

No. 14612

Supreme Court of Illinois

Curtis

vs.

Sage

STATE OF ILLINOIS.

SUPREME COURT,

THIRD GRAND DIVISION.

No. 71 2

J. W. Middleton & Co., Stationers, 196 Lake St.

14612

884
Curtis
vs
Sage
City

Supreme Court of Illinois

April Term 1863

Alfred S. Curtis

Plaintiff in error

vs

Horace L. Sage

Defendant in error

} An Error
from
Knox

It is hereby stipulated ^{and agreed} on the
part of the above named defendant in error
that the writ of error & deo facies in this
Case is waived and defendant's appearance
is to be ~~entered~~ without process —

Douglas Herzig

Atty for Deft & Error

J. F. Bost

att. put off in error

257 7/ 21

Went

Day

Disputation to raise

proceedings

Topic

Fri. Apr. 28, 1863,

Deland

Ch.

State of Minn. }
Thos Leonty } ss Thos Circuit Court

Horace & Sage }
Alfred S. Leonty } Error from Thos
to Supreme Court.

It is stipulated & agreed
that a suit was commenced against
the Plaintiff Horace & Sage in favor
of George A Hamilton in the Circuit
Court of the United States for the
Northern Dist. of Minn. at Chicago
for the recovery of the amount of
the note described in the Plaintiff's
declaration executed by the said
Plaintiff & Charles F Camp, & that
on the 23 day of May A.D. 1861
by the Conclusion of said Court a
judgment was rendered in said
Cause & in favor of said Hamilton
for \$1264 $\frac{43}{100}$ damages & Costs
amounting to \$33. $\frac{21}{100}$ & that on
the 28th day of September 1861, ~~said~~ ^{was satisfied}
~~said~~ ^{by} ~~Hamilton's~~ ^{to said} ~~judgment~~ ^{disposition} ~~of~~
the payment thereof. That on the
trial of this suit in the Circuit
Court the above facts were fully
proven by a transcript from
the Record & files of the Court.

in which Judgment was rendered
^{properly entered}
 & that since the trial of this Cause
 said Record has been lost or
 misplaced & this stipulation is
 made to supply the want of said
 proof in the Bill of Exceptions
 now certified into the Supreme
 Court, & this stipulation is to be
 regarded & have the same force
 & effect as though said proof
 was incorporated in the Bill
 of Exceptions as entered
 in the Record.

L D mylars
 for H. L. Sage
 Spt - in Error

April 1. 1860
 p. in Error
 254 v

H. L. Sage Spt
 in Error
 Stipulation

Filed April 27. 1860.
 J. G. Fort
 Clerk
 atty for H. L. Sage

Wm L. Curtis

vs Patton

vs L. Sage

vs Patton

State of Illinois

Supreme Court

April 7. 1843

It is agreed that this case
& all the points raised in the
Record shall be submitted
during the present term on written
Briefs

J. G. Cook

att. for Patton

Douglas Fleming

att. for L. Sage

²⁰⁷ 7/20
A. L. Curtis

L

H. L. Sage

Aggt to submit

Filed Apr. 28, 1863
Island
Ch.

The Court, on the trial, allowed the deed to be filed as a part of the count, and this is alleged for error. Defendant knew of this deed, for it was in his chain of title.

This was no surprise to the Defendant, for the count alleged the making of the deed, and gave the names of the parties thereto and the date; and, again, the other counts in the declaration were sufficient for a recovery without the 2d count.

14
15 In this case there is no plea but the general issue. In order to avail himself of the Statute of Frauds, it must be specially pleaded.

Thornton vs. Heirs of Henry; 2 Scam., 220.

Leer vs. Choteau; 23 Ill., 39.

Comstock vs. Ward; 22 Ill., 248.

School Trustees vs. Wright; 12 Ill., 440.

Sartzer et al. vs. Skiles; 3 Gilman, 534.

Tarleton vs. Victes; 1 Gilman, 473.

Tibbs et al. vs. Allen; 27 Ill., 118.

It is insisted that Sage took a deed from Curtiss, agreeing to pay incumbrances, and had not done so, there being due Knox \$2,000. There was no proof that the contracts were mutual and dependent. The Defendants proved by Mr. Camp the admissions of Sage; and on cross examination as to same admissions it appeared that the trades were separate and distinct, one from the other. It would have been improper for the Court to have instructed the jury that the Plaintiff could not recover unless the proof showed that Sage had paid Knox. The 7th instruction was properly refused for the reason that it required the Court to instruct the jury "that if each agreed to pay off the respective incumbrances on the land deeded, then the contract would be mutual and entire," leaving the time of performance out of the view of the jury, making payment by Sage a condition precedent, whether it was prior in time of performance or not

78 The 8th instruction, refused, is not the law of this State; for it has been decided, time and again, in this State a promise to pay a debt of another to a third person is good, and an action

may be maintained by the person for whose benefit the promise is made, whether he was a party to the contract or not and although in the language of the statute, it is too general and might mislead the jury.

77 4th instruction was properly refused, for the reason there was no proof of any such contract, as is supposed, and if given it would mislead the jury.

2d. For the reason that a recovery might be had in that case under the common counts.

3. For the reason that it leads the jury to believe that the identical bills obtained from Hamilton must have been applied to the extinguishment of said liens.

4. Because it instructs the jury that the Plaintiff could not recover the amount of the Hamilton debt, even though the Defendant, as the consideration for the deed to him, agreed to pay it to Plaintiff, unless Sage applied it in a certain way.

5. Because it excludes from the jury the idea that the Plaintiff could recover on the proof, as stated in Plaintiff's 1st instruction.

6. Because the instruction stands on two hypotheses that do not exist in the proof.

7. Because it is abstruse and calculated to mislead the jury by mystifying the case.

8. The Plaintiff's 1st instruction presented the Plaintiff's right to recover clearly on his declaration, and the Court was not bound to instruct and mystify to suit the caprice of attorneys.

9. Because it was presenting a case different from the declaration and Plaintiff's proof; and because that instruction would not allow the jury to find for Plaintiff if there is such proof as is in the 4th instruction stated, even if the jury was satisfied the proof in Plaintiff's 1st instruction was also given.

77 The 5th instruction being based on the 4th, must fall with it.

77 The 9th instruction was too general, and did not apply to this case, and would mislead the jury.

79 The 10th was properly refused, because the jury was fully instructed as to the amount the Plaintiff was entitled to recover by the Plaintiff's 1st instruction.

79 The 11th instruction was too general; and although good law in a proper case and properly understood, still as offered and written would have mislead the jury.

80 The 12th instruction was not the law, as at the end of that deed it is expressly agreed that he would pay the incumbrances recited, and he accepted the deed on that condition.

The 12th instruction asked by Defendant is clearly wrong, because it asks the Court to judge for the jury as to the character of the admissions of Defendant given in evidence.

Frizell vs. Cole; 29 Ill., 465.

It must all fall together if any part of it is bad, even though some part of it is good. It is divided into three distinct propositions, but is nevertheless all one instruction, and is so treated and numbered.

82 Again, the jury at Defendants' request was sufficiently guarded as to the weight to be given to the admissions of Defendant, shown in evidence by the 6th instruction given for the Defendant.

The instructions given for the Defendant presented his case in as full a manner on the law and facts as the law authorized; and the jury being fully instructed in the case there is no error, even though proper instructions were refused.

Warren vs. Dickson; 27 Ill., 118.

82 There was no error in the red line erasure in Defendant's 6th instruction of the words "and if this was all the contract entered into on the part of Curtiss, this action cannot be maintained."

1. Because the Court, by an instruction, has no right to indicate to the jury what, in the opinion of the Court, is or is not proved.

2. Because it is impossible to tell by the words erased which contract is referred to—whether the contract to take the land, subject to liens, or the contracts to pay off incum-

brances. It is ambiguous, and therefore calculated to mislead.

3. The words "especially where both the deeds of Camp to Sage and from Curtiss to Sage contained no such a provision and obligation on the part of Sage," were properly erased.

1. Because the deeds were in evidence, and it is not in the province of the Judge to repeat in an instruction what the evidence is on a given point, and thus pettifog a case through for one party or the other, and especially as the words following this erasure are in brackets, put in as a modification of the instruction, and calls the attention of the jury to the absence of a particular clause in the deed to Curtiss, and its existence in both deed from Camp to Sage and Curtiss to Sage. The further modification of this instruction in brackets, "but a verbal contract to pay these incumbrances would nevertheless be valid," was necessary after such a flood of instructions to bring the mind of the jury back to the original proposition, that a recovery might be had upon a verbal promise to pay the Hamilton debt, if distinctly proven to the satisfaction of the jury.

The Plaintiff in Error has exhausted nearly sixteen pages of his brief to show that by certain decisions this case is within the Statute of Frauds, which it seems useless to follow and rebut, inasmuch as our own Supreme Court has expressly decided that he can not avail himself of that defence under the general issue, and that is the only plea in this case, and this is so if our Court will stand by its own decisions. It is only a matter of practice, in which courts in different States decide differently.

On pages 16 and 17 of Plaintiff in Error's brief, it is insisted that the Court took away from the consideration of the jury the fact whether Sage had performed or not. Now this is not so. Their theory is that there was an exchange of lands, and that Sage agreed to pay Knox and that he still owed Knox \$2,000. In the Plaintiff's instruction secondly given, the jury was given to understand that whether Sage had paid Knox was immaterial, unless the

contract to pay off incumbrances was mutual and dependent. If the agreements were mutual and dependent then it was material ; otherwise not, and there is and can be no pretence but that is the law in every case.

3. On the 17th page of his brief, it is said the Court expressly refused to submit to the jury the mutuality of the contract as to payment of incumbrances, refering to 7th instruction asked for by Defendant in the Court below. Now this instruction asks the Court to say to the jury that the promises stated in that instruction would make a mutual and entire contract, and on which contract the Plaintiff could not recover without first showing that he had paid Knox, and for this reason the iustruction was erroneous. And again, it was erroneous for assuming that the Plaintiff might recover on a contract upon which he had not declared. Again, it assumes that the Plaintiff must show that he had actually paid the money to Knox, and this Court has decided that giving an obligation is a payment, and between the party who is to pay, and the party who is to repay on such payment being made. In this case Sage had taken the land from Curtiss, charged with the debt, and by a clause in the deed to himself had expressly assumed the debt.

4. On 17th page of brief it is said the promise was void, as being an agreement to pay the debt of a third person. It has been decided time and again in this Court that a promise to pay to a third person a debt I owe him is not a promise to pay the debt of a third person, and that the person to whom the money is to be paid may declare on the promise as made to himself and recover upon it, even though he was not a party to the contract.

5. On same page it is said the contract was inadmissable, as varying the written contract contained in the deed to Curtiss, and the agreement to pay the incumbrances was inconsistent with the written clause at the end of the deed, that he took the deed subject to the incumbrances.

Suppose the deed had contained, 1st, a clause that Curtiss took the deed subject to the incumbrances ; 2d, that Curtiss

agreed in writing to pay the incumbrances. Would these statements be inconsistent with each other? If not, then one would not contradict, change, or vary the other; then if one claim was in writing and the other in parol, would the effect be different?

74 On 18th page of brief, 2d point, it is said the Court charged that performance of Plaintiff was immaterial in any event. The Court did not do it. See 2d and 3d instructions for Plaintiff, given.

Same page, as to evidence of admissions. This is answered by Frizell vs. Cole; 29 Ill., 465.

There is a great deal of difference between saying such evidence is to be taken with caution, even, and saying such evidence is suspicious, and, in other words, should be discredited. Such an instruction as asked for would overthrow the rule that such evidence is to be received and credited at all.

4. On 19th page of brief a case is referred to in 5 Denio, where land was sold with quit claim deed, and agreement on part of seller to pay off incumbrances. That is a case where the contract of the seller would be partly in writing and partly in parol; and in this case a clean deed is made by Sage to convey \$7,000 or \$8,000 worth of land, which is the whole of his agreement, and on the other hand Curtiss agrees by parol to pay the incumbrances as the purchase money, and the only consideration for the deed. Need we follow the parallel any farther? It is insisted that so far as Curtiss' contract was concerned, it was a verbal agreement to purchase and therefore void. The cases already cited show that where the contract is fully performed on one side, that the case is not within the statute; and if that be so, all this talk about the statute is at an end, and as already stated the statute must be plead. Then that ends the statutory defense.

5. On 20th page of brief it is said the Court erred in refusing to instruct the jury that if the evidence was of such a character as to lead them to no satisfactory conclusion, they should find for the Defendant. This part of the instruction was a part of the 12th instruction (see 14th page of abstract)

and other portions of the instruction being bad, was properly refused.

Is the promise of Curtiss to pay the Hamilton debt proven sufficiently to authorize the jury in so finding? I refer in support of the verdict to the evidence of George Camp, in pages 6, 7, 8, 9 and 10 of the abstract, the witness having been first examined by Plaintiff, and then recalled by the Court, and then recalled by the Defendant, as to statements made by Sage.

The evidence of A. A. Smith, on pages 8 and 9 of the abstract, and Martha Ann Camp, on pages 9 and 10 of the abstract.

The evidence is sufficient to show to the jury that Curtiss promised to pay the Hamilton debt, and this was all the Plaintiff claimed, and all the Plaintiff recovered.

Evidence showed a recovery vs. Sage, in the United States Court, for \$1,264 43-100, and \$33.21 costs, 23d May, 1861, on the Hamilton note. (See page 61 of Record.)

The evidence of L. Douglass, page 63 of Record, showed the payment of the judgment before suit brought.

As to the admissions testified to, Camp was interested in knowing how his father's estate stood, and was likely to know the answers to the inquiries, and that was one fact considered by the jury, and properly in ascertaining what weight was to be given to his statements, if the admissions and the evidence is sufficient to warrant the jury in finding such a contract existed. The idea is repulsive to a jury, and will be, undoubtedly, to this Court, to think that a man will buy and take a deed for \$7,000 or \$8,000 worth of real estate, and pay nothing for it, and then shield himself behind the statute when asked for the first thousand dollars. For the truth is, though there is no proof on that point, that not a dollar has been paid on all of said incumbrances, only what the land has paid under the hammer.

Can this Court say this judgment is not right? Can they say but that justice has been done? I think not. This

Court has often said that where justice has been done, the Court will not disturb the finding of the jury.

Warren vs. Dickson ; 27 Ill, 118.

Will the Court say that the Plaintiff must seek his redress in a Court of Equity, where if a man should have gone to Equity first, in the opinion of the Court, that he shall in a doubtful case go there after he has obtained a judgment at law?

If the Court thinks he ought to have gone in that Court, it must say it is not only a nice but doubtful point ; and is it not more consonant with justice to leave him in a court of law with his judgment, than to compel him to pay half his judgment in costs, and then say to him a Court of Equity is open to him, and especially where the same Court that lays this burden on him is the same Court that is to do him justice, if he will enter the Court by another door, and especially will the Court do this in aid of an unconscionable defense ? There is no conflict of evidence ; it is no question as to weight or preponderance of evidence, and if the evidence only tended to show a promise, as alleged, it would be sufficient.— But this is not the case. The evidence of Camp and Smith makes it clear that Curtiss promised as the consideration of making the deed to him to pay the Hamilton debt. I call the attention of the Court to the Record for the evidence of George Camp, which is in four different places, (the abstract may not be full) and also to the evidence of A. A. Smith.

Douglas Herwig
Atty for Supr Court

71
20
Spud R. L. Lunt
puff
N

H. L. Sage
Sept 1860

Prigg Sept 1860

Filed April 22, 1864
J. Leland Clerk

SUPREME COURT.

April Term. A. D. 1863.

ALFRED S. CURTIS,
Plaintiff in Error

vs.

HORACE L. SAGE,
Defendant in Error.

POINTS OF APPELLANT.

T. G. FROST, Att'y for Appellant.

This was an action by Sage, the defendant in error as vendor, against Curtis, the plaintiff in error, as vendee of certain real estate, to recover for a breach of an alleged agreement, made by Curtis on the sale, to pay off and discharge certain incumbrances thereon which he failed to pay, and which being secured by the personal note of Sage, he was compelled to pay. The declaration set forth a special agreement, and also contained the common counts. The question arising on the case and on which error is assigned, relate to the amendment of the declaration after the empanneling of the jury; the denial of the motion for continuance on account of the amendment on the part of the defendant in error; the admissability of the evidence to establish the contract charged, and its validity under the statute, and the sufficiency of the evidence to sustain the verdict and alleged errors in the instructions of the court.

I. The court erred in allowing a material amendment of the declaration after the empannelling of the jury, by incorporating therein, and making a part thereof, a certain deed materially affecting the nature and extent of the undertaking

of the defendant below, and the ground and extent of his liability.

II. This being a material amendment of the declaration, as a matter of course, entitled the defendant below to a continuance, and the court erred in denying his application therefor.

1 Gilman, page 236.
1 Scam., " 525.
Breese, " 43.

III. The contract proved in this case being verbal, was void by the Statute of Frauds, as an agreement not to be performed within one year, and the evidence of this verbal contract was objected to at the time, on this ground, as well as on the ground that it contradicted the written contract contained in the deeds and papers between the parties.

It is, however, insisted by the appellee and defendant below, that this defence is not admissible under the general issue:

1st. This objection is founded on an erroneous construction of the decision of the Supreme Court in several cases where it is held, the party "must set up the statute *by way of defence*, or rely upon it by pleading in some way."

The rule thus laid down, simply means that the defendant must claim the protection of the statute in his defence, and on the trial, and when the evidence is adduced against him, promptly in the regular mode, and according to the established rules of pleading and evidence in courts of law and equity respectively, and the rules applied to the various forms of action at law. A party by waiving all objection, either in pleading or to the evidence on the trial, and waiting until the evidence is closed, may lose his rights, and it will be too late for him to raise the objection for the first time by instructions; when, if the objection had been raised at the outset, written evidence might have been produced. Now, the rule laid down in all the text books on the subject without exception is, that in an action of assumpsit—as this action is—the defence that the contract is void by the Statute of Frauds, is admissible under the general issue, and without a special plea, as the following extracts will most abundantly show.

*This court held in 282ll 52
Storkham v Munson. That even the defence
of usury, not admissible under the
general issue of non assumpsit
is making "that such was the common law,
& under the plea is my remedy Statute, the defence
may be made under the plea of non assumpsit"*

1. Chitty on pleading, star pages 416-417; "When the defendant insists that no such contract as that stated in the declaration was in fact made, he *must* plead the general issue. Under this plea, also, he may give in evidence various matters of defence which admit that a contract was made, but deny that it was or is obligatory upon the defendant. So the defendant may give in evidence that he was under duress, and the want of sufficient or legal consideration for the contract or obligation, or illegality in the contract itself; *or that the contract was void by the Statute against Frauds.*" And on page 421: "The defendant is at *liberty* to plead any matter which does not amount to the general issue, which admits that in fact a contract was made, but insists that it was void either on account of infancy," &c., &c.; "or because the contract was *void under the Statute against Frauds.* So a release before breach, &c., though we have seen that *all these matters may be given in evidence under the general issue.*"

To the same effect, precisely, is the rule laid down in Archbold's *Nisi Prius*, star pages 119-144.

