Hughes *v.* Moore. (*a*)

Discontinuance.—Statute of frauds.—Oyer.

A plaintiff may, before verdict, discontinue a count in his declaration, and waive the issues joined thereon.

A promise to pay a sum of money, as a compensation to the plaintiff, for the injury done him by the misconduct of the defendant, in obtaining a patent in his own name, for land which he ought to have patented in the name of the plaintiff, and in preventing the plaintiff from obtaining a patent in his own name, and in consideration of the defendant's having procured the patent to be issued to himself, is a contract for the sale of land, within the statute of frauds, and must be in writing.

Oyer of a deed, set forth in the first count, does not make that deed part of the record, so as to apply it to other counts in the declaration.

Error to the Circuit Court for the district of Columbia, sitting in Alexandria. This was a special action of *assumpsit*, brought by Moore against Hughes. The declaration, after several amendments, contained four counts.

*1. The first count stated, that whereas, on the 16th of June 1797, [*177 it was agreed between the plaintiff and one John Darby, by a writing under their hands and seals, now here shown to the court, in substance, as follows: "Whereas, Cleon Moore had located, in his own name, 9922 acres of land, in Kentucky, by a treasury warrant No. 19,100," "and the said Cleon Moore, hath sold all his right, title and interest of and in the same, to John Darby, for the consideration of 300*l.* and warrants that no person or persons claiming under John Tebbs, now deceased, or under him, the said Cleon Moore, shall interrupt him, the said John Darby, in his said claim to the said lands, but as to all other claims, he is to run the risk, and on their account, will never require, that the said Cleon Moore, or any other person or persons, shall refund the said 300*l.*, or any part thereof, but if there should be as much land secured by the said location, as will bring 200*l.* or upwards, the said John Darby, is to pay the said Cleon Moore 700*l.* in money, over and above the said 300*l.*, so that he may receive altogether, 1000*l.*; otherwise, the said Cleon Moore is only to have the said consideration of 300*l.*" At the bottom of which writing was a receipt in these words: "Received of John Darby, the sum of 300*l.*, the full consideration for the first-mentioned location, in the foregoing agreement, or of his right, title and interest of and in the same—Cleon Moore," and a seal. And whereas, on the same day, a memorandum in writing, and under the seals of the plaintiff and the said Darby, was added and indorsed on the said agreement as part thereof as follows: "Memorandum: If a patent or patents have already issued for the first within-mentioned location, the said Moore doth agree to assign the same, to the within-named John Darby, of his heirs and assigns; or if not issued, that they issue in the name of the said Cleon Moore, and he is to assign them to the said John Darby, his heirs and assigns; and if in the opinion of any two respectable men in the neighborhood of the said lands, to be mutually chosen, they shall say the said lands will sell for 2000*l.*, or upwards, the said John Darby doth bind himself, his heirs and assigns, to pay unto the said Cleon Moore, his executors, *administrators and assigns, the sum of 700*l.*, as herein men- [*178 tioned.

(*a*) March 4th, 1812. Present, all the judges.

