that where parties have made an express contract, no other can be *implied*, has existed so long and been so repeatedly recognized by judicial decisions, that it has become an *axiom* of law, and authorities need not be cited in support of it.

IV. The *seventh* instruction asked by the appellant in the Court below is clearly the law, and should not have been refused. The question as to whether the appellee had waived the performance of any portion of the contract by the appellant, was proper for the consideration of the jury. The authorities cited in support of our second proposition, fully sustain said instruction.

V. The contract between the parties having been established, the appellee had no

right to abandon it unless for good cause shown, and having done so he cannot now recover upon the *quantum meruit.*

Story on Contracts, Sect. 15 and 22.
Chandler vs. *Thurston*, 10 Pick. 209.
Shaw vs. *Turnpike Co.*, 2 Penn. 454.
Stark vs. *Parker*, 2 Pick. 26.

VI. The court should have granted a new trial.

1. The evidence clearly does not authorize or support the verdict. The contract price (which must be the measure of damages in this action) for doing the whole work, was only $278,00, and the appellee admits payment of nearly *fifty dollars* to him under said contract, and the judgment is therefore excessive.

2. The original contract between the parties was proven beyond controversy, and if the appellee had any right of action at all, he had only a right to recover the sum that became due to him, upon showing performance on his part of *half* the work to be done under the contract.

3. Admitting that the appellee had a right of action for the *fifty* dollars, that became due upon completing *half* the contract, then the judgment must be reversed, because *that sum* had been paid him before the suit was commenced, and the damages assessed are therefore obviously excessive, unjust and oppressive.

4. The *seventh* instruction given for the appellee by the Court below is not the law. It *assumes* an entirely different state of facts from those established, and directed the jury to find for the appellee for the value of the work done by him, although it was done under a written and express contract, and for a stipulated price.

5. The first, second, third and fourth instructions asked by the appellant, are clearly correct and ought not to have been refused.

VII. The court should dismissed the suit for non-compliance with the rule to give security for costs

VIII. It was erroneous for the court to sustain the challenge for cause of Aaron Swanger, called as a juror, his statement upon Examination shows that he was a competent juror and the court erred in setting him aside
Rex vs Edmonds 6th E. C. L. R. 566
State vs Benton 2d Devereaux & Battles 196

Samuel Holmes

~~40~~ — ~~46~~ 44

William Stimmel

Brief

Filed April 27-1864

L. Leland

Clerk

Samuel Holmes
vs
William Stimmel

Supreme Court
3rd Grand Division
April Term 1860

And now comes the appellee ~~defendant~~ by Richmond & Burns his attys and moves the court to grant leave to said appellee ~~defendant~~ to file a written instead of a printed Brief in said cause; And the said appellee could suggest the following reasons in support of said motion

Stimmel the plaintiff below was permitted to prosecute his suit as a poor person under Section 3 Chap 26. of the act Entitled "Costs" Rev Statute of 1845. page 126

The present attys were attys for appellee in the court below, and are compelled by said section of the Statute to act in the Circuit Court without fees and as we suppose also in this Court. But whether compelled to act in this Court or not, we

are acting without fees here as well as below.

It follows then— our client as we think the record will show having a meritorious cause— and the fact being ~~that~~ he is wholly unable to advance and has not advanced his attys any thing for any purpose that if a printed brief is required his attys must pay for it out of their own pockets which we respectfully suggest is a little hard under all the circumstances. The Record pages 14 & 19 show that appellee was allowed to prosecute as a poor person

Richmond & Burns
Attys for appellee

40
Samuel Holmes
vs
William Hummel
Motion and reasons to file written Brief

Filed April 18, 1860
L. Leland
Clerk

Richmond & Burns
for appellee

1 "Pleas before the Honorable Circuit Court of Marsh-
all County in the State of Illinois at a term thereof
began and holden, at the Court House in the Town
of Lacon in the said county of Marshall on the eigh-
teenth day of October in the year of our Lord one
thousand eight hundred and fifty three.
Present the Honorable Edwin S. Leland Judge of the
ninth Judicial circuit court of the State of Illinois
William H. L. Wallace States attorney, Greenberry L.
Fort clerk and Henry L. Crane Sheriff."

Be it remembered that heretofore to wit on the second day of Septem-
ber A.D. 1853 a Summons was issued out of said Court in the
case of William Stummel against Samuel Holmes which Sum-
mons is in words and figures as follows to wit:

Summons "The People of the State of Illinois,
To the Sheriff of Marshall County, Greeting: We com-
mand you to Summon Samuel Holmes To appear be-
fore our Circuit Court, on the first day of the next
term thereof, to be held at Lacon, within and for
the said County of Marshall, on the 17th day of October
next then and there, in our said Court, to answer
William Stummel in a plea of assumpsit damna-
ges three hundred dollars as he says,
Hereof fail not, and make due return of your doings

Thereon.

Witness, Greenberry L. Fort, Clerk of our said Court, and the seal thereof, at Lacon, this 2d day of September, in the year of our Lord one thousand and eight hundred and fifty three.

Seal

Greenberry L. Fort, Clerk."

Upon which summons is the following return

Sheriffs return "I have served this writ by reading the same to the within named Samuel Holmes on this, the 2d day of September A. D. 1853, as within commanded."

"Henry L. Crane, Sheriff of Marshall Co., Ills."

And afterwards to wit on the 24th day of September A.D. 1853 a declaration was filed in said cause as follows.

Declaration "State of Illinois } ss. In the Marshall Circuit Court
Marshall County } To the Oct T. thereof A. D. 1853.

William Stummel Plaintiff in this suit by E. B. Ames his attorney complains of Samuel Holmes Defendant in this suit of a plea of trespass on the case on promises for that whereas the said Defendant heretofore to wit on the tenth Day of August in the year of our Lord one thousand Eight hundred and fifty three at and within the County of Marshall aforesaid was indebted to the said Plaintiff in the sum of three hundred Dollars lawful money of the United States for grubbing and piling the brush on fifty acres of land in said County

and for clearing done thereon, by the said Plaintiff for the said Defendant and at his special instance and request, and being so indebted, he the said Defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid at the County of Marshall aforesaid, undertook and then and there faithfully promised the said Plaintiff to pay him the said sum of money when he the said Defendant should be thereunto afterwards requested.

And whereas also afterwards, to wit: on the day and year last aforesaid at the County of Marshall aforesaid was indebted to the said Plaintiff in the further sum of three hundred Dollars of like lawful money for work and labor done and performed by the said Plaintiff for the said Defendant at and before that time and at the special instance and request of the said Defendant, and being so indebted he the said defendant in consideration thereof, afterwards to wit, on the day and year last aforesaid, at the county of Marshall aforesaid undertook and then and there faithfully promised the said Plaintiff to pay him the said last mentioned sum of money, when he the said defendant should be thereunto afterwards requested.

Nevertheless the said Defendant not regarding his said several promises and undertakings, but contriving and fraudulently intending to deceive and defraud the said Plaintiff in this behalf, hath not as yet paid the said several sums of money

4 or any or either of them, or any part thereof, to the said Plaintiff (although often requested so to do): but he the said Defendant to pay him the same hath hitherto wholly neglected and refused, and still doth neglect and refuse to the damage of the said Plaintiff of three hundred Dollars and therefore he brings his suit.

E. B. Ames Atty for Plff

Copy of a/c sued on

1853.

