No. 12308

Supreme Court of Illinois

Stummel.

---

vs.

Holmes.

Pleas before the Honourable Circuit Court of Marshall County, in the State of Illinois, at a term thereof begun and holden at the Court-house, in the Town of Lacon, in the 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 Honourable Edwin S. Leland, Judge of the Ninth Judicial Circuit Court of the State of Illinois; William H. L. Wallace, State's Attorney; Greenberry L. Fort, Clerk; and Henry L. Crane, Sheriff.

Be it remembered, that heretofore, to wit, on the first day of September, A. D. 1853, came the Plaintiff, by E. B. Ames, his attorney, and filed his praecipe for summons, which is in the words and figures following, to wit:

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

Praecipe. William Stammel. vs. Samuel Holmes. } Assumpsit. Damages $300.00

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 dont recollect), directed to Sheriff of Marshall Co. Also send me a subpoena to Putnam Co. for Peter Fogle, and much oblige Respectfuly yours,

E. B. Ames, Atty. for Plff.

[12908-J]

And on the back of which is the following endorsement:
Wm. Stummel, vs. Saml. Holmes. — Prec. — Filed Sept. 1st,
1853 — G. L. Fort, Clerk.

And afterwards, to wit, on the 24th day of September, A.D. 1853, came the Plaintiff, by E. B. Ames, his attorney, and filed his Declaration in this cause, which is in the words and figures following, to wit:

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

Declaration.

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 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, 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); he, the said Defendant, to pay him the same 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. 10th. To grubbing & piling the brush,
and clearing done on fifty acres of land, $300.00

" " To work & labor done, 300.00

And on the back of which is the following endorsement: Marshall Cir. Court, Oct. Term, A. D. 1853. — William Stummel, vs. Samuel Holmes. — Declaration. — Filed, Sept. 24, 1853. G. L. Fort, Clerk. — E. B. Ames, Plff's. Atty.

And on the 20th day of October, A. D. 1853, comes the Defendant, by T. L. Dickey, his attorney, and files his Plea in this cause, which is as follows, to wit:

Plea. State of Illinois, Marshall County & Circuit Court, Oct. Term, 1853.

Saml. Holmes, adt. 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 on the back of which is the following endorsement: Stummel, vs. Holmes. — Plea. — Filed, October 20, 1853. G. L. Fort, Clerk.

And on the 20th day of October, A. D. 1853, comes the Defendant, and files an affidavit in this cause, which is as follows, to wit:

Affidavit. State of Illinois, Marshall Circuit Court, Oct. Term, 1853.

Wm. Stummel, vs. Samuel Holmes. } Assumpsit.

Said Samuel Holmes, being duly

(2308-9)

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 affiant believes that the costs now accrued and to accrue could not be collected from him on execution, if judgmt. were rendered against him therefor.

Subscribed & sworn to before me, this 20th Octr, 1853. G. L. Fort, Clk. By G. O. Barnes, Deputy. } Samuel Holmes.

And on the back of which is the following endorsement:

Wm. Stummel vs. S. Holmes — Affidavit — Filed, Oct. 20th, 1853. G. L. Fort, Clk.

And on the 20th day of October, A. D. 1853, comes the Plaintiff, by his attorney, and files a Bond for Costs in this cause, which is as follows, to wit:

Bond for Costs.

State of Illinois, } In the Marshall Circuit Court.
Marshall County, } To the Oct. T. thereof, A. D. 1853.
William Stummel, } Assumpsit. Damages claimed, $300.00
vs. } I, Eli B. Ames, do hereby enter
Samuel Holmes. } myself security for costs in this case, and acknowledge myself bound to pay the same to the officers of this Court and the opposite party, as far as the said Plaintiff may become liable to pay the same. Given under my hand at Lacon, this 20th Day of Oct., A. D. 1853. E. B. Ames.

And on the back of which is the following endorsement:

Marshall Cir. Ct. – Oct. T. thereof, A. D. 1853. – William Stummel, vs. Samuel Holmes. – Security for costs. – Filed, October 20th, 1853. – G. L. Foot, Clerk.

