

No. **12376**

Supreme Court of Illinois

Holmes.

vs.

Stunnel.

Record of the Case of W^m Stummel
vs Samuel Holmes

Pleas Before The Honorable Circuit
court of Marshall county in the
State of Illinois began and
holden at the courthouse in the
Town of Lacon in said
county of Marshall on the
eighteenth 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. S. Wallace States Attorney
Greenberry L. Fort clerk and Henry
L. Crane Sheriff

Be it Remembered that among other
things the following proceedings were
had at said Term. in the case of
William Stummel vs Samuel
Holmes To wit-

October 19th 1853

William Stummel

vs

Samuel Holmes

Spumpsit

Rule

Be it remembered that this day the Plff by Ames his Attorney moves the Court for a rule herein against the deft to plead - Which motion is sustained And it is ordered that the defendant be required to plead herein by Thursday morning next

Wednesday October 26th 1853

"Lo wit"

William Stummel

vs

39

Samuel Holmes

Spumpsit

Oct 26th 1853

Be it remembered that this cause comes on to be heard and tried The Plaintiff comes in person and by C. B. Ames his Atty as well the Defendant by Dickey his Attorney and ^{also} in person

and issue being joined herein
a jury comes to try the same
who are Jacob L Fetter Hanson
Verdict Bonham William Bonham Chas
Love Robert Davis John Black
William Callen & Harry Gayland
James B Welch Henry Miller
Joshua D Bullman & Jonas L
Ball Twelve good and 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 we the jury find the issues
joined for the Plaintiff and
assess his damages at the sum
of one hundred and ninety three
dollars and thirteen cents (\$193.13)
whereupon Defendant by his Atty
for a new trial herein,

Saturday October 29th AD 1853,
Lo Wis

William Stimmell,
 Samuel W. } Appraisers
 Samuel Adams } Oct 29th 1833

Be it remembered that this day
 Order this cause coming on to be
 Overrule heard on a motion for a new
 Mo for Trial herein, and the court being
 New Trial duly advised in the premises,
 do the Order that the same be over-
 ruled. It is therefore considered
 Judgement and adjudged by the Court that
 the Plaintiff have and recover
 off and from the defendant herein
 the sum of one hundred and
 ninety three dollars and thirteen
 cents together with his costs of ~~suit~~
 and charges by him about his
 suit in this behalf expended
 and it is ordered that execution
 issue therefor. Whereupon comes
 appeal J L Dickey Atty for Deft and
 prays an appeal which is allowed
 upon said Defendant entering
 into an appeal bond in the penal
 sum of four hundred dollars

Within thirty days from the adjournment of this court with John Burns as his security and the said Deft renders his bill of exceptions and the court takes time to consider and settle the same.

Precipe

State of Illinois } In the Marshall Circuit Court
Marshall County } To the Oct Term thereof A.D. 1853

William Stummel } Assumpsit
vs } Damages \$300.00
Samuel Holmes }

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The Clerk will please
issue a summons in the above recited
case directed to the Sheriff of Marshall
County to execute. Also a subpoena for
the following named witnesses to wit:
Thomas Ware Jacob Helt, John Foster and Esqr
Sawyer (given name I don't recollect) directed
to Sheriff of Marshall Co, Also send a Sub-
poena to Putnam Co, for Peter Fogle and much
oblige

Respectfully Yours

E. B. Ames
Atty for Plt

Endorsed

Wm Stummel vs Samuel Holmes
Filed Sept 1st 1853
G. L. Fort
Clerk

Summons.

The People of the State of Illinois

To the Sheriff of Marshall County greeting:
We command you to summon Samuel Holmes to
appear before 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 Stum-
mel in a plea of assumpsit damages three
hundred dollars as he says

Whereof fail not, and make due return
of your doings hereon.

Seal

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

Greenberry S. Fort, Clerk

Return

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

Sheriff fees:

Service, \$.50

8 miles travel, 40

Return of this writ 10
\$ 1.00

Henry Schrau Sheriff of
Marshall Co., Ills

Endorsed

Wm Stummel vs Samuel Holmes
Summons

Filed Oct 17th A.D. 1853

G. L. Fort

Clerk

Have

State of Illinois: In the Marshall Circuit Court
Marshall County } To the C. J. thereof A.D. 1853

William Stummel Plaintiff in this
suit by O. 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 Plain-
tiff 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 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 neg-
lect and refuse to the damage of the said Plain-
tiff of three hundred Dollars and therefore he brings
his suit

E. B. Ames
Atty for Plff

(Page 10)

Copy of Plff's said on
1853

Samuel Holmes

To William Stummel Dec
Aug 10th To grubbing & piling the brush
and clearing down on fifty acres aforesaid \$300. 00
" " For work & labor done 300. 00

Endorsed

Marshall Cir. Court Oct Term AD 1853
William Stummel vs Samuel Holmes
Declaration Filed September 24 1853

E. B. Ames Plff's atty
G. S. Fort Clerk

Plea

State of Illinois Marshall county & circuit court - Oct
Term 1853 -

Sam^l Holmes }
vs }
Wm Stummel }

Assumpsit -

[2376-7]

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And the said Samuel Holmes by T. L. Dickey his
 Attorney comes and says that he did not under-
 take and promise in manner and form as plain-
 tiff has in that behalf in his said declaration alleged
 and of this he puts himself upon the country & Dickey
 And the plaintiff doth } for deft
 the like C. B. Ames }
 Atty for Plff }