"And whereas, the said defendant, afterwards, on the 5th of October 1799, well knowing the contract and covenants aforesaid, between the said Cleon Moore and John Darby, and more especially, well knowing that a patent or grant had not then been issued for the tract of 9922 acres, located in the name of the said Cleon Moore, and well knowing that the patent for that land ought, and could only be issued unto the said Cleon Moore, and well knowing that the said Cleon Moore was entitled to the sum of 700*l.*, lawful money of Virginia, of the value of $2333.33, provided, in the opinion of any two respectable men in the neighborhood of the said lands, to be mutually chosen, they should say, the said lands would sell for 2000*l.* or upwards, lawful money of Virginia; and whereas, the defendant, well knowing that the said lands were really and truly worth, on the day and year last mentioned, a much greater sum than 2000*l.*, and well knowing that it would materially injure the plaintiff in his contract aforesaid, and would materially benefit the said John Darby and himself, the said defendant, he, the said defendant, on the said 5th day of October, &c., assigned the plat and certificate of survey made of the said 9922 acres, and a warrant numbered 19,605, in the name of the plaintiff, unto himself, the said defendant and the said John Darby, without any lawful authority so to do, from the said Cleon Moore, by making and subscribing the said assignment of the said survey, in the name of him, the said Cleon Moore, by him, the said James Hughes, as attorney in fact for the said Cleon Moore, which assignment imported a desire of him the said Cleon, that patents might issue in the names of the said Darby and Hughes, intending thereby to defraud and injure the said Cleon Moore, and to benefit himself and the said John Darby, in respect to the premises aforesaid. And whereas, the said James Hughes, by means of the herein-before mentioned assignment, had caused and done to the plaintiff, an injury to the value of a great sum of money, to wit, the value of $4000, which he was disposed to compensate; the said James Hughes in consideration thereof, afterwards, viz., on the 17th of March 1806, came to
*179] an agreement with *the said Cleon Moore, whereby the said Cleon Moore promised that he would quit all claim to the said tract of land, and discharge the said James Hughes of and concerning all damages for, and by reason of his actings and doings aforesaid, in assigning the survey in manner aforesaid; and he the said James Hughes promised to the said Cleon Moore, that he would pay to him the sum of 700*l.*, when he should be thereafter required; and the plaintiff avers, that he has been always ready to keep, and has always kept his promise aforesaid; in consideration of which premises, the defendant became liable to pay to him, the said sum of 700*l.* &c., and being so liable, the defendant in consideration thereof, undertook," &c.

2. The second count stated, "that whereas, on the 5th of October 1799, the plaintiff was owner and proprietor of a certain plat and certificate of survey of 9922 acres of land, in Mason county, in the state of Kentucky, dated the 28th of November 1796, of the value of $20,000, and whereas, the defendant, well knowing the premises, afterwards, viz., on the 5th of October 1799, without any lawful authority from the plaintiff, and with a view to benefit himself and a certain John Darby, and to injure the plaintiff in this particular, assigned the last-mentioned plat and certificate of survey unto him, the said defendant and the said John Darby, by subscribing the

name of the said Cleon Moore, by the said James Hughes, as attorney in fact for the said Cleon Moore; and in consequence of the said unauthorized assignment, a grant of the said tract of land was afterwards made to the defendant and the said Darby, by the Commonwealth of Kentucky, styling them assignees of the plaintiff. And whereas, the defendant, by the assignment aforesaid, had caused and done to the plaintiff an injury and loss to the value of a great sum of money, viz., to the value of $4000, which he was willing to repair and compensate; in consideration thereof, the said defendant, afterwards, viz., on the 7th of March 1806, at the county of Alexandria, &c., promised to pay to the plaintiff, the sum of 700*l.* lawful money of Virginia, as compensation for the said injury and loss of the said land assigned as aforesaid. The said plaintiff, at the same time, agreed to the said terms, and to accept of the said compensation in full of *all claims and demands for the said land, and for the injury aforesaid. And the [*180 plaintiff avers, that he has always kept his promise aforesaid, and has been at all times ready and willing to do everything on his part to be done; and afterwards, viz., on, &c., at, &c., offered to perform the agreement on his part, and the defendant then and there refused to perform, &c., whereby the defendant became liable, &c., and being so liable, promised to pay," &c.

