PACKET COMPANY *v.* SICKLES.

1. Where the record of a former suit is offered in evidence, the declaration setting out a special contract, but not saying whether it was written or parol, and where jurors who were empanelled in the former suit are brought to testify that the contract declared on in the second suit was the same contract that was in controversy in the former one, and was passed on by them, testimony may be given on the other side that the contract was a parol one;—so as to let in a defence of the statute of frauds.

   [In the District of Columbia, in which the suits in this case were brought, the British statute of frauds, providing that "no suit shall be brought to charge any person upon any agreement that was not to be performed in one year, unless there was some memorandum or note in writing of the agreement," was in force. And the fact that the contract declared on was a parol one, and so within the statute, was one of the matters meant to be relied on by the defendants in the second trial.]

2. A contract where performance is to run through a term of years, but which, by its tenor, may be defeated at any time before the expiration of the term—*ex. gr.* a contract to pay for a right to use an invention, on a certain boat, so much a year during the term of a patent having twelve years yet to run, "*if* the said boat should so long last,"—is within the clause of the statute quoted in the preceding paragraph.

   In this case, which had become somewhat complicated by several trials below, and which had been in this court on error more than once, and was now returned with a mandate for a *venire de novo*, the court makes two observations over and above the points above stated as adjudged:

   (i) That the secret deliberations of the jury or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding; but that their evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration; and that then the record furnishes the only proper proof of the verdict.

   (ii) That where the extrinsic proof of the identity of the cause of action is such that the court must submit the question to the jury as a matter of fact, any other matters in defence or support of the action, as the case may be, should be admitted on the trial, under proper instructions.

THIS was a suit brought in the Supreme Court (the former Circuit Court) of the District of Columbia to recover damages under a special contract set forth in the declaration.

The contract, in substance, was, that on the 18th of June, 1844, the plaintiffs below, Sickles & Cook, and the Wash-

ington, &c., Steam Packet Company, the defendants, agreed that Sickles & Cook should attach, for use, to a steamboat owned by the company, the Sickles cut-off, a certain patented contrivance which was designed to effect the saving of fuel in the working of steam engines; and that, in consideration thereof, if the said cut-off should effect a saving in the consumption of fuel, the company would use it on their boat *during the continuance of the said patent,* IF *the said boat should last so long*, and that they would, for the use of the cut-off, pay to the plaintiffs, weekly, three-fourths of the value of the fuel saved. *The patent had, at the date of the alleged contract, yet twelve years to run.* The declaration set forth further, that it was agreed between the parties that the saving of the fuel caused by the use of the said cut-off should be ascertained by taking two piles of wood of equal quantity and burning one pile without and the other with the use of the cut-off, and thus to ascertain how much longer the boat would run, under the same circumstances, with the use of the cut-off than without, and that the proportion of savings as agreed upon above should be paid by the defendants. It alleged finally, that this experiment had been fairly made, and showed a saving of fuel by the use of the cut-off of thirty-four per cent.

The plaintiffs accordingly claimed the value of three-fourths of the fuel thus saved, between certain dates specified.

The defendants pleaded the general issue.

On the trial the plaintiffs, to support the issue, gave in evidence the record of a former trial between the same parties on the same contract as alleged, for payments due when the writ in that case was issued, in which trial a verdict and judgment had been rendered in their favor.

The declaration in the record of this former trial contained four counts:

1. A special count on the contract, corresponding in all respects with that set out in the declaration in the present suit.

2. A common count for compensation for the use of the cut-off by the defendants on their boat before that time had and enjoyed, and for such an amount as it was reasonably worth.

3. A common count for money had and received; and

4. A special count on a contract in substance like the first, with the difference hereinafter stated: It recited that, in consideration the plaintiffs had before that time attached the said Sickles cut-off to the engine of the defendants' boat, and had agreed that they should have the use of it during the continuance of the patent-right, if the boat should last so long, they, the defendants, undertook and agreed to pay the plaintiffs three-fourths of the value of the fuel saved by the use of the cut-off; that a large quantity of the fuel, to wit, one thousand cords of wood, of the value of $2500, had been saved, yet the defendants, not regarding their promise, &c., have refused, &c. The difference between this and the first count consists mainly in the omission of any agreement to ascertain the saving of fuel by the experiment.

To the declaration in this former suit, whose record was thus offered in evidence, the defendants had pleaded the general issue.