Endorsed

Stummel vs Holmes - Plea
 Filed October 20 1853

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G. S. Fort
 Clerk

Bond for costs

State of Illinois } In the Marshall Circuit Court
 Marshall County } To the Ct J. thereof A. D. 1853

William Stummel }
 vs } Assumpsit
 Samuel Holmes } Damages claimed
 \$300.00

I Eli B Ames do hereby enter
 myself security for costs in this case and ac-
 knowledge myself bound to pay the same to
 the officers of this court and the opposite par-
 ty as far as the said Plaintiff may be
 come liable to pay the same. Given under

my hand at Vacon this 20th Day of Oct A.D. 1853
E. Barnes

Endorsed

Marshall Cir Ct Oct T. term of A.D. 1853
William Stummel vs Samuel Holmes
Security for Costs - Filed October 20th 1853
G. S. Fort
Clerk

Affidavit

State of Illinois
Marshall Circuit Court - Oct Term 1853
Wm Stummel
vs
Samuel Holmes } *assumpsit*

Said Samuel Holmes
being duly sworn says on oath - that said
William Stummel does not reside in this
County & has no property in this State so
far as affiant has been able to find out
- and is not pecuniarily responsible for the
costs accruing in this suit - and that affi-
ant believes that the costs now accrued and
to accrue could not be collected from him on ex-
ecution if judgment were rendered against
him therefor

Subscribed & sworn to
before me this 20th Oct
1853

Samuel Holmes

G. S. Fort clk
By G. D. Barnes Deputy

Endorsed

With Stummel

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^{vs}
S Holmes — Affidavit Filed Oct 20th
1853 G. L. Fort, clerk

Bill of Discovery

To the Hon C. S. Deland judge of the Ninth
Judicial District - in Chancery sitting in the
circuit 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 assumpsit in said court
against your Orator for work and
labor done in grubbing and clearing
which suit is at issue - pending & undetermined

Your orator charges that said William
has received payment to apply on said work
as follows

	16½ lbs of meat by Mrs White	A	\$ 1.65
	50 lbs of flour " " "	A	.87
May 1852	2 bushels potatoes " "	A	1.50
	13½ lbs meat " "	A	1.35
July "	100 lbs flour " "	A	1.75
	Sea ————— " "	A	2.50 = 7.37
	100 lbs pork " "	A	10.30
July	100 lbs flour " "	A	2.25
Aug 12 th 1852	cash	A	5.00

Sept 1 st 1852	cash	\$ 3.00	}	X
Oct 6 th	" cash	10.00		
Nov 1 st	" cash	20.00		
Dec 14	" cash	A 30.00		
March 16 th 1853	cash	5.00		
	Flour	A 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 1853 - & 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 Stummel 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 Cash - and about the 6th 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 -

J S Dickey }
Solicitor }

Samuel Holmes

Subscribed & sworn to before me this 20th
day of Oct 1853 — G S Fort

Clerk

Endorsed

S. Holmes vs W. Stummond - Bill of discovery
Filed 20th Oct 1853 G. S. Fort
Clerk

Answer of Deft

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

Samuel Holmes }

vs

William Stummond }

The said William Stummond
in reply to the complainants bill of discovery
filed herein for an answer thereto as much thereof
as he is advised by Counsel he is required to answer
says, That he did not receive from the complain-
ant Holmes the payment of five Dollars on the 1st
of Sept A D 1852 as the complainant hath al-
leged in his bill filed herein, but did receive

five Dollars on the 25th 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 char-
ged in his said bill filed herein; but said
Holmes did pay to this respondent five Dollars
on the 6th of Oct and ten Dollars on the first
day of November 1852 ~~as the said complain-
ant hath charged in his said bill filed herein~~
~~but said Holmes did~~ which payments ad-
mitted are not a part and parcel of payment
charged on the 12th Day of August and the
4th Day of Dec AD 1852

And now having fully answered the
complainant's bill this respondent asks
to be discharged with his costs

Ames & Purple Z Wilfulm Hummel.

Solr for Deft Z

Subscribed & sworn to before me this 21st day
of Oct-1853

G. S. Hort
Clerk

Endorsed

Marshall Circuit Court Oct 7, thereof AD 1853
Samuel Holmes vs William Hummel - Answer
of Deft - Filed Oct 21st 1853

Ames & Purple
for Deft

G. S. Hort
Clerk

Appeal Bond

Know all men by these presents that we Samuel Holmes as principal and John Burns as security are held and firmly bound unto William Starnum in the penal sum of Four hundred dollars lawful money of the United States to the payment of which sum well and truly to be made we and each of us do bind ourselves our heirs executors and administrators jointly and severally, firmly by these presents. Witness our hands and seals this eleventh day of November A.D. 1853

The condition of the above obligation is such that whereas at the October Term of Circuit Court of Marshall County in the State of Illinois in the year A.D. 1853 the said William Starnum by the consideration and judgement of said Court recovered judgement in said Court against the above bounden Samuel Holmes for the sum of one hundred and ninety three dollars and thirteen cents, and the costs of suit from which judgement of the said Circuit Court the said Samuel Holmes has prayed and obtained an appeal to the Supreme Court of the State of Illinois - Now if the said Samuel Holmes shall duly prosecute his said appeal and

shall pay the said William Stummel
or his heirs executors administrators or assigns
the amount of said judgement costs interest
and damages thereon in case said judg-
ment shall be affirmed by said Su-
preme Court then and in that case
this obligation to be void otherwise
to be and remain of full force and
effect