So likewise in Browne on Statutes of Frauds, page 483, Sec. 511: "In the next place a defendant may insist upon the benefit of the statute by plea of the general issue." "This puts the plaintiff to proof of the agreement at the trial or hearing, and he then must produce a writing." The following cases are there cited in support of this rule: *Buttemere vs. Hayes*, 5 Mees & Wels, 456; *Johnson vs. Dodgson*, 2 ib. 653; *Eastwood vs. Kenyon*, 11 Adol & Ell. 438; *Leaf vs. Tuton*, 10 Mees & Wels, 393; *Reade vs. Lamb*, 6 Wels, Hurl & Gor. 130; *Cozine vs. Graham*, 2, Paige ch. (N. Y.) 181; *Ontario Bank vs. Root*, 3 ib. 478; *Small vs. Owings*, 1 Md. ch. Dec. 363; *Givens vs. Calder*, 2 Dessaus. ch. (S. C.) 174; *Kay vs. Curd*, 6, B. Mon. (Ky.) 100; *Fowler vs. Lewis*, 3 A. K. Marsh, (Ky.) 443.

If the answer deny even a parol agreement, the bar is of course complete, and the plaintiff cannot go into proof of his parol agreement.—*Askew vs. Poyas*, 2, Dessaus. ch. (S. C.) 145; *Cooth vs. Jackson*, 6 Ves 12; *Allen vs. Chambers*, 4,

Ired. Eq. (N. C.) 125; Dunn vs. Moore, 3 Ired. Eq. (N. C.) 364. 1 Denio 552, *Greer vs. Armstrong*.

The rule with its limitations and the manner in which the defendant may waive the benefit of the statute, even in chancery proceedings, is thus laid down in *Harris vs. Knickerbocker*, in N. Y. Court of Errors, 5 Wendall's Rep. page 643. "If the defendant admits the agreement and insists on the statute, he can protect himself from a decree for specific performance, notwithstanding his admission; but if he admits the agreement, but neither pleads the statute nor insists on it in his answer, he is deemed to have renounced the benefit of it. (6 Ves. 39). If the bill states generally a contract which the law requires to be in writing, the court will presume that it is made with the requisite formalities to give it validity until the contrary appears. The defendant in answering may either plead that the contract was *not* in writing, or insist upon the fact in his answer. If he meets the allegation of a contract in the bill with a general denial, and the complainant is put to his proof to establish it, he must show a written contract, and if he does not, the evidence to establish the issue will be adjudged incompetent. *Cozine vs. Graham*, 2 Paige 177, 1 Marshall's Kentucky, R. 437."

In 2 Paige, N. Y. ch. Rep. page 181, *Cozine vs. Graham*, cited by the Supreme Court of this State, with approval in 3 Gil. 534, *Switzer, et al. vs. Skiles, et al.* relied on by the plaintiff below, as establishing a contrary rule, the Chancellor says, "The rule of pleadings on this subject is *well settled in the courts of law*, and I do not see why the principle of that rule is not equally applicable to this court. *It is there held that the statute did not alter the form of pleading*; that if an agreement or contract is stated in the declaration to have been made, it is not necessary to *allege* that it was in *writing*, as that will be presumed until the contrary appears. If the agreement is denied, *the plaintiff must produce legal evidence of its existence*, which can only be done by producing a *written* agreement, duly executed according to the provisions of the statute. If the agreement is admitted by the

pleadings, no evidence to prove its existence is necessary, and the court never inquire whether it was or was not in writing. Even there I presume the defendant might demur, if it distinctly appeared by the declaration that the agreement or promise was one which was not legally binding on him. There was formerly some difficulty on this subject in chancery, on account of the idea which prevailed that the court was bound to carry into effect a parol agreement admitted by the answer, although the defendant at the same time insisted that it was not legally binding as being within the statute."

In 3d of Paige N. Y. Ch. Rep. 480, Ontario Bank vs. Root, the Chancellor again lays down the rule in the following words, viz: "As the agreement was denied in the defendant's answer it was not necessary for him to insist upon the statute as a bar; the complainants in such a case must produce legal evidence of the existence of the agreement which cannot be established by parol proof merely."

Notwithstanding the rule thus unequivocally laid down in the text books and authorities above cited in New York, the courts of that State still hold the rule to be, that when no objection is taken to the introduction of the evidence and no question as to the statute made on the trial, it is too late to raise it on appeal; and this is all the rule laid down by the Supreme Court means, when they say, "That the statute must be set up by way of defence or relied on by pleading in some way." The idea that it was necessary in an action of assumpsit when the general issue is pleaded, to plead specially the statute also, originated in an entire misconception of the rule laid down by the Supreme Court and perfectly well settled by the numberless authorities and by all the text books.

The general issue is a denial of the agreement. It is then, of course, incumbent on the plaintiff to prove a *valid contract by competent evidence*. The contract on which a recovery is sought cannot legally be proved except by written evidence, and when verbal evidence is offered, if it is objected to by the defendant, it is error for the court to admit it,

inasmuch as to admit it would be in direct contravention of the statute, and would be to allow to be proved by parol what the law requires to be evidenced by writing. The evidence itself was in this case objected to when first introduced, and as it was incompetent, the court erred in admitting it. The Supreme Court of this State has repeatedly held, that a verbal contract within the statute of frauds is utterly void.

When the pleadings on the part of the defendant admit the contract and raise no question as to its validity, no question can arise on the trial as to competency of the proof, but when by the issue formed the plaintiff is *compelled to prove the contract*, competent, legal proof if insisted on by the defendant must be furnished, and written evidence only is *competent* or admissable.

The declaration also contained the common counts under which, as well as the special count, the evidence was offered, and under which almost any legal claim recoverable in assumpsit when the contract had been fulfilled on the part of the plaintiff might have been given in evidence. This general indebitatus assumpsit which gave the defendant scarcely any notice whatever of the nature of the plaintiff's claim, could only be made out by legal proof, competent under the statute to establish a *legal liability* against the defendant, and the court erred, therefore, not only in his instructions on this point to the jury but also in admitting parol evidence, offered by the plaintiff below to prove his contract.

2. Inasmuch, therefore, as the question was fairly raised on the trial below on the introduction of the evidence, if not also by the instructions asked by the defendant below and on the motion for a new trial, this record fairly presents for the adjudication of this court the question whether the contract set forth in the declaration and claimed to have been proved on the trial was valid under the statute of frauds.

111.—The judgment and verdict cannot be sustained on the ground, that the plaintiff below was entitled to recover on a quantum meruit—for the following reasons:

1st. The Defendant below was entitled to an instruction that the contract was void, (whereas the Court instructed the jury at the request of Plaintiff below, that the contract was valid,) and to an instruction that, Defendant was entitled to all the legal consequences arising therefrom, and to the benefit of showing by proof, as well as the plaintiff below, the value of the consideration received, and that the defendant below paid in property a full compensation therefor, all of which would have been admissible upon a general indebitatus assumpsit, when a recovery was claimed on a quantum meruit.

2d. The evidence showed the plaintiff below had failed to fulfil on his part, two thousand dollars being actually due and unpaid, on the land sold by the Defendant below to the Plaintiff below in exchange, which the Plaintiff below, as his deed showed, expressly agreed to pay off, but did not and at all events, if as matter of law, the Plaintiff below might

recover; notwithstanding the contract was void when he had fulfilled entirely on his part, and the consideration had thus been fully received by the defendant below. The Court instead of instructing the jury as he did, that the contract was valid, should have instructed them it was void, but that if they found upon the evidence that it had been completely performed by the plaintiff below, he might in that event recover, notwithstanding the contract was in itself void, thus leaving the jury to find upon the question of fact, whether the plaintiff below had fully performed, under proper instructions applicable to such a state of facts, instead of virtually charging them as he did, that this was entirely an immaterial question, the contract itself being valid; had the jury been thus instructed the verdict might have been the other way.

3d. The Court expressly refused to give the instructions of defendant below on this very point, that if the plaintiff below had failed to perform his contract he could not recover. What the contract was, and what was the real construction, and whether the plaintiff below had fulfilled or not, all matters not to be decided by the Court, but to be left to the decision of the jury under proper instructions from the Court, and could not properly be taken from the jury. 5 Denio N. Y. Rep. 196.

4th. The contract was also void, as an agreement relating to Real Estate, and also as an agreement to answer for the default of a third person, and therefore required to be in writing.

5th. The contract proved was inadmissible as changing the effect of the provisions and contracts between the parties, contained in their deeds and papers, and could not for that reason be proved by parol.

1st. The Court erred in refusing each of the several instructions asked by the defendant, and particularly in refusing to instruct the jury, (as by the defendant below he was expressly requested to do,) that if the contracts were mutual and entire and the obligations on both sides reciprocate and concurrent, the plaintiff below could not recover if the jury

should find that he had failed to fulfill the contract on his part.

2d. The Court erred in charging the jury as he did, that compliance with his contract on the part of the plaintiff below, was in any event or contingency immaterial.

3d. The Court erred in refusing to give the following instructions: "Admissions are, *unless* clearly and distinctly *proved*, of a suspicious character of evidence, and should be carefully scrutinized by the jury."

The entire case was made of admissions, a large verdict was recovered on verbal *admissions alone*. The Court at the request of the Plaintiff below, had given his side of the law of evidence relative to admissions, and instructed the jury, they might give them such weight as they deemed them entitled to; but refused to give the unquestioned rule of law to the jury, qualifying and defining the legal character and effect of admissions, tending to the benefit of the defendant below, and eminently proper and appropriate in this case, and embodied in the above instructions, as the following extracts clearly show. 1 Vol. Phillips & Amos on Evidence, 8th Lond. Ed. 353, (star page 392;) "with respect to verbal admissions it may be observed that they ought to be received with a *great deal of caution*. The party from whom they proceed may probably not have correctly expressed his meaning; the meaning if correctly expressed may have been misunderstood, a slight alteration of the words without any design of intentional misrepresentation, may entirely vary the effect of his statement."

Again, in Vol. 1, Greenleaf on Evidence 3 Ed. 304, Sec. 200: "With respect to *all* verbal admissions it may be observed that they ought to be received with great caution.—The Evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him."—"but when the admission is deliberately made and *precisely identified*, the evidence it affords is often of the most satisfactory nature." This rule of Evidence so import-

ant in this case to the defendant below, the Court wholly excluded from the jury by refusing the instruction asked for on this point. In the 11th Ill. page 41 *Marshall v. Adams*, the Court says on the subject of admissions: "If it became necessary to give evidence of what Marshall had previously said, or verbally sworn too, it could only be done by the sworn testimony of some one who heard him make the statements, and then his *words* substantially must be given, and not the *result*, which his evidence proved." If this important rule of law had not been by the court concealed from the jury, the verdict might have been for the defendant below.

4th. The court erred in instructing the jury that the contract in question was valid, refusing to charge that it was void, for the reasons already given. Also for the reason that it was part and parcel of one entire agreement for the purchase and sale of Real Estate, which the Statute requires should be in writing. This point seems to be decided in 5 Denio N. Y. Rep. 196, "one who purchases land which is under incumbrance and receives a conveyance without covenants, cannot set up a concurrent agreement by parol, on the part of the grantor to pay off the incumbrances; such agreement is purely an entire agreement for the sale of lands, and to be valid must be in writing."

The Court in that case says: "It was a contract for the sale and conveyance of land, to the plaintiff on terms agreed to by him, the sellers on their part agreeing to pay off and discharge the incumbrances on said land, the contract was entire.

Being a mere verbal contract for the sale of land, the statute makes it void. It may be that an agreement to pay off incumbrances would be good, although not in writing, but a stipulation to that effect, proving part of a verbal agreement for the sale of land is invalid.

This objection is fatal to the present action. If the plaintiff has any remedy, it must be found in a Court of Equity, on the ground that the contract, having been in part performed by the execution of the deed to the plaintiff, will be

enforced by such a court." Here the defendant below was both the *vendor* and *vendee*. The contract was entire, and both deeds were executed at the same time. Besides a verbal contract to purchase Real Estate, is just as void as a verbal contract to sell Real Estate.

5th. The Court clearly erred in refusing to instruct the jury at the request of the defendant below, that if the evidence was of such a character as to lead the jury to no satisfactory conclusion in this respect, they should find for the Defendant. This instruction simply required the plaintiff below to prove his case, and was eminently appropriate under the peculiar character of the evidence given to prove the contract in question was void, and in instructing them on the other hand that it was valid.

6th. The Court erred in overruling the motion for a new trial, for the reasons filed at the time.

1st. Because the parol contract, claimed to have been proved, was void; and insufficient, for the reasons already given, to sustain the action.

2d. The only witness who attempted to swear to this verbal contract—George Camp—failed to prove it, and on his direct examination expressly swore that "Curtis did not say that he was to pay this note," and on the cross-examination, That he never heard Curtis say that he had agreed to pay off the liens. And Hannaman, the other witness present, swore that he heard no such admission made, directly or indirectly by Curtis. This evidence is altogether too contradictory and uncertain to sustain the finding of the jury, and falls entirely short of proving the contract; if the contract can be proved at all by parol, the evidence ought to be clear, distinct and satisfactory.

3d. The only evidence offered to prove the contract was not only illegal, as authorized by the statute of frauds, but was inadmissible, as contradicting the deeds and papers. The two deeds—the one executed by Curtis to Sage, and the other by Sage to Curtis—given at the same time, and constituting parts of the same transaction, are to be construed together and with reference to each other and to the whole

transaction, and these clearly each contain provisions as to the incumbrances on both tracts of land, and define precisely what liabilities the parties respectively assumed relative thereto, requiring Sage in terms to pay off the incumbrances and debt on the land sold by Curtis to Sage, and requiring, on the part of Curtis only, that he should take the land sold to him by Sage, subject to the incumbrances thereon, without requiring him to pay them off, or assume any personal liability relative thereto. The obligation assumed by Curtis could not be enlarged by parol, by making him personally responsible, any more than Sage's liability to pay the incumbrances on the land he purchased, could be qualified and changed by parol, so as to take away his liability. Both parties must stand upon the contracts expressed in their deeds, and by them alone. Had nothing been said on the subject in their deeds, the rule of law might, perhaps, have been different, but having defined the nature and extent of each other's obligation in their deeds, the deeds alone must control, and parol evidence is inadmissible to vary their legal construction or effect.

It is scarcely possible to conceive of a case where the rule of law requiring such a contract to be in writing to make it valid under the statute, and to make it consistent with the contract between the parties, on the same subject, ought more rigidly to be enforced, or the reasons for its enforcement are so abundant as here. When the party knowing the fact (Charles F. Camp) is dead, the record and written evidence of the parties themselves, is set aside, and a stranger, who was not a party to the negotiations, is brought in to give his *opinion* as to what the parties intended, and upon the loosest recollection, scarcely amounting to more than a bare impression, is able to secure a verdict of \$1,329,22 100 damages to the defendant.

71 20

Alfred S. Curtis

to

Francis L. Sage

Per B. B. B.

Given At 28. 1864

L. L. Allen

SUPREME COURT.

April Term, A. D. 1863.

ABSTRACT OF RECORD.

ALFRED S. CURTIS, }
Plaintiff in Error, }
vs ads. } ERROR FROM KNOX.
HORACE L. SAGE, }
Defendant in Error. }

T. G. FROST,
Attorney for Plaintiff in Error.
DOUGLAS & CRAIG,
Attorneys for Defendant in Error.

1 This was an action of trespass on the case on promises, commenced by Sage, the defendant in error as vendor, against Curtis, the plaintiff in error, as vendee of certain real estate, to recover for a breach of an alleged agreement, made by Curtis on the sale, to pay off and discharge certain incumbrances thereon which he failed to pay, and which being secured by the personal note of Sage, he was compelled to pay. 3 The declaration setting forth a special agreement, and also 16 containing the common counts, was filed at the February term 13 of the Knox County Circuit Court, A. D., 1862.

14.15 To the Plaintiff's declaration, the defendant interposed the plea of general issue; on which plea the plaintiff took issue.

15.16 On the 21st day of February, A. D., 1862, said cause came

34
16
39 on for hearing on the issues before Judge C. B. Lawrence and a jury. After the empanneling of the jury, the plaintiff below moved to amend his declaration, which motion was allowed by the court. The defendant excepted to the ruling of the court, and moved for a continuance on the ground of a material amendment of the declaration. which motion was overruled and exception taken to the ruling of the court by the defendant below.

16 And on the 25th day of February, A. D., 1862, the jury found a verdict for the plaintiff and assessed his damages at the sum of \$1329,22.

17 Thereupon the plaintiff by his counsel entered a motion for a new trial for the reasons shown in the bill of exceptions.

On the 28th day of February, A. D., 1862, the plaintiff by his attorney entered a remittitur of \$32,00 of the judgment. March 1st, 1862, after a hearing upon the motion of the plaintiff for a new trial, the court, by agreement of counsel took the same under advisement, the motion to be decided as of 18 that term, and should the motion be overruled the defendant was to have sixty days to file his bill of exceptions.

19 May 14, 1862, the court overruled the motion for a new trial and ordered the clerk to enter judgment on the verdict in the following words, to wit:

19 "It is ordered by the Court that said motion be overruled. Therefore it is considered by the Court that the plaintiff recover of the defendant the sum of (\$1297,22,) Twelve Hundred and Ninty-Seven Dollars and Twenty-Two Cents, being the amount of his damages assessed by the jury aforesaid less the sum of Thirty-two Dollars remitted by the plaintiff, (herein) together with his costs by him in this suit expended and may have execution therefor."

The opinion of the Court on overruling the motion for a new trial is found on pages 27, 28, 29 and 30 of the record.

32 A bill of exceptions was filed by leave of the Court, on 34
16 the 11th day of June, A. D., 1862, the plaintiff below objecting thereto, which shows the following evidence given on 91 the trial.

BILL OF EXCEPTIONS.

CIRCUIT COURT, KNOX COUNTY.

ALFRED S. CURTIS, }
^{ads}
 HORACE L. SAGE. }

STATE OF ILLINOIS, } ss.
 KNOX COUNTY. }

32 Be it remembered that at the February Term, A. D.,
 1862, of the Circuit Court, held in and for the County of
 34 Knox and State of Illinois, at the Court House in the city of
 Knoxville, on the 21st day of February A. D., 1862, the
 issue joined between the parties aforesaid came on to be tried
 by a jury of the county aforesaid for that purpose duly em-
 panneled.

After the empanneling of the jury, the Plaintiff moved
 to amend the second count of his declaration, by inserting
 34 therein a copy of a deed dated September 29th, A. D., 1858,
 35 given by Charles F. Camp and Weltha Ann his wife to Hor-
 36 ace L. Sage, which said Deed contains the following clause :
 " Subject to two judgments in Knox circuit court, one in fa-
 vor of Jonathan Dewel for about \$216,00, and one in favor
 of Catharine Radcliffe for about \$1300—against said Camp;
 and subject to a Trust Deed or Mortgage in favor of John
 S. Williamson from said Camp for \$5000 and interest, and
 37 being liens on said premises,"—"and that the above bar-
 gained premises in the quiet and peaceable possession of the
 said party of the second part, his heirs and assigns against
 the claim of all persons whomsoever he will forever warrant

39 and defend except against the above named liens, which liens said Sage is to assume to pay"—which was objected to be by defendant and allowed by the court. To which ruling of the court in allowing said amendment, the defendant then and there duly excepted.

And hereupon the defendant moved to continue the case on account of a material amendment of the declaration. To which motion the Plaintiff objected and the Court overruled the motion, and to which ruling of the court, the defendant then and there duly excepted.