3. The 3d count stated, that whereas, the plaintiff, by virtue of a certain land-warrant issued, &c., on the 26th of September 1783, duly located by entry, on the 7th of December 1783, and duly executed by actually survey, duly made on the 28th of November 1796, a plat and certificate whereof had been duly made and delivered according to law, was entitled to have a grant from the commonwealth of Kentucky, by patent to be founded on the said survey, and to be completed and issued to him, of 9922 acres of land in the county of Mason, &c., bounded, &c. And whereas, the defendant had, on the 5th of October 1799 (the plaintiff, being so entitled to have the land patented to him aforesaid, and the defendant well knowing the premises), for his own gain and advantage, and to the great wrong and damage of the plaintiff, without any lawful authority to that effect from the plaintiff, and without his knowledge or consent, but under color and pretence of being attorney in fact for the plaintiff, wrongfully, injuriously and wilfully made and executed, in the name of the plaintiff, a certain indorsement in writing, upon the back of the said plat and certificate of survey, purporting to be an assignment by the plaintiff, of the said plat and certificate, to one John Darby and the said James Hughes, for value received, and purporting to express a desire of the plaintiff, that patents might issue in their names, and purporting to be subscribed with the name of the plaintiff, by the said James Hughes, his attorney in fact. And whereas, the said James, afterwards, viz., on the 5th of April 1800 (the plaintiff being entitled to have the said land patented to him as aforesaid), without any authority to that effect from the plaintiff, and without his knowledge or consent, by means of the said pretended assignment, and under color of the same, for his own gain and advantage, and to the great wrong *and damage of the plaintiff, wrongfully, injuriously and wilfully caused and pro- [*181 cured the land so located and surveyed for the plaintiff as aforesaid, and bounded as aforesaid, to be granted by the commonwealth of Kentucky to them the said John Darby and James Hughes, by patent, bearing date, &c., founded on the said warrant and survey, and on the said pretended assign-

ment of the plat and certificate, and signed by James Garrard, the governor, and sealed with the seal of the said commonwealth of Kentucky, and in all respects, finally completed and issued to them, the said Darby and Hughes, and entered of record in the land-office of Kentucky aforesaid. And the plaintiff says, that the said land was patented to the said Darby and Hughes, by the procurement and pretences of the said James, as aforesaid, without the plaintiff's having ever in any manner authorized, contracted or consented, that the same should be patented in the name of any other person or persons whatsoever, other than himself. And the plaintiff produceth here in court, a copy of the said patent, &c.

"And whereas, afterwards, on the 13th of March 1806, at Alexandria, &c., a conversation was had, and propositions for an accord and satisfaction, were moved between the said James and the plaintiff, concerning a compensation for the loss, and liquidation of the damages sustained by the plaintiff, by reason of the misconduct and wrongdoing of the said James in the premises, and of the vesting them, the said Darby and Hughes, with the legal title to the said land as aforesaid; and it was then and there agreed by the said James on his part, in consideration of the premises, and of the just claims of the plaintiff for compensation and damages as aforesaid, that the said James should pay to the plaintiff in satisfaction of the same, 700*l.* Virginia currency, equal to $2333\frac{1}{3}$, currency of the United States, to be paid in four equal quarterly instalments, the first in three months, &c., each instalment to be secured by a bond of the said James; and the plaintiff agreed to accept the said 700*l.* by instalments as aforesaid, in full satisfaction of his just claims as aforesaid, and upon the said instalments being secured by the bonds of the said James, as aforesaid, to release and quit
*182] claim to the said James, all the plaintiff's *claims and demands whatsoever, for compensation, redress or damages arising from the wrongdoing and misconduct of the said James, in the premises, and from the vesting the said Darby and Hughes with the legal title to the said land as aforesaid." The count then stated, that the defendant promised to fulfil the agreement on his part, and the plaintiff on his part. That the plaintiff is, and always was, ready and willing to perform his part, if the defendant would perform his. That he afterwards required the defendant to perform his part, and offered to accept, and would have accepted of the defendant, the 700*l.*, in instalments as aforesaid, and secured by bonds as aforesaid, in full satisfaction of all the claims and demands of the plaintiff for compensation, redress and damages as aforesaid, and did then and there offer to perfect and execute, and would have perfected and executed to the said James, a good and sufficient quit-claim and release to him, of all the plaintiff's claims and demands for compensation, redress or damages arising from the misconduct and wrongdoing of the said James, in the premises, and from the vesting of the said Darby and Hughes, with the legal title to the said land as aforesaid, if he, the said James, would have secured by his bonds duly executed, the said 700*l.*, &c. But the defendant refused to perform his part of the agreement, &c.