Samuel Holmes

To William Stummel Dr

Aug 15th To grubbing & piling the brush and clearing done on fifty acres of land $300.00

" " To work & labor done 300.00

Endorsed "Filed Sept 24 1853"

"G S Fort clerk"

And afterwards to wit on the 19th day of October A.D. 1853, an order was made by said Court in said Cause and entered of Record to wit:

Rule to Plead

"William Stummel
vs
Samuel Holmes } Assumpsit.

This day the Plff by Ames moves the court for a rule to plead herein which motion is sustained and it is ordered that the defendant be required to plead herein by Thursday morning next."

And on the 20th day of October A.D. 1853, a Plea was filed in said Cause to wit:

Plea 5 "State of Illinois Marshall county & circuit court Oct Term 1853

Saml Holmes ads Wm Stummel } Assumpsit

And the said Samuel Holmes by T. L. Dickey his attorney comes and says that he did not undertake and promise in manner and form as plaintiff has in that behalf in his said declaration alleged and of this he puts himself upon the country & "

Dickey for deft

"And the plaintiff doth the like E. B. Ames Atty for Plff" }

And afterwards to wit on the 26th day of October A.D. 1853, the same being one of the days of the term aforesaid and the court being then judicially sitting the following Proceedings were had in said cause to wit:

First Trial "William Stummel vs Samuel Holmes } Assumpsit. Oct 26th 1853.

Be it remembered that this day this cause comes on to be heard and tried The Plaintiff comes in person and by E. B. Ames his Atty, as well the Deft by Dickey his Atty and also in person, and the issue being joined herein a jury comes to try the same who are Jacob L. Fetter, Hanson Bonham, William Bonham, Elias Love, Robert Davis, John Black, William Cullen, Chancy Gaylord, James B. Welch, Henry Miller, Joshua D.

6 Bullman v Jonas L. Ball twelve good & lawful men duly chosen tried empanelled and sworn herein according to law and the parties adduce their evidence and the jury after hearing the same and the argument of counsel retire to consider of their verdict and after due deliberation return into court and say are the jury find the issue for the Plaintiff and assess his damages at the sum of one hundred and ninety three dollars and thirteen cents ($ 193.13) Whereupon Deft moves by his Atty for a new trial herein."

Saturday October 29.th A.D. 1853

1 William Stemmel vs Samuel Holmes } Assumpsit Oct. 29th A.D. 1853.

Be it remembered that this day this cause coming on to be heard on a motion for a new trial herein and the court being fully advised in the premises doth order that the same be overruled It is therefore considered and adjudged by the court that the Plaintiff have and recover off and from the defendant the sum of one hundred and ninety three dollars and thirteen cents together with his costs and charges by him about his suit in this behalf expended, and it is ordered that execution issue therefor Whereupon

comes T. L. Dickey Atty for the deft and prays an = appeal which is allowed upon said defendant enter = ing into an appeal Bond in the penal sum of four hundred dollars within thirty days from the ad = journment of this court with John Burns as his se = curity. And the said deft tenders his bill of exceptions and the court takes time to consider and settle the same."

And afterwards to wit on the 28th day of October A.D. 1854, the same being one of the days of the October Term of said Court for said year the following order was made and entered of record in said Court to wit:

Order for Continuance

"William Stummel
vs
Samuel Holmes

Be it remembered that this cause is continued to the next term of this court."

And afterwards to wit on the twelfth day of February A.D. 1856 the same being one of the days of the February Special Term of said Court and the Court being then judicially sitting Hon Madison C Hollister Judge of the 9th Judicial Circuit of the State of Illinois presiding further proceedings were had in above cause and entered of record to wit:

2d Trial 8

William Stammel
vs
Samuel Holmes

Be it remembered that this day came the parties hereto as well by their attorneys and the issue being joined herein a jury comes to try the same. To wit Isaac N. Green, David Verney, John D. McVicar, Robert Clark, William Stratton, James Winters, Isaac Smith, Wm Atwood, Russell E. Peacock, Levi Holmes, Randal Bates and E. Hoyt.— twelve good and lawful men duly tried empanneled and sworn who after hearing the evidence adduced the argument of counsel and the instructions of the court retire to consider of their verdict and after due deliberation return into Court and say we the jury find the issue joined in favor of the Plaintiff and assess his damages at the sum of three hundred and ninety dollars. Whereupon comes the defendant by his attorney and moves the court for a new trial pending which motion the Plaintiff comes by his attorney and enters herein a remititer of the sum of ninety dollars of the aforesaid verdict and the court after hearing the argument of counsel and being now fully advised in the premises doth order that said motion for a new trial be overruled It is therefore considered ordered and adjudged by the court that the said Plaintiff have and recover of the said defendant the sum of Three hundred dollars. together with his costs and charges by him about his suit in this behalf expended and it is ordered that execution issue therefor. and now comes the defendant

Bill of Exceptions

" William Stummel } In the Marshall C. C Sept. T.
" vs } 1857
Samuel Holmes }

Be it remembered that on the second day of the present term of this court the defendant moved the court that the Plaintiff be required to file security for costs herein and in support of said motion filed the following affidavit herein.

State of Illinois } ss.
Marshall County } And circuit court thereof Oct. T. 1857

William Stummel
vs
Samuel Holmes

Samuel Holmes being duly sworn deposeth and saith that the above named plaintiff is unable to pay the costs of this suit and that the officers of this court will be in danger of loosing their costs unless the Plaintiff be ruled to file sufficient security for costs as he has been informed and believes.

That the Sheriff of this county has had an execution for costs against said Plaintiff from the Supreme court and that said Execution has been returned no property found belonging to said Plaintiff as he has been informed & believes.

And also that Eli B. Ames who was entered as security for costs in this case, has since he so entered himself as security, departed from and removed his residence out of this State and has now no residence therein as this

affiant has been informed & believes. And also that said Eli B. Ames has left no property in this state subject to execution of which this affiant has any knowledge or information.—

Subscribed and sworn to before me this 6th day of October A.D. 1887

G. L. Foote Notary Public

Samuel Holmes

Whereupon the court after hearing the parties sustained the motion and ruled "the Plaintiff to give security for costs before the "cause should be reached for trial"

On the 6th day of the present term the court on application of the defendant extended the time for giving security for costs until thirty days after the adjournment of Court and at the same time continued the cause, to the decision of the Court in extending the time for giving security for costs, and in continuing the case, the defendant then and there in open court excepted This was all that was done in the case Whereupon for in as much as said Exceptions do not appear of record it is ordered that this Bill of Exceptions be allowed, signed sealed, & made a part of the record"

"M. Ballou. (Seal)

Judge of 23d Judicial Circuit Ill.

13 Beas before the Circuit Court of Marshall County in the State of Illinois at a Term thereof began and held at the Court House in the City of Lacon in said County on the fourth monday the same being the twenty-fifth day of January in the year of our Lord one thousand eight hundred and fifty eight present Hon M Ballou judge of the 23d judicial Circuit of the State of Illinois presiding. George M. Stipp states attorney of said judicial Circuit, H L Crane Sheriff of said Marshall County and James Wescott clerk of said Circuit Court

Wednesday January 27. AD 1858

Motion to dismiss

"William Stummel vs Samuel Holmes } Assumpsit— Remanded—

This day came the defendant by Fort his attorney and enters a motion to dismiss this suit for the reason that the plaintiff has not complied with a Rule of this court entered at the last Term thereof whereupon comes the plaintiff by Richmond & Pratt his attorneys and enters a cross motion that the plaintiff be allowed to prosecute this suit as a poor person".