At which day came as well the said plaintiff as the said defendant, by their respective attorneys, and issue being joined and the jurors of the jury duly empannelled to try the same, also came and were in due form chosen and sworn to try said issue, and upon the trial of said issue the counsel for the plaintiff, to maintain said issue on his part offered and read in evidence a Deed from Charles F. Camp and wife to Horace L. Sage, dated September 28, 1858—"Subject to two judgments in Knox Circuit Court, one in favor of Jonathan Dewel for about \$216, and one in favor of Catharine Radcliffe for about \$1300, against said Camp and subject to a Trust Deed or Mortgage in favor of John S. Williamson, from said Camp for \$5000 and interest—being liens on said premises."—"Claim of all persons whomsoever he will forever warrant and defend—except against the above named liens, which liens said Sage is to assume and pay." Also a Deed to John S. Williamson from Charles F. Camp and wife, dated May 20, A. D., 1857, to secure the payment of two certain promissory notes, dated May 20, 1857, one for three thousand dollars and one for two thousand dollars due three years from date, &c. Also, Deed from Alfred S. Curtis and Hetta M. Curtis to Horace L. Sage, dated February 12, 1859."—"Subject to a certain Mortgage given to Jas. Knox by A. S. Curtis for \$4000, on which there has been paid by said Curtis the sum of \$587,65. The above Mortgage is a lien on said land and is to be paid by said Sage."—Also a deed from Horace L. Sage the plaintiff to Alfred S. Curtis, the defendant, dated Feb. 12th, 1859—

57 " Subject to two judgments in the Knox Circuit Court; one in favor of Jonathan Dewel for about \$216, and one in favor of Catharine Radcliffe for about \$1300,—against said Camp and subject to a trust deed or mortgage in favor of John S. Williamson from said Camp for \$5000 and interest, and also to a mortgage for \$1000, given to Geo. A. Hamilton by H. L. Sage, dated Oct. 1st, 1858, and due two years from date." Also, a record of the following judgments, viz :—one
61 in favor of Catharine Radcliffe for \$1264, of date May 4th, A. D., 1858, against Charles F. Camp.

One in favor of Jonathan Dewel of date April 26, '58, for \$281,60, against Charles F. Camp, both in the Circuit Court of Knox County.

61 Also, mortgage by Horace L. Sage and wife to George A. Hamilton on the premises conveyed by Sage to Curtis, dated Oct. 1st, 1858, to secure a note given and dated Oct. 1st, 1858, by Horace L. Sage, payable to George A. Hamilton, with ten per cent interest two years from date.

Also, an exemplified copy of a record of judgment in the U. S. Circuit Court for the northern District of Illinois, recovered on said note so secured by said mortgage in favor of said George A. Hamilton and against Horace L. Sage on the 23d day of May, A. D., 1861, for \$1264,43, \$33,21 costs, said note reads as follows, viz :

61 [\$1000.] ONEDIA, Oct. 1st, 1858.

Two years after date, we promise to pay to the order of George A. Hamilton, One Thousand Dollars with interest at ten per per annum.

Value Received.

62 (Signed)

CHARLES F. CAMP.

HORACE L. SAGE.

Endorsement, (Signed)

J. M. WETMORE.

63 Leander Douglas, a witness sworn in behalf of the Plaintiff, then testified as follows : I was Sage's attorney in the case; I paid about \$400 on the judgment in case of Hamilton vs. Sage, to the attorney of the plaintiff, and the balance

63 of the money I remitted to the clerk, William H. Bradley, after paying the \$400. I paid \$700, and sufficient to cover the amount of the judgment ; the money was furnished by Sage.

George Camp, a witness in behalf of the plaintiff, testified : My father's name was Charles H. Camp ; I was not present when Sage made this deed to Curtis ; father died June 3d, 1859 ; I heard a conversation between Curtis and Sage at father's house ; the following conversation took place : The question was asked, how matters stood ? Hannaman asked Curtis how he took this property described in deed to Curtis. The plaintiff then proposed to prove Curtis' statement and admission of the agreement of sale and of its terms, which was objected to by the defendant—1st, as contradicting the deed, and 2nd, being verbal was void by the statute of frauds, and 3d, made after the contract of sale was consummated, 64 which objections were overruled by the court, and the evidence was allowed to be given, to which ruling of the court the counsel for the defendant then and there duly excepted. The witness then proceeded. Hannaman asked how he took the property, and his reply was, the same as Mr. Sage took it, (which was duly objected to by the defendant, and the objection overruled by the court, and defendant duly excepted, the court allowing the witness also to proceed and state the contract as admitted by the defendant against defendant's objection, and exception duly made to the ruling of the court.) I don't recollect just the words said about the Hamilton debt ; I don't recollect exactly the words. Sage mentioned over the Radcliffe and Dewel judgments and the Hamilton money as being borrowed on the note and mortgage to George A. Hamilton, to pay the judgments. Sage asked Curtis if he was not to pay that, and Curtis did not say 65 that he was to pay it or was not to pay it. There was considerable said about the Radcliffe judgment and the Hamilton mortgage, and Sage spoke of the judgment and Sage said Curtis was to pay that. Curtis said yes, or something to that effect ; did not say he was to pay it or was not to pay it, and did not come out boldly. After it was all through,

65 Sage asked Curtis to give him a writing that he sold this property so and so, that he sold this property to pay the judgments, and showing that Curtis agreed to pay. Curtis said no, not now; did not say he would or would not do it. As near as I can recollect he said not now; it will be all right, or it is all right. I knew father had made a deed. This conversation was after father's death; the object was to call in Curtis and see how the estate stood. There was something said; cannot say what it was; about some claims Sage mentioned over what he let him have; he mentioned over a claim of Fleming and Conger, or a demand against Kilpatrick. I don't know as there was anything said, only he was to take the property same as Sage had taken it—to pay the debts. Curtis did not deny that. This was in the summer of 1859—July, 1859—Sage said he had turned over this property to pay the incumbrances.

66 Cross examined, witness testified: This conversation took place when I called at the house; Hannaman came there in reference to some property taken on chattel mortgage; there was one thing I thought he [Curtis] intended to take advantage; I don't know as he said it was all right; something to that effect. I don't know that there was a dispute; Sage said he took the property and was to pay certain debts, and Curtis took them the same way; I don't know that Curtis said he bought them, subject to these liens, and he could pay off or not, as he pleased. He carried the idea to me that he intended buying up the chattel mortgage; I did not state he intended to get around paying for the lands; I never heard Curtis say he had agreed to pay off these liens; Curtis came in; I think Hannaman asked the question; Hannaman asked Curtis how he took the property, and what property he took; when asked, Curtis admitted that he had it the same as Sage had it. To the following question: when Sage asked this question, did Curtis say yes? Witness said, Curtis did not come out boldly, and say distinctly, yes. Curtis utterly refused to sign any such writing as Sage requested.

67 Norman Conger, a witness sworn for the plaintiff, testified: I know the parties to this suit; Sage never held a note

67 against one Newton Conger. I paid a note to Curtis, signed by J. H. & N. Conger, between \$200 and \$250; the note was payable to C. D. Clark; I don't think the note was all paid at one time.

H. D. Clark, a witness for the plaintiff, testified:

I held a note against J. N. & N. H. Conger, for \$250; I sold it to H. L. Sage, in October, 1858; Sage let Curtis have the note.

Cross examined. I did not see Sage let Curtis have it, but understood he did.

Reuben Robbins, sworn in behalf of plaintiff, testified as follows:

I know the parties to this suit; Sage held a note against me of \$125; I paid it to Curtis; paid \$125; I suppose Curtis had the note.

68 George Camp, re-called by the Court, testified:

Sage went on, in the conversation with Curtis above referred to, to tell the claims he let him have to pay those debts. I believe there was a note against Flemming; he mentioned a note against the Conger's; he had to let Curtis have the notes to pay the debts; Curtis made no reply to that; I think there was one against Clark; I recollect a meeting house note that he let him have; I don't recollect the amount.

Witness Robbins re-called, testified:

Camp had a note against me; that note was given for a lot the Methodist Society had a parsonage on; the note was \$125; \$75 paid.

Witness Flemming testified and said:

69 I know Camp and Curtis; In July, 1859, I applied to C. H. Camp to buy two lots, and some writings had to be done through Sage; I gave note to Sage, and Sage deeded to me. I then spoke to Camp about the note; he said Curtis had carried it to Ohio; I paid it to Camp; I did not see the letter that brought it; I saw the note; there was no interest on it; paid \$140.

A. A. Smith, a witness in behalf of the plaintiff, testified and said:

69 I was attorney for Radcliffe, in case of Radcliffe vs. Camp. There was paid by Camp, on the judgement, \$785, October 15th, 1858; \$5 afterwards, and \$20, July 21, 1859, \$15; that is all paid by Camp. That judgment consisted of two notes of \$585 each, making a judgment of \$1300. I learned from Sage that Curtis was to pay this judgment, and I wrote to Curtis, and went to Oneida and saw him there. I told Curtis that Sage said he was to pay that judgement. Curtis gave me to understand he was liable to pay it. He said he was expending a good deal of money on a coal shaft, and gave that as an excuse for not paying. I looked to him to pay the judgment; Curtis gave me encouragement he would pay it; did not deny his liability; I did not get the impression he was liable to an action personally upon his engagement.

Y Cross examined, witness said: Sage said, Curtis is to pay that debt, Sage said that I think; I told him Sage said he was going to pay it, and I had come to get the money; I made no inquiry as to the contract, or how he was interested to pay the money.

T. G. Frost, Attorney for defendant, called and sworn in behalf of the plaintiff, testified:

Camp paid the Dewel judgment, or most of it; I think there was a small balance remaining unpaid; can't tell the amount nor when the payment was made, without referring to my books, but am willing to admit the payment to have been of any date named by plaintiff's counsel, and it was fixed in October, 1858.

George Camp re-called, testified:

I think this Hamilton loan was negotiated through father and Sage.

Martha Ann Camp, sworn on behalf of plaintiff, testified:

I knew Charles F. Camp; he was my husband; I and my husband made this deed to Sage; I knew of a loan negotiated with Hamilton subsequent to that; it was to get money to pay on the Radcliffe and Dewel judgements; I knew of no other loan being effected by Mr. Camp with Mr. Hamilton; I never saw this deed; I went in just as they [Sage and Cur-

71 tis] finished their business ; I don't recollect of anything being said about Sage letting Curtis have notes ; Curtis said he did not want the chattel mortgage, as he was amply secured without it. I suppose he had security against the mortgage and judgments he had to pay ; part of it was this Radcliffe and Dewel judgement. I heard the conversation after Mr. Camp's death, when Hannaman was present. Hannaman asked Curtis if he took the property and notes the same as Sage took them. Curtis said he did. I don't recollect what Sage said to Curtis about the Hamilton debts ; I did not hear the conversation about the deed ; I did not hear them say what Curtis was to give for that land ; I did not hear how Curtis took the property ; the land was to be sold, and debts paid off.

The plaintiff here closed his case.

George Camp, re-called by the defendant, testified :

72 I heard Sage say there was an exchange of land between him and Curtis. He took the Knox land Camp got in exchange for the land he deeded Curtis, and let him have notes ; he said he let Curtis have some notes of his own ; he took the Knox lands of Curtis, and conveyed to Curtis the Camp lands.

Witness, upon cross-examination, testified :

I understood it as I have stated ; Sage took and exchanged lands with him, and he also let him have notes of his own as much as he had paid. He deeded him this land he bought of father, and was to go on and pay off these debts. The defendant objected to this portion of Sage's admission, and to that given already by the witness as not called for by the defendant, which was overruled by the court, and the court allowed the witness to proceed with such statements, to which ruling of the court the defendant then and there duly excepted, whereupon witness proceeded. Sage said Curtis was to take the Camp lands and pay off these mortgages and debts that stood against the land. He said he gave land for that he got of Curtis, and let Curtis have notes for the amount that he had paid Knox ; he did not want to mix the said land tracts, and said that the trades were separate.

73 Isaac M. Wetmore, a witness sworn in behalf of the defendant, testified :

I know the parties to this suit ; I heard Sage speak of the contract between these two men—it was concerning the trade between Curtis and Sage. I spoke to Curtis and Sage and Camp, and Sage say, I have been making a trade with Curtis, trading for his lands and letting him have Camp lands ; he said they had been exchanging for the two places, one for the other ; nothing said about the liens one way or the other.

Cross examined, witness testified : The expression was, they had been exchanging lands ; he having got the land on Pope Creek, and he was to let Curtis have the Camp land ; I am positive he said he had exchanged farms or land ; the deed from Sage to Curtis was in Curtis's hand writing.

DeWitt C. Brown, a witness sworn on behalf of the defendant, testified and said :

74 Sage said he was all right, they could not make anything off of him ; he was talking about this subject, and of part of this land which Camp had sold Hubbard.

Robert L. Hannaman, a witness in behalf of the defendant, testified and said :

I was present at this conversation between Curtis and Sage referred to by witness George Camp ; I went there by agreement that neither Camp nor Sage were there when I got there, but came in ; I was present during the whole time ; I think they went away together ; Curtis never, to my knowledge, either directly or indirectly, admitted that he was to pay off these claims.

On cross examination witness said : My attention was called to this by Douglas ; I had forgotten all about my calling there till he named it ; there was a difference of opinion between these men about these deeds ; cannot recollect much about the conversation.

James Knox, witness on behalf of defendant, sworn, testified :

75 I sold this Pope Creek land to Curtis ; 3 quarter sections of land in Ontario township ; I sold it for \$6,000, and he paid \$2,000 down ; he paid \$587,85 in all since the sale.

Sage said he paid \$2,000, and \$2,000 is now due and interest still unpaid.

75 The evidence here closed, the foregoing being all the evidence given on the trial.

The Court at the request of the plaintiff, thereupon gave the following instructions :

Given. { 1. "The jury is instructed that if they believe from the evidence that the plaintiff and his wife executed and delivered to defendant the deed shown in evidence which purports to have been thus executed ; and that at the date of said deed, the plaintiff was bound for and to pay the Hamilton debt shown in evidence ; and that the defendant, in consideration of making said deed, promised and agreed to and with the plaintiff that he would pay the Hamilton debt ; and that the plaintiff has been sued for and has fully paid said debt, damages and costs, shown in evidence, then the jury will find for the plaintiff and assess his damages at the sum so paid by the plaintiff."

Given. { 2nd. The Jury is instructed that the admissions of Sage, proved in evidence by the defendant are to be received by the Jury as evidence and to be allowed such weight as the Jury may think are entitled to on a consideration of all the evidence.

Given. { If the jury believe from the evidence that there was an exchange of lands and that each party agreed to pay off all the incumbrances on the lands received by him, then the fact that Sage has not paid Knox in full is in itself immaterial, unless the jury further believe that both parties were to discharge the incumbrances—the one at the same time or to the same amount with the other.

(Filed Feb. 24, 1862, J. H. LEWIS, CLERK.)

To the giving of each and every of said instructions by the court the counsel for the defendant then and there duly, severally, and separately excepted.

The counsel for defendant, then and there requested the court to give the following instructions on the part of the defendant.

77 4th. "If the jury find upon the evidence that the contract

77 { between Curtis and Sage was in substance, that Curtis was
to pay off the liens existing against the property at the time
of the purchase by Sage, and whatever sum Sage was obli-
ged to pay towards the discharge of said liens and that the
Hamilton mortgage and note was given for the purpose of
raising money to pay off these incumbrances, the plaintiff
then could not recover the amount of the Hamilton debt
even though they should find that Sage paid the Hamilton
debt—unless they should further find that Sage, with the
money realized from the proceeds of the Hamilton loan, paid
said lien, or applied said money, and he, Sage, could then on-
ly recover to the extent of what he actually paid toward the
discharge of said liens.

Refused.

77 5th. If the Jury find the contract as stated in the last
preceding instruction, the plaintiff could not recover thereon
in any event, for the reason no such contract is set forth in the
declaration.

78 { 7th. If the Jury find upon the evidence that the contract
between the parties was in substance—that the parties should
exchange lands, and that the plaintiff was to convey to de-
fendant, the premises described in his deed to defendant, or
that he was to convey said premises and transfer the notes in
question to defendant, and that Curtis, in consideration there-
of, agreed to pay off the incumbrances on the premises deeded
from the plaintiff to defendant, and the plaintiff agreed to
pay off the incumbrance on the premises conveyed by the
defendant to the plaintiff, the contract between the parties
being mutual and entire, neither could recover against the
other, without in the first instance showing performance on
his own part; and if Sage failed to pay off and discharge the
incumbrance which he agreed to pay on the land conveyed
to him, then he cannot recover against Curtis for not fulfilling
his contract to pay off the incumbrances on the land conveyed
to him, and in that event the verdict should *be for* defendant.

Refused.

78 8th. The Jury are instructed that in order to charge the
defendant upon any special promise to pay the debts of an-
other, some note or memorandum of such agreement must
be made in writing and signed by the party to be charged,

78 otherwise such contract is void, and no action can be maintained on such contract *if verbal only*.

79 9th. That any contract in reference to the sale of land or any interest in land for a longer term than one year must be in writing and signed by the party to be charged; otherwise such contract is void, and no action can be maintained on such contract, *if verbal only*.

10th. If the plaintiff has shown a case which entitles him to *recover*, the measure of damages under the declaration and proof, is only the amount which Sage has been obliged to pay and has actually paid on the demands and liens which defendant agreed to pay and has failed to pay.

Refused. 11th. That where a written contract is made between two or more persons, and a verbal contract made between the same parties at the same time, the written contract must stand, and the verbal contract will be disregarded if it varies from the written contract.

12th. The provision in the deed to Sage from Camp did not make Sage personally liable to pay off the incumbrances therein referred to.

Admissions are, unless clearly and distinctly proved, of a suspicious character of evidence, and should be carefully scrutinised by the jury.

80 If the evidence is of such character in this case as to lead the jury to no satisfactory conclusion on the subject, they should find a verdict for the defendant.

"Filed February 24, 1862. J. H. LEWIS, CLERK.

Which the court severally refused to give. To which ruling of the court in refusing to give each separate instruction so refused by the court, the counsel for the defendant then and there duly, separately and severally excepted.

The Court against the defendant's objection also modified the following instructions, asked by the defendant. (The modifications of the court are in brackets, if modified by words added or interlined. If modified by erasing any words in the instructions as written by defendant—such words are erased by drawing across them red lines. J. H. LEWIS, Clerk.)

SAGE v. CURTIS.

80 The Court is requested to instruct the jury on behalf of the defendant as follows :

81 Given. { 1st. To enable the plaintiff to recover in this action, it is necessary for him to prove that the defendant entered into a valid legal contract to pay off, and discharge the Hamilton mortgage.

Given. { 2nd. [If there was] an agreement on the part of Curtis to take the property which Sage bought of Camp on the same terms on which Sage bought of Camp and the jury find upon the evidence that that agreement only bound Sage to pay off the liens existing on the premises at the time of his purchase, such a contract alone would not render Curtis personally liable to pay the Hamilton mortgage, created after the time Sage bought of Camp.

Given. { 3d. An agreement on the part of Curtis to pay off the liens existing on the property at the time of the purchase by Sage of Camp, or such portion of them as remained unsatisfied at the time of the purchase by Curtis would not render Curtis personally liable to pay the Hamilton mortgage unless [that mortgage] was a lien upon the property at the time Sage bought of Camp.

82 Given. { 6th. An agreement on the part of the purchaser to take the land purchased, subject to the liens existing thereon, does not render the purchaser personally liable to pay off such liens, or subject him to an action for not doing so without a further and distinct [express] agreement on the part of the purchaser to pay off the purchaser to pay off the incumbrances, and if this was all the contract entered into on the part of Curtis, this action cannot be maintained.