And on the 20th day of October, A. D. 1853, comes the Defendant, and files his Bill of Discovery under oath against the said Plaintiff, which said Bill is as follows, to wit:

Bill of Discovery.

To the Hon. E. S. Leland, 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 labour done in grubbing and clearing as 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 Wm. White.		A. $1.65
	50 lbs. of flour, " "		A. .87
May, 1852.	2 bushels potatoes, "		A. 1.50
	13½ lbs. meat, "		A. 135
	100 lbs. flour, "		A. 1.75
	Tea, "		A. .25 7.37
	103 lbs. pork, "		10.30
July "	100 lbs. flour, "		A. 2.25
Aug. 12th, 1852.	Cash,		A. 5.00
Sept. 1st, "	Cash,		5.00

[1230B-4]

Oct. 6th, "	Cash,	10.00	*
Nov. 1st, "	Cash,	20.00	
Dec. 14, "	Cash,	A. 30.00	
March 16th, 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, 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~~ember~~ 1852, five dollars in cash; and nor 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.

T. L. Dickey, Solicitor. } Samuel Holmes.

Subscribed & sworn to before me, this 20th day of Oct., 1853.

G. L. Fort, Clerk.

And on the back of which is the following endorsement: S. Holmes, vs. W. Stummell. — Bill of Discovery. Filed, 20th Octr., 1853. — G. L. Fort, Clerk.

And on the 21st day of October, A. D. 1853, comes the Plaintiff, and files his Answer under oath to the aforesaid Bill; which said Answer is as follows, to wit:

Answer.

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 Complainant's 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 Sept., A. D. 1852, as the Complainant hath alleged 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 charged 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; which payments admitted are not a part and parcel of payments charged on the 12th day of August, and the 14th day of Decr, A. D. 1852.

[12308-5]

And now, having fully answered the Complainants bill, this respondent asks to be discharged with his costs.

Ames & Purple, Sols. for Deft. } Wilfulm Stummel.

Suscribed & sworn to before me, this 21st day of Oct., 1853.

G. L. Fort, Clerk.

And on the back of which is the following endorsement:

Marshall Circuit Court. Oct. T. thereof, A. D. 1853.

Samuel Holmes, vs. Williams Stummel. — Answer of Deft.

Filed, Oct. 21st, 1853. G. L. Fort, Clerk.

And on the 26th day of October, A. D. 1853, being one of the days of said Term, the following proceedings were had in said cause, to wit:

Verdict.

William Stummel, } Assumpsit.
vs. } Oct. 26th, 1853.
Samuel Holmes. }

Be it remembered, that this day this cause comes on to be heard and tried; the Plaintiff comes in person and by C. B. Ames, his Atty., as well as 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. Letter, Hanson Bonham, William Bonham, Elias Love, Robert Davis, John Black, William Callen, Chancey Gaylord, James B. Welch, Henry Miller, Joshua D. Bullman and Jonas L. Ball, twelve good and lawful men, duly chosen, tried, empannelled and sworn herein according to law; and the ~~jury~~ 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 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.

And on the 29th day of October, A.D. 1853, being one of the days of said Term, the following judgment was rendered in said cause, to wit:

Judgment.

William Stummel, 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, it doth order, that the same be overruled. It is therefore considered and adjudged by the Court, that the Plaintiff have and recover of and from the defendant the sum of

$193.13

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. Lickey, Atty. for the 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. tenders his bill of exceptions, and the Court

takes time to consider and settle the same.

And on the 10th day of November, A. D. 1853, comes the Defendant, by his attorney, and files his Bill of Exceptions aforesaid, which is as follows, to wit:

Bill of Exceptions.

State of Illinois, Marshall County, ss. Circuit Court thereof, October Term, 1853.

William Stummel, vs. Samuel Holmes. } Action of Assumpsit.