It should be here mentioned that this suit had been in this court before. It was here in 1860.* On a trial from the result of which the writ of error then came, a record of a former trial had also been offered in evidence; apparently the same offered in the suit to whose result the present writ was taken.

The record offered in that previous trial contained a declaration having two counts upon the contract, with the common counts, a plea of the general issue, a general verdict for the plaintiffs *on the entire declaration*, and a judgment on the first count; a count similar to the counts in the declaration in the suit then pending.

Besides this testimony of the contract, the plaintiffs proved on that previous trial the quantity of fuel used in running the boat, and relied upon the rates as settled to determine their demand, and insisted that the defendants were estopped to prove there was no such contract, or to disprove any

* See the case in 24 Howard, 334.

one of the averments in the first count of the declaration in the former suit, or to show that no saving of the wood had been effected; or to show that the so-called experiment was not made pursuant to the contract, or was fraudulently made, and was not a true and genuine exponent of the capacity of the said cut-off; or to prove that the said verdict was in fact rendered upon all the testimony and allegations that were submitted to the jury, and was in point of fact rendered, as by the record it purported to have been, upon the issues generally, and not upon the first count specially.

The Circuit Court adopted these conclusions of the plaintiffs, and excluded the testimony offered by the defendants to prove these facts. On the matter coming here in 1860, by exceptions in that second suit, this court, in 24th Howard,* remarked upon the exclusion of this testimony as follows:

"The record produced by the plaintiff showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity of that contract might have been litigated. But the verdict *might* have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial, with a view to ascertain what was the matter decided upon by the verdict of the jury. It may have been that there was no contest in reference to the fairness of the experiment or to its sufficiency to ascertain the premium to be paid for the use of the machine; or it may have been that the plaintiffs abandoned their special counts and recovered upon the general counts. The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the facts properly pleaded by the plaintiffs; but when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it."

Considering, therefore, that the Circuit Court had erred in holding the Packet Company estopped by the proceed-

* Pages 333, 346.

ings in the first suit from any inquiry in respect to the matters in issue, and actually tried in that cause, this court reversed the judgment given against it, and the case went down for trial a second time; the trial, namely, after which the present writ of error was taken.

On this new trial the plaintiffs called several of the jurors who had been empanelled in the former trial, to give evidence of the testimony then given, and also as to the matters in contest before the court on that trial; the purpose in introducing this extrinsic evidence having been to prove such facts as, in connection with the record, would show that the same contract was in controversy in the second suit, and had been conclusively adjudged in their favor. [Many of these jurors, it may be remarked, while stating *the particular grounds on which they found the verdict*, and speaking of a *contract* that was before them, did not all speak so definitely as to the terms of the contract as to make it easy to say whether they described such a one as was set forth in the first count, or such a one as was set forth in the last count.]

When the plaintiffs rested, the defendants offered a competent witness to prove that the only contract given in evidence on the former trial was by parol, *and not reduced to writing;* the purpose of this testimony having had obvious reference to a provision of the statute of frauds, in force in the District of Columbia; the words of the statute being: "That no suit shall be brought to charge any person upon any agreement *not to be performed in one year*, *unless* there was some memorandum or note in writing of the agreement," &c.

The evidence thus offered was objected to, and excluded by the court. The defendants offered to prove, further, that the contract was by parol, *and to be performed at the time stated in the declaration;* which testimony was also objected to, and excluded, except as to the latter branch. The questions growing out of this exclusion of evidence were now before this court on a bill of exceptions for review.

Two questions were, accordingly, raised here:

1. Whether the evidence as above mentioned was rightly excluded

2. Whether the contract, which it was sought to show was in issue in the former suit, was now to be regarded as valid. This question being suggested, of course, by the above-quoted section of the statute of frauds.

Messrs. Carlisle and Davidge, for the plaintiff in error:

I. The court erred in excluding the testimony:

1. Because the fact that the only evidence offered at the trial alleged to be an estoppel was parol evidence, was a fact proper for the consideration of the jury in weighing the evidence offered by the plaintiffs to show what the prior jury found.

2. Because the estoppel relied on was not an estoppel of record, in the strict sense, but was to be applied by the jury to the subject-matter by parol evidence.

As the case was tried, the court assumed the absolute truth of the evidence offered by the plaintiffs, and refused to submit that evidence to the jury, or to allow the defendants to offer any evidence based on the hypothesis that the estoppel might not be found as set up. In other words, the court undertook to determine the weight of the parol evidence.