The fact that there is no obligation to pay off these incumbrances, or the Hamilton debt inserted in the deed from Sage to Curtis is proper evidence for the consideration of the jury, tending to show that no such contract was made or obligation assumed on the part of Curtis, especially when both the deed of Camp to Sage, and from Curtis to Sage, contained no such a provision and obligation on the part of Sage, [and

82 the absence of this contract to pay is to be duly weighed by the jury in connection with the other evidence and with the insertion of an express contract to pay the incumbrance in the deeds from Camp to Sage, and from Curtis to Sage.]

Given. 83 The fact that there is no writing containing such a contract as the plaintiff claims to have existed in this case, and that the amount assumed to be paid was large, is proper evidence ~~to be submitted to the jury in~~ [to be considered by the jury in determining] the question whether any agreement to pay off these incumbrances was ever made by Curtis, [but a verbal contract to pay these incumbrances would nevertheless be valid.]

To each and every of which several modifications of the court of the several instructions asked by defendant, and given as modified by the court, the counsel for the defendant then and there duly and severally and separately objected and excepted.

The jury find a verdict for the plaintiff as follows :

"H. L. SAGE, } Knox Circuit Court,
vs } Feb'y. Term, 1862.
"A. S. CURTIS. }

"We, the jury, find the issue for the plaintiff and assess his damages in the sum of one thousand three hundred twenty-nine dollars and twenty-two cents.

February 24, 1862, And. Thompson, Foreman."

Filed Feb'y. 23, A. D., 1862. J. H. LEWIS, Clerk.

84 Thereupon on the 28th day of February, A. D., 1862, the following is the record of this said court in this said cause, to wit :—

142. H. L. Sage, }
vs } Assumpsit.
A. S. Curtis, }

This day came the plaintiff, by attorney, and entered a remittitur of (\$32) Thirty-two Dollars of the *judgment* rendered heretofore herein in his favor.

And thereupon the defendant came and made his motion for a new trial as follows, viz :

KNOX CIRCUIT COURT, }
February Term, A. D., 1862. }

HORACE L. SAGE, }
vs
ALFRED S. CURTIS. } ss.

84 And now comes the defendant, by Hannaman & Frost, his attorneys, in the above entitled cause and move the court for a new trial in said cause, on the following grounds:—

1st. On the ground of newly discovered evidence.

85 2nd. On the ground of surprise, said ground being more fully specified in the affidavit filed in this cause for the purpose of obtaining a new trial in said cause.

3d. On the ground of erroneous rulings of the Court in giving each of the several instructions asked for by the plaintiff and given by the Court.

4th. On the ground of erroneous rulings of the Court in refusing each of the several instructions asked for by the defendant and refused by the Court.

5th. On the ground of erroneous rulings of the Court, in modifying each of the instructions of the defendant which were modified by the Court.

6th. On the ground that the Court erred in allowing the plaintiff to amend his declaration after the commencement of the trial and some of the jurors called.

7th. On the ground that the Court erred in denying the defendant's motion for a continuance after the amendment of the plaintiff's declaration.

8th. The Court erred in excluding the evidence offered by the defendant.

86 9th. The Court erred in admitting on the trial the evidence offered by the plaintiff, and objected to by the defendant.

10th. The verdict and damages by the jury assessed are excessive.

11th. The verdict is against the evidence.

12th. The verdict is against law and the instructions of the Court.

13th. The Court erred in admitting the verbal contract offered in evidence and proved by the plaintiff.

86 14th. The verbal contract proved, which was the foundation of the action, was void by the Statute of frauds for not being in writing.

15th. Said contract was void by the statute of frauds as being an agreement not to be performed within one year from the making thereof, and verbal merely.

HANNAMAN & FROST,
Defendants' Attorneys.

Filed March 1st, 1862. J. H. LEWIS, Clerk.

87 to 90 Affidavit referred to in motion aforesaid for new trial.

Which motion for a new trial was overruled by the Court.

91 To which ruling of the Court in denying said motion, the counsel for defendant, then and there duly excepted.

And because none of the said exceptions so offered and made to the opinion and decision of the Court, of the said Circuit Judge, do appear upon the record of the said trial; therefore on the prayer of the said defendant, by his counsel, the said circuit Judge hath to this bill of Exceptions, put his seal according to the statute in such case, made and provided this — day of — in the year of our Lord One Thousand Eight Hundred and Sixty-Two.

C. B. LAWRENCE. [SEAL.]

95 The plaintiff in error assigns the following errors upon the record :

The Circuit court erred in admitting improper evidence on the part of the plaintiff below.

The circuit court erred in excluding the evidence offered by the defendant below.

The court erred in denying the motion of the defendant below for a new trial asked for, on the ground of newly discovered evidence, and on the ground of surprise as well as on the other ground and errors mentioned in the motion.

The court erred in giving each of the several instructions asked for by the plaintiff below, and given by the court.

96 The court erred in refusing each of these several instructions asked for by the defendant below and refused by the court.

The court erred in modifying each of the instructions of the defendant below, *which were* modified by the court.

The court erred in allowing the plaintiff below to amend his declaration after the commencement of the trial and after some of the jurors had been called. The court erred in denying the motion of the defendant below for a continuance after the amendment of the declaration. The court erred in admitting the verbal contract offered in evidence and proved by plaintiff below.

Said contract was void by the statute of frauds, not being in writing and said contract was void, being verbal, and an agreement not to be performed within a year of the making thereof, and said contract was void as a contract for the sale of real estate, being verbal only, and said contract was void, being an agreement to answer for the debt and default of another person—not being in writing, and the court erred in instructing the jury that said contract was valid.

97 The verdict and damages by the jury assessed, are excessive.

The verdict is against the evidence.

The verdict is against law and the instructions of the Court.

251

Curtis

vs

Sage

Record

1863

Filed Apr. 28-1863,

L. Leland

Clerk

Alfred S. Curtis } Supreme Court of
v } Illinois
Horace L. Sage } April 1. 1863

Said defendant in Error comes
 & moves the Court to strike
 the said plaintiffs in Error's
 bill of exceptions from
 the record for the following
 reasons to wit

March 1 '62 (See Record page 17) leave given
defendant below to file bill of exception
in 60 days, having failed & neglected to
file such bill or prepare it until
after the expiration of the time
allowed (See affidavit of L. Douglas
pages 30 & 31) he asked the court at
Term Term 1862 for further time
in which to file it, to which Plff. below
objected & excepted (See page 20).
He had 15 days left after the final
decision in which to file it.

under this state of facts, it is claimed
that it would be ~~making~~ a loose
practice to allow the filing of the
bill under an order of a
subsequent Term of the Court &
when the case was not regularly on
the docket
L. Douglas ~~with the other Justices for~~
for Sept 2 1888

²⁵¹
Alfred S. Curtis

Horace L. Sage

Motion to strike
bill of captions
from file

Filed April 28 1863.
Leland
Clk.

Dec \$31.00

Transcript of the Record
and
Files in the Circuit Court
of
Knox County
in
the cause of
H. L. Sage
vs.
A. S. Curtis

Pages
A True and Complete Copy of the Record
and Files of The Circuit Court of
Shore County, State of Illinois, in a cause
in said court wherein Horace L. Sage
is Plaintiff and Alfred S. Curtis is
Defendant; — Action: — Trespass on the case
on promises.

" "

December 24. A.D. 1861.

On this day came H. L. Sage by Douglas
Heraig, his Attorney, and placed upon
the files of this said court the following
process: —

H. L. Sage }
v }
Alfred S. Curtis } Shore Cir. Court }
Feby 7. 1862 }

Issue summons in a plea of trespass on
the case on promises — Damage of \$2000.
of \$2000.

Douglas Heraig atty for Plffs.
"Filed Dec. 24, 1861. J. H. Lewis CLK"

" "

Thereupon on the
28th day of December A.D. 1861, the said
process was duly obeyed and a summons
issued by the Clerk of this said court,
as follows: —

2

State of Illinois }
 Knox County } ss.

The People of the State of Illinois, To the Sheriff of Knox County Greeting:— We command you to summon Alfred S. Curtis if he may be found in your county to appear before the Circuit Court of said County of Knox on the first day of the next term thereof, to be holden at the Court House in Knoxville on the third Monday in the month of February next, to answer unto Horace L. Sage in a plea of Trespass on the Case on Promises to the damage of said Plaintiff \$2000, as he says; And make return of this Writ with an Endorsement of the time and manner of serving the same, on or before the first day of the Term of said court to be held as aforesaid.

L.S.

Witness John H. Davis, Clerk of our said Court, and the seal thereof at Knoxville this 28th day of December A.D. 1861.

John H. Davis Clerk.
 " "

— and delivered to the said Sheriff, who returned said summons into said court on the,

1st day of January A.D. 1862. — as to me appears from the Endorsement thereon as follows:

3

I served the within summons by reading
 the same to the within named Alfred S.
 Curtiss this 14th day of January A.D.
 1861 — E. C. Prott, Sheriff of Snodgrass Co. Ill.
 Service \$0.50 — J. H. Lewis Deputy Sheriff.
 miles travel \$0.75 return \$0.10 — Total \$1.35

— And on the back of said summons appears
 as follows: — "Filed this 14th day of Jan'y A.D. 1861
 J. H. Lewis Clerk"

February 6th A.D. 1861.

On this day again came the Plaintiff by his
 attorneys; and placed upon the files of this
 said Court his Declaration; which is as
 follows, as it is now upon the files of this said
 Court: —

State of Illinois }
 Snodgrass County } Snodgrass Circuit Court
 February Term A.D. 1861

Alfred S. Curtiss, was summoned, as defend-
 ant herein, to answer unto Horace L.
 Sage, the Plaintiff, of a plea of Trespass
 on the Case on promises.

And thereupon the Plaintiff in this suit
 complains of the Defendant, for that whereas,
 heretofore, to wit on the 12th day of Feb-

4
ruary A.D. 1839, to-wit; - at said County
& State the Plaintiff claimed to be the owner
of the lands in this Court hereinafter describ-
ed, situated in said County and State
which lands were then subject to cer-
tain liens by judgment & mortgage then
existing thereon & remaining unsatis-
fied; - some of said liens exist-
ing upon all of said lands and some
upon parts thereof; - that said liens
were as follows to-wit; - a judgement in this
Court rendered on the 26th day of April A.D.
1838 in favor of Jonathan Sewell for
\$209.52/100 damage & the costs of suit against
Charles H. Camp - & one judgement
in this Court rendered on the 4th day of
May A.D. 1838 in favor of Catherine
Radcliff for damages \$1264.94/100 & the
costs of suit & against said Camp - and
a Trust Deed or Mortgage executed
by Charles H. Camp, to-wit; dated
the 20th day of May A.D. 1837 & given
to one John S. Williamson to secure the
sum of \$5000. - & interest - and
also a certain mortgage executed by
the Plaintiff & George A. Hamilton, dated
to-wit; the 1st day of October 1839
& secure a note given by Plaintiff &
Charles H. Camp to said Hamilton
for the sum of one thousand dollars
& interest -; And that heretofore
to-wit, on the day and date last afore-

5
said town; at said county, at the spe-
cial instance and request of the defend-
ant, the Plaintiff together with his wife
made, executed and delivered to the
defendant their certain deed in due
form, conveying said land, to wit: - lots
6, 7, & 8 in Block 1, lots 1, 2 & 8 in Block
2, lot 3 in Block 8, south half of 1 & 2
& all of 8 in Block 10, lot seven (7) in
Block 18, lots 1 & 2 in Block 22, lots
3 & 4 in Block 24, lots 5, 6, 7, 8, 9, 10,
11, 12, & 13 in Block 32, lots 3, 4, 5, 6, 7, 8,
& 9 in Block 33, lots 3, 4, 5, 6, 7, & 8
in Block 34, lots 4, 5, 6, 7 & 8 in Block
35, lots 1, 2, 3, ~~4~~, 5, 6, 7, & 8 in Block
36, lots 1, 2, 3, 4, 5, 6, 7, & 8 in Block
37, lots 1, 2, 3 & 4 in Block 40, lots 1, 2, 3
& 4 in block 41, lots 1, 2, 3, 4, 7 & 8 in
Block 42, lot 1 in Block 43, lots 1, 2, 3,
4, 5, 6, 7, & 8 in Block 44, lots 1, 2, 3,
4, 5, 6, 7, & 8 in Block 45, lots 1, 2, 3,
4 in Block 46, lots 1, 2, 3, & 4 Block
47, lots 1, 2, 3, 6, 7 & 8 in Block 48,
lots 1 & 2 in Block 49, lot 1 in Block
50, lots 1, 2 & 3 in Block fifty-one,
lots 3, 4, 5, 8, 9, 10, 11, 13 & 13 in Block
52, lots 2 & 3 in Block 15, out lots one,
2, 3, 4, 5 & 6 in Block 1, lots 2, 3, 4, 5,
6, 7, 8, 9, 10, 13 & 14 in Block 3, all sit-
uate in the town of Onida, & also a
part of the southwest quarter of sec-
tion 26 in Township 13 north of range 2.

East in said county, commencing four rods south of the south east corner of Block 33 of the town of Lucida, running thence west to the west line of said quarter, thence south 120 rods, thence east 31 rods, thence north 16 rods, thence east 20 rods, thence north 104 rods, subject to said liens.

Which deed was delivered to & accepted by the Defendants — And the said Defendants then & there in consideration of the making of said deed as aforesaid which was the only consideration for the making of said deed, undertook and then & there faithfully promised the said Plaintiff that he would pay off and satisfy the aforesaid indebtedness.

And the Plaintiff avers that there before a suit was commenced by the said George A. Hamilton against the Plaintiff in the Circuit Court of the United States for the Northern District of the state of Illinois to recover the said \$1000.00 of indebtedness so as aforesaid secured to the said Hamilton & the interest accrued thereon and such proceedings were had in said court, that afterwards, to wit: On the 23^d day of May A.D. 1861 at Chicago, & in said county, the said George A. Hamilton by the consideration of said court

2
recovered judgment in said court
against The Plaintiff for his damages
to wit; - The sum of \$1764.43/100 this
costs in that behalf expended, amount-
ing to the sum of to wit \$33.21/100
And the Plaintiff avers that afterwards
to wit; - On the 25th day of September ad
1838. to wit; - at said County, he
paid & satisfied said judgment
last named.

Yet The said Defendant hath not
paid The sum of money or the interest
thereon so secured to be paid to said
George A. Hamilton as aforesaid or
any part thereof either to the said
Hamilton or this Plaintiff or the said
sum of money so paid by this plain-
tiff in satisfaction of said judgment
so recovered against The Plaintiff.

— Also for that Whereas heretofore
to wit, On the 29th day of September ad.
1838, One Charles H. Camp claimed
to be the Owner of the following first
described list of lands at the coun-
ty & state aforesaid & at the date
last aforesaid there were existing
& unsatisfied judgments or mortgages
against said Camp, which were liens
upon said lands, as follows, to wit; -
two judgments in this ^{Chancery} Court. One in favor of Jonathan Ward

8.

For \$209.57/100 costs of suit rendered
On the 26th day of April A.D. 1838, & ~~are~~
One in favor of Catharine Radcliff
For \$1244.94/100 dollars costs of suit
rendered on the 14th day of May
A.D. 1837, & a mortgage or Trust
Deed executed by said Camp
& Melthy Ann. his wife, to John S.
Williamson conveying a part or all
of said lands to secure the sum of
\$5000. & interest, Rated on the
20th day of May A.D. 1837

And at the date last aforesaid, to-wit;
at said County, the said Charles T.
Camp together with Meltha Ann Camp
his wife, executed and acknowledged
& delivered to the Plaintiff their certain
deed which deed, which deed is in
the following words & figures:— (Here
insert the deed).

that in and by said deed the lands
therein described were by the said Camp
& wife conveyed to the Plaintiff and that
at the date last aforesaid, to-wit; at said
County the Plaintiff in consideration of
said conveyance then & there undertook
& agreed to pay off and discharge the
said indebtedness & accepted said deed
upon that condition & afterwards & for the
purpose of paying in part off said
indebtedness, the Plaintiff & the said
Charles T. Camp borrowed of ^{one} Charles

9
George A. Hamilton the sum of One thousand dollars & gave the said Hamilton their promissory note signed by them ~~secured~~ to secure the same & in order the better to secure the said sum of One thousand dollars the Plaintiff & Julia E. Sage his wife, executed to George A. Hamilton their certain mortgage deed dated on the 1st day of October and 1858, conveying the following land to wit: - situate in Knox County, Illinois bounded as follows: Commencing four rods south of the southeast corner of Block no. 33, thence west 51 rods to the west line of S.W. q. of sec. 36, thence south 120 rods, thence East 31 rods, thence north 16 rods thence east twenty (20) rods, thence north 104 rods to place of beginning his part of said quarter section, Township 13 N. R. 2 E. ; and that afterwards the said money so borrowed of said Hamilton was paid upon one or more of said judgements; And that afterwards to wit on the twelfth day of February and 1859, to wit at said county, it was agreed by and between this plaintiff, said Charles W. Camp and the Defendant, that the Plaintiff should convey to the Defendant the lands

10
described in the first count of this
declaration & deliver to said De-
fendant notes as follows, to wit:-
One against One, Russell for about
\$50. One against J. H. & A. H. Conger
for about \$250, & interest. One against
Ruben Robins for about \$120. One a-
gainst J. H. Fleming for about \$140.
One against Joseph Kilpatrick for about
\$200. And one against ~~Samuel~~ ^{Samuel} Whiting
for about \$45.00, And that in Con-
sideration thereof the said Defendants
would pay off & discharge the
above mentioned indebtedness & that in
pursuance thereof the Plaintiff together
with his wife Cule E. Sage on
the day and date last aforesaid
by their deed of that date, to wit:
at said county, conveyed said land
to the Defendants subject expressly
to said incumbrances & then & there
the Plaintiff delivered to the defend-
ant the said deed & notes which
he then & there accepted & in con-
sideration thereof, the Defendant then &
there undertook and faithfully promised
to pay off and discharge said indebt-
edness aforesaid, which was the only
consideration received ~~by~~ ^{of} the Plaintiff
for the making of said deed & said
notes; And that afterwards, to wit,
On the 23d day of May A.D. 1881

11
at Chicago, to wit, at said county, in the
Circuit Court of the United States
for the Northern District of the state of
Illinois by the consideration of said
court, the said George A. Hamilton
recovered a judgment against the
Plaintiff, as the survivor of said Camp,
upon said note so executed to him
as aforesaid for the sum of \$1264.
43/100 damages & costs of suit taxed at
to wit \$33.21/100 and afterwards to wit, on
the 28th day of September A.D. 1861
at Chicago, to wit, at said county
the Plaintiff fully paid and satisfied
said last named judgment, of which
the Defendant had notice,

Yet the said Defendant hath not paid
either to the said George A. Hamilton
or to this Plaintiff the last mentioned sums
of money, to wit, said damages & costs
last named or any part thereof; but
hath hitherto and still doth neglect
so to do, though often requested &c

— And Whereas, also, the said Defend-
ant, afterward, to wit, on the 30th day of
September in the year of our Lord
one thousand eight hundred and sixty one,
to wit at — in said county, became
and was indebted unto the Plaintiff in a large
sum of money, to wit; two thousand dollars
for money before that time lent and ad-

vanced to, and paid, laid out and expended for said Defendant by said Plaintiff at said Defendant request & in a like sum for notes sold and delivered to Defendant at his request and for money before that time had and received by said Defendant and for the use of said Plaintiff; and also in like sum for goods, wares and merchandize before that time sold and delivered by said Plaintiff to said Defendant at like special instance & request; and also in the like sum for the labor, care and diligence of said Plaintiff before that time done and performed by said Plaintiff for said defendant and at the like instance and request of said Defendant.

