MAIN *vs.* GORDON.

The law does not raise a promise on the part of the vendor of land, upon the cancellation of the contract of sale, to pay for the improvements made by the vendee while in possession: there must be a special promise to pay for such improvements at the time of vacating the sale.

In an action to recover the value of such improvements, the defendant cannot set off, as damages, the value of wood and timber cut off the land by the vendee in violation of his contract of purchase.

A party, who permits illegal testimony to be given to the jury without objection, cannot, after verdict, avail himself of the error on a motion for a new trial.

Testimony illegal at one period of the trial because no foundation has been laid for its introduction, may, at a subsequent period, become legal and competent, but in such case the party must again offer it in evidence.

Appeal from Crawford Circuit Court.

The declaration in this case contained four counts. The *first* count was for money *laid out and expended:* the *second,* for so much money "due and payable for and in respect of relinquishing and giving up of certain buildings, erections and improvements before then made and erected by the plaintiff in and upon certain lands and premises before that time quitted, relinquished and given up by the said plaintiff, and given up to said defendant at his special instance and request," averring a promise by defendant to pay in consideration thereof: The *third,* was a *quan-*

tum valebat, for the same consideration as in the second: the *fourth,* was for *work and labor.*

The defendant pleaded *non-assumpsit,* and the statute of limitations: to which there were general replications and issues; verdict and judgment for the plaintiff. The defendant moved for a new trial; his motion was overruled and he excepted, setting out the testimony in his bill of exceptions.

John N. Davis, a witness for the plaintiff, testified, in substance, that he knows the plaintiff made certain improvements on the land, in clearing, fencing and building houses; that the plaintiff said that he had purchased the land and was making the improvements for himself; that the plaintiff sold wood and lumber off the land; that Main, the defendant, is now in possession; that it was the witness' understanding that Main was to pay for the improvements, that the plaintiff told him that Main was to pay for them.

The defendant asked the witness, 1st, how much the wood and timber sold by the plaintiff was worth: 2d, was the improvement made by the plaintiff worth more than the wood and timber sold. The plaintiff objected to the witness' answering the questions, and the Court sustained the objection.

The plaintiff then read in evidence, after proof of the handwriting, the following letter and answer:

"Dr. Main: Be so good as to say what you will give me for what I have done on your place and leave it, in writing, and I will come in this evening and see you, as I can't stay until you come.

P. GORDON."

"It is a difficult matter for me to determine what to offer you. It is generally thought that the wood is worth the clearing. For the work done on the house and making rails together with old rails, I have thought I could give you a chunk of a horse or the value of one in other property. I have a plain gold watch which I would give you or an 8 day brass clock.

J. H. P. MAIN.

March 24th, 1847.

I have a superior rifle gun, which I will let you have."

The defendant then offered in evidence a writing obligatory, which it is agreed was in the following words:

Know all men by these presents, that I, Pleasant Gordon, have this, 20th day of August, A. D. 1846, purchased of John H. P. Main the south-west quarter of the south-east quarter of section twenty-three, in township eight north, in range thirty-two west, containing 40 acres.

Conditioned, that I am to pay for said land four hundred dollars in twelve and twenty-four months, and I bind myself not to cut or allow to be cut any timber on said land except what is necessary for farming purposes, in order that if the said land should revert to the said John H. P. Main, it may not be injured thereby.

P. GORDON, [SEAL.]

The only other testimony in the case was as to the situation and location of the land.

WATKINS & CURRAN, for the appellant. There is no proof showing a promise to pay for the improvements, and the law clearly will not in this case imply a promise. The offer of a horse, &c., if founded on a consideration, would not be a contract until accepted; and if it had been accepted, the plaintiff could not recover in the present action.

But if the law implied a promise, then, as there was an express stipulation that no wood should be cut off the land, the evidence offered was clearly competent; as in an equitable action any matter can be given in evidence which in conscience should reduce the claim.

JORDAN, contra. No off-set or bill of particulars was filed, nor any notice given to the plaintiff in relation to a claim of reduction of damages on account of the wood; and if there had been, it is not the subject of an off-set, being for unliquidated damages —the evidence was therefore properly rejected.