4. The 4th count stated "that whereas, on the 5th of October 1799, the defendant, without any lawful authority to that effect, but for his own gain and advantage, and to the great wrong and damage of the plaintiff, with intent to prevent the land hereinafter mentioned, from being patented to the plaintiff, and to cause and procure the same to be patented to the defendant

and one John Darby, wrongfully, injuriously and wilfully made and executed, in the name of the plaintiff, a certain other indorsement in writing, upon a certain other plat and certificate of survey, duly made for the plaintiff, on the 28th of November 1796, the said survey having been so made, in due execution of a certain other warrant duly issued in favor of the plaintiff, from the land-office of Virginia, on the 26th of September 1783, &c., and in pursuance of a location and entry, &c., which last-mentioned indorsement purported to be an assignment, &c., from the plaintiff to the said John *Darby and the defendant, for value received, &c., purporting to be [*183
subscribed, &c. And whereas, the defendant had, on the 5th of April 1800, in further pursuance of his said intent to prevent the land from being patented to the plaintiff, and to cause it to be patented to the said Darby and the defendant, wrongfully, and without authority, and under color of being attorney in fact for the plaintiff, caused the land to be patented to the said Darby and the defendant, &c.; and the plaintiff produceth here a copy of the patent, warrant, survey, &c. And the plaintiff avers, that he never authorized the defendant to make the said assignment, and that the defendant knew he had no such authority; that it was made without the plaintiff's knowledge or consent; that the plaintiff was, until the issuing of the patent to Darby and the defendant, entitled to have the land patented to himself; by which wrongdoing of the defendant, the plaintiff had suffered great wrong and injury, and was entitled to be compensated in damages by the defendant, and to be indemnified for being prevented from having the land patented to him, and for the same being patented to Darby and the defendant. And whereas, afterwards, on the 13th of March 1806, a conversation was had and propositions for a compromise were moved between the plaintiff and defendant, touching the compensation and indemnification of the plaintiff, and the defendant then and there agreed, in consideration of the just claims of the plaintiff to be compensated for the damage and injury arising from the misconduct of the defendant in the premises, and in consideration of the defendant's having procured a patent to be issued to him and Darby for the land, that the defendant would pay to the plaintiff another sum of 700*l.*, Virginia currency, of the value, &c., which the plaintiff agreed to accept in satisfaction of his just claims to compensation arising from the causes and considerations last aforesaid; and the defendant in consideration of his said agreement, assumed and promised to the plaintiff that he, the defendant, would perform his part of the agreement. And the plaintiff, in consideration of that promise, agreed to accept the 700*l.*, in satisfaction, &c., as aforesaid, and upon payment of the same, or upon its being secured to be paid in four instalments, &c., that he, the plaintiff, would quit-claim and release to the defendant, all the plaintiff's claims and demands *and [*184
rights whatsoever to compensation for being prevented from having the land patented to him, and for and on account of the same being patented to the said Darby and the defendant; and the plaintiff says, that he was and hath ever since been willing and ready to perform, &c., and requested the defendant to perform, &c., and offered to accept, &c., the 700*l.*, &c., in full satisfaction, &c., and offered to quit-claim, &c., all the plaintiff's claims for compensation, &c., if the defendant would pay, &c., but he refused, &c.

1. The defendant, having prayed *oyer* of the agreement and the memorandum, of which a *profert* was made in the first count, pleaded *non assump-*

sit to that count, and so in like manner to each of the other counts separately ; upon all of which pleas, issues were joined.

2. The defendant (without again praying *oyer*), for further plea to each of the counts, severally, said, that the promise alleged to be made by the defendant to the plaintiff, or any memorandum thereof, was not in writing, signed by the defendant or any other person by him thereunto lawfully authorized, and this he is ready to verify, &c.