Be it remembered, that on the trial of the issue in this case, the plaintiff proved that he had done grubbing for defendant, having commenced 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 labour done was worth from three hundred to three hundred 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 Foster's, being the same land bought of Edmond Evans by William White. Here plaintiff rested his case.

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 Foster's, that William White bought of Edmond 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 dollars when the work is one half completed, 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.

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 clear 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

[12308-7]

of the ground, without the roots being grubbed out; and that in their opinion it would cost half as much labour 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 down and cleared away," to which the plaintiff objected; which objection was sustained 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 a large number of ~~forest~~ growing forest trees of various sizes, some large and some small, from six inches in diameter and 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 quality 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 neighbourhood 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; same witnesses testified that some appeared to have been cut off by a scythe, and ~~that they~~ 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 neighbourhood 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 ~~terms of the~~ contract; that by the terms of the contract the plaintiff was required to grub the brush along the ravine; but that the evidence was admissable for another purpose, viz, that it was competent as evidence tending to prove that defendant, if he knew that such was the custom, 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 neighbourhood to grub such ravines; and plaintiff did prove that fact. To which decision of the Court, in 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, except about one acre which lay

on the outside 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 he 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, some time in the month of April, 1853, after grubbing over all the ground on the west side of ~~the~~ 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's witnesses, who had said the grubbing was done as well as common, he testified that within the 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 he, 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 of the object of their visit, insisted 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 having 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 plaintiff, testified that the ravine spoken of was a narrow wash, at some places so deed as not to be passable by a horse, and up towards one end it might be crossed by a horse or wagon; that it was subject to periodical washing, so that grass could not be

raised to advantage, and that it was unfit for cultivation for grains. One witness said the grubbing out of the bushes along the ravine he would regard no benefit 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 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 neighbourhood to have such ravines grubbed, and that deft. knew it, and that defendant knew (at the time that plaintiff was passing said ravine, in the progress of the work, and 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 afterwards legally require of plaintiff to grub the brush along the ravine, even though 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 and 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 though 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, defend-

[12303-41]

ant 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.

C. S. Leland, Seal

Judge of the 9th Jud. Dis.

And on the back of which is the following endorsement: Stummel, vs. Holmes.—Bill of Exceptions.—Filed, November 10th, A. D. 1853. G. L. Fort, Clerk.

And on the 11th day of November, A. D. 1853, comes the Defendant, and files his Appeal Bond in this cause; which said Bond is as follows, to wit:

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 Stummel, 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 Stummel, by the consideration and judgment of said Court, recovered judgment in said Court against the above-bounden Samuel

Holmes, for the sum of one hundred and ninety-three dollars and thirteen cents, and costs of suit; from which judgment 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 judgment, costs, interest and damages thereon, in case said judgment shall be affirmed by said Supreme 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 Burns. Seal

And on the back of which is the following endorsement: William Stummel, vs. Samuel Holmes. — Appeal Bond. — Filed, November 11th, A. D. 1853. G. L. Fort, Clerk.

[12308-12]

A Record of the orders, judgments, decrees and proceedings of the Circuit Court of Marshall County, in the State of Illinois, begun and holden at the Court-house, in the City of Lacon, in said County, on the Seventeenth day of October, in the year of our Lord one thousand eight hundred and fifty-four.

Present, the Honorable Edwin S. Leland, Judge of the Ninth Judicial Circuit of the State of Illinois; Henry L. Crane, Sheriff; and Greenberry L. Fort, Clerk.

Be it remembered, that heretofore, to wit, on the 10th day of October, A.D. 1854, the following Record from the Supreme Court of the State of Illinois was filed in this cause, to wit:

Order remanding cause.

At a Supreme Court, begun and held at Ottawa, on Monday, the 12th day of June, in the Year of our Lord one thousand eight hundred and fifty-four, within and for the Third Grand Division of the State of Illinois,

Present, the Honorable Samuel H. Treat, Chief Justice,
" " John D. Caton, Associate Justice,
" " Walter B. Scates, " "

Friday, August 4th, 1854.

Samuel Holmes
83 vs. } Appeal from Marshall.
William Stummel.