Cross Motion to Prosecute as a poor person

And afterwards to wit on the 12th day of February A.D.1858. the same being one of the days of the Term last aforesaid the following order was made and entered of Record in said Court to wit

Order overruling Motion to dismiss

"William Stummel vs. Samuel Holmes } Assumpsit— Remanded—

This day this cause came on to be

14 heard upon the motion of the defendant to dismiss this suit and the same was argued by counsel and the Court being now fully advised in the premises doth order that ~~the~~ said motion to dismiss be and the same is hereby overruled. And the application of the plaintiff to prosecute this suit as a poor person is allowed."

And on the same day and year last aforesaid the following Bill of Exceptions was filed in said cause.

Bill of Exceptions

William Stummel
no
Samuel Holmes
} In the Marshall county circuit court To Jan. Term A.D. 1858.

Be it remembered that at this Term the defendant came into court and moved the court to dismiss this cause for the reasons on file as follows.

William Stummel
no
Saml Holmes
} In the Marshall C. C.
Jany 7. 1858.

In this case the defendant now comes and moves the Court to dismiss the same because the order of the Court requiring the plaintiff to give security for cost has not been complied with

By G. L. Fort his atty

15 Whereupon comes the Plff and makes application for leave to prosecute said action as a poor person which application is as follows—

William Stummell
vs
Samuel Holmes
} Assumpsit January Term A.D. 1858.

And now comes the Plaintiff and petitions the Court and shows that he is a poor person and unable to pay the cost of this suit and he therefore prays for leave of the Court to prosecute this suit as a poor person

Affidavits filed (For which affidavits see Page 19 of this record docket)

William Stummell

By Richmond & Pratt

And thereupon the court overruled said motion to dismiss this cause and sustained the said Plaintiffs application and granted leave to prosecute as a poor person in accordance therewith to which order of the Court in overruling said motion to dismiss, the defendant excepted to such decision at the time and also to said decision of the court in allowing said application, and permitting the said Plaintiff to prosecute his cause as a poor person the said defendant excepted at the time And it is ordered that this bill of exceptions be signed & sealed and made a part of the record"

"M. Ballou Judge (Seal)
of 20th Judicial Circuit"

16. "Pleas before the Circuit Court of Marshall County in the State of Illinois at a Term thereof began and held at the Court House in the city of Lacon in said County on Monday the third day of May in the year of our Lord one thousand eight hundred and fifty eight. Present the Hon M. Ballou judge of the 23rd judicial circuit of the State of Illinois presiding, George W. Stipp State attorney for said Judicial Circuit— Henry L. Crane Sheriff of said County and James Wescott clerk of said Circuit Court."

And afterwards to wit on the 7th day of May A.D. 1858, the same being one of the days of the Term as above stated further proceedings were had in said cause to wit:

Trial

"William Stummell vs Samuel Holmes } Assumpsit— Remanded

This day came the plaintiff by Pratt & Richmond his attorneys and the defendant came in person as well as by Read & Miller his attorneys and issue being joined herein a jury came to try the same to wit: Thomas J. Chase, William S. Walker, Joseph F. Lowe, James Marshall, John Perkins, J. V. Vail, David Adams, John Noyes, Joseph Malone, Henry Hoskins, James M Hadley & Isaac L. Mitchell twelve good and lawful men chosen from the body of the county who were duly empannelled and sworn well and truly to try the issues in this cause and a true verdict to render according to the evidence, and after

17 a portion of the evidence had been given the hour of adjournment arrived and this cause was adjourned until to morrow morning."

Saturday May 8th A.D. 1858

Trial continued

William Stemmel
vs.
Samuel Holmes
} Assumpsit— Remanded—

This day again came the parties in person and by their respective counsel and the jury who were empannelled yesterday, and after hearing the evidence adduced the arguments of counsel and the instructions of the court the jury retire to consider of their verdict."

Tuesday May 11th A.D. 1858.

William Stemmell
vs
Samuel Holmes
} Assumpsit— Remanded—

This day the jury came into court and say we the jury find the issue

Verdict

herein for the plaintiff and assess his damages at the sum of two hundred and sixty two dollars and thirteen cents:

Motion for new trial

Whereupon came the defendant and moved the court for a new trial herein."

18 And afterwards to wit on the 18th day of May A.D 1858 the same being one of the days of the Term last aforesaid further proceedings were had in said cause to wit

17

Order overruling Motion for new trial

William Stummel
vs
Samuel Holmes

Assumpsit— Remanded—

This day this cause came on to be heard upon the motion of the defendant for a new trial herein and was argued by counsel and the court being now fully advised in the premises doth order, that said motion be and the same is hereby overruled. Therefore it is considered by the court that the said— William Stummel have and recover of the said Samuel Holmes the said sum of two hundred and sixty two dollars and thirteen cents his damages assessed by the jury as aforesaid together with his costs in this behalf expended and it is ordered that he have execution therefor. Whereupon came the defendant by his counsel and prays an appeal to the Supreme Court of this State, which appeal is allowed upon the defendants filing a Bond in the sum of One thousand dollars conditioned according to law with Peter Forbes as security in thirty days from this date, and it is further ordered that the defendant have leave to settle & file a bill of exceptions in two months from this date."

Judgment

Appeal

19 William Stummell vs Samuel Holmes } Marshall Co. Circuit Court Jany T. 1858.

William Stummell the plaintiff in said cause being duly sworn on his oath saith that he is a poor person that he is the owner of no property whatever Except a small amount of Household furniture that he has a family and that said property is not worth in all over about twenty five dollars which is all the property of any kind he owns, that he had a good valid and subsisting cause of action against the above mentioned defendant amounting to about two hundred dollars that the case has been tried in the circuit Court of Marshall Co twice and verdicts rendered at both trials for him this affiant. That he is wholly unable to give security for costs that E. B. Ames his former Security for costs is now a non-resident of this State.

Subscribed & sworn This affiant therefore prays that prays to be allowed to prosecute his said suit as a poor person under the Statute,

Subscribed & Sworn to before me this 26th day of January A.D. 1858 James Mescott Clerk } William Stummell

State of Illinois } ss. L. G. Pratt and S. L. Richmond being
Marshall County } duly Sworn say that they are and have been for many years attys for said Stummell that they believe the Statements in the foregoing affidavit are true that they have each tried said cause and they verily believe that he is unable to give

20 Security for costs that he has no property Except as stated by him in his affidavit and that said Stemmel has as they verily believe a good valid and Subsisting cause of action said Holmes

Subscribed & Sworn to before me this 26th day of Jany 1858
James Wescott Clerk

S. L. Richmond
Lorin G. Pratt

William Stemmel
vs
Samuel Holmes

In the Peoria Circuit Court May Term A.D. 1858.

To William Stemmel or his attornies

You are hereby notified to produce on the trial of the above entitled cause a certain agreement entered into between you & the said defendant on the 15th day of April 1852 concerning concerning the clearing & grubbing of a certain tract of land for which clearing & grubbing you have commenced the aforesaid action - Said agreement being in writing May 6. 1858.

Samuel Holmes By Mead his atty

I have this day received a copy of the above May 6. 1858

S. L. Richmond
atty for Stemmel

21 Plff. Instructions

Stummel
vs
Holmes

The plaintiff asks the Court to instruct the Jury

1. If the Jury believe from the Evidence that the plaintiff grubbed fifty acres of land for the defendant then the Jury ought to allow to the plaintiff what the Jury believe the grubbing was worth unless the defendant has proved a valid contract for a less sum or that he (defendant has paid for said grubbing.