3. The defendant also, without again praying *oyer*, for further plea to each of the counts, severally, said, " that after making the agreement and memorandum between the plaintiff and the said John Darby, in the declaration mentioned, viz., on the 29th of August 1799, Alexander D. Orr and John Graham, two respectable men residing in the neighborhood of the lands, in the said agreement mentioned, were mutually chosen by the plaintiff and the said John Darby, to say and determine whether the said lands would sell for 2000*l.*, or upwards, and the said Alexander D. Orr and John Graham, afterwards, viz., on the 29th of August 1799, did say and determine, that the plaintiff's claim to a survey of 9922 acres, in the county of Washington, being the land in the said agreement and memorandum mentioned, would not sell for 2000*l.*, Virginia money, and this he is ready to verify," &c.

*185] *4. The Defendant also, without again praying *oyer*, pleaded separately to each count, " that there was not as much land secured by the said location in the agreement mentioned, as would bring 2000*l.* or upwards, and this he is ready to verify, &c.

The plaintiff demurred generally to the second plea to all the counts, and to the 3d and 4th pleas to the 2d, 3d and 4th counts. To the 3d and 4th pleas to the 1st count, there was a general replication and issue.

The count below adjudged all the demurrers in favor of the plaintiff. The plaintiff then entered a *nolle prosequi* upon the first count of his declaration, and waived all the issues joined thereon. Upon the issues of *non assumpsit* to the 2d, 3d and 4th counts, there was a verdict and judgment for the plaintiff.

After the jury had retired to consider of their verdict, they returned into court and requested the court to determine whether a verdict for the plaintiff would give to the defendant all the right and interest of the plaintiff and his heirs, in the patent of land in the declaration mentioned, and the court instructed them, that if the plaintiff should recover a judgment in this case, he would be thereby barred in equity from setting aside the patent issued to the defendant and the said John Darby in the declaration mentioned. To this instruction, the defendant excepted ; and brought his writ of error.

Swann and *C. Simms*, for the plaintiff in error, contended, 1. That the plaintiff had no right to discontinue as to the first count, and waive the issues on that count, without the leave of the court, or the assent of the defendant. 2. That the statute of frauds was a good bar to every count in the declara-

*186] tion, and 3. That if it was not, the court erred in instructing *the jury, that a recovery in this suit would bar the plaintiff in equity from setting aside the patent.

1. The plaintiff had no right to discontinue as to the first count, after

issue. Cro. Jac. 35, 316. The *oyer* being once prayed and granted, the agreement and memorandum were spread upon the record, and the defendant had a right to avail himself of it in all his pleas. The defendant had a right to show that the title of the plaintiff to those lands was never worth 2000*l.* and therefore, he was never entitled to anything more than the 300*l.* which Darby had paid him; consequently, the obtaining a patent in the name of Darby and Hughes, could be no injury to the plaintiff, and if the plaintiff did promise to pay the 700*l.*, it was a promise without consideration. This was the real substantial defence in the cause. In order to entitle the plaintiff to recover, he must not only prove that the defendant did a wrong action, but that it did an injury to the plaintiff. 1 Bac. Abr. 50; 6 Mod. 46.

2. As to the plea of the statute of frauds. By the act of assembly of Virginia (P. P. 15), which is like that of Kentucky, it is enacted, that no action shall be brought, whereby to charge any person upon any contract for the sale of lands, tenements or hereditaments, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.

The contract set forth in each count of the declaration is a contract for the sale of land. It is a contract whereby the plaintiff was to part with all his title to the land; and it is immaterial, whether that title was legal or equitable. The first count states expressly, that the plaintiff "promised to quit all claim to the tract of land," and the defendant promised to pay 700*l.* The 2d count also states, that the defendant was to pay the 700*l.*, as compensation for the injury and loss of the land; and the plaintiff agreed to accept it "in full of all *claims and demands for the said land, and for the injury aforesaid." The 3d count says, that a conversation was had [*187 concerning a compensation for the loss, and a liquidation of the damages, sustained by the plaintiff, by reason of the misconduct and wrongdoing of the defendant, and of the vesting them, the said Darby and Hughes, with the legal title to the said land, and it was agreed, in consideration of the premises, that the defendant should pay to the plaintiff 700*l.*, in full satisfaction of the plaintiffs claims as aforesaid, and the plaintiff agreed, upon such payment being made, to quit-claim to the defendant all the plaintiff's claims for compensation, &c., arising from the wrongdoing and misconduct of the defendant in the premises, "and from the vesting the said Darby and Hughes with the legal title to the said land." The 4th count states that the defendant agreed, in consideration of the just claims of the plaintiff to be compensated for the damage and injury arising from the misconduct of the defendant in the premises, and in consideration of the defendant's having procured a patent to be issued to him and Darby for the land, that he, the defendant, would pay the plaintiff another sum of 700*l.* &c. Thus, the quit-claim of the plaintiff's title to the land is the consideration of every promise in the declaration; and if the plaintiff had no title, or if no title was to pass from the plaintiff, by the contract, it was *nudum pactum.*