— And being so indebted, said Defendant in consideration thereof, then & there undertook and promised to pay said Plaintiff, said last mentioned sum of money, when thereunto afterward requested.

Yet the said Defendant not regarding his said promises and undertakings but contriving etc., although often requested to do, hath not paid said Plaintiff either of said sums of money, the money in this Court mentioned or the said damages & costs so paid by the Plaintiff or any part thereof, but so to do hath hitherto wholly neglected and refused and still doth neglect and refuse, to

13 The damage of said Plaintiff of two thousand dollars and therefore he brings this suit, etc.

Rouglas H. Craig
Atty for Pff.

Copy of instrument sued upon:-
Alfred S. Curtis

To H. E. Sage Dr.	
To Money lent and advanced & left.	\$ 2000. —
To Money expended and paid out for left.	\$ 2000. —
To Money received for use of Pff.	\$ 2000. —
To Goods Wares & Merchandise	\$ 2000. —
To Labor and services	\$ 2000. —
To balance on account stated between Pff & left	\$ 2000. —
To Cash for notes sold by Pff & left.	\$ 2000. —

And on the back of said Declaration appears as follows: "Filed Feb. 6. 62 J. H. Lewis clk"

February 1st and 2nd 1862

This day met the Circuit Court of Knox County, State of Illinois, in Court in course of the February Term, pursuant to adjournment. The record of which is as follows:-

February Term 1862
State of Illinois)
Knox County) ss
Plea before the Clerk.

14
Charles B. Lawrence, Judge of the
Fifth Judicial Circuit of the State
of Illinois, at a court begun and held
at the Court House in the City of Spore-
ville in said County, on Monday the
14th day of February, in the year
of our Lord One thousand eight
hundred and sixty-two; being the
third Monday of said month

Present:-

Hon Charles B. Lawrence Judge
James H. Stewart States Attorney
John A. Lewis Clerk
E. C. Broth Sheriff

Court opened by proclamation.
" "

February 18th and 18th

On this day came the Defendant and placed
upon the files of this said Court his Plea
as follows:-

State of Illinois }
Spore County } Spore County, ^{circuits} Court
February Term 1862
Horace L. Sage }
v. } Assumpsit
A. S. Curtis }

And now comes the Defend-
ant Alfred S. Curtis, by R. L. Han-
nahan, his atty, and for plea says
he did not undertake and promise

15-

in manner and form as the said plain-
tiff hath ^{above} ~~alleged~~ ^{complained} And of this he
puts himself upon the Country &c
R. L. Hannaman
Deft. Atty.

And on the same day, on the same
instrument of writing the Plaintiff by atty.
came and added replication, the
similiter, as follows, & Deft's said
plea:-

"& the Plff. doth the like
Douglas for Plff.-
And the said Plff. doth the like
Douglas & Craig attys for Plff.

On the back of said instruments of
writing appears as follows:-

"Filed Feb. 18. '62

J. H. Lewis Clerk. ??
" " "

February 21st 1862

1412
H. L. Sage }
v. } Assumpsit
A. S. Curtis }

This day came the
parties and their attorneys, and issues
being joined, for trial put themselves
upon the country, thereupon came a
jury to wit: Andrew Adams, John
Somers, P. R. Henderson, John Bur-
lingham, Henry Arms, Alonzo Clay

116

J. S. Rude, James Woodmansie, E. Stonesipher, F. K. Wetmore, John McGraw and Andrew Thomson, who being duly elected, tried and sworn well and truly to try the issues joined herein, after hearing the evidence, were permitted to separate under instructions of the court and required to meet the court on Monday next at 11 o'clock A.M.

February 24th 1888

147.

H. L. Sage }
v. } Assumpsit
A. S. Curtis }

This day again came the parties and their attorneys and also came the jury heretofore empannelled herein, who, after the hearing the arguments of counsel, retired to consider upon their verdict.

" "

February 25th 1888

147.

H. L. Sage }
v. } Assumpsit
A. S. Curtis }

This day again came the parties and their attorneys, and also came the jury heretofore empannelled herein, and for verdict upon their oaths do say: "We, the jury, find the issue for the Plaintiffs and assess his damages

147. at the sum of (\$1329.²²/₁₀₀) One
thousand, three hundred and ^{twenty nine} 22/100
dollars. Thereupon came the
Defendant by attorney and moved the
Court for a new trial and in
arrest of judgment herein.

February 28th at War.
H. L. Sage }
147. A. S. Curtis } Assumpsit.

This day came the
Plaintiff by attorney and entered a
verdict of (\$32.00) thirty two dol-
lars of the judgment rendered here-
tofore herein

March 1st at War.
H. L. Sage }
147. A. S. Curtis } Assumpsit.

This day again came
the parties and their attorneys, and
this suit being again called for
hearing on Defendant's motion for a
new trial and in arrest of judgment
and the Court having heard said
motion — by agreement of counsel
took the same under advisement, the
motion to be decided as of this term
and if said motion is overruled, the
defendant is to have sixty days to

18 file his Bill of Exceptions herein.

May 14th and 1862

This day ^{came} Hon. C. B. Lawrence, Judge
as aforesaid of this said court and
gave to the clerk of this said court
the following written order:—

"Sage } Supreme Circuit Court.
"Curtis } Taken under advisement at
the February Term 1862 & decided in vacation
as of this term

"The Clerk will enter an order as
"of the February Term over-ruling
"the motion for a new trial and en-
"ter judgment ~~as~~ of this term on the verdict
"C. B. Lawrence"

And on the back of said Order ap-
pears as follows:

"Filed May 14th 1862

"J. H. Lewis Clerk"

And as to the last said order of
this said ^{court} so is judgment entered
upon the aforesaid verdict less the
aforesaid remittitur by Plaintiff &c

19

Followed, as of the February Term
And Mar. :-

142

30. L. Sage

A. S. Curtis

Assumpsit

And now the court
Having had this cause under ad-
visement on Defendant's motion for a
new trial and in arrest of judg-
ment, and being fully advised in
the premises, It is ordered by the
Court that said motion be over-ruled.

Therefore it is considered by the
Court that the Plaintiff recover of the
Defendant the sum of (\$1297.22)

twelve hundred and ninety seven
dollars and twenty two cents being
the amount of his damages assessed
by the jury aforesaid (less the sum
of thirty two dollars remitted by the
Plaintiff herein) together with his
costs by him in this suit expended
And may have execution therefor

June 2nd And Mar.

On this day again met the circuit court of
Knox county, state of Illinois in court in
course of the June Term, pursuant to

20
adjournment. The record of which is
as follows:—

June Term After
State of Illinois
Spencer County Sss.

Pleas Before the Hon
Charles B. Lawrence, Judge of the
Tenth Judicial Circuit of the State of
Illinois, at a court begun and held at
the Court house in the city of Knoxville
in said County On Monday the 2nd day
of June in the year of our Lord
One Thousand, eight hundred and
sixty-two, being the first Monday of said
month.

Present

Hon. Charles B. Lawrence Judge
James H. Stewart State's Attorney
John H. Lewis Clerk

E. C. Proff, Sheriff

Court opened by proclamation.

June 3d After.

Horace L. Sage

Alfred S. Curtis

Assumpsit.

This day came the
Defendant by his attorney and moved
the court for leave to file Bill of
Exceptions herein.

21

4/1

June 11th A.D. 1882
 Horace L. Sage }
 v. }
 Alfred S. Curtis }

Assumpsit.

This cause coming on for a hearing on Defendant's motion for leave to file Bill of Exceptions therein, and the court having heard said motion, It is ordered that said motion be allowed and that Defendant have leave to file Bill of Exceptions ^{in due time} as of last term and of date of March 1st. Thereupon came the Plaintiff by attorney and filed his bill of exceptions to the ruling and decision of the court in entering the foregoing order.

" "

Which Bill of Exceptions is as follows as it is on the files of this said court:—

State of Illinois
 Knox County S.S. Knox Circuit Court
 June Term A.D. 1882.
 Horace L. Sage }
 v. }
 Alfred S. Curtis }

Be it remembered that

at this Term of this court, came the Defendant and entered his motion for leave to file Bill of Exceptions in this cause & in support of his motion filed the affidavit of T. G. Frost and the letter of C. B. Lawrence which affidavit & letter are in the following words:—

State of Illinois }
 Knox County } ss. Circuit Court of Knox County
 June Term 1878
 Horace L. Sage }
 v. } Knox County, Ill.
 Alfred S. Curtis }
 Thomas G. Frost

Being duly sworn, deposes and says that this case was tried at the last term of this Court and a verdict rendered in favor of the Plaintiff for \$1329.22/100 And at the same time a motion for a new trial was made on the part of the Defendant and after argument before the court, was taken under advisement with an arrangement that further authorities by the counsel for the respective parties should be furnished the court And with the expectation that the case would be decided at the then next term of the circuit Court of Warren County; that accordingly additional authorities were furnished on behalf of both parties; but contrary to expectation, the case

was not decided till after the said
 term in Warren County and the letter
 of his Honor, Judge Lawrence direct-
 ed as follows, viz: "F. G. Frost, Esqr. or
 Alexander Douglass, Esqr. Galesburg Illinois
 was received about the 14th or 15th
 of April, the precise day the deponent
 cannot state - but said letter was post mark-
 ed the 14th of April - announcing
 the conclusion of the Court in denying
 the motion for a new trial: - that though
 this affiant did not know or had forgotten
 the exact terms of the order of this court
 in relation to the making and filing
 of a Bill of Exceptions, this deponent
 did not suppose that there would be
 any serious difficulty in filing the Bill
 any time within the period allowed by
 the order and dating the same from the
 time the discession of the court was
 actually made and this deponent says
 that the Bill of Exceptions was pre-
 pared by this deponent and under his
 directions and that the same was
 on or about the 15th of May A.D.
 1862, deposited in the Post Office
 post paid & directed to Alexander Douglass
 Esq., who resides in Galesburg & is one
 of the attorneys for the Plaintiff, with re-
 quest to make his amendments & return
 the same to this deponent, which
 has never been delivered to this deponent

24
nor has this Deponent received any
Communication written or verbal from
either of the Plaintiff's Attorneys on
the subject.

This Deponent further says that he
supposed that said Bill would be
treated and regarded as duly and
properly served and prepared
and would be allowed to be filed.
And that this Deponent was the more
encouraged in this idea & thrown off
his guard in relation to any delay in
filing said Bill from the language
of His Hon. Judge Lawrence in his
letter to this Deponent announcing
his decision in which he stated
as follows viz: - "I do not remember
how much time was allowed for filing
the Bill but I will direct the clerk
to file it unum pro tunc."

And this Deponent further says that
some time after the depositing of said
Bill in said Post Office & aforesaid
the Deponent saw Judge Lawrence per-
sonally, who informed this Deponent that
said Douglass had signified to said
Judge his ~~attention~~ intention of opposing
the filing of the Bill and of contesting
the right of the Deponent to file said
Bill on the ground of the delay. And
this Deponent says further that has
learned and believes the orders in

The Judge's Rocket on this subject are as follows:—"Motion for a new trial, Taken under advisement, The motion to be decided at of this term and judgment entered this term; if motion overruled Defendant & have sixty days for filing Bill of Exceptions. This order entered by Agreement Mar 1."

This deponent says that he believes that there is no order on the Rocket or on ^{the} record requiring the Bill to be filed in sixty days from the time of said entry aforesaid above set forth or showing that "the sixty days" is not to be computed in the usual ^{manner} viz: from the date of the order denying the motion for a new trial under said Entry above set forth requires that construction. That this deponent is anxious that the Bill of Exceptions aforesaid may be at once settled & signed & sealed filed without delay. — That if the construction of this above entry or order requires the sixty days to be computed from the date of said entry.

In case the decision of said motion had been delayed about two weeks or sixteen days longer, it would have resulted in a total denial of justice as there would be no time after the decision to file said Bill — That this Deponent was very much occupied

26

with other engagements after the receipt of said letter & that the sixteen days or two weeks that remained for filing the Bill which it would seem to be if the construction contended for by the counsel for the Plaintiff were allowed, and would be an unusually short time to be allowed for the making, serving, settling & filing a Bill of Exceptions in such case.

This Deponent says farther that he has endeavored to obtain the Bill of Exceptions mailed said Douglass of which this Deponent retained no copy. But said Douglas was absent at Chicago, This Deponent has not succeeded in obtaining it. But the same, as this Deponent believes, is still in possession of the Plaintiff's attorney or one of them. And this Deponent unless said Bill can be had, will be under the necessity of preparing again said Bill of Exceptions.

Thomas C. Frost
Subscribed & sworn to before me this 3d day of May A.D. 1868

Thomas Harrison,
Police Magistrate.

Filed June 3d '68 J. H. Lewis clerk

The said letter of Judge Lawrence is as follows, to wit:—

24

The Mound. — near }
 Prairie City, April 13/67 }
 Messrs Frost & Douglas.

Gentlemen,
 You have probably thought me a long time in deciding the motion for a new trial in Sage v. Curtis: but I have had considerable difficulty in coming to a conclusion satisfactory to myself. — I have however, finally decided to over-rule the motion on the following grounds:—

The examination of the cases cited in your briefs has satisfied me that this promise is not to be classed among those which may by some contingency, be performable within the year, for the reason that under no possible contingency could the Plaintiff have acquired the right of action on this promise within one year after the promise was made. This fact distinguishes this case from the case in 5 Hill relied on by Mr. Douglas, there the money was promised to be paid as soon as ^{it was} received. — in the mortgage and although the mortgage was not due for two years yet it might have been paid sooner and whenever paid a right of action at once accrued to the Plaintiff in the suit. But in the case before us nothing could occur which would give a right of action

On this promise within a year after it was made. But in investigating the case I have come to the conclusion that the above considerations are immaterial for the reason that the contract was executed on the part of the Plaintiff as soon as made and that therefore the statute does not apply.

This is a matter entirely distinct from the question of part performance. While the latter consideration arises only in Equity, it seems the settled rule outside the state of New York that if the contract is completely executed on one side at the time of making it, and if all that remains to be done on the other side is the mere payment of money, then the statute shall not apply ^{merely} on the ground that the money was not to be paid within one year. If anything else is to be done besides the payment of money it is true the statute would apply. And it is in cases of this sort that Courts have held that the original contract could not be introduced into evidence even in reference to the quantum of damages but that the recovery must be had on a quantum meruit.

In the case of *Ronellan v. Good* decided in the Queen's Bench in 1832 and reported in 3 Bam. & Adolph 899, the court say: "as to the contract not being to be performed within the

29

year, we think that as the contract was entirely executed on one side within the year and as it was the intention of the parties that it should be so, the statute does not apply. In case of a ^{partial} sale of goods it often happens that they are not to be paid in full till after the expiration of a longer period than a year, and surely the law would not sanction a defence on that ground when the buyer had had the full benefit of the goods on his part. — This case is quoted in Broome on the statute of Frauds page 288. He discusses this doctrine in sections 286, 287, 288, 289, 290 & 291 and although indirectly not satisfied with the rule and disposed to consider it of recent introduction and not well settled, yet he admits that it is the recognized rule of the English courts the last case being in the court of Exchequer in 1849. He also says it is recognized in Maine, Massachusetts, and in the Southern and Western states and quotes the cases: — but is not recognized in New York.

As the weight of authority is clearly in favor of the rule and as it seems to me founded in good sense, I am disposed to follow it in this case. The fact that in this case the money was to

be paid to an incumbrancer instead of to the Plaintiff directly would not take this case out of the principle of the rule

The motion for a new trial is therefore over ruled.

I suppose Mr Frost will wish to take a Bill of Exceptions. I shall go to Mercer next Saturday. I do not remember how much time was allowed for filing the Bill, but I will direct the clerk to file it in due time

I will direct the letter to you jointly with the request that whichever of you may receive it, will pass it over to the other

I will take care of your respective briefs

Yours very truly

C. B. Lawrence
"Filed June 10. '62 J. H. Lewis clerk"

— The Plaintiff also filed the affidavit of J. Douglas; which is in the following words & figures:—

State of Illinois }
Shore County } ss

Chas. L. Sage }

A. S. Curtis }

Shore Circuit Court
June Term 1862

J. Douglas, being duly sworn, doth say that he was in the

31

trial of this cause One of the Attorneys
for the Plaintiff. & Deponent says he never
saw until this day the letter of Hon.
C. B. Lawrence filed in this court by
Def., as part of his motion for leave to
file his bill of Exceptions; that on
the 8th or 10th day of April 1862
J. G. Frost, Def's Attorney, notified
affiant that the motion of Def., for
a new trial was over-ruled; that
no copy of Bill of Exceptions was
served on Plff. or his Attorney until
after the 1st. Then the 15th day of May
1862 a copy was handed to affiant
but no notice served thereon except
a request to suggest Amendments and
in the supposition that it was too
late to obtain a Bill this Deponent
paid no attention to it & that Plff.
his Attorneys never agreed to give
any time to file Bill of Exceptions
except that they agreed to the order
entered for sixty days made when
the cause was tried

J. Douglas
Subscribed & sworn before me this
10th day of June A.D. 1862
J. H. Lewis CLK
" Filed June 10th 1862 J. H. Lewis CLK

— On the hearing of said motion
all of said affidavits & letter were read

32

That there was no other evidence read in said motion for or against the same & said motion coming on to be heard on said proof, the court sustained said motion and the following order was entered in said court on the records thereof which is in the following words

June 11th 1888
 Horace L. Sage }
 v. } Assumpsit
 Alfred S. Curtis }

This cause coming on for hearing on defendant's motion for leave to file Bill of Exceptions therein, and the court having heard said motion, it is ordered that said motion be allowed and that defendant have leave to file Bill of Exceptions within pro time as of last term, and of date of March 10th. Thereupon came the Plaintiff by attorney and filed ~~the~~ Bill of Exceptions & the ruling and decision of the court in entering the foregoing order. ??

And the Plaintiff then and there at the time of sustaining said motion & the entry of said order objected and excepted to the ruling of the court in the sustaining of said motion

& the decision of the court in sustaining said motion & the entry of said order.

That the matters aforesaid might be made a matter of Record, I have signed this Bill of Exceptions

C. B. Lawrence (Seal)

" "

Which said Bill of Exceptions of Plff. is filed as follows:—

"Filed June 11, 1862 J. H. Lewis clk"

" "

— And on the same day, June 11th A.D. 1862, came the Defendants by his attorney and filed his aforesaid Bill of Exceptions as by the last order of this court as aforesaid he was permitted to do, to wit, "Filed June 11th A.D. 1862 as of March 1, 1862."

J. H. Lewis Clerk
B. M. Gilson Deputy Clerk

— which said Bill of Exceptions is as follows, to wit:—

"Circuit Court Knox County
"Alfred S. Curtis
"Advs.
"Horace L. Sage } State of Illinois
"Knox County S.S. }
"Petition—

34
remembered that at the February Term
AD 1852 of the Circuit Court held in
and for the County of Knox and State
of Illinois At the Court House in the
City of Knoxville on the 21st day of
February AD 1852, the issue joined
between the parties aforesaid came on to
be tried by a jury of the county aforesaid
for that purpose duly empanelled.