Given

2. If the Jury believe from the Evidence that the plaintiff done the grubbing in a fair workman like manner and as well as such kind of grubbing is usually done then the Jury ought not to allow plff any less than the contract price even if a contract price has as been proved

Given

3. If the Jury believe from the Evidence that under a contract between the parties, the plaintiff was bound to grub the ravine yet if the Jury further believe that the defendant released the plaintiff from grubbing out the Ravine then the Jury ought to find for the Plaintiff the contract price the work less a reasonable deduction on account of not grubbing the ravine.

Given

22

4. Unless the Defendant has proved a valid existing contract between the parties under which the work sued for was done then Plaintiff is entitled to Recover from the Defendant the value of the work done by him as proved— That to show such valid Contract it must be proved that it was assented and agreed to by both parties and was for a sufficient consideration.

Given

5. It is for the Defendant to prove the existance of the written Contract— and unless he has proved it the Plaintiff is entitled to recover the amount he has proved his labor to be worth.

Given

6th If the Defendant has shown a written Contract for the work done by the Plaintiff The Plaintiff is still entitled to recover under such Contract— provided he has shown that he has complied with the same.

Given

7. Under the pleadings in this case if the Jury believe that the work was done under a written Contract— still the Plaintiff is entitled to recover for the work done in proportion to the Contract price— if they believe the Plaintiff has proved that he did work for the Defendant.

Given

23 Stummer vs Holmes } Instructions asked by Defendant

Defendants Instructions

1st If the Jury believe from the evidence, that the grubbing for which the plaintiff has sued was done under a written special contract then the plaintiff cannot recover in this action unless it has been proved to the satisfaction of the Jury that the Contract has been violated by the Defendant, and that in consequence of such violation the same has been rescinded by the plaintiff, and it makes no difference whether or not such contract was made by Stummer with Holmes or with other parties for Holmes.

Refused

2d That if the Jury believe from the Evidence that there was a written special contract under which the grubbing was done the Plaintiff can only recover upon such written contract unless the same has been violated by the Defendant and rescinded by the Plaintiff.

Refused

3d That where there is a written Contract in relation to work, or any other matter, — The Parties must Sue on such written contract and cannot recover in the present form of action unless such contract has been violated by one party and rescinded by the other, or rescinded by mutual agreement of the parties founded upon a valid considerations.

Refused

24

4th That there is no evidence before the Jury that the written contract under which the work was done (if any such contract was made) has been violated by the Defendant, or rescinded by the plaintiff on account of any such violation

Refused

5. If the work was done under a Special contract stating the price to be paid for the grubbing and the time when it was to be paid and the manner of doing the work the plaintiff cannot recover unless he has performed the contract on his part, or unless it had been rescinded by the plaintiff in consequence of the default of the defendant.

Given

6. If Plaintiff made a contract with Holmes or with his wife for time, to clear & grub the brush, on the land such contract means such under-brush as ought to be grubbed, and if he was not to have his pay until such work was done — he cannot recover in this case unless he has done the work according to the contract, or unless it was violated by Holmes & rescinded by Plaintiff.

Given

7. If the Jury believe from the evidence that the grubbing in question was done under a contract like the one offered in evidence, then Stummel was bound to grub, cut and pile the brush on all the land as well that in the ravine as the

Refused

25 other, and that unless the performance of that portion of the work was waived by the defendant, then the plaintiff cannot recover in this case

Reasons for New trial

William Stummel
vs
Samuel Holmes

In the Marshall Circuit Court May T. 1858

And now comes the said defendant and moves the court for a new trial for the following reasons.

1st The verdict is contrary to law, and the instructions of the court.

2. It is contrary to the evidence.

3. The Court excluded proper evidence upon the part of the defendant and admitted improper evidence upon the part of the plaintiff.

4. The Court gave improper instructions upon the part of the plaintiff

26 5. The court refused to give proper instructions upon the part of the plaintiff

6. The damages are Excessive.

For which reasons said defendant prays for a New trial

By Read & Miller his Attornies

Endorsed "Filed May 12. 1858 James Wescott clerk"

And afterwards to wit on the fifth day of June A.D. 1858 an appeal Bond was filed in the above entitled cause which is as follows to wit

Appeal Bond Know all men by these presents that we Samuel Holmes as principal and Peter Forbes as his Security are held and firmly bound unto William Stummel in the penal sum of One Thousand Dollars, lawful money of the United States for the payment of which well and truly to be made we and each of us bind ourselves our heirs, administrators, executors and assigns, firmly by these presents,

Signed sealed and dated at Lacon, this Fifth day of June A. D. 1858.

The condition of the above obligation is such that whereas, the said William Stummel, lately, on the Eighteenth day of May A.D. 1858, recovered a judgement against the above bounden Samuel Holmes, at and within the Circuit Court of Marshall County

27 and State of Illinois at a regular term thereof then holden at the day last aforesaid for the sum of Two Hundred and Sixty Two dollars and thirteen cents, from which Judgment of the Circuit Court aforesaid the said Samuel Holmes has prayed and obtained an appeal to the Supreme Court of the State of Illinois.

Now therefore if the said Samuel Holmes shall duly prosecute his said appeal and shall pay the said William Stimmel or his heirs, executors, administrators or assigns the amount of said Judgment costs and interest and damages thereon in case said Judgment shall be affirmed by said Supreme Court, or upon the dismissal of said appeal then this obligation to be void otherwise to be and remain in full force and effect.

Entered into and delivered in presence of and before me this Fifth day of June A.D. 1858

Samuel Holmes Seal

Peter Forbes Seal

Endorsed "Filed June 5. 1858 James McCoth clerk"

State of Illinois }
Marshall County } ss I, James Wescott clerk of the Circuit Court in and for said County do certify that the foregoing is a correct transcript of the proceedings had and the papers on file in said Court in the cause of William Stummel against Samuel Holmes as the same appears of Record and on file in my Office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Lacon in said County this twenty sixth day of March A D 1859.

James Wescott clerk

Fees for Record $5.90
Postage 21

204

Samuel Holmes

vs

William Stummel

Filed April 19. 1859

L. Leland

Clerk

Samuel Holmes
vs
William Stummel

In the Supreme
Court April Term
1859

Appeal from Marshall

In this case the Bill of exceptions
having been lost or mislaid is not
incorporated in the record. It is
therefore agreed that a new Bill
of exceptions shall be made as
speedily as possible and filed in
the Court below & certified to this
court, after which, the appellant
may assign Errors & the cause shall
be tried

S L Richmond
Atty for Stummel

A M Mead
Atty for Holmes

~~284~~ 411

Samuel Holmes

vs

Wm Hummel

Agreement &
Record -

Filed April 19. 1859
L. Leland
Clerk

7

William Stammel
vs
Samuel Holmes

In the Marshall Circuit
Court May Term A. D. 1858

Be it remembered that on the trial of this case Aaron Swegen was called as a juror who upon being examined, stated that he did form an opinion upon the merits of the controversy but had never expressed it. He cannot say he has a decided opinion now as to which party ought to recover. The opinion might influence him if the evidence was the same as the statement he heard. That he would be governed by the evidence in deciding the case, if he should never hear anything more about it he has an opinion. He has never changed his former opinion. Whereupon the Plaintiff challenged said juror for cause and the Court sustained the challenge & discharged the juror to which decision of the court the defendant by his counsel then & there excepted. The jury having been empannelled the plaintiff in order to maintain the issue on his part called Thomas Weir who testified that he knew the parties. That Plaintiff did grubbing for defendant in 1851, or 1852 began in 1852 & finished in april 1853. He thinks he grubbed about 12 acres & it was worth from