Samuel Holmes *Seal*
John Barry *Seal*

Endorsed William Stummel vs Samuel Holmes
Appeal Bond - Filed November 11th AD 1853
G L Fort
Clerk

State of Illinois
Bill of Exceptions, Marshall County & Circuit Court thereof - October
Term 1853 -

William Stumrzel }
vs } action of assumpsit
Samuel Holmes }

Be it remembered that on trial of the issue
in this case - the plaintiff proved that he had
done grubbing for defendant - having com-
menced work some time in the Spring
of 1852 assisted by his wife & some hands
a considerable part of the time and
worked till some time in the Spring of 1853
and that the value of the labor done was
worth from three hundred to three hun-
dred and fifty dollars that said work
was done at the instance of defendant
and upon a certain tract of land
lying south of the road running from
Sandy Creek bridge to John Fosters being
the same land bought of Edmund
Evens by William White - Here plaintiff
rested his case -

Defendant thereupon proved
that said work was done under a
written Contract between said parties

24
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 are the undersigned set our hands and seal this April the 13th 1852

William Stummel
Samuel Holmes

Defendant further proved that on said land is a ravine running through the same from near the south west corner to a point near the north

east corner - and that along the whole line of that ravine there were at the time of the trial still standing brush and bushes which were on said land at the time of the contract and were there still and not grubbed - And that to grub and pile the same would be a very considerable job and would take a man at least a month and probably more to do it -

Defendant produced witnesses who testified that the grubbing which was done by plaintiff was not well done - that many of the bushes and brush were merely cut down or cut off at the surface of the ground without the roots being grubbed out - and that in their opinion it would cost half as much labor to take said land, as plaintiff left ^{it} and grub it in good order, as it would have taken to have grubbed it in good order taking it in the condition in which it was when plaintiff entered upon the work.

Defendant then offered to prove that "to clear land" required that the trees
" as well as the bushes should be taken

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"down and cleared away" to which plaintiff objected which objection was sustained by the court - and said testimony so offered was excluded by the Court - to which decision of the Court in sustaining said objection and excluding said evidence from the jury the defendant by his Counsel then and there excepted - Defendant then offered to prove that upon said land mentioned in said contract - there were at the time of the contract a large number of growing forest trees of various sizes some large & some smaller from six inches in diameter & upward - and that said trees were still standing upon the land at the time of said trial and not cleared off said land - to the introduction of which evidence so offered plaintiff objected upon the ground that he alleged that he was not required by the terms of said contract to do any thing with the trees - And the Court sustained said objection and excluded said testimony - to which decision of the Court in sustaining said objection and excluding said testimony so offered the defendant by his Counsel then and

there excepted -

Plaintiff then introduced witnesses who testified that they had ~~had~~ a large quantity of grubbing done and had done considerable themselves and that they had examined the ground after plaintiff had quit work and that as to the quantity of the work they considered it a common job of grubbing - done as well as men commonly had grubbing done for themselves - It was also testified to that it was generally understood in that neighborhood that grubbing was the removal of brush and trees under six inches in diameter - One witness said he considered that the grubbing was very well done - plaintiff's witnesses on cross examination said that some of the stools (or spreading surface roots) of the oak bushes were left in the ground the bush having been cut off - some witnesses said that some appeared to have been cut off by a sythe & might have been accidentally cut off while mowing the small brush - and that they did not consider grubbing done in good order unless the stools and roots near the surface were taken out - And that it was true that a line of bushes and brush along said

ravine passing entirely through said land was left entirely ungrubbed and untouched — It was also testified to by some of the witnesses that it was an unusually heavy job of grubbing —

Plaintiff then asked of one of his witnesses whether it was the custom in that neighborhood to grub out bushes along such a ravine — to this defendant objected — and urged that the terms of the contract required the grubbing and piling of the brush on all the land — the plaintiff insisted that the jury were to judge of what the parties meant by the Contract — and that this custom tended to show the intention or meaning of the contract — the Court decided that the evidence was not competent to explain the Contract — that by the terms of the contract plaintiff was required to grub the brush along the ravine — but that the evidence was ~~admissible~~ for another purpose viz that it was competent as evidence tending to prove that defendant if he knew that such was the custom had waived the execution of the Contract in that behalf — and therefore overruled the

objection of defendant and permitted plaintiff to prove that it was not usual in that neighborhood to grub such ravines and plaintiff did prove that fact. To which decision of the Court overruling said objection of defendant and admitting said evidence as aforesaid defendant by his counsel excepted at the time when said decision was made.