On this day came again the said parties, and the Court having diligently examined and inspected, as well the Record and Proceedings aforesaid, as the matters and

things therein assigned for Error, and being now sufficiently advised of and concerning the premises, are of opinion, that in the Record and Proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest Error: Therefore, it is considered by the Court that, for that Error, and for others in the Record and Proceedings aforesaid, the judgment of the circuit court in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be Remanded to the circuit court for such other and further proceedings as to law and justice shall appertain. And it is further considered by the Court, that the said Appellant recover of and from the said appellee, his costs by him in this behalf expended, and that he have execution therefor.

I, Lorenzo Leland, Clerk of Supreme Court of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order, & the attached is a true copy of the opinion of the said Supreme Court, in the above entitled cause, of record in my office.

In Testimony Whereof, I have hereunto set my hand, and affixed the Seal of the said Supreme Court, at Ottawa, this 4th day of October, in the year of our Lord one thousand eight hundred and fifty-four.

Seal.

L. Leland, Clerk of the Supreme Court.

By P. K. Leland, Depy. Clk.

And on the back of which is the following endorsement: William Stummell, vs. Samuel Holmes.— Order remanding

cause from Supreme Court, & Opinion of Court.- No. 100.
Filed, October 10th, 1854. G. L. Fort, Clerk.

And on Saturday, the 28th day of October, A. D. 1854, being one of the days of said term, the following order was made in this cause, to wit:

Order for continuance.

William Stummel, vs. Samuel Holmes. } Be it remembered, that this cause is this day continued to the next term of this Court.

[12308-14]

A Record of the orders, judgments, decrees and proceedings of the Honourable Circuit Court of the County of Marshall, in the State of Illinois, at a term thereof begun and holden at the Court-house in and for said County, at the City of Lacon, on the fifth day of February, in the year of our Lord one thousand eight hundred and fifty-six, held in pursuance of an order entered upon the records of this Court at the last regular term of this Court.

Present, the Hon. Madison E. Hollister, Judge of the Ninth Judicial Circuit of the State of Illinois; Wm. H. L. Wallace, State's Attorney for said Circuit; Greenberry L. Fort, Clerk, and by Jas. St. C. Boal, deputy; and Abraham Gardner, Sheriff, and by H. L. Crane, his deputy.

And this cause having come on for trial, on Tuesday, the 12 th day of February, A. D. 1856, being one of the days of said term, the following are the Instructions given by the Court on behalf of the Plaintiff, to wit:

Plaintiff's 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, workmanlike 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 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 not to make any deduction in consequence of said ravine not being grubbed.

Given.

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 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.

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 he has shown that he has complied with the same.

Refused.

(12308-15)

And on the back of which is the following endorsement:

Stummel, vs. Holmes. — Plff's. Insts. — Filed, Feb. 12, 1856.
G. L. Fort, clk.

And the following are the Instructions given by the Court, at the time aforesaid, on behalf of the Defendant, to wit:

Defendant's Instructions.

Stummel, vs. Holmes. } Instructions asked by Defendant.

1st. That if the jury believe from the evidence, that the grubbing for which the Plaintiff has sued was done under a written contract, that the Plaintiff can not 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.

Given.

2. That if the jury believe from the evidence, that there was a written contract, under which the work 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.

Given.

3rd. 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.

Given.

4. That where there is a written contract in relation to work, - or any other matter - the parties must

sue on such written contract, and can not sue in the present form of action, unless such contract has been violated by one party, and rescinded by the other, or rescinded by the mutual agreement of the parties, founded upon a valid consideration.

given.

And on the back of which is the following endorsement: Wm. Stummel, vs. Saml. Holmes. – Deft's. Instructions. – Filed, Feb. 12th, 1856. G. L. Fort, Clerk.

And on Tuesday, the 12th day of February, A.D. 1856, being one of the days of said Term, the following Record was made in said cause, to wit:

Verdict.