8 to 10 dollars an acre — Was engaged about 12 months in the grubbing. Was on Holmes land — Holmes was absent about half the time. about one half of it was done after Holmes returned Holmes was absent in California when Plaintiff commenced grubbing. — as one lived on the land Holmes knew that Stummel was grubbing & he once met Holmes on the land while Plaintiff was there. Afterwards Holmes built a house on the land & moved in to it. Stummel some times had one hand and sometimes two to assist him. Paid Peter Teagle $ 50 for work & his wife piled brush on the land. It was a piece of No 1 bottom land. a dense thicket & had to be moved — principally shoemake & saplings of Oak. On cross examination this Witness testified that he did not see the money paid to Peter Fogle and does not know of his own knowledge that it was paid to him. It was his impression that the work was done under a written contract Plaintiff called this witness & Enoch Sawyer & Jacob Held on to the ground to look at the work. They went on & Ex, "amined it. There was a contract then produ, "ced by Stummel as near as he remembers wh, "ich was drawn between William White and James Ferguson — Understood from Stummel that the work was done under a contract &

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Stummel had the contract there. By the contract Stummel was to do the work. Stummel had signed his name with Fergusons at the bottom of the paper The paper was about the cleaning of this land this was the contract under which the work was done & was in April 1853 on on Monday the first day of the term of the Circuit Court. The contract was in the hands of Sawyer They Examined as to how the work was done. went across it in one or two directions. Examined a piece East of the branch & all that was not ploughed on the west side of the branch It was pretty well grubbed. Except where hoop poles had been cut. & standing trees. There was hoop pole grubs left — a good many of them. they were of hickory. Thinks it was a fair piece of work. Had a talk with Holmes, who said he held Stummel to grub the ravine. The ravine was not grubbed. It is caused by a big hollow, after a rain there is a big branch of water. On the second bench of this ravine a few bushes were left.
The plaintiff here rested his case.

The defendant then called G. L. Fort who testified that he was present on a former trial of this cause, the first one and was Clerk of the Circuit Court at the time. On that

trial there was a contract produced & read in evidence between Stummel & Palmer concerning the grubbing of the land in controversy It was a written contract & he has a copy of it in the record that went to the Supreme Court The record from the Supreme Court was produced by him. properly certified & he stated that he had compared the Copy in the record with the original & new it to be correct. When he copied it they had the original contract which was used in evidence on the first trial of the case before them. Thomas B. Deaver Copied it & they compared it. He does not Know what became of the original contract. He left it on file with the other papers. On cross examination this witness testified that he did not get the contract from the Bill of Exceptions but got it from the original. Thinks the original contained the name of Fergus, and that it had been scratched out and the name of Stummel substituted. The record produced is the first record produced by him & has been brought from the Supreme Court. He compared the original agreement with the Copy in the record and is very positive that it is correct. Knows that Stummels name was to the contract Is confident that he compared them & found the copy to be correct.

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Samuel Holmes was next called who testified that he saw a contract or agreement like the one produced by Mr Fort. It was used on the trial of this case He took a copy of it at the Spring term of the Court next following the trial. He got the agreement from G. L. Fort the Clerk and returned it to him He copied it in the Court room, while Court was adjourned for dinner & returned it when Court came in. Does not know what has become of it, has never seen it since. It is not in his power possession or control. It has never been in his possession since the trial except to copy it. The Defendant then proved the service of a notice on the plaintiff to produce the agreement.

G. L. Fort was then recalled & testified that he had looked a great deal for the agreement among the records & files of the Court. Has examined all the files and cannot find it he has kept a general look out for it for a long time, & has been unable to find it He has opened most of the bundles of papers that were in use about that time & has looked every where, where such papers are kept & cannot find it.

William White testified that he was present on the first trial of this cause. An agree

ment or contract like this one now offered was used in evidence on that trial. New drew up the original contract & gave it to Stummel It was first made between Sam'l. or Sarah Holmes and James Fergus. Gave it to Stum. "mel to have Fergu's name scratched out and Stummels substituted. Next saw the agree. "ment in Court on the first trial of this case Stummels name was then affixed to it. — —— the Court was the next fall. Knows it was the same paper he gave to Stummel and Fergu's name was scratched out and Stum. "mels substituted. On cross Examination this witness testified that the contract was made between Holmes wife & Stummel but he can. "not say whether the name signed was Sarah Holmes or Samuel Holmes. Can't say positive. "ly whether Stummels name was in the body of the contract or not Stummel came to the house of witness with another Dutchman and took the contract and was to substitute his own name in the place of Fergus

The agreement or contract was then read in evidence & is as follows. "The following is a copy of" Article of agreement made and entered into between William Stummel of the one part and Samuel Holmes of the other part. Witn.

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"exceth that said William Stummel has this day agreed to clear, grub and pile the brush all to be done in good order on all the land South of the road running from Sandy Creek bridge to John Fasters that William White bought of Edward Evans to be done and completed by the first day of April 1853 and the said Samuel Holmes hath agreed to pay the said William Stummel two hundred and seventy eight dollars for the same — fifty when the work is one half completed — the ballance when done and completed in witness we the undersigned set our hands and seal this April the 13 th 1852."

"William Stummel"
"Samuel Holmes"

William White then testified That he knew about the Grubbing done by Stummel. There was about 40 acres in the whole field at the time Stummel commenced there was Eight acres grubbed in the field which left 32 acres or more to be grubbed. The ravine Stummel did not pretend to grub. The ravine is 70 or 80 rods long & runs diagonally across the piece It commences at the North West corner and comes out at the South East corner. The part not grubbed averages 30 feet wide

along the whole length of the ravine. There are bushes, trees, underbrush & saplings. left which are not cut down. Stummel left off grubbing in April 1863 at that time Holmes was at home. He got home from California in August previous and took the management of his own affairs. He is the father of the wife of Holmes. He examined the grubbing thoroughly. The grubs were cut off below the surface from one to three inches below the surface The grubs were from 1½ to 6 inches thick. Does not think one in fifty was grubbed out. The body of the root was left Holmes has had a great deal of grubbing done on the land since last spring or fall he took out as many as 20 Waggon loads of grubs from the same land grubbed by Holmes. This year he has grubbed three or four weeks on the same land himself & hired hand. Here a large lot of ugly looking grubs were brought into Court & were identified by this witness as being taken from the land - grubbed by ~~himself~~ Stummel. He further stated that the oak, hickory & cherry grubs were cut off & were not grubbed out. Witness paid Stummel some money and Holmes wife paid him some before Holmes came home from California - some

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Twenty or Thirty dollars. There was a good deal of the land that did not need grubbing: it was smooth prairie — no rock on any of the ground. Holmes also paid Stummel some money after he came home from Cali. "fornia. On Cross Examination he stated that the money paid by himself + Mrs Holmes to Stummel may have been $10 or 20$ or $20 + $30 - he cant remember which. Thinks Judge Staples notes are correct The plaintiff here offered the Bill of Excep. "tions to witness for Examination to refresh his memory upon the amount paid to Stum. "mel which bill of Exceptions upon that point is as follows.