The evidence of Davis was received without objection, and thereby became legitimate testimony in the cause, and sufficient

to warrant the jury in enforcing a promise by Main to pay for the improvements. *Hazen v. Henry,* 1 *Eng.* 86; *ib.* 428; 2 *ib.* 174; 5 *ib.* 138; 6 *ib.* 630.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

There can be no pretence, under the circumstances of this case, as developed by the testimony, that the law raised a promise on the part of the appellant to pay for the improvements which had been made upon the land in question. The appellee had absolutely purchased the land, gone into possession and made the improvements upon it as his own property, and his having abandoned his property could not in any way affect the contract of purchase and consequently he could not exact the price of his labor bestowed upon it without first showing that such contract of purchase, had been cancelled, that he had been relieved from its obligations, and that in consideration of such improvements, the appellant had undertaken to pay. The declaration contains no count, which purports to be based upon the special promise that the evidence tended to establish. The only proof going to show a legal liability, and which was admissible under the form of the counts, was that detailed by the witness Davis. This was wholly incompetent, and would doubtless have been excluded by the court below had a motion for that purpose been made in proper time; yet as it was permitted to go to the jury, and that too without objection, it is not for this Court now to say how far it may have gone to convince the jury of the existence of the fact attempted to be established by it. We do not design to intimate that all the testimony of Davis was inadmissible, but confine the remark to the understanding or hearsay of the witness and the declarations of the plaintiff below as stated by the witness. It is contended, by the appellant, that the Circuit Court erred in refusing him permission to interrogate the witness in relation to the value of the wood and timber which the appellee had sold upon the land. The counsel for the appellee controverts this position upon two distinct grounds. First, that no set-off or bill of particulars was filed as a basis for the introduction of such evidence,

nor notice in any manner whatever that the defendant below intended to rely upon the value of the wood and timber which had been taken from the land. And secondly, that the defendant, having accepted a higher security for any loss that he might sustain from that source, was bound to resort to such security, and could not avail himself of the same matter of defence in this action.

The court below correctly refused to permit the witness to testify as to the value of the wood and timber, which had been sold by the appellee, at the time it was called for by the appellant, as no foundation had been previously laid for the introduction of testimony to establish that fact. The action is assumpsit based on contract, and it is clear that any damages, which might have accrued to the appellant, resulting from the sale of wood and timber by the appellee, could not have been set up by way of set-off or in mitigation of the amount claimed in this action, unless it had been made to appear that such was a part and parcel of the contract entered into by the parties. No such showing had [illegible] the court ruled out the testimony, and consequently there was no error in that respect. True it is that, at a subsequent period in the progress of the trial there was some evidence adduced which tended to show that, so far as the appellant's admissions were concerned, if taken against him to establish a promise to pay for the improvements, were also admissible for him to explain the character and extent of such promise, and if after the basis thus laid by the appellee by the introduction of the appellant's own admissions, the court had been called upon to receive other evidence corroborative of such admission in relation to the value of the wood and timber disposed of by the appellee, there can be no question but that it would have been error. We have not been able therefore to discover any error in the rulings of the court during the progress of the trial.

The question now to be determined is, whether any error intervened in overruling the motion for a new trial for any of the causes therein specified.

The first cause assigned is, that the finding of the jury was contrary to the evidence: second, that the court excluded from the

jury evidence offered by the defendant which ought to have been admitted, and thirdly, that the court permitted illegal evidence to go to the jury. In respect to the first, we cannot say that the jury found contrary to the evidence. It is conceded that the testimony going to show a promise by the appellant to pay for the improvements, was rather slight and doubtless would have been rejected altogether as illegal, if an objection had been interposed in proper time, yet it was silently permitted to go to the jury, and, for aught that we can know, was fully sufficient to convince their minds of the existence of the facts for which it was introduced. Neither can we say that the court excluded from the jury evidence offered by the defendant, which ought to have been admitted. The evidence sought by the appellant in relation to the value of the wood and timber sold by the appellee, was clearly incompetent at the time it was called for, and consequently the court cannot properly be charged with error in not receiving it. If the appellant desired the evidence of other witnesses to corroborate and sustain his own statement, which had been introduced by his adversary, and thereby made evidence in his own favor, he should have renewed his application after he had been thus permitted to lay a foundation for it, and if the court had then refused, it would have been most clearly error. The third is that the court permitted illegal evidence to go to the jury. That this is true in point of fact, will not be denied, but although strictly true, it is not a matter which can avail the party upon a motion for a new trial, as he has stood by in silence and made no objection during the whole trial. If he considered any part of the evidence offered against him inadmissible for any reason whatever, it was his duty to lay his finger upon it and to make his objection at the time, and having failed to do so whilst the matter was passing before the lower court, it is now too late to avail himself of such objection.

We are therefore of opinion, from a full and careful view of the whole record, that there is no error for which the judgment ought to be reversed. The judgment of the Crawford Circuit Court herein rendered, is, therefore, in all things affirmed.