3. If this was not a contract for the sale of the plaintiff's title to the land, a judgment for him in this suit could not have barred the plaintiff from setting aside the patent in equity. There seems to have been an inconsistency in the opinions of the court below. If the agreement extinguished the plaintiff's equitable title, then it was an agreement for the sale of land, and ought

to have been in writing. If it did not extinguish the plaintiff's equitable title, then it could not bar him from setting aside the patent.

Jones and *C. Lee*, contrà.—This was a case of naked *tort;* there is no *188] evidence *of any authority from Moore to Hughes to make this transfer, but it was done by the latter, with a full knowledge that it was contrary to the plaintiff's intention. It was of itself an injury to the plaintiff for which he was entitled to redress. It was actionable *per se.*

But suppose, that a judgment for the plaintiff in this case should prevent him from setting aside the patent, yet it does not follow, that it is a case within the statute of frauds. Contracts executed are not within that statute. If there be a verbal agreement for the sale of land, and the vendor executes his part of the agreement, by conveying to the purchaser the legal title; which he accepts, and receives the possession and the title papers, it is not necessary, that the vendor should have a promise in writing from the purchaser, in order to compel him to pay for it; a court of chancery would decree him to execute the contract.

The plaintiff's subsequent ratification of the act of the defendant, was equivalent to his previous assent. The contract then was executed on the part of Moore. The defendant had all his title, and the possession, and the title papers. No further act was necessary on the part of the plaintiff.

Besides, it does not appear, that the contract on the part of the plaintiff, if there was any, for the transfer of his right, was not in writing. If it was necessary that it should have been in writing, it will, after verdict, be presumed to have been so. 1 Chitty on Plead. 133; 1 Saund. 276, *a*, note 2; 4 East 400.

As to the *nolle prosequi*, the plaintiff has a right to enter it at any time before verdict, and even after verdict, before judgment. Sayer on Damages 113; 12 Mod. 558.

The defendant could not, by *oyer* of the agreement stated in the first count, make that agreement applicable to other counts which do not refer to it. The 3d and 4th pleas were only applicable to the first count.

It is immaterial, whether the plaintiff actually sustained damage to the *189] value of 700*l.* It is sufficient, if he sustained *any damage at all. It is an action for liquidated damages, and it is immaterial, what was the real injury which the plaintiff suffered. 7 Vin. 300, tit. Damages, S; *Colman's Case*, Moore 419; *Lowe* v. *Peers*, 4 Burr. 2228; 1 Lord Raym. 1164.

The court below was correct in the opinion, that a judgment in this suit would have barred a suit in equity to set aside the patent. It was only an agreement for the extinguishment of an equitable right, which need not be in writing. It transferred nothing to the defendant.(*a*)

(*a*) It is understood, that the opinion of the court below was grounded on the idea, that this case was to be governed by the principles relative to implied trusts, which are not within the statute of frauds. Darby and Hughes having obtained the legal estate, without the assent of the plaintiff, were to be considered as holding it in trust to secure to him the payment of 700*l.*, in case the land should turn out to be worth 2000*l.* This was an implied trust, resulting from the circumstances of the case, and which would cease to exist upon payment of the 700*l.* Upon the plaintiff's receiving payment of that sum, his equitable title would cease. It would not be transferred to the defend-

Hughes v. Moore.