"That before September 1852. He paid Plaintiff "towards said Grubbing between $10- and $20. ""

To the introduction of the Bill of Excepti. "ions for the purpose offered the Defendant objected. but the Court overruled the objection + admitted the witness to refresh his memory by it to which decision the defendant then + there by his Counsel excepted

David Etinger. testified that he knew the ground grubbed by Stummel and had ex. "amined it thoroughly Three years ago he went on to it to work for holmes and has often been on it ever since, he has worked the

land and has known it Eight years. In the fall of 1880 he brake ground next to this piece & wanted to get this to grub. went through it. Examined it. & offered to grub it for $4.00 per acre which he considered a fair price not worth more. It is not well grubbed in some places the stumps are six inches high above the ground and hundred of them were cut off just below the surface. The roots & stumps are left and the ground cannot be ploughed without hitting the grubs Does not think more than one half of the grubs were taken out. according to his best belief there were thousands of grubs left He has helped to grub the land since He brake Eight acres of the land last fall four, and it very difficult. had two boys ahead of the plough to grub out the stumps. They dug up & hauled off six Waggon loads of grubs from the 8 acres and the stumps that were taken out were not more than two thirds hauled off. and they were not all dug up — a good many were left. when he was coming to Court on a former trial Stummel the plaintiff got in to the waggon and rode down. He said a good deal of time was lost in coming to Court. Stummel was in the waggon & he told Stummel

that he ought to have done his work better and got his money Stummel replied that it was too hard work. The witness was here asked whether he recollected of Stummels acknowledging while in the waggon, the receipt of $ 90. from Holmes and he stated he did not. He was then asked whether he had not so testified on a former trial but he said he did not remember so testifying but if he had so stated, it was correct. The defendant then produced the Bill of Exceptions, taken on the former trial of this case, properly signed & sealed & made of record, and proposed to let the witness read it to refresh his memory on this point. That part of the bill of Exceptions is as follows

"David Ettinger called by Defendant stated That last April Term of the Court Stummel said as they, he, Holmes, Stummel & Some others were riding in to Court, that this law suit was costing a good deal of time and money — Holmes said he knew it was but Stummel ought to have done his work Right and finished his job according to the contr, "act — and admitted what he Holmes had paid him. Stummel said he knew he ought to — But the job was too hard, or it

was too hard work, or something to that effect. — Holmes said he had paid him about $90.00 and he ought to acknowledge it — Witness stated that he had seen the grubbing — That it was about half done — not well done —"

But the plaintiffs counsel objected to. having the witnes refresh his memory by perusing that part of the Bill of Exceptions, and the court sustained the objection & refused to let the witness read it to which decision the defendant then & there objected.

The witness then stated that the bush ~~on~~ the land were piled by Stummel and that he would rather grub one half the land as it was originally than to grub what is left by Stummel — He had rather grub two trees than one stump — it is easier & lighter work. On Cross Examination this witness stated that there were several places in the field that needed no grubbing — they were smooth places covered with blue grass In the hazel and plumb patches the stubs were cut off — they are all over the piece. the stubs are sticking up from one inch upwards. — plenty now sticking up. — The Plumb trees and crab apples & shoe make

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were cut off about six inches above the ground — great quantities of them — many were dead & have sprouted from the roots — Could safely swear there were thousands of Coat & plum grubs on a single acre

Charles Parker testified that he had Exam"ined the ground at request of Forbes Found plenty of grubs — many above the surface, & many dug round of various sizes every description. He counted in a circle of one rod Thirty Three grubs above the ground from the size of his wrist to the size of his leg. Wherever he went it was the same thing. He was there again in the spring and noticed a good deal of grubbing had been done of late. Thinks there is thousands of grubs there now — was there a few days ago.

Peter Forbes testified that he knew the land went there at request of Holmes to examine the grubbing — found plenty of grubs some above & some below the surface — some of Cherry, some of Oak, red bud, Coat apple & plum. In one place he counted as he stood in his tracks 40 or 50 stubs — Has been there 3 or 4 different times He would not like to pay a man anything to grub in

that way for him. There was about one and a half acres in the ravine not grubbed at all.

Henry Benson. testified that he knew the land. He went on to it on the 1st. April 1857 found it rough & poorly grubbed. there were plenty of grubs left of Cherry, hickory, oak & the like — many above ground — many even with the ground — He stood in one place & counted 50 stubs within a dis-tance of three rods.

Thomas Thompson. Examined the land on the 14th April 1848 found the grubbing a poor job. found a great many grubs

Nathan Shugarts. Examined the land with Thompson & Forbes, and two or three times since. Found the grubbing in a mis-erable condition — could step from one grub to another & did so once for four or five steps — Is acquainted with grubbing & thinks it worth double to take out a grub after the tree is cut off. It is a very bad job.

Thomas Cummings has known the land

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12 or 15 years. Knew it when Stunned worked there. He began in the Spring & ended next winter in Cold weather – Some of the ground is not grubbed at all – The ravine 1½ Acre is not grubbed at all. It is a bad job. There is a three Cornered piece of about two acres, on west side of the field midway, which is not grubbed at all. The grubbing is a very poor job.

John Millyard Knows the land & grubbed there in the fall of 1856 – he found all kinds of grubs, they were very thick on 7 or 8 acres which was not brake – Could not drive through with a plow. Some of the grubs were cut off above the ground, some below, & some not at all. Some of the grubs left were as big as a mans arm & from that up to four inches. Would rather take out three grubs before the tops was cut off than one afterwards. all grubs should be taken out below the surface. He & David Ettinger & Wm. Ettinger work'ed on the land grubbing it for Holmes from three to four weeks a year ago last fall

Van Buren Mc. Kipson. Knows the land

& saw Stummel grubbing there. Has often been over it found a plenty of grubs of all sizes — He was in a waggon with Stum-
mel & Holmes & David Ettinger coming to Court. two years ago this spring — Holmes told Stummel he ought to have finished his job & get his money, and told him he didnt think he had done right deny-
ing payment. Holmes said "you know "I paid you between 90 & 100 dollars & Stum-
mel replied he knew it. & acknowledged he did. — In the spring of 1893 he heard Stummel and Holmes talking about the grubbing & Stummel said he was going to quit. Holmes asked what for? — he replied because plenty of farmers told him he hired men & did not pay them — Witness then told Stummel he had no reason for thinking so for Holmes had al-
ready paid him more than he agreed to — Stummel said he had, and Holmes had paid him near $100. Stummel then said he would not finish the job. Holmes then told him that what he had done was not done right, and wanted him to go on & finish the job & get his pay. — Stummel then wanted to know if he should grub the ravine and Holmes

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said he wanted it grubbed. He saw Stum-
"mel at work on the ground. saw him
cut off hickories & plumb bushes above the
ground & did not grub them — worked
along side of him.
The defendant then offered to read in evi-
"dence a Bill of discovery filed by him
against Stummel in the Marshall Circuit
Court & the answer thereto which are as
follows.