Thereupon plaintiff proved - that he began said job in the Spring of 1852 - that he began at the south west corner on the east side of said ravine and worked along to the north and east until he had grubbed over all of said ground on the east side of said ravine ~~and worked along to the north and east until he had grubbed over all of said ground on the east side of said ravine~~ - except about an acre which lay on the out side of the fence on the South East Corner - that he then passed over the ravine to the west side of the ravine beginning at the south west and grubbed along the west side of said ravine leaving the ravine untouched - and thus proceeded until he

had grubbed over all of said ground lying west of said ravine - That she passed from the East side of said ravine and began grubbing on the west side thereof about the first day of September 1852 - and that at that time defendant was living within 80 or 100 rods of the premises and continued to live near by until the plaintiff quit work and that plaintiff sometime in the month of April 1853 after grubbing over all the ground on the west side of said ravine - returned to the acre (left ungrubbed on the outside of the fence as aforesaid - on the South East Corner of said land) and grubbed that acre -

On cross examination of one of plaintiff witnesses - who had said the grubbing was done as well as common he testified that within a track of a wagon running once across said land witness observed from forty to fifty stools of oak bushes that were left in the ground and ought to have been taken out to have done the grubbing in good order -

Defendant thereupon called a witness who testified that plaintiff had told him (the witness) that the defendant wanted

him to grub out the ravine but that he (the plaintiff) would not do it - Another witness called by defendant testified that defendant (while said grubbing was in progress on said land) sent word by witness to plaintiff "that plaintiff was not taking out the roots deep enough - nor doing the grubbing clean enough" and that the witness delivered the message to plaintiff as requested -

Another witness testified that shortly before plaintiff quit work - and after he had done all the grubbing which was done (except the acre last grubbed on the South East corner) plaintiff placed said written contract in the hands of said witness and two other persons - and requested them to go upon said ground and for him to examine said ground and see whether he had done all the work called for by said contract - or not - that after they had made said examination and before they had reported their opinion to the plaintiff - the defendant on being informed as to the object of their visit insisted to them that the job mentioned in the contract was not completed in several respects and among others insisted that plaintiff had failed to perform his contract in not hav-

ing grubbed the brush along said ravine -
- On further examination witness stated, that
he did not tell plaintiff what defendant
had said on that subject -

One or more witnesses called by plain-
tiff testified that the ravine spoken of
was a narrow wash at some places so
deep as not to be passable by a horse & up
towards one end it might be crossed by a
horse or wagon - that it was subject to peri-
odical washing so that grass could not
be raised to advantage and that it was
unfit for cultivation for grains - One wit-
ness said the grubbing out of the bushes
along the ravine he would regard as ben-
efit to the owner of the land but rather
an injury by making it more subject to
wash - on cross examination said witness
said the bushes left along said ravine
would injure the adjoining grounds by
shading them and that it would have been
a benefit to the land to have cut down the
bushes and destroyed the shade leaving the
roots ~~leaving the roots~~ in the ground to
protect the land from washing - Some of
plaintiff's witnesses said that all the arable
ground on said tract was grubbed -

It was further proved by defendant that he had made divers payments to plaintiff along from the beginning of the work to some time in March A.D. 1853—amounting in all to the sum of seventy eight dollars \$78.00—

This was all the evidence in the case

The Court instructed the jury among other things that by said Contract the plaintiff was not required to clear the land and therefore the jury need not take into consideration the question of clearing off the trees from said land—that were too large to be called brush—that by the Contract—the plaintiff was bound to grub and pile all the brush on said land as well that growing along the ravine as that on the plain land—and that if defendant had been paid fifty dollars he could not recover unless the proof showed that plaintiff had done the whole of said grubbing—or unless the defendant had waived the performance of such part of the work as was left undone—that the mere silence of defendant when plaintiff in the progress of the work passed the ravine without grubbing it out, would not of itself relieve the

plaintiff from performing that part of his contract - but that if the jury believe from the evidence that it was not usual in that neighborhood to have such ravines grubbed - that defendant knew it - and that defendant knew (at the time that plaintiff was passing said ravine in the progress of the work & leaving it ungrubbed) that plaintiff was so leaving it ungrubbed and that it is probable from the usual manner in which such work is done that plaintiff would have grubbed out the ravine as he went along unless defendant had consented to his leaving the same ungrubbed - that the jury might infer from such circumstances that defendant had waived so much of the contract as required plaintiff to grub along said ravine - and if the jury should believe from the evidence that defendant at any time in the progress of the work consented that plaintiff need not grub the brush along the ravine - he could not afterward legally require of plaintiff to grub the brush along the ravine - even tho such demand were made of plaintiff by defendant before the plaintiff had quit work —

The defendant objected to so much of said instruction as decided that plaintiff was not required by said contract to clear the land - but merely to clear the brush - but the Court overruled the objection and gave said instruction - to which decision of the Court in so charging the jury defendant then ~~there~~ excepted when said decision was made -

Defendant also excepted to the ruling of the Court in instructing the jury that they might infer (from the circumstances mentioned in the instruction) that defendant had waived so much of the contract as required plaintiff to grub along the ravine - and said exception was taken by the defendant at the time when said instruction was given -

Defendant also at the time when said instruction was given excepted to so much thereof as laid down the law to be that "if defendant had at any time in the progress of the work, consented that plaintiff need not grub the brush along the ravine, defendant could not afterwards legally require of plaintiff to grub the brush along the ravine - even tho such demand were made of plaintiff by defendant before

the plaintiff had quit work - After verdict -
- the defendant moved the court for a new
trial, which motion was overruled by the
court - to which decision of the court in
refusing to grant a new trial defendant
then and there excepted and prays that this
his bill of exceptions may be signed sealed
and made a part of the record which is done