William Stummel, 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 A. Green, David Verney, John D. McVicar, Robert Clark, William Stratton, James Winters, Isaac Smith, Wm. Atwood, Russell E. Heacock, Levi Holmes, Randal Bates and E. Hoyt, twelve good and lawful men, duly tried, empannelled 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 favour 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

Remittitur. herein a remittitur 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

Judgment. 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, by his attorney, and prays an appeal to the Supreme Court; which appeal is allowed by the Court, upon the defendant entering into bond, with Joseph Holmes as his security, in the penal sum of six hundred dollars, within forty days from the adjournment of this term of this Court; said bond to be filed with the Clerk of this Court, within said time.

And on the day last aforesaid, the Defendant, by his attorney, comes and files the following Reasons for a new trial, to wit:

Reasons for new trial. Wm. Stummel, vs. Samuel Holmes. } In Circuit Court of Marshall County.

The Defendant enters a motion for a new trial in this cause, for the following reasons:

1st. The verdict of the jury is against the law & evidence.

2. The verdict is against the instructions of the Court.

3. The Court gave improper instructions, at the Plaintiff's request.

4. The damages are excessive.

Feb. 12, 1856. Purple, for Deft.

On the back of which is the following endorsement: Stummel, vs. Holmes. – Deft's. reasons for new trial. – Filed, February 12, 1856. G. L. Fort, Clerk.

And on the same day last aforesaid comes the Defendant, by his attorney, and files his Bill of Exceptions in this cause; which said Bill is as follows, to wit:

Bill of Exceptions.

William Stummel, vs. Samuel Holmes. } In the Circuit Court of Marshall County. Assumpsit.

Be it remembered, that on the trial of this cause, the Plaintiff, to maintain the issue on his part, produced as a witness, Thomas Wier, who testified that Plaintiff grubbed for Defendant about 50 acres of land, in 1852 & 1853, finishing about the 15th April, A.D. 1853, being something over a year in doing it; that the work was worth ten dollars per acre; that he heard no contract about the grubbing; that the land ~~th~~ ~~land~~ on which it was done was taxed to Sarah Holmes, the Defendant's wife; that Wm. White, Defendant's father-in-law, appeared to have possession of, and exercise control over, the land; that Stummel worked on the land after Defendant returned from California, and that Holmes knew of his doing so; (Holmes admitted that he was the owner of

5 12308-17

the land on which the grubbing was done;) that about a year after the land was grubbed, Defendant built a house on it.

On cross-examination, he stated, that on the land there was between 1 and 2 acres in a ravine not grubbed; that he saw a written contract in relation to the grubbing in the Plaintiff's hands; [that it, -the contract- was between William White, or Holmes' wife, and a man by the name of Ferguson]. The evidence in brackets was objected to by Defendant, having been called out by plaintiff; it was admitted by the Court, and defendant accepted to the admission of the same, at the time it was given. Witness further stated, that Stummel called on him, showed him the contract, and got him to go and look at the work "grubbing", to see ~~if it~~ whether it was done according to the contract; that the grubbing was well done.

Here the plaintiff rested.

The defendant, having given notice to the plaintiff to produce on the trial a certain contract in writing, a copy of which is incorporated into the bill of exceptions in this cause, and which is as follows: (see first bill of exceptions;) called as a witness, G. L. Fort, Clerk of the Circuit Court of Marshall County, who testified, that on a former trial of this cause in this Court, a written contract, in relation to the grubbing sued for in this action, was given in evidence by defendant; that he thinks, in making out the record for the

Supreme Court, he copied said contract into the record from the original, but of this he is not certain; that he has no recollection of having seen said contract since; and that he has searched among the records and files of his office, in all places where said contract would be likely to be, and can not find the same; that he thinks the copy above set out is in substance a copy of said contract.

Samuel Holmes, the defendant, was then sworn, and stated, that he saw said contract above referred to, and took a copy of the same, at the October Term, A. D. 1854; that after copying it, he returned it to G. L. Fort, the Clerk of the Court, and that he has not since seen it; that the same is not in his possession or power. The defendant then offered in evidence the copy of said contract contained in said Bill of Exceptions; the plaintiff objected, but the Court permitted the same to be given in evidence.