3. Because the evidence, if admitted, showed that the testimony submitted at the former trial had relation only to the common counts. Evidence of a parol contract could not support the first count of the declaration in the former suit; nor could such evidence be objected to, as it was admissible as tending to show the measure of damages under the common counts.

We assert that if, in fact, the prior jury found only a parol contract, we are not estopped from denying its validity in law in the present case. We are estopped only from denying the particular points of facts found, to wit, a parol promise.

The fact, if true, that we did not, at the former trial, make objection on this ground was, at most, but an admission for the purposes of that case. It was an admission of law, which does not estop in any subsequent action. Questions of *law*

are not submitted to, or found by a jury, but only the naked issue of facts.*

We maintain that the contract being in parol merely was void in law, since it was not to be performed within one year.

Taking it for granted, for the present, that it was void, cases show that courts go far in searching out the particular point of fact—the *punctum facti*—decided by the prior jury, and in holding such point to be set aside and different from the one at issue in the case on trial.

Thus, in *Carter* v. *James*, a case in the English Exchequer,† the defendant had given a bond, secured by mortgage for £600. The mortgage contained a covenant to pay the debts. The plaintiff sued upon the bond, but the defendant set up a usurious agreement, and averred that the bond was given "in pursuance of that agreement," and so was void. The plaintiff replied that it was not given in pursuance of that agreement, and upon this issue was joined and a verdict found for the defendant. Afterwards, the plaintiff sued upon the covenants contained in the mortgage, it being confessedly for the same debt. The defendant pleaded the former verdict by way of estoppel, but, on demurrer, the plea was held bad, on the ground that the point of fact found in the former case was no answer in this; that point being that the bond was given in pursuance of the complainant's agreement, whereas in the present case the point was whether the covenant was so given, and whether the agreement itself was usurious.

The covenant was an agreement to pay the same debts as were named in the bond; and if the bond was given in pursuance of the complainant's agreement, the inference is irresistible that the covenant was so also; yet the court made a distinction.

In the prior case the plaintiff had not denied the fact of a usurious agreement, but had by his pleading virtually

* Richardson *v.* City of Boston, 19 Howard, 263; Hughes *v.* Alexander, 5 Duer, 488.

† 13 Meeson & Welsby, 137.

admitted it for the purposes of that case. Held (Alderson, B.) that his so admitting did not estop him on that point, as it was one on which the jury did not pass.

So in the present case, we deny that there was a written contract; we are not estopped from doing so by our not having denied it at the former trial, nor by the jury finding that there was a parol contract.

In *Burlen* v. *Shannon*,* a prior judgment had been obtained against the defendant for the board, for a certain period, of his wife, who had left his house, she being justified in doing so, it was asserted, on the ground, first, of his cruelty, and, second, of his consent. On a suit to recover board for a subsequent period, the ground then being that the wife was absent from cruelty (not his consent), the former verdict was set up as an estoppel. But its being so was denied on the ground that it was dubious whether the jury found cruelty, and that it must be left to the present jury to decide, from the evidence produced to them, what particular fact (of the two alleged) the former jury found.

In *Sawyer* v. *Woodbury*,† in the same court, a plaintiff had brought an action of covenant, alleging several distinct breaches. The jury found a general verdict in his favor. In a subsequent suit he set up one of those breaches, and claimed the former verdict as an estoppel. But the court held that evidence might be adduced to enable the jury to decide which breach it was the prior jury found.

II. The alleged contract, if merely parol, was void.

The statute avoids all contracts not "to be" performed within one year—meaning acts agreed not to be so performed; acts agreed to be done beyond the end of one year. Now, the acts stipulated to be done by the defendant in this case were, as alleged, to pay the money at certain intervals throughout the term of twelve years. In order to perform the contracts, the defendant must make these payments.

In case the boat ceased to exist during that term, the defendants would *then*, indeed, be excused from paying after-

* 14 Gray, 433.

† 7 Id. 499.

wards; but this would be a defeasance, as if by a condition subsequent, not a performance of the contract.

Had the words, "if the boat shall last so long," not been inserted, there can be no question that the alleged agreement would be void. Can these words cause a difference? The agreement was, not to pay so long as the boat should last. If that had been the agreement, then it might possibly have been fully performed in one year. But the agreement was, to pay for twelve years, though it was provided that such payments for that period might be excused and dispensed with, if the boat should previously cease to exist.