E. S. Leland 
Judge
of the 9th Jud Dis -

Endorsed

Stammell vs Holmes

Bill of Exceptions

Filed November 10th AD 1853

G. L. Fort

Clerk

State of Illinois }
Marshall County } 1854

I Greenberry L
Fort clerk of the circuit court of
said Marshall County do hereby
certify the foregoing to be a true
and correct copy of a manuscript
of the record and papers on file
in the case of William Stummel
vs Samuel Holmes in assumpsit
tried and appealed to the supreme
court at the October Term of said
circuit court in the year A.D. 1854

In witness whereof I
have hereunto set my
hand and affixed the
seal of said court at
Lacon this 10th day of
June A.D. 1854

clerk's fee

Manuscript ~~75~~ 40

Cert & seal 35

\$8.75

762. pd by Dr. King
1.03 - cert pd

Greenberry L Fort
clerk cir ct

83
Saml Holmes
vs
Wm Sturmel

Appeal from
Marshall

Record

1854

83

Filed June 19. 1854
V. Keland Clk.

1854



Abstract

Supreme Court - June Term 1854
Samuel Holmes vs Stummel - appeal
from Marshall -

This was an action of assumpsit brought
by Stummel vs Holmes on 2nd day of
September 1853 - in Circuit Court of Cherokee

Declaration - Common counts for work
and labor done - Gen issue - trial -
verdict for pl^{ffs} \$193.19 - mo for new
trial overruled - & judgment -

Bill of exceptions Shows all the evidence
& instructions - Plaintiff proved

That he had done grubbing for defendant
commencing work in Spring 1852 & contin-
uing until sometime in Spring of 1853 -
worth from \$300 to \$350 - the work done on
a tract Defendant proved that the work
was done under a contract in writing
as follows -

Oct Term
1853 -

Pl^{ffs} proof

Article of agreement made between Wm
Stummell & Samuel Holmes. witnesseth
that Stummell agrees to clear, grub and
pile the brush, all to be done in good order
on all the land South of the road
from Sandy Creek-bridge to John
Forster's That William White ^{Esq} of Edward Evans
to be done and completed by the
1st day April 1853 - Holmes agrees
to pay Stummell \$278.00 for the same
\$50 when the work is half completed
and the balance when done and
completed - Dated Apr 13th 1852

Wm Stummell
Sam^l Holmes

Defendant then proved - that on said land
there was a ravine running from the South
west to the North east thro the same -

That along the whole line of said ravine
at the time of trial were still standing brush
& bushes ~~and~~ which were on the land at the time
of the contract - & remaining ungrubbed and
that to grub and pile the same would
be a considerable job & require atleast a
months labor -

Defendant then offered to prove that "to
clear" land required that the trees as well
as the bushes should be taken down and

cleared away" - which evidence so offered was excluded by the Court & defendant except

Defendant then offered to prove that upon said land there were at the time of the Contract a large number of growing forest trees of various sizes from six inches in diameter upward and that said trees were at time of the trial still standing upon the land and not cleared off - This was excluded by the Court and defendant excepted -

Plaintiff then proved (with the leave of the Court defendant objecting) that it was not usual in that neighborhood to grub such ravines -

That plaintiff began the job near the S.W. corner of the land on the east side of the ravine and worked to the North & East until he had grubbed over all of the land lying east of the ravine except about one acre on S.E. corner - That he then began near the S.W. corner of the land on the west side of the ravine and grubbed over all the land west of the ravine - leaving the ravine untouched - that after that he grubbed over the acre left as aforesaid on the S.E. corner - and that at the time plaintiff commenced work on the west side the ravine Holmes resided about 80 rods from the premises and continued to live there until plff

quit work

Defendant proved - that plaintiff had three witnesses "that defendant wanted him to grub out the ravine but that he plaintiff would not do it" - That while the grubbing was going on defendant complained to plaintiff that "he was not doing the grubbing clean enough" -

And that after plaintiff had done all the work he did do - except grubbing the last acre defendant insisted (to some men plaintiff had sent to examine & see whether he had performed the contract or not) that plaintiff had not completed his job and among other things specified the bushes along the ravine that were not grubbed

Defendant proved payments to the amount of \$18.00 - Contract price \$278 - ~~verdict~~ 193.19

The court instructed the jury that -

The contract did not require plaintiff to clear the land - and the jury should not take into consideration the matter of clearing trees

That the plaintiff was bound by the contract to grub all the bushes - as well those on the line of the ravine as those on the plain land. That if however the jury believed from the

- 1st evidence - that it was not usual in the neighborhood to have such ravines grubbed - &
2nd defendant knew it - &
3rd that defendant knew at the time (that plaintiff passed over the ravine and began to grub on the east side) that plaintiff was leaving the ravine ungrubbed - &
4th that it is probable from the usual manner in which such work is done that plaintiff would have grubbed out the ravine as he went along unless plaintiff had consented to his leaving it ungrubbed.

