offered to bidders at the public sale, they would have been purchased. 2d. They were claimed as school lands, selected for township nine, range eleven. 3d. The trustees for the township took possession of them, and leased them out as early as 1834; and their tenant is yet in possession, and here sued. 4th. The endorsement, on the plat of the lots, of the word "school," indicates, to some extent, that they had been selected by the proper authority. What weight this may have, it will be proper to leave to the jury. 5th. That this township had no school lands assigned to it, unless the lots referred to were assigned.

These facts, with others, were proper to be submitted to the jury, from which they might have presumed that the lots had been duly selected.

In the language of the Supreme Court of Ohio, in the case of Coombs and Ewing *v.* Lane—"Facts presumed are as effectually established as facts proved, where no presumption is allowed." That was a suit for the possession of this same land, and involved the same evidence this case does, and presented the same questions of law. But there, the cause was submitted to the Circuit Court on the law and the facts, without the intervention of a jury; and the Supreme Court was appealed to in order to reverse the opinion of the lower court, on a motion for a new trial. The State courts dealt with both facts and law; whereas, here, the jury must deal with the facts and presumptions, under the instructions of the court, as respects the law.

We order the judgment of the Circuit Court to be reversed, and remand the cause for another trial.

HENRY HILL, PLAINTIFF IN ERROR, *v.* CALEB B. SMITH AND OTHERS.

Where it appeared from the record that a party sold land to a railroad company, the price of which was paid in the stock of the company, guarantied by certain persons to be at par after a named time, and suit was brought upon this written contract, the case does not appear to be open to a demurrer by the defendants, and the judgment of the court below sustaining such a demurrer must be

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reversed. It is an original contract, and, being declared on as such, the plaintiffs are entitled to judgment.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

It was an action brought upon the contract recited in the opinion of the court, to which there was a general demurrer, which was sustained by the Circuit Court.

Hill, who was the plaintiff, then brought the case up to this court by a writ of error.

It was submitted on a printed argument by *Mr. O. H. Smith* for the plaintiff in error, no counsel appearing for the defendants.

Mr. Smith made the following points:

First. That the Circuit Court erred in sustaining the demurrer to the *first* and *second* counts, and each of them; to sustain this position, we rely upon the positions above, and authorities cited, to sustain the *third*, *fourth*, *fifth*, *sixth*, *seventh*, and *eighth* points.

Second. That the court erred in sustaining the demurrer to the whole declaration, if there be one good count, or part good of a *divisible* count.

1 Chitty, p. 665, Ed. 1855, notes c (3) and authorities.

Third. The guaranty set out in the *first* and *second* counts was an *original* undertaking of the appellees, and is binding in law.

4 Maule and Selw., 66; 8 East., 231.

1 Johns. R., 362; 1 Parsons on Con., 480.

2 Howard, 450; 12 East. R., 227.

Cowper R., 714; Chitty on Con., 80, 81.

1 Parsons on Con., 495.

6 E. C. L. R., 32; 41 E. C. L. R., 848.

1 How., 187; 10 Pet., 493.

Fourth. The whole contract set out in the first and second counts being in writing, and founded upon a sufficient consideration, was obligatory upon the parties.

10 Moore R., 395: 3 Bing. R., 107.

8 Cush. R., 159; 15 Penn. St. R., 156.

Fifth. Suppose the undertaking of the appellees to be col-

lateral to a contract of the railroad company, the undertaking or guaranty is valid in law, and binding on the appellants.

2 How. R., 426; 7 Cranch R., 69.

10 Peters R., 482; 7 Peters R., 122.

10 Moore R., 395; 3 Bing. R., 3, 107.

14 Illinois R., 237; 15 Penn. St. R., 27.

2 Story on Con., p. 400, sec. 862, and authorities cited, Ed. 1857.

17 Peters R., 161; 5 B. and Ad., 1109.

Mood. and Al. R., 394.

Sixth. Neither the railroad company nor their guarantors can set up the illegality of their *executed* contract, either at law or in equity, without placing the parties *in statu quo.*

4 Blackf., 515; 5 Blackf., 441.

7 Blackf., 55; 8 Blackf., 409, 469.

Adams Equity, 191.