To the Hon. E. S. Leland Judge of the
Ninth Judicial District — in Chancery
sitting in the Cir. Court of Marshall County
Oct. Term 1853 —

Your Orator Samuel Holmes
humbly represents to your Honor that one
William Stummel has brought an action
of accompsit in said Court against your
Orator for work and labor done in grubbing
and clearing as which suit is at issue
pending and undetermined — Your Orator
charges that said William has received
payment to apply on said work as follows

16½ lbs of meat	by Mrs White	at	$ 1.65
50 " " flour	" " "	at	87
May 1852 2 Bushels potatoes	" "	at	1.50

18	13½ lbs meat	@	1.35	
	100 lbs flour	@	1.75	
	Tea	@	.25	7.37
	103 lbs pork		10.30	
July "	100 " flour	@	2.20	
Aug 12th 1852	Cash	@	5.00	
Sept 1st "	Cash		5.00	*
Oct 6th "	Cash		10.00	*
Nov 1st "	Cash		20.00	*
Dec 14th "	Cash	@	30.00	
March 16th 1853	Cash		5.00	
	Flour	@	2.00	

Your Orator charges that he does not know of any witness by whom he can prove the payment of the three aforesaid items embraced in the bracket opposite the Star above or either of them — viz. the item of $ 5. in Cash paid 1st September 1852 & the item of $10. in Cash paid 6th. Oct 1852 and the item of $ 20. in Cash paid Nov 1st 1852. — Your Orator therefore prays that said William Stummell may be made party defendant to this bill of discovery — and required to discover and answer upon his Corporal Oath — whether or not he did not receive from your Orator about the 1st of Sept. 1852 five dollars in

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Cash. — and about the 6th day of October. 1852 the sum of ten dollars in money — and on or about the 1st of November 1852 the sum of twenty dollars — being other and different sums. than those contained in the other items of the account above set forth. — And your Orator prays that said William Stummel may be enjoined from proceeding with said action at law until he shall have fully answered this bill of Complaint — as your Orator will ever pray —

Samuel Holmes

T. L. Dickey
Solicitor

Subscribed & sworn to before me this 20th day of Oct. 1853.
G. L. Foat Clerk

State of Illinois } In the Marshall Cir. Ct.
County of Marshall } To the Oct. T. thereof 1853

Samuel Holmes
vs
William Stummel

The said William Stummel

in reply to the Complainants bill of discovery filed herein, for an answer thereto or as much thereof as he is advised by Counsel he is required to answer — says. That he did not receive from the Complainant. Holmes the payment of five dollars on the 1st. of Septr. A. D. 1852 as the Complainant hath alleged in his bill filed herein, but did rece, "ive five Dollars on the 20th day of August 1852 — Respondent answering further says that he did not receive from said Holmes the sum of ten dollars on the 6th Day of Oct 1852 nor the sum of twenty Dollars on the 1st. Day of Nov 1852 as the said Complainant hath charged in his said bill filed herein but said Holmes did pay to this respond. "ent five Dollars on the 6th of Oct. and ten Dollars on the first day of November 1852. which payments admitted are not a part and parcel of payments charged on the 12th Day of August and the 14th Day of Dec A.D. 1852. And now having fully answered the Complainants bill this respon, "dent asks to be discharged with his costs.

Ames & Semple
Sols for Deft

Wilfalm Hommal

Subscribed & sworn to
before me this 21st day of Oct 1853
G L. Fort Clerk

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To the reading of which the plaintiff by his counsel objected; and the Court permitted the answer to be read but excluded the Bill. to which decision the Court then & there Excepted.

Here the defendant rested

The plaintiff then called Enoch Sawyer who testified that he examined the land soon after the grubbing was done. There was a small piece of the South End not grubbed Thos. Weir. Jacob Held & Stummel went along with him. His judgment at the time was. that it was a fair job. It was a heavy job of grading. Had never grubbed much. Many hoop poles had been cut on the land. Thinks it was worth $8. per acre to grub it. He saw the written contract under which it was done. it was handed to him by Stummel. Thinks the same contract was offered on the first trial of this case. There was only one written contract used on that trial.
Lorin G. Pratt was Attorney for plaintiff in 1883. There was only one contract used

on the first trial. He helped Judge Dickey try the case & settle the Bill of Exceptions. The Bill of Exceptions offered is the same Here the following bill of Exceptions was offered in relation to the contract.

"Defendant thereupon proved that said work was done under a written contract between said parties, of which the following is a copy." "Article of agreement made and entered into between William Stummel of the one part and Samuel Holmes of the other part. Witnesseth that said William Stummel has this day agreed to clear, grub and pile the brush all to be done in good order on all the land South of the road running from Sandy Creek bridge to John Fosters that William White bought of Edward Evans to be done and completed by the first day of April 1853 and the said Samuel Holmes hath agreed to pay the said William Stummel two hundred and seventy Eight dollars for the same — fifty when the work is one half completed — the ballance when done and completed. In Witness we the undersigned set our hands and seal this April the 13th 1852"

"William Stummel"

"Samuel Holmes"

Stummels name was not in the body of the contract & according to his recollection Sarah Holmes name was to it. It is not a Copy of the Contract. The copy is not a copy of the contract because Samuel Holmes name was not signed to the contract.
To all of the evidence of L G. Pratt about the contents of the contract the defendant by his counsel objected at the time but the Court overruled the Exception and the defendant then & there excepted. He further stated that Wm White name was in the contract — there was an erasure. Fergu, "sons name & Sarah Holmes was at the bottom. To all which Evidence the defend, "ant objected but the Court overruled the objection & the defendant then & there Excepted.

Enoch Sawyer called by plaintiff that he saw the contract. there was an erasure in it. & Fergus name name was erased Wm White was a party of the first part & James Fergus & Sarah Holmes names were at bottom: & thinks Stummels was there also. cant say whether it was Whites or Stummels name. I am talking of the Con, "tract as I saw it in the field. I went

on to the land to Examine the grubbing on the 1st. April 1853. It was all grubbed Except a piece on the South. many hoop poles were cut on the land in 1851 & 1852 His father owned it before 1850 when many hoop poles were cut. & sold it in that year. Went on to the land a year ago at request of Holmes & found a good many grubs. It was not a good job.
When he first went on to the land Weir Held & Stummel were along. They were burning some on the land. The South part was all completed Except a piece on the South end. The brush on the 18 acres East of the ravine was not burnt & Could not tell very well how it was grubbed Had no Mattock the first time he went one. Since then Holmes hands brought a Mattock & he found the stumps were not taken out.

John Myers that he had never seen the land only as he poked it in the road, saw a great many grubs piled, out thought from the looks from the road it was well done. Thinks it was worth $ 10 per acre to grub it. Has grubbed three small farms

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John Foster Knows the fob. Knows the ravine, Saw the grubbing with the Exception of half an acre & concidered it a fair fob. worth from 7 to 10 dollars per acre. It could not be done for $4,00 per acre. In 1848. 49 & 50 many hoop poles had been cut on the land and the fire had run over it

John Weir. Has grubbed considerable The fire causes the Stubbs. He Examined the grubbing two or three years ago last fall at request of Holmes. Here the plaintiff asked the witness "State whether a heavy fob or a light fob of grubbing? This was objected to. but the Court overruled the objection & the witness answered "It was a heavy fob" To which decision of the Court the defendant then & there Excepted. The plaintiff then asked "What was it worth an acre to grub it at the time it was done". The witness answered $10 per acre

The Plaintiff then asked the witness whether or not it is difficult to find all the grubs where a portion of the timber has been cut down previous to the grubbing? To which he answers

It is difficult for they rot off under the ground & the sprouts will not grow above the ground if the brush is thick

To the asking of each & both of the last foregoing questions the defendant by his counsel before the answers were given & afterwards objected. but the objection was overruled by the Court. & the questions were permitted to be asked and the defendant then & there excepted

Thomas Weir being next called testified that he had known plaintiff since he first took the job. In 1853 Stummel did not speak the english language well he would. He would generally get but one broken English word in a sentence. He had to get him to repeat his words before he could understand him. This evidence was objected to at the time but admitted by the Court & defendent excepted

Enoch Sawyer testified that in the spring of 1853 he could not well understand Stummel. because he spoke the English language so badly. Once in a while he could understand him.

generally talked to him throughs an inter-
preter. In 1855 1855. he could not well
understand him. & had to talk through
an interpreter. This evidence all was
objected to at the time, but the objection
was overruled and the defendant excepted
then & there on the trial of said cause