After the Empanelling of the jury, the
Plaintiff moved to amend the second count
of his declaration by inserting therein
a copy of the following deed, the
words "here insert the deed" having
been written in parenthesis in said count in
the blank left for its insertion, instead
of writing the deed out a length, viz-

This Indenture made and Entered into
this twenty ninth day of September in
the year of our Lord One thousand
Eight Hundred And fifty eight, between
Charles T. Camp and Martha Ann
his wife, of Knox County State of
Illinois of the first part and
Horace L. Sage of Knox County
State of Illinois, of the second part
Witnesseth that the said party
of the first part for and in con-
sideration of the sum of two thou-
sand, six hundred dollars paid
by the said party of the second
part, the receipt of which is

Herby Acknowledged, do by these presents Grant Bargain And sell unto the said party of the second part his heirs and assigns these certain tracts or parcels of land situated in the town of Onida County of Groves And state of Illinois described as follows, to wit:—

lots 6, 7 and 8 in block (1) one, lots 1, 2 and 8 in block (2) two, lots 1 and 2 in block (5), lots 3 in block (8), lots south half 1 and 2 and 8 in block (10) lots 7 and 8 in block (18), lots 1 and 2 in block 22, lots 3 and 4 in block 24, lots 5, 6, 7, 8, 9, 10, 11, 12, 13 in block (32), lots 3, 4, 5, 6, 7, 8 and 1, in block (33), lots 3, 4, 5, 6, 7, 8 block 34, lots 4, 5, 6, 7, 8 in block 35, lots 1, 2, 3, 5, 6, 7, 8 in block 36, lots 1, 2, 3, 4, 5, 6, 7, 8 in block 37, lots 2, 3 and 4 in block 38, lots 1, 2, 3, 4 in block 40, lots 1, 2, 3, 4 in block 41, lots 1, 2, 3, 4, 7 and 8 in block 42, lot 1 in block 43, lots 1, 2, 3, 4, 5, 6, 7, 8 in block 44, lots 1, 2, 3, 4, 5, 6, 7 and 8 in block 45, lots 1, 2, 3, 4 in block 46, lots 1, 2, 3, 4 in block 47, 1, 2, 3, 6, 7, 8 in block 48, lots 1 and 2 in block 49, lot 1 in block 50, lots 1, 2, 3 in block 51, lots 3, 4, 5, 8, 9, 10, 11, 12 and 13 in block 52, lots

2, and 3 in block in block 13. —

Also Out lots to the town of Oneida
lots 1, 2, 3, 4, 5 and 6 in block one
lots 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14
in block three.

Also a part of the South West
Quarter of Section twenty six in Town-
ship thirteen north, range two East
of the principal meridian, Commenc-
ing four rods south of the Southeast
corner of block no. 33 of the town of
Oneida, running thence West to
the West line of said quarter, thence
south One hundred and twenty rods
, thence East thirty one rods, thence
north sixteen rods thence east twenty
rods, thence north One hundred and four
rods to the place of beginning containing
thirty six and one fourth acres.

Subject to two judgments in Knox
Circuit Court; one in favor of Jonathan
Newel for about \$216.00 and one in
favor of Catherine Radcliffe for
about \$1300. — against said
Camp & subject to a Trust Deed
or mortgage in favor of John S. William-
son from said Camp for \$5000. &
interest & being liens on said prem-
ises.

Together with all and singular
the hereditaments and appurtenances
thereunto belonging or in any wise ap-
pertaining: To Have and To

3^d

Hold the said premises as above described with the appurtenances unto the said party of the second part, his heirs and assigns forever And the said party of the first part for himself and heirs, executors and administrators do hereby covenant & and with the said party of the second part, his heirs and assigns that he is well seized of the premises above conveyed as of a good and indefeasible estate in fee simple and has good right to sell and convey the same ^{in manner and form} as aforesaid; that the said premises are free from all incumbrances; and that the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the claim of all persons whomsoever, he will forever warrant and defend except against the above named liens which liens said Sage is to assume & pay.

In testimony whereof the said Charles H. Camp & Meltha Ann his wife, parties of the first part have hereunto set their hands and seals the day and year first above written.

Charles H. Camp *[Signature]*
 Meltha Ann Camp *[Signature]*
 Signed, sealed and delivered in

presence of

State of Illinois }
 Knox County }

I, C. H. Conger
 Notary Public for said County,
 do certify that on this day appeared
 before me Charles H. Camp & Meltha
 Ann Camp whose names appear
 signed to the foregoing deed of Con-
 veyance and who are personally
 known to me to be the identical per-
 sons whose names are subscribed
 to said deed as having executed
 the same, and acknowledged that
 they had executed the same as their
 voluntary act and deed for the uses and purposes
 therein expressed. And Meltha Ann Camp wife
 of the said Charles H. Camp having been by
 me made acquainted with the contents of said
 deed and being by me examined separate and apart
 from her said husband, acknowledged that she had
 executed the same and relinquished her dower
 in the premises conveyed voluntarily, freely &
 without any compulsion of her said hus-
 band and that she has no desire to
 retract the same

Given under my hand & seal nota-
 rial this second day of October
 1858

C. H. Conger
 N. P.

"Filed Feb. 21. '62 J. H. Lewis clk"

— Which was objected to by Defendant and allowed by the court, To which ruling of the court in allowing said Amendments the Defendant then and there duly excepted.

And hereupon the Plff moved to continue the case on account of a material Amendment of the Declaration, To which motion the Plaintiff objected And the court overruled the motion And to which ruling of the court the Plff, then and there duly excepted.

At which day came as well the said Plff as the said Def, by their respective Attorneys and issue being joined and the jurors of the jury, duly empanelled to try the same, also came and were in due form chosen And sworn to try said issue And upon the trial of said issue the counsel for the Plff, to maintain said issue on his part offered and read in evidence a deed from Charles H. Camp & wife to Horace E. Sage, dated Sep^r 28, 1858 — Which reads as follows, viz:

This Indenture, made and entered into this twenty ninth day of September in the year of our Lord one thousand eight hundred and fifty eight, between Charles H. Camp and Melba Ann Camp his wife, of Knox County, state of Illinois, of the first part and Horace

44

L. Sage of Knox county, state of Illinois
 of the second part, Witnesseth that
 the said party of the first part, for
 And in consideration of the sum of two thou-
 sand six hundred dollars paid by the
 said party of the second part, the
 receipt of which is hereby acknowledg-
 -ed, do by these presents Grant
 Bargain & Sell unto the said party of
 the second part, his heirs and assigns
 these certain tracts or parcels of land
 situated in the town of Cayida, county
 of Knox and state of Illinois, described
 as follows to wit: Lots 6, 7 & 8 in Block 1.
 One, lots 1 & 2 in Block (2) two, lots 1 & 2
 in Block (5), lots 3 Block (8), lots
 south half 1 and 2 and 8 in block (10)
 lots 7 and 8 in Block 11, lots 1 and 2 in
 Block 22, lots 3 and 4 in Block 27, lots
 5, 6, 7, 8, 9, 10, 11, 12, 13 in block 32, lots
 3, 4, 5, 6, 7, 8 & 9 in Block 33, lots 3, 4
 5, 6, 7, 8 in block 34, lots 4, 5, 6, 7, 8
 in Block 35, lots 1, 2, 3, 5, 6, 7, 8 in block
 36, lots 1, 2, 3, 4, 5, 6, 7, 8 in block 37, lots
 2, 3 & 4 in Block 38, lots 1, 2, 3, 4 in
 Block 40, lots 1, 2, 3, 4 in Block 41, lots
 1, 2, 3, 4, 7 and 8 in block 42, lot 1 in block
 43, lots 1, 2, 3, 4, 5, 6, 7, 8 in Block 44
 lot 1, 2, 3, 4, 5, 6, 7, 8 in Block 45
 lots 1, 2, 3, 4 in block 46, lots 1, 2, 3,
 4 in block 47, lots 1, 2, 3, 6, 7, 8 in
 Block 48, lots 1 and 2 in Block 49,
 lot 1 in Block 50, lots 1, 2, 3 in Block

41

51, lots 3, 4, 5, 8, 9, 10, 11, 12 and 13 in block 52, lots 2 and 3 in Block 15 - Also Out lots to the town of Oneida lots 1, 2, 3, 4, 5 and 6 in block One lots 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14 in block (three).

Also a part of the South West quarter of section twenty six in township 13 thirteen north range two East of the Principal meridian, Commencing four rods south of the South East corner of Block no. (33) of the town of Oneida, running thence west to the west line of said quarter, thence south One hundred and twenty rods thence East thirty rods, thence north sixteen rods, thence East twenty rods, thence north One hundred and four rods to the place of beginning, containing thirty six and one fourth acres. Subject to two judgments in Grose Circuit Court, one in favor of Jonathan Hewel for about \$216. & one in favor of Catharine Radcliff for about \$1300. - against said Camp & subject to a Trust deed or Mortgage in favor of John S. Williamson from said Camp for \$5000. - & interest, being liens on said premises - Together with all and singular the hereditaments and appurtenances therunto belonging or in anywise appertaining, To Have and To Hold

42

the said premises as above described with the appurtenances unto the said party of the second part, his heirs and assigns forever. And the said party of the first part for himself and heirs, executors and administrators do hereby Covenant & bind with the said party of the second part, his heirs and assigns that he is well seized of the premises above conveyed as of a good and indefeasible estate in fee simple and has good right to sell and convey the same in manner and form as aforesaid that the said premises are free from all incumbrances and that the above conveyed premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns against the claim of all persons whomsoever he will forever warrant and defend except against the above named liens, which liens said Sage is to assume and pay.

In testimony whereof the said Charles H. Camp & Meltha Ann Camp his wife, parties of the first part have hereunto set their hands and seals the day and year first above written.

Charles H. Camp
Meltha Ann Camp

Signed, Sealed & delivered in presence of

43

State of Illinois
Greene County,

I, J. P. Conger
Notary Public for said County, do certify
that on this day appeared before me
Charles H. Camp & Meltha Ann Camp
whose names appear signed to the fore-
going deed of conveyance and who are
personally known to me to be the
identical persons whose names are sub-
scribed to said deed as having executed the
same, and acknowledged that they had
executed the same as their voluntary
act and deed for the uses and purposes
therein expressed, and Meltha Ann
Camp, wife of the said Charles H. Camp, having
been by me made acquainted with the contents
of said deed and being by me exam-
ined separate and apart from her
husband, acknowledged that she
had executed the same and relin-
quished her dower to the premises there-
conveyed voluntarily, freely and without
any compulsion of her said husband
and that she does not desire to retract
the same

Given under my hand and seal
notarial this second day of October
1835

{L.S.} C. H. Conger N.P.

44 State of Illinois? No 26,625.
Grove County 1888

I Cephas Arms
Clerk of the Circuit Court and ex-offi-
cio Recorder within and for said County
and State aforesaid, do hereby certify
that the within and foregoing instrument
of writing was filed for record on the
6th day of October A.D. 1888 at 11
O'clock A.M. and duly recorded in
Volume 42 of Records on page
453.

In testimony whereof I have
hereto set my hand and affixed the
seal of said Court at Groveville
this 6th day of October A.D. 1888
L.S. Cephas Arms clerk
Per E. S. Pierce Depy

11 11

45-

Also a deed to John S. Williamson from Charles F. Camp, dated May 20th A.D. 1857, which reads as follows, viz:—

This Indenture made this twentieth day of May in the year of our Lord One thousand, eight hundred and fifty-seven, between Charles F. Camp and Melba Ann, his wife, of the county of Knox and state of Illinois, of the first part, and John S. Williamson of the county of Hunterdon and state of New Jersey, of the second part,

Witnesseth that the said Charles F. Camp is justly indebted unto the said John S. Williamson in the sum of Five thousand dollars secured by two certain promissory notes both bearing date May 20th 1857, One for three thousand dollars and One for two thousand dollars both due three years from date payable to John S. Williamson or Order at the Bank of Commonwealth of New York City with interest payable annually on each

Now Therefore These Presents Witness that the said party of the first part in order to secure the prompt and punctual payment of said notes herein before specified, according

44
According to its tenor and effect And in
consideration of Five thousand dollars
to the said Party of the first part
paid, the receipt whereof is hereby
confessed, do hereby Grant, Pa-
gain and Sell unto the said Party
of the second part And to his ex-
ecutors or Administrators All the following
described Premises situate, lying
And being in the County of Knox
and state of Illinois, to wit: The west
half of the South West Quarter And
thirty seven acres on the east side
of the East half of the South
West Quarter All in Section thirty
six (36) in Township Thirteen (13)
north, range two (2) east of the
fourth P.M. Also All the following
lots ^{in block} in the town of Oneida, County
And state aforesaid, to wit: - lots num-
ber One (1) two (2) three (3) And four
(4) in Block Forty two (42) And
Block thirty nine (39), forty (40)
, forty one (41), forty four (44)
, forty five (45), forty six (46)
forty seven (47), forty eight (48), forty
nine (49), fifty (50) and 51 fifty one
Together with all and singular
the tenements, hereditaments and
appurtenances therunto belonging or
in anywise appertaining: To have
And to hold the above described
Premises unto the said party of

44
The second Part And to his executors or Administrators in trust nevertheless for the following purposes to-wit:- In trust in case default shall be made by the said Party of the ~~second~~ ^{first} Part his heirs, executors or Administrators to pay the said notes above mentioned according to the tenor and effect thereof then on application of the said John S. Williamson or the legal holder or holders of said notes and having first given ninety days notice by publishing the same in a public newspaper printed in the County where said premises are situated then it shall and may be lawful for the said Party of the second part his executors, Administrators or Attorney duly authorized to take possession of the premises aforesaid and to sell the same or any part thereof at Public Sale at such hour and place as the said party of the second part, his executors, Administrators or attorney may appoint or to adjourn said sale from time to time, and upon making sale as aforesaid to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same in

45
As Simple; And Out of the money
Arising from such sale, After first
paying All reasonable expenses
growing Out of the execution of the
trust aforesaid And all taxes
And Assessments levied upon the
premises aforesaid or on such
part thereof as may be sold for
the purposes aforesaid to pay the
said John S. Williamson or
his representatives, executors or administrators
or the legal holder or holders thereof the
amount of which may then be due on said
notes above mentioned for principal and
interest rendering the Overplus of the pro-
ceeds of such sale (if any there should
be) unto the said Party of the first part
or his heirs, executors or administrators
In case no default is made in the
payment of the aforesaid notes, then this
conveyance shall be null and void
In case the aforesaid notes and all
costs and reasonable expenses of the
said Trust shall be satisfied by a sale
of part of the premises aforesaid, then the
title to and the right of entry on the
unsold residue of said premises aforesaid
shall rest absolutely in the Party of the
first part and the said unsold resi-
due shall be fully discharged from
all liens created by the trust aforesaid
And the said Charles H. Camp and William

49

Ann his Wife, Party of the first part, for
himself and his Heirs, executors and
Administrators do hereby covenant to
with the said Party of the second part
and his executors or administrators
and to and with the purchaser or purcha-
ers at the sale aforesaid that at the
time of the executing and delivery of
these presents he is well seized of the
premises above conveyed as of an
indefeasible estate of inheritance in
law in fee simple and that the same
are free from all incumbrances of what
nature soever; and against all and
every person lawfully claiming or to claim the
whole or any part thereof will forever
Warrant and Defend; and that he will
during the continuance of these presents
pay all taxes and assessments levied
on the above described premises or
any part thereof — before any ad-
vertisement or charges accrue against
the said premises

In Witness Whereof the said Party of the
first part have hereunto set their
hands and seals the day and year
first above written

Charles T. Camp
Netta Ann Camp
Signed sealed and delivered in
presence of Ezra Chapman

57

State of Illinois
 Knox County, Ss

I Ezra Chapman
 a Justice of the Peace of said County
 do certify that on this day personally
 appeared before me Charles H. Camp
 and Meltha Ann Camp whose names
 appear signed to the foregoing deed of
 Trust and who are personally known
 to me to be the real persons who ^{are}
 in whose names the acknowledgement ^{of the above deed} is
 proposed to be made as having executed the same
 and acknowledged the execution thereof as their volun-
 tary act and deed for the uses and purposes therein
 expressed, and Meltha Ann, wife of the
 said Charles H. Camp having been by me
 made acquainted with the contents of said
 deed and being by me examined separately
 and apart from her said husband, ac-
 knowledged that she had executed the same
 and relinquished her dower to the lands
 and tenements therein mentioned volun-
 tarily and freely and without compul-
 sion of her husband and does not wish
 to retract

Given under my hand and seal at
 Queida this twentieth day of May
 A.D. 1834

Ezra Chapman seal
 Justice Peace

State of Illinois
 Knox County, Ss, No 434 of
 I Ephraim Arms

57
Clerk of the Circuit Court and ex-officio
Recorder within and for the said County of
Knox and State aforesaid, do hereby
certify that the within and foregoing
Instrument of Writing was filed for
Record on the 21 day of May A.D. 1854
at 10 o'clock P.M. and duly recorded
in volume 4 of Mortgages on page
419.

In testimony whereof I have hereto
set my hand and affixed the seal of said court
at Knoxville, this 21 day of May and
1854

R. S. Cephas Arns clerk

Also deed from Curtis to Sage:—

This Indenture made this twelfth day of
February in the year of our Lord
One Thousand, eight Hundred and
fifty nine, between Alfred S. Curtis and
Hetta M. Curtis, his wife, of the first
part, and Horace S. Sage of Knox
County & State of Illinois of the sec-
ond part, Witnesseth that the said
party of the first part for and in
consideration of the sum of twenty-
six hundred dollars paid by the party
of the second part, the receipt of which
is hereby acknowledged do by these
presents Grant, Bargain and Sell

57
Convey And Confirm unto the said
Party of the second Part his heirs
And assigns certain tract or parcel
of land situate in the township of
Ontario, County of Knox & State of
Illinois And being more particularly
described as the West half of sec-
tion seven and the south East
quarter of said section seven
being township thirteen north and
range two east of the fourth principal
meridian subject to a certain mortgage
given to Jas Knox by A. S. Curtis
for \$4000, on which there has been paid
by said Curtis the sum of \$584.65

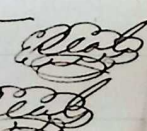
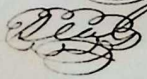
The above mortgage is a lien on said
land and is to be paid by ~~Curtis~~ ^{said} Sage

Together with all and singular the rights
privileges And appurtenances thereto
belonging or in any wise appertaining
To Have And To Hold the said
premises as above described unto
the said party of the second Part
his heirs And assigns forever, And
The said Party of the first Part for
Ourselves And our heirs, executors
And administrators do hereby Cove-
nant To And with the said Party
of the second Part, his heirs, ex-
ecutors, administrators and assigns
that we are well seized of the prem-
ises above conveyed as of a good
And indefeasible estate in fee

53

Simple and have good right to sell
and convey the same in manner
and form aforesaid And that the
above described premises are free
from all incumbrances; and that
the above described premises is the
quiet & peaceful possession of the said
party of the second part, his heirs
or assigns against the claims of all
persons whomsoever, he will forever
Warrant and defend

In testimony whereof the said
Alfred S. Curtis & Hetta M. Curtis, his wife, have
hereunto set their hands and seals the
day and year first above written

Alfred S. Curtis 
Hetta M. Curtis 

Signed, sealed and delivered in presence
of C. H. Camp

State of Illinois }
County of Knox } ss.