March 7th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the opinion of the court, as follows :—Much of the seeming intricacy of this cause will disappear, if we extricate the questions made by the pleadings before the court, from others which might greatly embarrass and perplex it.

The declaration contains four counts. The first recites an original contract between Cleon Moore and John Darby, for the sale of certain lands, lying in Kentucky, and proceeds to recount in detail those transactions on which the action was founded. The other counts state, in different terms, the several *assumpsits*, which they allege to have been made.

The defendants crave *oyer* of the written contract stated in the first count, and file several pleas to that *count. They, then, without repeating the *oyer*, file similar pleas to the remaining counts. After taking issue on some of the pleas, and demurring to others, the plaintiff below discontinues his first count. [*190

By the counsel for Hughes, this has been considered as error. But the court can perceive no reason for this opinion. After this discontinuance, the parties are in precisely the same situation, as if all the issues, both of law and fact, which were joined upon that count, had been decided in favor of the defendant below. Such decision could not, in point of law, have affected the rights of the parties, under the issues joined on the remaining counts, and consequently, the discontinuance upon that count must leave those rights unimpaired. Whether this count remain in the declaration, or be stricken out of it, the right of the plaintiff in the circuit court, to recover on the other counts, will be precisely the same. The examination of this right must be conducted on the same principles as if the declaration had never contained the first count.

By the plaintiff in error, it is contended, that the *oyer*, which was prayed of the written contract alleged in the first count, spreads that contract on the record, and makes it a part of all his subsequent pleas. This is certainly true, with respect to all his subsequent pleas to that count, but not with respect to his pleas to the other counts. Different counts allege different contracts, and different *assumpsits*. It is upon this idea alone, that a verdict can be rendered for the plaintiff, on one count, and for the defendant on another. Now, the *oyer* of one contract cannot be the *oyer* of another contract, and cannot spread upon the record a contract supposed to be totally distinct from that which was read. The discontinuance of the first count produces no change in this respect, in the condition of the parties. Had it remained, it could have had no influence on the other counts, nor could the *oyer* of the written contract it stated, have transferred that contract to the other counts.

The second count states, that Cleon Moore was owner and proprietor of

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ant; but would be extinguished. If the 700*l.* mentioned in the declaration were to be considered as the compensation for the injury done in depriving the plaintiff of his legal security for 700*l.* to be paid upon a contingency, it is evident, that that injury could not have exceeded 700*l.* And whether it were to be paid as compensation for that injury, or as the sum which would be due upon the happening of the contingency, it would equally destroy the implied trust. And as an implied trust can be raised without writing, so, it was thought, it could be extinguished without writing.

a plat and certificate of survey for lands lying in Kentucky, for which he was entitled to a patent from the government of that state; and that *James Hughes, without authority, transferred that plat and certificate, in the name of Cleon Moore, to John Darby and the said Hughes, by which wrongful act, a patent for the said land was issued to the said Darby and Hughes, to the great injury of the said Moore. That afterwards, the said Hughes promised to pay to the said Moore, "the sum of seven hundred pounds for the said injury, and loss of the said land assigned as aforesaid; the said plaintiff at the same time, agreed to the said terms, and to accept of the said compensation in full of all claims and demands for the said land and for the injury aforesaid. To this count, the defendant pleaded several pleas, one of which was, that neither the promise nor any memorandum thereof was made in writing. To this plea, the plaintiff demurred, and the court sustained the demurrer. The correctness of this decision depends entirely on the application of the statute of frauds to the contract stated in the declaration.

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Cleon Moore is averred to have been the proprietor of a plat and certificate of survey, on which Hughes and Darby obtained a patent, by using his name, without authority. This tortious act did not divest Moore of his equitable title. The land, in equity, was his. Did he part with this title by the contract stated in the declaration? The answer must, in the opinion of the whole court, be in the affirmative. "He agreed to accept of the said compensation in full of all claims and demands for the said land, and for the injury aforesaid. This, then, was an agreement to sell his equitable title to the land for the sum of 700*l.* The court can perceive no distinction between the sale of land to which a man has only an equitable title, and a sale of land to which he has a legal title. They are equally within the statute. It is, therefore, the unanimous opinion of this court, that the judgment upon the demurrer to this plea, ought to have been in favor of the defendant below. This plea being a complete bar to the second count, it is unnecessary to consider the other pleas.