The fact that further performance may be thus dispensed with will not take the case out of the statute.*

Mr. Bradley, contra.

I. By the testimony of the former jurors, it appears that the contract specially declared on in the first two counts of the declaration in the second cause—the experiment provided for in that contract; the result of that experiment, and the consequent saving of fuel to the defendants—were the main issues in that cause, and were found by that jury.

Now, it will thus be seen that there are only two questions:

1. Was the verdict and judgment on the former trial conclusive on all the questions directly in issue on that trial, upon the proof offered by the plaintiffs, if believed by the jury?

2. Could the defendants go *behind* that verdict and judgment while the plaintiffs confined themselves to proof of what was then *in issue* and tried by the jury?

As to the first, we submit that it was, and that the court below was right in rejecting all evidence tending to show that no such contract had been made, *or that the contract was not in writing*, or that the experiment was insufficient to establish the rate of saving, or that it had been unfairly or fraudulently conducted. All these matters were involved

* Birch *v.* Earl of Liverpool, 9 Barnewall and Cresswell, 392; Roberts *v.* Tucker, 3 Exchequer R. 632; Dobson *v.* Collis, 1 Hurlstone and Norman, 81

in the issues raised by the two counts in the declaration and the pleas in the former action, and passed upon by the jury, as shown by the witnesses.

The other question may be more novel; but, according to general principles of law, and according to the settled law of Maryland, by which it is to be determined, is free from difficulty.

II. *As to the statute of frauds.*

If the contract was within the statute, the fact whether it was in writing or not was directly in issue in the first suit. If the defendant then waived the defence (if this was one) arising from the contract's being but in parol, as he might, he should have offered evidence of that fact on the second trial. He did not make such offer. *None of the bills of exceptions assert that it was not set up in that action.* If it had been, and if it was a defence, the suit could not have been sustained; which it was completely.

The authorities from *Peter* v. *Compton*, reported by Skinner,* to this day are numerous to show that the case was not within the statute.

What was this contract? It was one to put a machine on defendant's boat, to be paid for by a share of the savings of fuel caused by its use, to be ascertained as soon as the machine was in working order: that share to be paid for, from time to time, whenever demanded. The contract might run on to the expiration of the patent, or it might be terminated the next day. There is nothing from which it can be inferred that the parties understood it could not be performed within the year. It would have been *completed* by the loss or destruction of the boat at any time during the year, a matter in terms provided for.

There is a distinction between a performance which shall *complete*, and one which may *defeat* the contract within the year. If it can be *completed* within the year (as this one

* Page 353.

might have been), it is not brought within the statute, by the fact that it *may* run on for many years.*

Mr. Justice NELSON delivered the opinion of the court.

When this case, or one of the class, was formerly before this court,† in which the record of the former recovery was in evidence, it was claimed that, without any extrinsic evidence, it concluded the defendants from again denying the existence of the contract, or from disproving any other of the averments in the first count of the declaration, and it had been so ruled by the court below.

This court, when the case came up on error, agreed that the record was properly admitted as evidence of the former trial between the parties, but held the pleadings, verdict, and judgment did not furnish the necessary proof to show that the contract in controversy in the suit then on trial had been before agitated, and conclusively adjudicated in the former trial in behalf of the plaintiffs; and that the verdict had been rendered upon the entire declaration, and without special reference to the first count.

The record, with the pleadings and verdict, furnished evidence that the same matters might have been litigated on that trial, and afforded ground for the introduction of extrinsic evidence to show that the same contract had been in contest before the court, and had been referred to the decision of the jury, but nothing more. For this reason the judgment was reversed, and a new trial ordered.

Taking this view of the application and effect of the record of the former trial, the plaintiffs introduced in this case extrinsic evidence, and have endeavored to prove the necessary facts which, in connection with the record, would lead to the conclusion that the same contract was in controversy in the former suit, and had been conclusively adjudged in their favor. But this extrinsic evidence was open to be controverted on the part of the defendants. As the record

* See the authorities in support of this proposition, collected in Browne on the Statute of Frauds, 2d edition, ch. 13, §§ 272, 6, 7, 8 and 9.