I, C. H. Camp
a Justice of the Peace for said County
do certify that on this day personally
appeared before me Alfred S. Curtis
and H. M. Curtis his wife, whose
names appears signed to the for-
going deed of conveyance and who
are personally known to me to be the
identical persons whose names
subscribed to said deed as having
executed the same and acknowl

54

edged that they had executed the same
 as their voluntary act and deed
 for the uses and purposes therein ex-
 pressed. And Hella M. Curtis
 wife of the said A. S. Curtis having
 been by me made acquainted with the
 contents of said deed and being
 by me examined separately and
 apart from her husband, acknowl-
 edged that she had executed
 the same and had relinquished
 her dower to the premises therein
 conveyed voluntarily, freely and
 without compulsion of her said hus-
 band. And does not wish to retract.
 Given under my hand and
 at Oneida seal this twelfth day of
 February eighteen hundred
 thirty nine.

J. H. Camp J. P.

Filed for record June 24th 1859 at 2 o'clock P.M.

Also a deed from Horace G.
 Sage the Plff. to Alfred S. Curtis
 the Def. dated Feb. 12, 1859. Which
 reads as follows, viz:—

This Indenture made this twelfth
 day of February in the year of our
 Lord One thousand, eight hun-
 dred and fifty nine, between Grace
 S. Sage of Knox County & state of
 Illinois of the first part, & Alfred
 S. Curtis of Norwalk Ohio, of the
 second part, Witnesseth that
 the said party of the first part
 for and in consideration of the
 sum of two thousand & six hun-
 dred dollars paid by the
 party of the second part, the
 receipt of which is hereby acknowl-
 edged, do by these presents, grant
 bargain and sell, convey and
 confirm unto the said party of the
 second part, his heirs and assigns
 certain tracts or parcels of land
 situate in the town of Oneida
 county of Knox and state
 of Illinois, described as follows
 to wit:— Lots 1, 4 and 8 in Block One
 (1), lots 1, 2 and 8 in Block two (2)
 lots 3 in Block 8, south half of 1
 and 2 and all of 8 in Block ten (10)
 lot 4 in Block (18), lots 1 & 2 in
 Block 22, lots 3 and 4 in Block
 27, lots 15, 6, 7, 8, 9, 10, 11, 12
 and 13 in Block 32, lots 3, 4, 5
 6, 7, 8 and 1 in Block 33, lots
 3, 4, 5, 6, 7 and 8 in Block 34

57

lots 4, 5, 6, 7 & 8 in Block 35
 lots 1, 2, 3, 5, 6, 7 & 8 in Block
 36, lots 1, 2, 3, 4, 5, 6, 7 & 8 in Block
 37, lots 1, 2, 3 & 4 in Block 40,
 lots 1, 2, 3 & 4 in Block 41, lots 1,
 2, 3, 4, 7 & 8 in Block 42, lot
 1 in Block 43, lots 1, 2, 3, 4, 5, 6,
 7 & 8 in Block 44, lots 1, 2, 3, 4,
 5, 6, 7 and 8 in Block 45, lots 1,
 2, 3, 4, in Block 46, lots 1, 2, 3 & 4
 in Block 47, lots 1, 2, 3, 6, 7 & 8 in
 Block 48, lots 1 & 2 in Block 49
 lot 1 in Block 50, lots 1, 2, & 3 in block
 51, lots 3, 4, 5, 8, 9, 10, 11, 12 & 13
 in Block 52, lots 2 & 3 in Block
 15

Also Out Lots 1, 2, 3, 4, 5 & 6
 in Block 1, lots 2, 3, 4, 5, 6, 7,
 8, 9, 10, 13 & 14 in Block three

Also a part of the Southwest quarter
 of Section Twenty six in Township Thir-
 teen north, range Two East of the
 fourth principal meridian, commene-
 ing four rods south of the South East
 corner of Block No. 33 in the town of Chrida
 running thence west to the West
 line of said quarter, thence South
 One Hundred & twenty rods, thence East
 thirty one rods, thence north six-
 teen rods, thence east twenty rods
 thence north One Hundred & four rods
 to the place of beginning. Containing
 thirty six & one fourth Acres of land

52
more or less subject to two judgments in the Knox Circuit Court One in favor of Jonathan Hewel for about \$216. — And One for in favor of Catharine Radcliff for about \$1300. — Against said Camp & subject to a trust deed or mortgage in favor of John S. Williamson from said Camp for \$5000. — & interest, And subject also to a mortgage for \$1000. given to Geo. A. Hamilton by H. S. Sage dated Oct. 1st 1858 and due two years from date

— Together with all and singular the hereditaments, rights, profits elegs and appurtenances therein belonging or in anywise appertaining To Have and To Hold the said premises as above described unto the said Party of the second part his heirs and assigns, And the said Party of the first part for himself and his heirs, executors & administrators doth thereby covenant & agree with the said Party of the second part his heirs, executors, administrators and assigns that he is well seized of the premises above conveyed as of a good and indefeasible estate in fee simple and have

58

good right to sell and convey the same in manner and form aforesaid And that the above described premises are free from all incumbrances And that the above described premises in the quiet and peaceful possession of the said party of the second part, his heirs or assigns against the claim of all persons whomsoever he will forever warrant and defend.

In testimony whereof the said Horace L. Sage and Gali E. Sage, his wife have hereunto set their hands & seals the day and Year first above written

Horace L. Sage J.S.
Gali E. Sage J.S.

Signed, sealed and delivered in presence of C. H. Camp

State of Illinois
County of Knox J.S.

I, C. H. Camp
a Justice of the Peace for said County do certify that On this day personally appeared before me Horace L. Sage and Gali his wife, whose name appears signed to the foregoing deed of conveyance and who is personally known to me to be the identical person whose name is subscribed to said

57

deed as having executed the same
 And Acknowledged that he had
 executed the same as his vol-
 untary act and deed for the use
 And purposes therein expressed
 And Fuli E. Sage wife of the
 said Horace S. Sage having been
 by me made acquainted with the
 contents of said deed and being
 by me examined separately and
 apart from her said husband
 Acknowledged that she had ex-
 ecuted the same and had re-
 linquished her dower & the premises
 therein conveyed voluntarily, freely
 And without any compulsion of her
 said husband And does not wish
 to retract

Given under my hand at Queida real
 this twelfth day of February Eighteen
 Hundred and Fifty nine

Wm H. Camp L. S.
 J. P.

Filed for record June 14th at 11 o'clock a.m.

61

Also a record of the following judgments viz:— One in favor of Catharine Radcliff for \$1264. — of date May 4th and 1838 against Charles H. Camp. —

One in favor of Jonathan Hewell of date April 26 /58 for \$281.60 against Charles H. Camp both in the circuit court of Knox county.

Also Mortgage by Horace L. Sage & wife to George A. Hamilton on the premises conveyed by Sage & Curtis dated Oct. 1. 1838 to secure a note given and dated Oct. 1. 1838, by Horace L. Sage payable to George A. Hamilton with ten per cent interest two years from date.

Also an exemplified copy of a record of judgments in the U. S. Circuit court for the Northern District of Illinois, recovered on said note so secured by said mortgage in favor of said George A. Hamilton & against Horace L. Sage on the 23d day of May and 1841, for \$1264.43/100, \$33 3/4 costs, said note reads as follows viz:—

\$1000. Onida Oct. 1st 1835
Two years after date we promise to pay to the order of George A. Hamilton One thousand dollars with interest at ten per per annum Value received

12

(Signed) Charles H. Camp
Horace L. Sage
(Endorsement (signed) J. M. Wetmore.



113

Spencer Douglas a witness sworn in behalf of the Plaintiff, then testified as follows: -

I was Sage's attorney in this case. - I paid about \$400.00 on the judgment in case of Hamilton v. Sage to the atty of the Plff and the balance of the money I remitted to the clerk William H. Bradley after paying the \$400.00 - I paid \$400.00 and sufficient to cover the amount of judgment. The money was furnished by Sage

George Camp, a witness on behalf of the Plaintiff, testified: -

My father's name was Charles H. Camp. I was not present when Sage made this deed to Curtis, Father died June 3. 1839. I heard conversation between Curtis and Sage at father's house. The following conversation took place: - The question was asked: 'how matters stood?' - Hannaman asked Curtis how he took this property described in deed to Curtis.

- The Plaintiff then proposed to prove Curtis' statement and admission of the agreement of sale and of its terms; which was objected to by the Defendants - 1st as contradicting the deed - 2nd being verbal it was void by the statute of frauds 3rd it was made after the contract of sale was consummated. - Which

64 objections were over-ruled by the Court
And the Evidence was allowed to be
given, To which ruling of the Court
the counsel for the Defendant then and
there duly excepted.

— The witness then proceeded:—
'Hannaman asked how he took the
'Property and the reply was:— "the same
'as Mr Sage took it".

Which was duly objected to by Deft.
Which objection was overruled by the
Court — And Defendant duly excepted
The Court allowing the witness also
to proceed and state the contract as
admitted by the Defendant against
Defendant's objection and exception
duly ~~over~~ruled made, being over-
ruled.

'I don't recollect just the words
said about the Hamilton debt — I
don't recollect exactly the words
— Sage mentioned over the Newell and
Radcliff judgment And the Hamilton
money as being borrowed on the note
and mortgage to Geo. A. Hamilton, to
pay the judgment — Sage asked Custer
if he was not to pay that? — and Custer
did not say he was to pay it or was
not to pay it — There was considerable

65 said about the Radcliff judgment and
Hamilton mortgage and Sage spoke of the
judgement And Sage said Curtis was
to pay that, - Curtis said "Yes" or some-
thing to that effect - did not say he was
to pay it or was not to pay it and did
not come out boldly. After it was all
through Sage asked Curtis to give him
a writing that he sold this property so
And so, that he sold the property to
pay the judgment and showing that
Curtis agreed to pay. - Curtis said:
"No, not now". - did not say he would
Or would not do it, - As near as I
can recollect he said: "Not now. - It will be
all right" or "it is all right" - I know
father had made a deed, - This
Conversation was after father's death.
The object was to call in Curtis and
see how the estate stood - There was some-
thing said, cannot say what it was, about
some claims - Sage mentioned over what
he let him have. He mentioned over a
claim of Fleming and Conger or a demand
against Kilpatrick - I don't know
as there was anything said why he was
to take the property same as Sage had
taken it to pay the debts. Curtis did
not deny that. This was in the sum-
mer of 1839 ^{July 1859} Sage said he had
turned over this property to pay the
incumbrances 77

66

Cross Examined, witness testified: — "This conversation took place when I called at the house, Hammaman came there in reference to some property taken on Chattel mortgage, that was one thing. I thought that he (Curtis) intend to take advantage. — I don't know as he said it was all right — something to that effect. I don't know that there was a dispute — Sage said he took the property and was to pay certain debts and Curtis took them the same way. — I don't know that Curtis said he bought them subject to these liens — And he could pay off or not just as he pleased. He carried the idea to me that he intended buying up the Chattel Mortgage, I did not think he intended getting round paying for the land, I never heard Curtis say he had agreed to pay off these liens. — Curtis came in. — I think Hammaman asked the question — He asked Curtis how he took this property and what property he took? — When asked, Curtis admitted he had it the same as Sage had it."

To the following question: — "When Sage asked this question, did Curtis say 'Yes'?" — witness said: — "Curtis did not come out boldly

1.4
'And say distinctly "Yes". - Curtis utterly refused to sign any such paper as
Sage Requested!

Norman H. Conger, a Witness Summoned for the Pff., testified and said: -
I know the parties to this suit - Sage never held a note against one Newton Conger, I paid a note to Curtis signed by J. H. & N. Conger between \$200.00 and \$250. - The note was payable to H. W. Clark - I don't think that the note was all paid at one time

H. W. Clark, a witness for the Plaintiff testified: - I held a note against J. H. & N. H. Conger for \$250, - I sold it to H. S. Sage in Oct. 1835. - Sage let Curtis have the note, -
Cross Examined: - I did not see Sage let Curtis have it, but understood he did

Ruben Robbins, sworn in behalf of Pff., testified as follows: - I know the parties to this suit. - Sage held a note against me of \$125. - I paid the Curtis; paid \$123.00 - I suppose Curtis had the note.

(18)
George Camp recalled by the court, testified: 'Sage went on in the conversation with Curtis above referred to, to tell the claims he let him have & pay the debts — I think there was a note against Hemming, He mentioned a note against the Congers He had & let Curtis have the notes & pay these debts — Curtis made no reply to that, — I think there was one against Park, I recollect a meetinghouse note that he let him have, I don't recollect the amount,

Witness Robbins recalled, testified: 'Camp had a note against me, that note was given for a lot the Methodist Society had a parsonage on. The note was \$125. — paid \$45. —

J. H. Hemming, a witness for Pff, testified & said: — I know Camp & Curtis — In July 1839 I applied to C. A. Camp to buy two lots and some writing had to be done through Sage — I gave note to Sage and Sage deeded to me, I then spoke to Camp about the note, He said Curtis had carried it to Ohio, I paid it to Camp, I did not see the letter that brought it. I saw

119 The note. There was no interest on it
paid 140 off

A. A. Smith, a witness on behalf of the
Pff., testified and said: — "I was
atly for Radcliff in case of Radcliffe
v. Camp. And was paid by Camp
on the judgement, \$485, Oct. 15. 1858.
\$5.00 afterwards and \$20. July
21. 1859 — That is all paid by
Camp. That judgment consisted of
two notes of \$385. — each, making
judgment of \$1300. — I learned from
Sage that Curtis was to pay this judg-
ment and I wrote to Curtis and went
to Queida and saw him there. I told
Curtis what Sage said. I told
Curtis that Sage said he was to pay
that judgment. Curtis gave me to
understand that he was liable to
pay it. He, said he, was expending a
good deal of money on a coal shaft; and
gave that as an excuse for not paying. I
looked to him to pay the judgment. Curtis
gave me encouragement he would pay it
and did ^{not} deny his liability. I did not
get the impression he was liable to an
action personally upon his engagements?
Cross examined, witness said:
Sage said 'Curtis is to pay that debt.' Sage
said that, I think. — I told him Sage

70
said he was going to pay it, — and I had
come then to get the money, I made no
inquiry as to the contract or how he was in-
terested to pay the money.

J. G. Frost, atty for Def., called and
sworn on behalf of the Pff., testified: —
"Camp paid this Real judgment or most
of it. I thought there was a small bal-
lance ^{remaining} unpaid — Can't tell the amount
~~of~~ ^{nor} when the judgment was made without
referring to my books — but am willing to
admit the payment to have been of any date
named by Pff's counsel and it was fixed
in Oct. 1858. 22

George Camp re-called, testified: —
"I think this Hamilton loan was negotiated
through father and Sage"

Martha Ann Camp, sworn on behalf of Pff.,
testified: — "I know Charles F. Camp, He was
my husband. I and my husband made
this deed to Sage, — I know of a loan
negotiated with Hamilton subsequent to
that. It was to get money to pay on the
Radcliffe and Newel judgment. I know
of no other loan being effected by Mr.
Camp with Mr. Hamilton, I never saw
this deed. I went in just as they,

41
Sage & Curtis, finished their business, I don't recollect of anything said about Sage telling Curtis have notes, Curtis said he did not want the Chattel Mortgage as he was amply secured without it, I suppose he had security against the mortgage and judgments he had to pay. Part of it was this Radcliffe and Qual judgment, I heard this conversation after Mr. Camp's death when Mr. Hannaman was present. Hannaman asked Curtis if he took the property and notes the same as Sage took them? Curtis said he did, — I don't recollect what Sage said to Curtis about the Hamilton debts, — I did not hear the conversation about the deeds. I did not hear them say what Curtis was to give for that land, I did not hear how Curtis took the property. The land was to be sold and debts paid off.

The Plaintiff here closed his case.

George Camp recalled by Deft., testified
I heard Sage say there was an exchange of land between him and Curtis, for the Knox land, Camp got in exchange for the land he deeded Curtis, He said he let Curtis have some notes of his own

47

He took the Knox land of Curtis and
conveyed to Curtis the Camp land.
Cross-examined, witness tes-
tified:—"I understood it as I have
stated, Sage took and exchanged
lands with him and he also let
him have notes of his own as much
as he had paid. He deeded him
this land. He got of father and
he was to go on and pay off the
debts."

The Deft. objected to
this portion of Sage's admission
and that already given by the witness, as
not called for by the Deft.; which
was overruled by the court. And the
court allowed the witness to proceed
with such statement, to which ruling
of the court the Deft. then and there
duly excepted. Whereupon the witness
proceeded:—

Sage said Curtis was to
take Camp's land and pay off the
mortgages and debts that stood
against the land. He said he gave
land for what he got of Curtis and
let Curtis have notes for the amount
he had paid Knox. He did not
want to mix the said land tracts
and said that the trades were
separate.

73

Isaac M. Wetmore a witness sworn
On behalf of the Plaintiff, testified:—

"I know the parties to this suit, I heard
"Sage speak of the contract between
"these two men, it was concerning the
"trade between Curtis and Sage, I
"spoke to Curtis, Sage & Camp and
"Sage says:— 'I have been making a trade
"with Curtis & pay for his land and letting
"him have Camp's land, Blee said they
"had been exchanging for the two places.
"One for the other, nothing said about
"the price one way or the other.?"

Cross examined, witness testified:—

"The expression was:— they had been
"exchanging lands, Blee having got the
"land on Rope Creek and he was
"to let Curtis have the Camp land.
"I am positive he said he had
"exchanged farms or lands, The deed
"from Sage to Curtis was in Curtis'
"hand writing.?"

Re Will C Bacon, a witness sworn
On behalf of the Defendant testified and
said:—

"Sage said he was all right
"they could not make anything off of

u/H
him, He was telling talking about that subject and of a part of the land which Camp had sold Hubbard

Robert L. Hannaman a witness on behalf of Dept. 7 testified and said:—

"I was present at this interview between Curtis & Sage referred to by witness Geo. Camp - I went there by agreement. Neither Curtis nor Sage were there when I got there but came in, I was present during the whole interview, I think we went away together. Curtis never to my knowledge admitted directly or indirectly that he was to pay off these claims?"

On cross Ex. - "u", witness said:—

"My attention was called to this by Douglas.
"I had forgotten all about my calling
"there till he named it. There was difference of opinion between the men
"about their deeds. — Cannot recollect
"much about the conversation?"

James Knox, a witness on behalf of Dept. sworn, testified:—

"I sold this Pope Creek land to Curtis

95)

"Three quarter sections of land in
"Ontario township, — I sold it for \$6000.
"He paid \$2000, down, — He paid
"\$384.85 in all since the sale.
"4 Sage Since that has paid \$2000.
"\$2000, is now due & interest still
"unpaid."

The Evidence here closed, the foregoing
being all the Evidence given. On the trial

The court at the request of the Plaintiff
thereupon gave the following instructions:

1. — "The Jury is instructed that if they believe
"from the Evidence that the Plaintiff &
"his Wife executed and delivered to
"Defendant the deed shown in Evidence
"which purports to have been thus exe-
"cuted; & that at the date of said
"deed, the Plaintiff was bound for & to
"pay the Hamilton debt shown in Ev-
"idence; & that the Defendant in Con-
"sideration of making said deed, prom-
"ised and agreed to and with the Plaintiff
"that he would pay the Hamilton debt;
"& that the Plaintiff has been sued for
"the fully paid said debt, damages
"& costs shown in Evidence, then the
"jury will find for the Plaintiff & assess

Given {

76

his damages at the sum so paid by the Plaintiff?"