The defendant then called the said Thomas Weir, who testified, that the land mentioned and described in said contract was the same land which was grubbed by the plaintiff, and that said grubbing was well done.

Here the defendant rested.

The plaintiff then called Enoch Sawyer, who testified as follows: "I saw a contract in writing, about two years ago last April, between William White and James Ferguson, signed at the bottom of the

contract by Sarah Holmes. This one offered in evidence is not ~~the one I saw~~ a correct copy of the one I saw; the one I saw was the same one Wier saw. When we were together on the ground, Stummel showed me the contract. Stummel got me to go and see the land; I went at his request, and examined the land and the contract; this was in April, 1853. Holmes had hands there burning brush. There was from one to 1½ acres in the ravine not cleared or grubbed, when Stummel quit work; That it was worth from $15.00 to $20.00 to clear this out and grub it; that the grubbing done there was well done, and worth from $8.00 to $10.00 per acre."

Plaintiff next called Wm. Wear (?), who testified, that the contract, or supposed copy thereof, offered in evidence in this case, is not the contract that he saw, nor the one introduced in evidence on the former trial of this cause. On said former trial, the defendant introduced the said contract in evidence. This was done by Judge Dickey, the defendant's counsel, and was the only contract used on the said former trial.

Plaintiff next called Peter Fogle, who testified, that about middle of March, 1853, Holmes came to the place where Stummel was at work grubbing, and aked him how much he got an acre for grubbing. Stummel made no reply. Holmes asked him how many acres there were in the piece he was grubbing. Holmes said there were 55 acres in all; that an Irishman had grubbed 5 acres, and that and the ravine was to

go off from Stummel's grubbing; this was about the middle of March, 1853. Witness was a German, and stated that at the time of this conversation he had been about a year in the country, but understood English then about as well as now; that he had worked about a month for Stummel on the grubbing. (Said witness gave his evidence a portion of the time in English, and a portion through three interpreters.)

Defendant then called William White, who is his father-in-law, who testified, that he knew the land on which the grubbing was done; that he knew at the time of its being done; that he lived about a mile and three quarters from the place; that said grubbing was done under a written contract; and that the plaintiff was to have between two hundred and seventy and two hundred and eighty dollars for doing said work; that the work was not well done by one half its value; that before September, 1852, he paid plaintiff, towards said grubbing, between $15. and $20.00.

On cross-examination, he stated, that the way he knew the work was done under a written contract, was that he wrote the said contract himself. That such contract was between Holmes' wife and a man by the name of Ferguson, and signed by them; he believed Holmes' wife's name was to it.

Defendant then called Edward McKisson, who testified, that in April, 1853, he heard a conversation between plaintiff and defendant, on the ground where the grubbing was done; that Stummel said that

[12308-19]

Holmes' neighbours had told him that he, Holmes, would not pay him for his work, and he was going to quit next day. Holmes told him, Stummel, that when he had finished the grubbing according to the article, his money was ready for him. Holmes asked him to grub the ravine; he said he would not. Stummel, in this conversation, said Holmes had paid him between $90. and $100. dollars. Witness stated, he thought the plaintiff quit grubbing on Monday after this conversation, which was on Saturday, but of this he was not certain.

+ David Etinger, called by defendant, stated, that last April Term of the Court, Stummel said, as they – he, Holmes, Stummel and some other – were riding in to Court, that this lawsuit 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 contract, 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.

Theodore Kishner, called by defendant, testified, that he saw a part of the land, about 15 acres, on East side of ravine, after it was grubbed; that it was not well done; good many stumps left in it.

John Wear, called by the defendant, stated, that he had seen and examined the grubbing since it was done, and that in his opinion it was tolerably well done.

Defendant then gave in evidence the plaintiff's Answer to the Bill of Discovery, which is as follows: (See Bill of Discovery, ante.)

This was all the evidence.