† As reported in 24 Howard.

itself did not furnish evidence of the finding of the existence or validity of the contract in the former suit, and hence extrinsic proof was required to this effect, it was of course competent for the defendants to deny and disprove both, as in so doing they did not impeach the record, but only sought to disprove the evidence introduced by the plaintiffs.

The rejection of this evidence, therefore, offered by the defendants on the trial, was error. Whether or not the contract, as proved on the former trial, rested in parol or was in writing, was material. If in writing, there could be no controversy in fact in respect to its terms or stipulations; and its construction and legal effect belonged to the court to determine. If it rested in parol, its terms and conditions depended upon the extrinsic proof, and hence the materiality of the first question put to the witness, as preliminary to further proof. It was important to settle the terms of the contract in evidence on the former trial, in order to determine whether it was the same as the one then in controversy, and, resting in parol, these terms depended very much upon the testimony in the case.

There is another view in this branch of the case that must be noticed. As we have seen, the declaration in the former suit contained four counts, to which the general issue was pleaded, and a general verdict for the plaintiffs. The first and fourth counts set up two different special contracts relating to the same subject-matters, and which constituted the cause of action between the parties. Now, the extrinsic evidence furnished on the part of the plaintiffs as to the former trial, and the grounds of proceeding therein, tended to prove either count, and was sufficient to have justified the jury in finding either contract. These contracts, as thus set forth, were identical, with the exception of the agreement to settle the proportion of fuel saved by an experiment, which had been made, and resulted in the saving, by the use of the cut-off, of three-fourths of the fuel as used by the old throttle valve. The jury, therefore, might have found in favor of the plaintiffs on the contract as set forth in the fourth count, even if they disbelieved the proof of the agreement

as to the mode of settling the proportion of fuel saved. Many of the jurors called and examined speak of a contract between the parties in respect to the use of the Sickles cut-off, but so indefinitely it is impossible to determine whether the testimony related to the one set out in first or fourth counts, and no attempt was made to distinguish between the one or the other on the trial.

As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded.*

In view of this doctrine, it is quite clear that the record of the former trial, together with the extrinsic proofs, failed to show that the contract in controversy in the present suit was necessarily determined in the former in behalf of the plaintiffs. We agree, if the declaration had contained but the first count, which had set out the contract in controversy in the present suit, the effect of the judgment would have been different. The verdict of the jury, then, could not have taken place without finding the existence and validity

* Wood *v.* Jackson, 8 Wendell, 10, 16, 31, 36; Washington, &c., Packet Co. *v.* Sickles, 24 Howard, 333, 343, 345; Lawrence *v.* Hunt, 10 Wendell, 80; Cowen & Hill's Notes to Phillips's Evidence, Part 2, N. 121.

of the contract. But, as we have already shown, the record and evidence on the former trial are different, and tend to a different conclusion.

Some of the jurors in the former trial were permitted to testify as to the particular ground upon which they found the verdict. This testimony was not objected to, and therefore is not available as error here. But it is proper to say, that the secret deliberations of the jury, or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding. The jurors oftentimes, though they may concur in the result, differ as to the grounds or reasons upon which they arrive at it.

The evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict.*

There is another suggestion, also, it may be proper to make, growing out of the rule, now very general both in the Federal and State courts, to admit the record of a former trial as evidence to conclude a party from agitating the same matters in a second suit, and that is where the extrinsic proof of the identity of the cause of action is such that the court must submit the question to the jury as a matter of fact; any other matters in defence or support of the action, as the case may be, should be admitted on the trial, under proper instructions. For, if the jury should find against the conclusiveness of the former trial, then this additional evidence would not only be material, but constitute the whole of the proof on which the cause of action or defence must rest. If the extrinsic evidence should be so conclusive that the court could properly hold the record to be conclusive, the trial would of course be at an end, so far as

* Wood v. Jackson, 8 Wendell, 36; Lawrence v. Hunt, 10 Id. 85; Hitchin v. Campbell, 2 Blackstone, 827; Saunders on Pleading and Evidence, Pt. I. 260.

the matters embraced therein were identical with those in controversy. But, if not so conclusive, and the question must be submitted to the jury, then the record and evidence in respect to the former trial would constitute but one of the grounds relied on before the jury in support of the cause of action, or in defence, and be entirely consistent with any other grounds for the maintenance or defence of the suit in the possession of the parties. This must be so, for the reason that if the trial should, in the case contemplated, be confined to the issue growing out of the former trial, and the jury should find against its conclusiveness, nothing would be determined. The former trial, therefore, when its conclusiveness must be submitted to the jury, can be regarded only as a preliminary question, and the merits, independently of this question, should be heard and tried.