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*The third count states the title of Cleon Moore, and the injury sustained by him to the same effect with the second count. It then states a conversation between the parties, "concerning a compensation for the loss, and a liquidation of the damages sustained by the said Cleon, by reason of the misconduct and wrongdoing of the said James in the premises, and of the vesting them, the said Darby and Hughes, with the legal title to the said land as aforesaid; and it was then and there agreed by the said James, on his part, in consideration of the premises, and of the just claims of the said Cleon, for compensation and damages as aforesaid, that the said James should pay to the said Cleon, in satisfaction for the same, the sum of 700*l.*," &c. "And the said Cleon then and there agreed, on his part, to accept of the said 700*l.* in full compensation of his just claims as aforesaid," and, upon the same being secured, &c., to release and quit-claim to the said James, all his, the said Cleon's claims and demands whatsoever, for compensation, redress or damages arising from the wrongdoing and misconduct of the said James in the premises, and from the vesting the said Darby and Hughes, with the legal title to the said land as aforesaid. To this count also, the statute of frauds was pleaded in bar. The plaintiff below demurred to the plea, and the defendant joined in demurrer.

Upon the true construction of the contract stated in this count, there was some contrariety of opinion among the judges. It is, however, the opinion of the majority, that the contract must be understood to import a sale of land, and that the sum of money stipulated to be paid, was, in contemplation of the parties, to extinguish the title of the said Cleon Moore. The conversation was "concerning a compensation for the loss and a liquidation of the damages sustained by the said Cleon," not only "by reason of the misconduct of the said Hughes, but also by reason "of the vesting them, the said Darby and Hughes, with the legal title to the said land." "And it was then agreed, in consideration of the just claims of the said Cleon, for compensation and damages, that the said *James should pay the said Cleon, in satisfaction for the same, the sum of 700*l.*" To the majority of the court, it seems, that a compensation for the loss of the title to the land must be understood to be a compensation for the land itself, and that the receipt of this money by Cleon Moore, would not only have barred an action for damages, but a suit in equity for the title. If this opinion be correct, then, the contract is substantially for the sale of land, and, to be valid, ought to have been in writing. On this plea also, the demurrer ought to have been overruled. [*193

The fourth count states the injury more in detail than is done in either the second or third counts. It states the claim of Cleon Moore to be compensated for the loss sustained by his land being granted without his consent to Hughes and Darby. A conversation was then held, and "propositions for a compromise were made, touching the compensation and indemnification of him, the said Cleon," "and it was then and there agreed by the said James, in consideration of the just claims of the said Cleon, to be compensated for the damage and injury for the misconduct of the said James in the premises, and in consideration of the said James having procured and obtained a patent to be completed and issued to the said James, and the said John Darby, as last aforesaid, for the said land," that he, the said James, would well and truly pay the said Cleon, one other sum of 700*l.* This the "said Cleon agreed to accept in satisfaction of his just claims to compensation arising from the causes and considerations last aforesaid." The compensation here offered and accepted, is for the injury sustained by Cleon Moore, in consequence of the grant of his land, by the state of Kentucky, to Hughes and Darby. It seems to the court, that this compensation was in lieu of the patent itself, and must have been intended to extinguish his right to that patent. It is difficult to suppose an intention, in this case, to receive a full compensation for the loss of a title, and yet to retain the right to that title. The majority of the court is of opinion, that, under the contract as stated in this count also, the payment of the money agreed to be *paid, would have extinguished the right of Cleon Moore to the land in question, and that this contract likewise is substantially a contract for the sale of land. The demurrer, therefore, to this plea ought to have been overruled. [*194

It is unnecessary to examine other points which were made in the cause. The judgment of the circuit court must be reversed, and judgment rendered for the plaintiff in error.

Judgment reversed.