12266

No._____

Supreme Court of Illinois

Holmes.

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vs.

Stummel.

Samuel Holmes } In Supreme Court
vs
William Stewart } Appeal from Marshall

This is an action of Assumpsit brought by Stewart vs Holmes for clearing grubbing and piling the brush on fifty acres of land, as claimed in the first Count

The Second is for Work and labor generally.

Plea General Issue

Points.

1st. The Verdict was against Evidence

[illegible]

Q. The Testimony of the witnesses of both Parties proves beyond Controversy that the work was done under a written Contract

This was Either the Contract which the defendant gave in Evidence — Or another Contract which was proved to have been in the Possession of the Plaintiff.

3. Where Work is done under a Written Contract, the Plaintiff Can not recover in Assumpsit for Work and labor — at least Without producing or proving the Contract and Showing that its terms and Conditions, have been fully performed.

Instructions

4. The 1st 4th and 5th Instructions are wrong in Assuming, that the Defendant Must in order to Constitute a defence prove a Written Contract — thereby Negativing the Idea that it would amount to a defence if proved by the Plaintiff

The 2nd instruction is erroneous because it says that the Plaintiff was entitled to the Contract price of the Grubbing if it was done or well as such kind of Grubbing is usually done.

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The third (3rd) instruction is clearly wrong

It assumes that no deduction is to be made for not grubbing the Roots if Plaintiff's proof related thereto, without Regard to the character of the Contract of release

5. The damages are excessive.

6th When work is done under a written contract, no action can be maintained on the common counts unless the contract has been fully performed, or the contract rescinded by the mutual agreement of the parties — or by one of the parties for a failure of performance by the other.

2. Greenlf Ev. S. 104.

Samuel Holmes

vs

William Stevenson

Brief

Samuel Holmes
vs
William Stummell

The evidence shows pretty conclusively that the grubbing was not done under the contract read in evidence by the defendant -

The evidence on that subject is as follows:
Thomas Weir after testifying that the work was done by Stummel says; I saw a written contract in relation to the grubbing in plaintiffs hands - That contract was between William White or Holmes Wife and a man by the name of Ferguson - Witness said Stummell called on him, showed him the contract & got him to go and look at the work to see if it was well done

Enoch Sawyer testified that he saw a contract in writing between William White and James Ferguson signed at the bottom by Sarah Holmes, the one I saw was the same one Weir saw, when we were together on the ground Stummell showed me the contract - I went at Stummels request and Examined the Land and the contract

Wm Weir testified that the contract read in Evidence by defendant was not the contract he saw nor the one read in evidence by defendant on the former trial - From this evidence it appears very clearly that the Court will not set aside the verdict of the Jury because they found that the work was not done under the Contract -

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There is evidence enough to sustain the verdict so far as this contract is concerned.
The only evidence tending to show that this was the contract offered in evidence on the other trial was that of Fort who thinks but it is not certain that he copied the right contract in the bill of exceptions. It will readily occur to the court that an Error might easily be made by the Clerk if the bill of exceptions had been originally drawn without copying the contract but with (here insert).

Was the plaintiff below at work under Fergusons contract? not at all. There is no pretense that plaintiff was at work for Ferguson, and the fact that a contract was in Existence between Kolbines and Ferguson ~~and the fact~~ would not of itself prevent Stummell from recovering on quantum meruit, if it is true that Stummell showed the contract of Ferguson at the time when he called Frier to look at the land, this is not sufficient to show that Stummell was to be bound by all of Fergusons agreements. I conclude therefor that the jury might well find that the proof failed to show affirmatively that the grubbing was done under either of these contracts.

The 1st Instruction is objected to become because it is said that the said Instruction excluded the idea of work being done under a contract. To that I reply. 1st It is not pretended that the tract of land mentioned in eather contract exceeded fifty acres. Kolbines told Forge.

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(See Peter Foyles testimony) that the Land was 55 acres, and an Irishman (Ferguson probably) had grubbed five acres, leaving 50 acres for Stunnell to grub, there was no conflicting testimony on this point. Then the instruction means this, if the work was done the plaintiff ought to recover what it was worth, unless he had contracted for a less sum. This is the law even if the work was done under a special contract, for when a contract is performed payment may be enforced without declaring on the contract. I shall not cite Authorities on this point for I understand Judge Purple to distinctly admit this to be law.

That this is the construction to be given to the Instruction is apparent from the first Instruction given for Defts. That if the jury believe from the Evidence that the grubbing for which the plaintiff has sued was done under a written contract, the plaintiff can not recover unless the contract has been violated and rescinded. It can not be pretended that the Instruction can bear the construction placed upon it by Judge Purple without directly conflicting with the Instruction asked by Defts and given by the Court.

The 2d Instruction is law. It is not merely that the Pltff should recover if he has done the grubbing as well as such kind of grubbing is usually done as Judge Purple contends; but if plaintiff has done the grubbing in a fair workmanlike manner, and as well as grubbing is usually done

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As to the 3d Instruction of

The Evidence tends to show that it was not usual or advantageous to grub ravines such as this was. If the plaintiff did not require this ravine to be grubbed and told Stunmell that he need not do it, then Stunmell was not required to do it. And upon completing the grubbing as Holmes wanted it done, was entitled to recieve his pay, and the Jury ought not to deduct any thing from the price of what was done, for that reason, and that is what this instruction means.

As to the 5th Instruction:

The burden of proof is upon the defendant in this case, to show a special contract existing if he relies upon that fact to defeat a recovery upon a quantum meruit, and unless the deft did prove it the plaintiff would be entitled to recover what he had proved his work to be worth. It was not necessary that deft should prove it by his own witnesses but might prove it by the pltffs witnesses. And this instruction does not limit him to his own witnesses.

The Instructions for the defendant are not set out in the abstract, the Court is respectfully asked to look into these Instructions also for the purpose of determining the construction to be given to the instructions given for the pltffs below. And it is believed that it will appear that the law was correctly laid down by the Court.

All of which is respectfully submitted.
B. L. Cook Atty for Appellee.

[12266-T]

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Samuel Kobres
vs
William Stummell

argument for
Appellee

Filed June 24, 1895.
L. Leland
Clerk

B-b-book

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