1 Story on Con., p. 601, sec. 497, note 2, Ed. 1857.

Hill on Trustees, p. 221, Ed. 1857.

Seventh. The third count sets out an original, independent contract between the appellant and the appellees, founded upon a sufficient consideration, and the facts being admitted by the general demurrer, raising no question as to the form, is valid in law, and the demurrer to the whole declaration should have been overruled.

1 Parsons on Con., 497, and authorities.

37 E. C. L. R., 120; 2 McLean, 103.

3 McLean, 387; 1 Story on Con., p. 530, sec. 431.

Ib., p. 544, sec. 551.

Eighth. The undertaking of the appellees is valid and binding, whether an action could be maintained against the railroad company or not.

1 Burr. R., 371; 1 B. and Ald., 297; 15 E. C. L. R., 47.

1 Stark. R., 14, 19; 2 E. C. L. R., 16, 18.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiff's demand is founded on the following contract, dated August 17th, 1853, signed by defendants, and set forth at length in the declaration:

"Whereas Henry Hill, of Delaware county, has proposed to convey to the Cincinnati, Newcastle, and Michigan Railroad Company a certain tract of land in Delaware county, containing three hundred and nine acres, for the consideration of six thousand one hundred dollars, to be paid in the capital stock of said company, at par, on the condition that Caleb Smith and other responsible persons will guaranty that the said stock shall be worth par in three years from the present date, and in default thereof, that the company shall make it up to par; and whereas the said Cincinnati, Newcastle, and Michigan Railroad Company have agreed by a resolution of their board of directors to accept said proposition: Now, we, the undersigned, in consideration of the premises, hereby guaranty to the said Henry Hill, that the said stock shall be worth par in three years from the date of this instrument; and if at the expiration of that date said stock shall not be worth par, we guaranty the said Henry Hill that the said Cincinnati, Newcastle, and Michigan Railroad Company shall make up to him or pay him whatever sum the said stock shall be worth less than par, so as to make the said stock worth par to said Henry Hill at that date."

The declaration is in proper form, and contains all the averments necessary to show a breach of this contract, and the consequent liability of defendants.

There was a general demurrer to the declaration and judgment for the defendants.

As we have not been furnished with an argument on behalf of defendants, we are at a loss to discover on what grounds it is supposed that this judgment can be supported.

As the contract is in writing, signed by the parties to be charged, it cannot be affected by the statute of frauds; and, although the term "guaranty" is usually applied to a collateral undertaking to pay the debt of another, yet when taken in connection with the other terms of the instrument, this is clearly an original, independent contract. If it had been under seal, the term "*covenant*" would have been the technical synonym for the word "guaranty" as here used.

It states that the defendant would not agree to sell his land

in exchange for stock, except on condition that defendants should guaranty that the stock in three years would be worth par, or should be made so by the corporation. For this consideration, defendants agree to make it so, or, in other words, to pay the difference between the cash value of the stock on that day and its nominal value.

On this condition and for this consideration, the plaintiff agreed to convey his land to the railroad company; and, on the faith of defendants' undertaking, he has conveyed it, and accepted, not money, but certain stock, which defendants have agreed to make equal to money by a certain day. The declaration avers, that at the time specified the stock was wholly worthless, and of no value, and the railroad company utterly insolvent, and unable to pay the difference; and that defendants, having full notice of these facts, refuse to comply with their contract.

There is no reason why this contract should be treated as void because of an illegal or immoral consideration. Its conditions require no previous suit to be instituted against any one as principal debtor. The declaration contains every necessary averment: a valid contract, a large consideration paid, and a breach of the contract by defendants; all set forth in proper and technical language.

The plaintiff is therefore entitled to judgment on the demurrer, unless the court below, in their discretion, shall permit the defendants, on payment of costs, to withdraw their demurrer, and plead some good defence in bar.

The judgment of the court below is reversed, and record remitted for further proceedings.

BENJAMIN FORD, PLAINTIFF IN ERROR, *v.* JOHN S. AND HERMAN WILLIAMS.

Where a contract is made by an agent, the principal whom he represents may maintain an action upon it in his own name, although the name of the principal was not disclosed at the time of making the contract; and, although the