As the case must go down for another trial, and as the validity of the contract set out in the declaration may be involved in that trial, it is proper that we should express our opinion upon it, if, as it was offered to be proved, the contract was not in writing, but rested in parol.

We have referred particularly to the contract in the fore part of this opinion. The question raised is, whether or not it is within the statute of frauds, and therefore void. The law in this district, it is admitted, is a copy of the English statute on the subject.

The patent had some twelve years to run after the date of this contract, which was in June, 1844.

The words of the statute are: "That no suit shall be brought to charge any person upon any agreement that was not to be performed in one year, unless there was some memorandum or note in writing of the agreement," &c. Now, the substance of the contract is, that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals throughout the period of twelve years, if the boat to which the cut-off is attached should last so long.

The statute applies to contracts not wholly to be performed within the year.*

It is insisted, however, that this contract is not within it, because it may, by the happening of a certain event,—the loss or destruction of the boat,—terminate within the year. The answer is, that the possibility of defeasance does not make it the less a contract not to be performed within the year.

In *Birch* v. *The Earl of Liverpool*,† a contract for hire of a coach for five years, for a stipulated price per year, was held to be within the statute, although determinable by either party at any time within that period.

The same principle was again held in *Dobson and Another* v. *Espie*.‡ That case was the hiring of a traveller for more than a year, subject to a determination by three months' notice. Pollock, C. B., in delivering his opinion, stated that the object of the enactment was to prevent contracts not to be performed within the year from being vouched by parol evidence, when at a future period any question might arise as to their terms. No doubt, he further observes, formerly it was the practice to construe not only penal statutes, but statutes which interfered with the common law, as strictly as possible; but, in my opinion, that is not the proper course of proceeding. Alderson, B., observed: "The very circumstance that the contract exceeds the year, brings it within the statute. If it were not so, contracts for any number of years might be made by parol, provided they contained a defeasance, which might come into operation before the end of the first year."

We might refer to many other cases arising upon this statute. They are numerous, and not always consistent, for the reason, probably, given by Pollock, C. B., that the courts at first construed the enactment as strictly as possible, as it interfered with the common law. We think the construction given in the cases referred to is sound, and adopt it. The

* Boydell *v.* Drummond, 11 East, 142; Broadwell *v.* Getman, 2 Denio, 87.
† 9 Barnewall & Cresswell, 392. ‡ 2 Hurlstone & Norman, 81.

result is, that the contract in question is void, not being in writing. It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time. All the mischiefs which the statute was intended to remedy apply with full force to it.

Judgment reversed, the cause remitted, and

VENIRE DE NOVO.

Mr. Justice MILLER, dissenting.

I dissent from the opinion of the court just delivered.

The points in the case before us for review are whether there was such a contract made as that set forth in the first count of the declaration, and if so, whether it was valid.

The only evidence of both these propositions offered by plaintiffs was the record of the former trial, and the testimony of certain jurors on that trial, tending to show that their verdict was based on the same contract which is described in the first count of the declaration in the present suit. If that testimony did not establish both those propositions, then plaintiffs failed in their action, for they offered no other evidence on that issue. If that testimony did show that the contract on which the verdict in the former suit was rendered was the one set up in the first count of the present declaration, then the record established both the making of that contract and its valid character, for a judgment was rendered on that verdict which is still in full force and unreversed. If the testimony of the witnesses tended to show this fact, then it should go to the jury, for its sufficiency to establish the fact was for them and not for the court. No charge on this subject was asked by defendants, and none given by the court to which defendants excepted.

The main exception sustained by this court is to the offer of defendants to prove by a competent witness that the contract proved in the former trial was a parol contract.

Did this testimony have any tendency to disprove that of the witnesses of plaintiffs who testified as to the contract on

which the former verdict was founded? I am not able to see it.

The witness did not propose to swear that the *terms* of the contract proved on the former trial differed from the terms of the contract counted on in this suit. He was expected to state that the only contract proved in the former suit was a parol contract. None of the witnesses of the plaintiffs said it was other than a parol contract. It was not pretended that the contract relied on in the first suit was a written contract.

It is said that if the contract was in parol, it is void as against the statute of frauds, and that question could not be concluded by the former judgment.