Henry Ware. Examined the land, and con-
cluded it was an average job of grubbing
It was a heavy job & was worth $6. an
acre to grub & $2 per acre to pile the
brush

Nathan Ramsey Examined the ground
at Holmes request between 1st & 2nd trial
& thought it a common job. It was worth
$8 per acre to grub & pile the brush

All the evidence offered as to the kind
of job & the value per acre for grubbing
was objected to at the time it was offered
& the Court overruled the objection & admi-
-itted the evidence & the defendant then
& there excepted to such decisions

The plaintiff here rested again

The Defendant then recalled Van Buren McKipson who testified that he was along when Sawyer & others Examined the land in 1853. at that time there was but little grubbing done East of the ravine. When I was along with Stummel & Holmes in the waggon I did understand Stummel perfectly

Wm White recalled. testified that he had known the land since 1834 — He had owned it & bought it in 1850 or 1851 & no fire had ever run through it to his knowledge, or that he ever saw & but few hoop poles had been cut. He might have cut a few where Paul Dods grubbed, but not on the Stummel tract "My name was not to the contract" with "Stummel, as a party. I am positive of this because I wrote the contract

This was all the evidence in the case

The plaintiff then asked the Court to in- "struct the jury as follows

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1 If the Jury believe from the evidence that the plaintiff grubbed fifty acres of land for the defendant then the Jury ought to allow to the plaintiff what the Jury believe the grubbing was worth, unless the defendant has proved a valied contract for a less sum, or that he (defendant) has paide for said grubbing.

Given

2 If the Jury believe from the evidence that the plaintiff done the grubbing in a fair workman like manner and as well as such Kinde of grubbing is usually done then the Jury ought not to allow plff any less than the contract price even if a contract price has been proved

Given

3 If the Jury believe from the Evidence that under a contract between the parties the plaintiff was bound to grub the <u>ravine</u>, yet if the Jury further believe that the defendant released the plaintiff from grubbing out the <u>Ravine</u>, then the Jury ought to find for the plaintiff the contract price for the work less a reasonable deduction on account of not grubbing the ravine,

Given

4 Unless the Defendant has proved a <u>valide existing Contract</u> between the parties under which the work sued for was done then Plaintiff is entitled to recover from the Defendant the value of the work done by him as proved — That to show such valid Contract it must be proved that it was assented and agreed to by both

Given

parties, and was for a sufficient consideration.

5 It is for the Defendant to prove the existence of the written Contract — and unless he has proved it, the Plaintiff is entitled to recover for the amount he has proved his labour to be worth.

Given

6th If the Defendant has shown a Written Contract for the work done by the Plaintiff. The Plaintiff is still entitled to recover under such Contract - Provided he has shown that he has complied with the same

Given

7 Under the pleadings in this case if the Jury believe that the work was done under a written Contract - still the Plaintiff is entitled to recover for the work done in proportion to the Contract price - if they believe the Plaintiff has proved that he did work for the Defendant.

Given

To the giving of which the defendant then & there objected but the Court overruled the objection & gave the instructions marked "given" & the defendant then & there excepted

The defendant then asked the Court to instruct the Jury as follows

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1st. If the Jury believe from the evidence that the grubbing for which the plaintiff has sued was done under a written special contract then the plaintiff cannot recover in this action unless it has been proved to the satisfaction of the Jury that the contract has been violated by the Defendant, and that in consequence of such violation the same has been rescinded by the plaintiff, and it makes no difference whether or not such contract was made by Stummel with Holmes or with other parties for Holmes.

Refused

2d That if the Jury believe from the evidence that there was a written special contract under which the grubbing was done. The Plaintiff can only recover upon such written contract unless the same has been violated by the Defendant and rescinded by the Plaintiff.

Refused

3d That Where there is a written Contract in relation to work, or any other matter — The Parties must Sue on Such written Contract and cannot sue in the present form of action unless such contract has been violated by one party and rescinded by the other, or rescinded by mutual agreement of the parties founded upon a valid consideration

Refused

4th That there is no evidence before the Jury that the written contract under which the work was done (if any

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Refused

such contract was made) has been violated by the Defendant, or rescinded by the plaintiff on account of any such violation.

Given

5 If the work was done under a special contract stating the price to be paid for the grubbing and the time when it was to be paid and the manner of doing the work the plaintiff cannot recover unless he has performed the contract on his part. or unless it has been rescinded by the plaintif in consequence of the default of the defendant.

Given

6 If Plaintif made a contract with Holmes or with his wife for him, to clear & grub the bush on the land, such contract means such underbush as ought to be grubbed, and if he was not to have his pay until such work was done — he cannot recover in this case unless he has done the work according to the contract, or unless it was violated by Holmes & rescinded by Plaintif

Refused

7 If the Jury believe from the evidence that the grubbing in question was done under a Contract like the one offered in evidence then Stimmel was bound to grub, cut and pile the bush on all the land as well that in the ravine as the other, and that unless the performance of that portion of the work was waived by the defendant, then

the plaintiff cannot recover in this case.

Those marked "refused" the Court would not give & defendant then & there excepted.

The Jury found a verdict for plaintiff whereupon the defendant moved for a new trial & filed the following motion.

William Stummel
vs.
Samuel Holmes.

In the Marshall Circuit Court
May T. 1858.

And now comes the said defendant and moves the Court for a new trial for the following reasons.

1st The verdict is contrary to law, and the instructions of the Court.

2 It is contrary to the evidence

3 The Court excluded proper evidence upon the part of the defendant and admitted improper evidence upon the part of the plaintiff

4 The Court gave improper instructions upon the part of the plaintiff

5 The Court refused to give proper instructions upon

the part of the plaintiff.

6. The damages are excessive

For which reasons said defendant prays for a New trial

By Mead & Miller his attornies

but the Court overruled the motion & the defen, "dant then & there excepted.

The defendant then moved the Court to arrest the judgment & filed his motion therefore as foll, "ows.

(There is no motion to arrest judgment on file - clerk)

35

But the Court overruled this motion also and the defendant then & there Excepted.

The defendant then appealed to the Supreme Court.

And for in as much as the matters & things afore, said do not appear of record. it is ordered that said exceptions be allowed signed & sealed & made of record.

M. Ballou (Seal)
Judge of 23d Judicial Circuit
Ills

Which Bill of Exceptions are endorsed "Filed this 5th day of May A.D. 1859, as of the May Term A.D. 1858." "James Wescott clerk"

State of Illinois
Marshall County } ss. I, James Wescott clerk of the circuit Court within and for the County of Marshall and State of Illinois, do hereby certify that the foregoing is a correct copy of the Bill of Exceptions in the Suit of William Stuninel against Samuel Holmes as the same appears on file in my office.

In witness whereof I hereto set my name and affix the Seal of said Circuit Court at my office in Lacon in said County this tenth day of January A.D. 1860.

James Wescott
Clerk

Clerks fees for copy & Certificate & seal 7.50
35
$7.85

William Stunnard

No 40

vs

Samuel Hobbs

Bill of Exceptions.

State of Illinois. Supreme Court
3d Grand Division
April Term A.D. 1860

Samuel Holmes
vs
William Stummel

And now comes the said appellee by Richmond & Burns his attorneys and says that in the Record and proceedings and in the rendition of the judgment in the above Entitled Cause there is no Error as the said appellant hath above in that behalf alledged Wherefore he prays that the said Judgment may be in all respects affirmed &c

Richmond & Burns
Attorneys for appellee

Samuel Holmes
vs Appl from Marshall
William Stimmel

Record. Agreement & Assignment of Error