The Court, at the request of the plaintiff, instructed the jury as follows: (See Plaintiff's Instructions, 1, 2, 3, 4, 5, ante.) To the giving of which instructions, the defendant's counsel then and there, at the time the same were given, objected and excepted.

At request of the defendant, the Court instructed the jury as follows: (See Deft's Instructions, 1, 2, 3, 4, ante.)

The jury found the following verdict: (See Verdict, ante.)

The defendant entered a motion for a new trial, for the following reasons: (See Motion and Reasons, ante.)

The Court overruled said motion; and the defendant's counsel then and there excepted to the opinion of the Court, in overruling said motion, and requested the Court to sign and seal this Bill of Exceptions; which is done.

M. E. Hollister. (Seal)

And on the back of which is the following endorsement:

Stummel v. Holmes — Bill of Exceptions — Filed, Feby. 12, 1856. G. L. Fort, Clerk.

{12308-20}

And afterwards, to wit, on the 5th day of March, A. D. 1856, came the defendant, and filed herein his Appeal Bond, which is as follows, to wit:

Appeal Bond.

Know all men by these presents, that we, Samuel Holmes, as principal, and Joseph Holmes, as his security, are held and firmly bound unto William Stummel, in the penal sum of six hundred dollars, current 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 March, A. D. 1856.

The condition of the above obligation is such, that whereas William Stummel lately, to wit, on the 12th day of February, A. D. 1856, recovered a judgment against the said and above-bounden Samuel Holmes, at and within the Circuit Court of Marshall County, in the State of Illinois, at the Special Term thereof then holden on the day last aforesaid, for the sum of three hundred dollars and the costs of suit; from which judgment of the said Circuit Court of said County, 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 Stummel, or his heirs, executors, administrators ~~or~~ and assigns, the amount of said judgment, costs, interest and

damages thereon, in case said judgment shall be affirmed by said Supreme Court, or upon the dismissal of this appeal, then, and in that case, this obligation to be void; otherwise to be and remain in full force and effect.

Entered into and delivered in presence of me, March 5th, 1856.
G. L. Fort, Clerk.

Samuel Holmes. (Seal)
Joseph Holmes. (Seal)

And on the back of which is the following endorsement:
Stummel, vs. Holmes.— Appeal Bond.— Filed, March 5th, A. D. 1856. G. L. Fort, Clerk.

State of Illinois } ss. I, G. L. Fort, Clerk of the
Marshall County, } Circuit Court for said County,
do certify, that the foregoing Record, from page 1 to page 41 inclusive, is a true and correct transcript of the papers on file, and the proceedings had, in the case of William Stummel vs. Samuel Holmes, in said Court.

Witness my hand, and the Seal of said Court, at Lacon, this 20th day of May, A. D. 1856.

G. L. Fort, Clerk.
By Jas. St. C. Boal, Deputy.

Clerk's fees
Transcript $12 50
Cert & 35
$12.85

[12308-21]

Samuel Holmes
vs
William Stewart } In Supreme Court

And now comes the said Appellant and says that in the Record and proceedings and in the rendition of the Judgment aforesaid there is Error in this.

1st. Said Court Erred in giving the instructions asked by Plaintiff below

2 Said Court erred in Overruling the Defendants motion for a new trial

3. Said Court Erred in giving Judgment for the Plaintiff on the Verdict of the Jury.

4. Said Court erred in not giving Judgment for the Defendant,

For this and other Errors appellant prays that said Judgment may be reversed Set aside & wholly for nothing Esteemed

Pugh for Appt.

June 11th 1856.

It is agreed by the attorneys of the Parties to this suit, that the instructions copied in the Record, the Reasons assigned for a new trial, and the answer to the bill of discovery referred to in the Bill of Exceptions, shall upon the hearing of this cause be taken and considered a part of the bill of Exceptions in the same manner as though they had been copied into said Bill of Exceptions

June 11th 1856.

J M Dimple
for Appellant
S L Richmond
for Appellee

[12308-22]

92

Stimmel

vs

Holmes

Filed June 10 1895

L. Leland

Clk.

12308