I think the law is otherwise. In the case of *Smith* v. *Whiting*,* the Supreme Court of Massachusetts says: "It is apparent from the pleadings that this very demand has been once tried and determined; and although the court may have decided wrong in rejecting the evidence in the former suit, yet this is not the way to remedy the misfortune. Exceptions might have been filed to the opinions of the judge, or a new trial had upon petition. We must presume that this very matter has been tried, and it is never permitted to overrule the judgment of a court having jurisdiction by another action." To the same effect is the case of *Grant* v. *Button*, in the Supreme Court of New York.†

If the law be, as claimed, that there can be no estoppel as to matter of law, but only as to matter of fact, what becomes of the estoppels by judgments rendered on demurrer? The authorities in favor of estoppels in this class of cases are numerous. The case of *Goodrich* v. *The City*, decided at this term,‡ is directly in point. There the judgment of the State court of Illinois on demurrer, in a former suit between the same parties, was held a bar, although it was intimated that if it had been an open question, this court might have differed with the Illinois court in the construction of the law. All decisions on demurrer must necessarily be on questions of law, for the demurrer admits the facts pleaded and only

* 11 Massachusetts, 445.

† 14 Johnson, 377.

‡ See *supra*, p. 566, last preceding case.

raises the questions of law which grow out of those facts. If the principle contended for were true, there could be no estoppel by demurrer.

If, then, the jury were satisfied from the record in the former case, and from the testimony of the witnesses, that the terms of the contract on which that verdict was founded were the same as the special contract set out in the present suit, then the verdict and judgment in that case established the existence and validity of that contract for the purposes of this suit, and whenever it may be called in question between the same parties in relation to the same transaction. And the testimony offered, if admitted, would have had no tendency to disprove either of those propositions, but only to show that the court erred in its judgment in the first suit.

Again, if I understand the opinion aright, it is said that it must be made to appear from the record of the former suit, and the testimony of the witnesses, that the former verdict was *necessarily* founded on the contract set out in this suit. It seems to me that when this case was last here before,* the court then stated the proposition much short of this. For the opinion, after alluding to the indefinite character of the pleadings in many actions, says: "It was consequently decided that it was not necessary as between parties and privies that the record should show the question upon which the right of the plaintiff to recover, or the validity of the defence depended, for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury." The rule, as I understand it, is that to render such former judgment conclusive it is only necessary to show that the same matter might have been decided, and actually was decided.

Again, it is said in the opinion that the testimony of the jurors in the former trial was incompetent to disclose the grounds of their decision in the former case. I think the

* As reported in 24 Howard.

rule in those courts where it is adopted at all, and it is rejected wholly in many, is that a juror cannot be permitted to impeach his verdict, but that he is never refused to sustain it. And this only applies to proceedings to set aside that verdict, and not to cases where the question of what was actually decided may arise in another proceeding.

On the whole, I am of opinion that there was but one question in the case, and that was whether the former verdict and judgment were based on the same contract counted on in the present suit, and that the evidence which went to the jury had a tendency to establish that fact, and the evidence rejected by the court had no tendency to disprove it.

De Haro v. United States.

1. In 1844, persons in California petitioned the Mexican governor of that province for a grant of certain described land, situated in the vicinity of the Mission of San Francisco. The petition was referred to the secretary of state, who reported that the land was unoccupied, but that inasmuch as "common lands" (ejidos) were to be assigned to the said mission, he was of opinion that in the meanwhile the petitioners might occupy the land solicited under a provisional license. The governor thereupon made a decree, declaring the petitioners "empowered to occupy provisionally" the land, and directing a proper document to be issued to them, and a registry made of it. An instrument was accordingly issued to the petitioners, signed by the governor and attested by the secretary of state, by which the governor, in virtue of the authority vested in him, and in the name of the Mexican nation, granted "to them the occupation" of the land, subject to the measurement to be made of common lands for the establishment of San Francisco, with conditions against alienation, and for the occupation of the land within a year, and for forfeiture in case the conditions were not complied with. On this case:

Held, That the decree of the governor constituted only a naked license to occupy the land provisionally; and that the instrument issued pursuant to the decree did not pass any title to or interest in the land; that this license was a personal privilege of the parties, and upon their death did not extend to their heirs; that a claim for land, resting upon a license of this character, is not entitled to confirmation under the act of Congress of March 3, 1851.