2nd } The Jury is instructed that the admissions of Sage proved in Evidence by the Defendant are to be received by the Jury as Evidence and to be allowed such weight as the Jury may think they are entitled to in a consideration of all the Evidence

Given } If the Jury believe from the Evidence that there was ~~an~~ an Exchange of lands and that each party agreed to pay off all the incumbrances ~~in~~ on the lands received by him, then the fact that Sage has not paid ~~know~~ in full is in itself immaterial unless the jury further believe that both parties were to discharge the incumbrances, — the one at the same time or to the same amount with the other? — (Filed Feb. 24. Mar. J. H. Lewis Clerk)

— To the giving of Each and Every of said instructions by the Court the Counsel for the Defendant then and there duly, severally & separately accepted.

The Counsel for Plt. then & there requested the Court to give the following instructions on the part of the Defendant:—

4th If the Jury find upon the Evidence
that the contract between Curtis & Sage
was in substance: - that Curtis was to pay off
the liens existing against the property
at the time of the purchase by Sage, and
whatever sum Sage was obliged to pay
towards the discharge of said liens and
that the Hamilton mortgage and note was
given for the purpose of raising money
to pay off these incumbrances, the
Plff. then could not recover the amt.
of the Hamilton debt even though they
should find that Sage paid the Hamilton
debt - unless they should further
find that Sage with the money realized
from the proceeds of the Hamilton loan
paid said liens or applied said
money thereon. And he, Sage, could
then only recover to the extent of what
he actually paid toward the discharge
of said liens

5th If the Jury find the contract as stated
in the last preceding instruction, the
Plff. could not recover thereon in any
event for the reason: - no such con-
tract is set forth in the Declaration

6th If the Jury find upon the Evidence
that the contract between the parties
was in substance: - that the parties
should exchange lands and that

a/3
the Plff was to convey & Deft.
the premises described in his deed to
Deft. ~~And~~ that he was to convey said
premises & transfer the notes in question
to Deft., and that Curtis in consid-
eration thereof agreed to pay off the
incumbrances on the premises deeded
from the Plff. to Deft. And the Plff
agreed to pay off the incumbrance on
the premises conveyed by the Deft. to the
Plff. & the contract between the parties being
mutual and entire, neither could recover
against the other without in the first instance
showing performance on his own part
And if Sage failed to pay off and
discharge the incumbrance which he
agreed to pay on the land conveyed
to him, then he cannot recover against
Curtis for not fulfilling his contract
to pay off the incumbrances on the land
conveyed to him and in that event
the verdict should be for Deft.

Refused }
8 The Jury are instructed that in order
to charge the Defendant upon any special
promise to pay the debts of another, some
note or memorandum of such agreement
must be made in writing and signed
by the party to be charged; otherwise such
contract is void and no action can be
maintained on such contract if verbal only.

9 That any contract in reference to the

4/9
Refused Sale of land or any interest in land for a longer term than one year must be in writing and signed by the party to be charged; otherwise such contract is void and no action can be maintained on such contract if verbal only.

10. If the Plaintiff has shown a case which entitles him to recover, the measure of damages under the declaration & proof is only the amount which Sage has Refused been obliged to pay & has actually paid on the demands & liens which he has agreed to pay & has failed to pay.

11. That where a witness written contract is made between two or more persons, and a verbal contract made between Refused the same parties at the same time, the written contract must stand and the verbal contract will be disregarded if it varies from the written contract.

12. The ^{provision} ~~premises~~ in the deed to Sage from Camp did not make Sage personally liable to pay off the incumbrances therein referred to Refused

Admissions are, unless clearly & distinctly proved, of a suspicious character of evidence & should be carefully scrutinized by the jury Refused

80 — If the Evidence is of such character in this case, as to lead the jury to no satisfactory conclusion on the subject, they should find a verdict for the Deft.
"Filed Feby 24. '62 J. H. Lewis clk"

— which the Court severally refused to give. To which ruling of the Court in refusing to give each separate instruction so refused by the Court the counsel for the Deft. then and there duly, separately & severally, excepted. The Court against the Defendant's objection also modified the following instructions asked by the Defendant.

(The modifications of the Court are in brackets, if modified by words added or interlined. If modified by erasing any words in the instructions as written by Deft., such words are erased by drawing across them red lines. J. H. Lewis clk.)

Sage
or
Curtis }

The Court is requested to instruct the jury on behalf of the Defendant as follows:—

1st To enable the Plff. to recover in this action, it is necessary for him to prove that the Defendant entered

Given } into a valid legal Contract to pay off
81 And discharge the Hamilton mortgage

2nd [If there was] An Agreement on the
part of Curtis to take the property
which Sage bought of Camp on the
same terms on which Sage bought
of Camp, and the jury find upon
the evidence that that agreement one,
bound Sage to pay off the liens ex-
isting on the premises at the time of
his purchase. Such a Contract alone
would not render Curtis personally
liable to pay the Hamilton mortgage
created after the time Sage bought of
Camp

3d - An Agreement on the part of
Curtis to pay off the liens existing
on the property at the time of the pur-
chase by Sage of Camp, or such
portion of them as remained unsatisfied
at the time of the purchase by Curtis,
would not render Curtis personally
liable to pay the Hamilton mortgage
unless [that mortgage] was a lien upon
the property at the time Sage bought of
Camp

4th An Agreement on the part of
the purchaser to take the land pur-
chased subject to the liens existing

82

Given

Thereon, does not render the purchaser personally liable to pay off such liens, or subject him to an action for not doing so without a further and ~~distinct~~ [Express] agreement on the part of the purchaser to pay off the incumbrances. And if this was all the contract entered into on the part of Curtis, this action cannot be maintained.

Given

The fact that there is no obligation to pay off these incumbrances or the Hamilton debt inserted in the deed from Sage to Curtis is proper evidence for the consideration of the jury tending to show that no such contract was made or obligation assumed on the part of Curtis; ~~especially when both the deed of Camp to Sage & from Curtis to Sage contain such a provision & obligation on the part of Sage~~ [and the absence of this contract to pay is to be duly weighed by the jury in connection with ^{the} other evidence. And with the insertion of an Express contract to pay the incumbrances in the deeds from Camp to Sage and from Curtis to Sage]

The fact that there is no writing containing such a contract as the Plaintiff claims to have existed in this case & that the amount assumed to be paid was large is proper evidence.

83
to be submitted to the jury on [to be
considered by the jury in determining]
the question whether any agreement to
pay ~~them~~ off these incumbrances was
ever made by Curtis. [but a verbal
contract to pay these incumbrances
would nevertheless be valid.]

To Each And Every of which several
modifications of the Court of the
several instructions asked by Dept.
And given as modified by the Court
the Counsel for the Defendant then
And there duly & severally & separately
by objected And excepted.

The jury find a verdict for the Plain-
tiff as follows:-

"H. L. Sage }

"A. S. Curtis } Special Cir. Court.

"Feb'y Term 1862
"We the Jury find the issues for the
"Plaintiff and assess the damages
"in the sum of One thousand, three
"hundred, twenty nine & 72/100 dollars
"Feb'y 24, 1862 And Thomson, Foreman

"
Filed Feb 23 and 1862 J. B. Jones clk

814 Thereupon on the
25th day of February A.D. 1882 the follow-
ing is the record of this said Court
in this said cause, to wit:

142 H. L. Sage }
v. A. S. Curtis } Assumpsit

This day came the plain-
tiff by attorney and entered a
remititur of (\$32.) Thirtytwo
dollars of the judgment rendered
heretofore herein in his favor

And thereupon the Defendant comes
and made his motion for a new trial
as follows, viz:—

Know Circuit Court

Horace L. Sage }
v. Alfred S. Curtis } ss,

February Term A.D. 1882
And now comes the
Defendant by Hannaman and Thos
his attorneys in the above entitled
cause and moves the Court for
a new trial in said cause on the
following grounds:—

1st On the ground of newly discov-
ered evidence

85) 2nd On the ground of Surprise
said ground being more fully specified in the Affidavit filed in this cause for the purpose of obtaining a new trial in said cause.

3^d On the ground of Erroneous rulings of the Court in giving each of the several instructions asked for by the Plaintiff And given by the Court.

4th On the ground of Erroneous rulings of the Court in refusing each of the several instructions asked for by the Defendant And refused by the Court

5th On the ground of the Erroneous rulings of the Court in modifying each of the instructions of the Defendant which were modified by the Court

6th On the ground that the Court Erred in allowing the Plaintiff to Amend his Declaration after the Commencement of the trial & some of the jurors called.

7th On the ground that the Court Erred in denying the Defendant's motion for a continuance after the Amendment of the Plaintiff's Declaration.

8th The Court Erred in excluding the evidence offered by the Defendant
9th The Court Erred in admitting

86

On the trial the Evidence offered
by the Plaintiff and objected to by the
Defendant

10th The verdict and damages
by the jury assessed are excessive

11th The verdict is against the Evidence

12th The verdict is against law and
the instructions of the Court

13th The Court erred in admitting
the verbal contract offered in evidence
and proved by the Plaintiff

14th The verbal contract proved
which was the foundation of the
Action was void by the statute
of Frauds for not being in writing

15th Said Contract was void by
the statute of Frauds as being
an agreement not to be performed
within one year from the making
thereof And verbal merely

Hamman & Frost
Plt's Attys

Filed Mar. 1. W. J. H. Lewis clk

Affidavit referred to in motion aforesaid
for new trial.

Circuit Court
Horace L. Sage
Alfred S. Curtis

State of Illinois
Greene County ss. Alfred

84
S. Curtis being duly sworn deposes
and says that he has learned since
the trial of this cause of important
and material testimony for this deponent
in this in this case; That William
Clubbard & Harrison Weight & William
P. Candee are the witnesses by whom
he expects to obtain said testimony
which is to the following purport
in substance, viz: - He expects to
prove by said witnesses if permitted
to have a new trial in this case, viz:
That said Plaintiff after his purchase
of said premises mentioned in the
deed introduced on the trial from
Charles F. Camp to said Sage
repeatedly admitted & stated that
he was no way liable by his contract
& arrangement with said Camp to pay
to pay off the incumbrances existing
on the property described in said deed.
And this deponent says further
that in point of fact this deponent
never agreed with said Sage
to pay off said incumbrances or
the incumbrances on said property
at the time of the purchase thereof
by this deponent or to pay off the
Camilton debt & this deponent did
not believe prior to the trial of
this cause that any witnesses
would swear to any such thing or to

Any Admission of such agreement
 on the part of this Deponent &
 that he advised his Counsel prior to
 the trial that no witness could swear
 to any such statements & that no such
 agreement was ever made & that this
 Deponent was wholly surprised by
 such testimony on the trial of this cause
 & was not prepared to meet it. And this
 Deponent says that he expects to be
 able to prove by said witnesses
 admissions & statements of said
 Sage inconsistent with the ex-
 istence of said alleged agreement
 in the part of this Deponent & lay off
 the incumbrances aforesaid on
 any portion ^{thereof} & that on a failure
 future trial of this cause this de-
 ponent expects to be able to meet
 said testimony by competent
 proof & that if this Deponent had
 known what evidence of said pretend-
 ed agreement the said Sage
~~subscribed~~ ^{would produce} he should have made great
 effort to prepare for the trial of the
 cause & to meet said testimony by coun-
 ter proof. But this Deponent knowing
 that no such agreement ever was made
 & that this Deponent never admitted
 any such agreement, this Deponent
 confidently relied for an entire defense
 to the suit on the fact that no witness
 as this Deponent supposed could do

89
would swear to any such agreement or admissions thereof. And this Deponent says further that although this Deponent lives in Queida in this county, where said Sage also lives (also said George Camp lives near Queida about a mile therefrom), this Deponent & said Sage & Camp having resided there for a long time previous to said trial, this Deponent received no intimation from either said Sage or Camp although this Deponent had for a long time prior to said trial saw both said Camp and Sage every day, that said Camp would swear to any such fact as he stated on the trial in the said agreement on the part of this Deponent to pay off said incumbrances on the said property. And the first intimation this Deponent had that said Camp would swear to any such thing was from his Counsel Mr. Hannaman, who as this Deponent was informed had his information from Mr. Rogers one of the Plaintiff's Attorneys. & said information was not communicated to this Deponent till after the commencement of this term of court a short time before the trial of this cause & so late & enable this Deponent to look up evidence or prepare to meet such ~~evidence~~ ^{testimony} of said Camp & this Deponent did not expect even after

90

he heard said information believe
 said Camp would swear to any such
 statement after he came upon the
 stands as such agreement was
 never in fact made by this Deponent
 Nor any admission made of any
 such fact by this Deponent, Deponent
 says further that he has learned
 from said William D. Cauder &
 expects to be able to prove by him
 that after said purchase by Sage of
 Camp, said Cauder applied to said
 Sage relation to some of said incum-
 brances said Cauder being interested
 in some of the lots named in the Wil-
 iamson mortgage interested in the
 removal of said incumbrances of said
 Williamson mortgage therefrom; that
 when so applied to, said Sage utter-
 ly denied and repeatedly afterwards
 denied in the most unequivocal man-
 ner his liability by reason of his
 contract of purchase & arrangement
 with said Camp to pay off said
 incumbrances

Alfred S. Curtis

Subscribed and sworn to before me
 this 27th day of Feb'y A.D. 1862

Thomas Harrison

Police Magistrate

Filed Feb'y 28th 1862 J. H. Smith

— which motion for a new trial was

91

Over ruled by the Court. To which
 ruling of the court in denying said
^{motion}
~~request~~, the counsel for deft. then ^{and}
 there duly excepted

And because none of the said excep-
 tions so offered and made to the opin-
 ion ^{and decision} of the court of the said Circuit
 Judge do appear upon the record
 of the said trial, therefore on the
 prayer of the said Defendant by his
 counsel, the said Circuit Judge
 hath to this Bill of Exceptions put
 his seal according to the statute
 in such case made and provided
 this ——— day of ——— in the
 year of our Lord One thousand Eight
 Hundred and Sixty two

C. D. Lawrence *Deak*
 " "

And on the Back of said Bill
 of Exceptions appears as follows:
 "Filed Feb. 28. 62 J. H. Lewis clk"

Filed June 11. Bar of March 1, Bar. J. H. Lewis clk
 J. H. Wilson Dep

April 8th A. D. 1863

On this day came the parties to this

cause and placed on the files of this
said court as follows:—

State of Illinois }
Knox County } ss Knox Circuit Court

Sage }
v. }
Curtis }

It is stipulated that the Circuit clerk may copy from the record into the Bill of Exceptions the records of any records or papers which are matters of record which may be called for by such Bill of Exceptions and of which the originals are not in the hands of the clerk

Galesburg April 4, 1863

J. G. Frost
Deft's Att'y }

Rouglas & Craig
for Plff }

Filed April 8, 1863

John D. Jew's clerk
By E. C. Cheaney, Depy

93

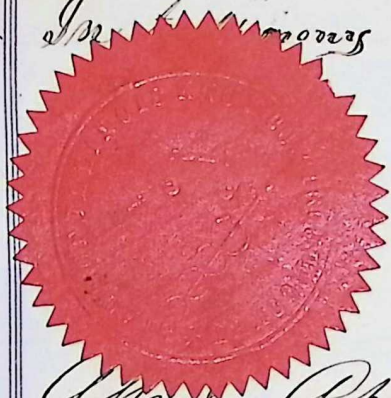
State of Illinois
County of Knox

I, John H. Lewis, Clerk of the Circuit Court in and for said County of State, do hereby certify that the above and foregoing instrument of Writing is a true, exact and complete copy of the Record and Files of said Court in the first above named cause. I further certify the deed from Horace L. Sage to Alfred S. Curtis, called for in the Bill of Exceptions on page 54 of this instrument of Writing is not on the files of this Court and that by stipulation between the parties, set forth on page 42, I have copied the record of said deed, as it appears of record on page 63 of volume 49 of Knox County Illinois Record Books. I further certify the same of the deed from A. S. Curtis to H. L. Sage called for in the Bill of Exceptions therein on page of this instrument 51. - I further certify that the deed from C. H. Camp et. al. to H. L. Sage is copied on page 34 - And on page - 39 of this instrument is so copied by order of Bill of Exceptions calling for deed between these parties with date of Sept. 28, A.D. 1858, and the following stipulation of the parties hereto: "The error in date makes no difference - Put in the deed, April 11, 1858, filed April 11, 1858 J. H. Lewis, Clerk of the Circuit Court in and for said County of State." - Said stipulation referring to said last named deed

J. G. Frost
Doubtless & Co.

94

In



Whereof I have herewith set
my hand and affixed
the seal of said Court at
the city of Knoxville this
fifteenth (15) day of
April 1883

John M. Lewis clerk
By E. E. Chesney Deputy

Alfred S. Curtis)
 vs
 Horace L. Sage)

Afterwards to wit on the third Tuesday of April in this same term - before the Justices of the Supreme Court of the the People of the State of Illinois at the Court Room in the City of Ottawa comes the said Alfred S. Curtis by Thomas S. Frost his attorney ^{And} says that in the record ^{And} proceedings aforesaid ^{And} also in giving the judgment aforesaid there is manifest error in this to wit -

The Circuit Court erred in admitting improper evidence on the part of the Plaintiff below - objected to by the defendant below

The Court erred in excluding the evidence offered by the defendant below

The Court erred in denying the motion of the defendant below for a new trial asked for on the ground of newly discovered evidence ^{And} on the ground of surprise, as well as on the other ground ^{And} errors mentioned in the motion

The Court erred in giving each of the several instructions asked for by the Plaintiff below ^{And} given by the Court -

96 The Court erred in refusing each of the several instructions asked for by the defendant below refused by the Court

The Court erred in modifying each of the instructions of the defendant below which were modified by the Court.

The Court erred in allowing the Plaintiff below to amend his declaration after the commencement of the trial ^{and} after some of the jurors had been called. The Court erred in denying

The Court erred in denying the motion of the defendant below for a continuance after the amendment of the declaration.

The Court erred in admitting the verbal contract offered in evidence ^{and} proved by Plaintiff below.

Said contract was void by the Statute of frauds, not being in writing ^{and} said contract was void being verbal ^{and} an agreement not to be performed within a year of the making thereof ^{and} said contract was void as a contract for the sale of Real Estate being verbal only ^{and} said contract was void being an agreement to answer for the debt ^{and} default of another person - not being in writing & the Court erred in instructing the jury that said contract was valid.

The Verdict ^{and} damages by the jury aforesaid are excessive

9. The Verdict is against the evidence

The Verdict is against law ^{And} the instructions of the Court.

And the said Alfred D. Curtis prays, that the judgment aforesaid for the errors aforesaid ^{And} other errors in the record ^{And} proceedings aforesaid may be reversed, annulled ^{And} altogether held for nothing ^{And} that he may be restored to all things which he hath lost by occasion of the said judgment &c.

Thomas G. Fozz

atty for Plaintiff

Supreme Court of the State of Illinois
April Term A D 1853

Horace L. Sage
and
Alfred B. Curtis.
defendant in error
Plaintiff in error

And hereupon afterwards to wit on the third Tuesday
of April in this same Term before the Justices of the
Supreme Court of the People of the State of Illinois at
the Court Rooms in the City of Ottawa - comes the
said Horace L. Sage by Douglas & Craig his
attorneys And says there is no error either in the
record & proceedings aforesaid or in giving the
judgment aforesaid And he prays that the
Court now here may proceed to examine as well
the record & proceedings aforesaid as the matter
aforesaid above assigned for error; and that
the judgment aforesaid given may be in all things
affirmed &c

Douglas & Craig
Attys for Deft in Error

25471 24

Alfred Curtis
by
Hiram L. Sage
Record.

Filed Apr. 27, 1863.
L. Seland
C.R.