The jury might infer from such circumstances that plaintiff defendant had waived so much of the contract as required plaintiff to grub along the ravine &

If at any time in the progress of the work defendant consented that plaintiff need not grub the brush on the ravine - He could not afterwards require the plaintiff to grub the brush on the ravine even tho such demand were made by defendant before the plaintiff had quit work

Defendant ~~excepted~~ excepted
Exception to decision overruling motion for a new trial

Points -

- 1st The contract was entire (and after receiving the first payment of \$50-) plaintiff could not recover until he had performed in full - Eldridge vs Rowe 11 Gil. 93.
- 2nd There is no evidence tending to prove a waiver.
- 3rd The waiver if any was without consideration - & at any time before pl^{ff} had suffered any inconvenience from it he had a right to retract it & did.
- 4th The contract required plaintiff to clear the land - if not the word "clear" is surplusage and has no effect. The comma ought to be put in after the word "on" - and the meaning of the parties was - he shall clear ^(all the land) - grub ^(all the land) and and pile the brush ^(all the land) on, ^(all the land). Thus the sense & the grammar for once concur & effect is given to every word - otherwise it makes nonsense -

~~The court admitted improper evidence~~
Excluded proper evidence
The instructions are not law
I have no evidence to rest upon
The verdict ought to have been set aside -

Supreme Court. Ill. June Term 1854
Saml Holmes }
vs Stummell } appeal from Marshall

Argument of J. L. Dickey for
the appellant -

The first question that arises is
what is the true construction of the
Contract - Stummell undertakes
to "clear grub and pile the brush on
a given area of land, on which at the
time of the contract was standing &
growing bushes. small trees and larger
trees - The appellant insists that
this is a contract to clear the land
to grub the land and pile the brush
on the land - and officers by proofs
show that the clearing of land was a
term known in that business and em-
braced the taking down of the trees
as well as the bushes -

The Court held - that the contract was
to clear the brush - to grub the brush
and to pile the brush found on the
land -

The first is the literal grammatical con-
struction of the sentence and is sen-
sible and every word is thus made
effective - Simply cutting off the grub
would fulfil the word clear -

the word grub however is ~~addess~~ and imposes the additional duty of digging out such roots as are usually taken out in preparing ground for the plow and "pile the brush" imposes an additional duty (after the land is cleared - and grubbed) that of piling the material thus prostrated in a suitable condition for fire?

The other construction is tautological - the word clear is made superfluous - For if Stummel had nothing to do but to grub & pile the brush - why was the word clear put in the contract -

If it means to clear the brush and not clear the land - then the work is done by grubbing & piling - The word clear was put in for some purpose - and unless it means to clear the land - it serves no purpose and adds nothing to the ~~idea~~.

The construction we claim is the plain - unsophisticated common sense of the sentence - and among common people - no question would ever arise as to its meaning.

The word clear is in common use in connection with the word land - But all the writings of all people & speaking too may be unsuited in vain - for another

* No man ever before heard the expression "grub the brush" - but every one speaks of grubbing land -

instance of a man using the word clear in that connection with the word brush - *

2nd "Clearing and grubbing are terms relating to the trade or business of preparing land for agricultural purposes - and for that reason it was competent that we should prove lay men of that business what was its meaning and import - which privilege was denied us & in that the Court erred -

3^d - It was ~~error~~ - to allow plaintiff to prove that 'such levines' were not usually grubbed - in that neighborhood - Holmes had a right to have his land prepared in an unusual manner if he chose to pay for it and a man contracting to do it - was just as much bound to do it as if it had been usual -

4th - The court erred in directing the jury that they might infer a waiver from the circumstances of the case - In the first place Stummell under the Contract had the right to do the work in whatever order he pleased - And if in the progress of the work he quit one part of the land and went to work at another - Holmes had no right to object and no inference is to be drawn against a

See Bill of exceptions - pages 24 & 25 - record

man for not speaking - when he has no
right to speak and was not called upon
to speak - Again the proof does not
show that he did not speak - on the
contrary Stummell told one witness
that Holmes wanted him to grub
the ravine but he Stummell would
not do it - No man ever conceived
the idea that Holmes had waived
the performance of the contract so
far as grubbing out the ravine - until
it was suggested on the trial by
the Circuit Judge - The parties - the
witnesses & the counsel on both sides
were in blessed ignorance of that
waiver until that time - and it
existed then only in the imagination
of the judge until he created it
in the minds of the jury - in the
same manner that the way made
the crowd acknowledge that they
did see something like a dragon
in a clear sky, by asking the ques-
tion "Dont you see it?" "Why
dont you see it?" - If it is was
not usual to grub such places - at all
it could not be that there was "the usual
manner in which such work is done"
referred to in the instructions of the Court -

The Court permits plaintiff - for the purpose
of showing a waiver ^{to page 26} that the job was
one not usual - and then without
any proof that such a job had ever
been done before - directs the jury
to infer from the manner in which
such unusual work is usually
done - that ~~that~~ Holmes waived
its performance - without letting
the defendant know, what was that
peculiar usual manner of doing
unusual work - from which such
an inference should be drawn.

The defendant & his counsel are to
this day in ignorance on this point
~~They know they were slain and~~
~~by whom - but they can not see~~
~~how it was done - or precisely~~
~~upon what metaphysicals such~~
~~absurd contradictions can rest -~~

The court tells the jury that the mere
silence of Holmes (by the way there is no
proof he was silent) would not relieve Holmes
Stummell from grabbing the ravine - but
they are authorized to infer Holmes waiver
from the fact that Stummell did not perform
that part of the work - if they believe
that Stummell would not have left
it undone without Holmes agent"

This to my mind is just as good logic and
no better - but of the same kind with that
of the justice of the Peace - who gave
judgment in favor of a plaintiff -
without proof - upon the ground that
"he believed it was probable that the
plaintiff would not have sued the
defendant unless the defendant owed
him the amount sued for"

If ~~the jury believe~~ ^{says the Court} it is probable "from
the usual manner such work is done"
^{that plaintiff} would not have left that part of the work
undone - unless defendant had consented
thereto - then jury are to infer that Holmes
did asent" - So

If ^{says the justice} it was probable from the usual
manner such business is conducted -
that plaintiff would not have sued
defendant unless defendant owed
him - the ^{inference} ~~fact~~ is to be drawn
that defendant did owe plaintiff -

Establish the precedent that the
failure of a party to perform a certain
part of his contract - is to be considered
as evidence tending to prove that
the other party waived such per-
formance - and waivers will be
proved in every such case -

The next position we take is that if while the work was in progress and unfinished - Holmes did consent that he would accept the work, without having the bushes along the ravine grubbed out - yet if before the work was finished - and before Stummell had suffered any inconvenience from such ~~apart~~ consent - and there being no consideration for such consent or promise - Holmes had a perfect right to retract such promise or consent and insist upon its full performance - And this was done for Holmes so insisted to the agents of Stummell whom he had sent upon the ground to examine ^{for him} and see whether the work was all done - And after this the acre which had been left on the S.E. corner of the land was grubbed by Stummell.

The verdict ought to have been set aside. This is a much stronger case than the case of Eldridge vs Rowe 2nd Gilman 93. In that case - Rowe had agreed to work for Eldridge for 8 months for \$90 - After working about ~~five~~ ^{four} months - he suspended work - Eldridge then made

Rowe three propositions

- 1st That he might work out his time himself.
- 2^d That he might get another hand to do so -
- 3^d That Eldridge would pay him \$30. for what he had done - and Rowe agreed to let him know that day which he would do -

Within the time limited Rowe sent a messenger who informed Eldridge that "he would not work any more for him"

In that case the Supreme Court decide that Rowe could not recover any thing for his labor -

Now if the Supreme Court had been deceived of a tythe of the genius exhibited by the Circuit Court in the case at bar in "implying waivers" it seems to me they would have said that Eldridge had waived the entirety of the Contract - that it was probable that if he had not made those propositions Rowe would have gone back to work or they would have presumed that when Rowe sent word that he would work no more - he accepted the offer of \$30, for what he had done

The judgment cannot be affirmed in this case without direct conflict with

the case of Eldridge vs Rowe -

J. L. Dickey
atty for appellant -

Holmes

Stummell

Abstract of record
& argument for
appellant by
J. L. Dickey

Holmes vs Sturmsell - appeal
from Marshall

And now comes said Appellant by
T. L. Dickey his attorney and says
there is manifest error in the record, jud-
gment and proceedings herein affirmed
to the injury of the appellant and
that the said judgment ought to
be reversed - and for special
grounds & points of errors points out
the following -

The court erred in admitting improper
evidence against appellant

The court erred in excluding proper
evidence offered by appellant -

The court misdirected the jury -

The court erred in refusing to
grant a new trial to appellant -

T. L. Dickey
for appellant

And the said ^{appellee} ~~defendant~~ in errors comes
and says that in the record & proceedings
aforesaid is no error & he prays that
said judgment be affirmed

B. C. Cook
att^y for ^{appellee} ~~def~~ in errors
appellee

Samuel Holmes

Williamth Stumull Appeal from Marshall

The first point made by appellant is upon the construction of the contract

It is said the words, "clear grub and pile the brush on the land," mean clear the land grub the land & pile the brush on the land

This is clearly not the grammatical construction of the words. The grammatical construction of the sentence is, clear the brush pile the brush, & grub the brush, on the land, this is the clear meaning & construction of the language. By no rule of construction with which I am acquainted can the words be made to read "clear the land," it might unless the meaning is "clear the brush," it must necessarily be "clear on the land," what are the reasons urged why the court should disregard the plain grammatical construction of the word & give to them another meaning And here I admit that if the meaning of the parties is clear it must govern regardless of grammatical construction, what I insist is that the court will take the grammatical construction of the sentence unless it is plain that would do violence to the intent of the parties. It is said that the contract is a contract to clear the land. Because

- 1st it is the literal grammatical construction of the sentence

- 2 That the construction is tautologous the word clear is made superfluous

3^d If it means to clear the brush and not clear the land that can be done by grubbing & piling

4th The word clear is used in connection with land & not in connection with the word brush.

I propose to answer these in their order. As to the 1st proposition it is simply untrue that the grammatical construction of the sentence is clear the land &c. it is apparent on inspection that such meaning can not be given to it without interpolating a word suppose the sentence had been "cut split and haul the wood on the land, would the grammatical construction be cut the land split the land & haul the wood. If it would be in one case it would in the other.

But it is said my construction is tautologous. The word "clear" is made superfluous, that clearing the brush could be done simply by grubbing & piling the brush. Let us look at this

In this country where grubbing is necessary it is usually where a thrifty under growth has sprung up (from the fire being kept out) among scattering trees. to fit the land for the plough requires that the larger growth of bushes be cut down and their roots which would obstruct a plough to be dug out there remains then after there are grubbed a smaller & younger growth which together with the smaller kind of bushes such as hazel (whose roots are so obstinate to the plough) are mown with a scythe or bush hook

To clear the brush is to cut it all down large & small, To grade is to dig out such roots as are an obstacle to the plough, grubbing the brush then is not clearing it.

As to the 4th reason. I answer it is simply an unwarranted assumption the phrase clear the brush, is in as common use (and more so in this country) as clear the land,

I propose to show that the construction given by the appellant is not the construction given by the parties. If it means to clear the land, what does it require not merely as Judge McKinney insists to cut down the trees but something more either to remove them from the land, or burn them, land is not cleared when the trees are cut down & left lying where they fell. Now in this prairie country timber is never burned simply for the sake of destroying it, it is far too valuable that what was to be done with these trees if there were any to be cut down, they must be taken off to clear the land, when should Stimms take them, the contract is silent it would not have been if there had been trees to have been cut down.

3 At no time did Holmes pretend that these trees were to be cut down, when he said about the time the sale was completed that Stimms had not cleared the brush ~~the~~ he did not say Stimms has not cut the trees no complaints of that sort this is palpably an after thought of counsel. If when Stimms sent a man to see if the sale was done & Holmes told him

the ravine was not grubbed and insisted upon that as a reason for not paying, why did he not also say the land is not cleared it is palpable there was no such agreement

3 As to the 3^d point made by appellant I answer it was not competent for appellant to prove what was meant by the phrase "to clear land for timber had not contracted to clear land but to clear brush on certain land,"

3 There was no error in allowing p^lty to prove that the universal custom of the country was not to grub or clear the brush in such ravines

3^d Because p^lty might show that he had substantially complied with his contract & if a few bushes in a deep narrow ravine remained that it was no loss or damage to deft and that the contract was substantially complied with

3 It was proper for the reason that a knowledge of the custom of the country was necessary in the construction of the contract, a universal custom was a part of the contract. The Court is to give such effect to this contract as the parties intended, in ascertaining this intention the circumstances of the parties & the customs of the country in reference to which they are presumed to have acted 8 Ham 325

2 Cow 195 11 Mass 302 3 Hair 429 2 Ship 233
8 Mass 214 11 Pick 154 8 Greenleaf 32 16 Conn 192
10 Mass 379 4 Dallas 345 11 Verm 583, 10 Verm 865

3^d It was proper for the reason assigned by the
it was evidence proper to go to the Jury from
which they might (not must) infer a waiver
of so much of the contract. To illustrate
I am erecting a building by contract. The contract
says, the windows shall be fitted with weights
& pullies, the cellar windows have no weights
and pullies. I see the contractor may be not
prove 1st that weights & pullies are never put into
cellar windows in this country, 2^d that the cellar
windows are as good without them.

3^d that when the cellar windows were put in
I stood by & saw them & made no complaint
till the house was done, might he not have
this evidence go to a Jury as tending to show
a waiver of so much of the contract as requires
weights & pullies in the cellar windows

So in this case we show 1st This was a narrow
deep ravine when the water washes, 2^d It would
be no advantage to the land to clear the brush
in that ravine 3^d The universal custom of
the country is, ^{not} to clear the brush in such a
ravine 4th when ptly in clearing come to
this ravine he worked up to it. Then crossed
it & worked from it & this was known to
deft & he remained silent making no
objection (Judge Sickley says there is no
proof of his silence we prove it by the record
it is perfectly silent as to any complaint
by him) is not all this evidence tending
to show that deft did not insist upon
having the brush in the ravine cleared
& grubbed, & as such properly left to a

Jury and that the Court will not disturb
their finding

1st If Holmes did while the work was progressing
consent to accept the work without having
the ravine cleared and it was so arranged
between Holmes & Stummel & the arrangement
was that Stummel was not to clear the
ravine nor be paid for so doing
The assent of Stummel was a good consideration
for the assent of Holmes, and afterwards
neither party alone could establish the
original Contract Holmes could not compel
Stummel to clear the brush in the ravine nor
could Stummel do so without the assent
of Holmes & compel payment. I don't
think this needs argument.

The Jury found upon the evidence that the
contract was completed according to
the understanding of the parties and
allowed to plaintiff the contract price
deducting what was proven to be worth
to clear the brush in the ravine,

It is evident that the parties did not understand
that the brush in the ravine were to be cleared

That it was never done in the country
That it would be no advantage to have it
done and it is a mere pretext set up in
the Court below for the first time to cheat
deft out of his pay for his summer labor

There being Evidence tending to prove
the state of facts claimed by ptty and
the Jury having found in his favor
I insist that the Court can not ~~in~~
without a violation of well settled
rule of law in this state set the Jury
aside

The Case is not at all like the case
of Eldridge vs Rowe it is not a case where
the Jury endeavored to enforce an unfinished
contract, but where all the facts show
either that the clearing the brush in the
ravine was no part of the contract or
the Jury were told that they should pass upon
the question whether so much of the contract
as was of no benefit to the defendant had
not been waived. Had not the plaintiff
a clear right to have this question passed
upon by the Jury

B. B. Cook

atty for appellee

Volmer & Simmell

Argument of Pelletier

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Land. Holmes
by
Wm. Sturges

12376

Prepared