McCullough, Edward et al v. McCullough, James 1860 Marion 4477/6

The State of Missouri, ss.

The State of Missouri, to the Honorable the Circuit Court in the Sixteenth Judicial Circuit **in said State Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the Circuit Court held in Cape for the County of Mercer in said State,

wherein Edward D. McCullough, and Peter McCullough by their guardian Ann McCullough were plaintiffs and James McCullough was defendant

in a Civil action manifest error hath intervened, to the great damage of said defendant as by his complaint we are informed.

NOW, being willing that the error, if any there be, should be corrected and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held in the City of St. Louis, in the County of St. Louis, in said State, on the Third Monday in October next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law, ought to be done.

WITNESS, WILLIAM S. GLANVILLE, Clerk of our said Supreme Court, at office in the City of Saint Louis, the nineteenth day of September in the year of our Lord one thousand eight hundred and fifty-nine.

W. S. Glanville

CLERK.

State of Missouri
County of Marion } Missouri Circuit Court

The Service of the rather wont is made to appear by the transcript of the record and proceedings in the Court herein specified, hereto annexed, as fully and Completely as the same remains of record in our said Court.

Witness Thomas E. Thompson Clerk and the seal of our said Court. Done at office at Palmyra this the 28th day of September 1859.

[illegible] Thompson Clk

(1) State of Missouri
County of Marion } Be it remembered that heretofore to wit on the 9th day of July 1858 there was filed in the Office of the Clerk of the Circuit Court within and for the County of Marion and State aforesaid a petition in the words and figures following to wit:

Petition Edward S. McCullough & Delia McCullough who are infants under the age of 21 years by their Guardian Mrs Ann McCullough against James McCullough } Plffs Deft

In the Circuit Court of Marion County before July Term 1858.

Plffs state that about the month of May 1845 James McCullough the Deft who is the father of Andrew H. McCullough now deceased in consideration of the natural love and affection he bore the said Andrew H. as well as in consideration of work and labor done and performed for him Deft in improvements & cultivating the farm on which Deft then resided did give and sell to said Andrew the following land lying in said County of Marion to wit a part of Section No 10 township 59 Range No 8 Beginning at a point in the centre of a Road

(2) leading from Houston alias Cameron in said County of Marion to New Ark in Knox County on the western line of said Section running thence N. to the N.W. corner of said Section 10 thence East with the northern line thereof to a point from which a line drawn South to the said road will give 100 acres.

And Deft promised and agreed with the said Andrew H. for the conditions above stated in further consideration that if he would go upon & improve & make a farm upon said land he Deft would execute and deliver to him a full and sufficient deed therefor and in pursuance of such gift and sale the said Andrew H. was by Deft in said month of May 1846 put into possession of and entered upon said land and relying in good faith upon said gift and sale and looking to the faithful execution of same by Deft made thereon the following valuable and substantial improvements.

That is to say he the said Andrew H. cleared enclosed & put in cultivation 35 acres of said tract, enclosed & put in pasture between 10 & 15 acres built a log dwelling house with a double stone chimney two rooms below & one above, a stay and a half high covered with a shingle roof built a good Cistern, smoke house, Dairy, hen house & Stable & cow crib and enclosed a garden & house lot. all which said improvements so made were of the value of 500 dollars,

(3) Pltffs further state that the said Andrew H. continued with his family to reside upon said land from the same month of May 1845 until 1847 in the spring of which last year the said Andrew H. went to the then Territory of California leaving his family the Pltffs and their Mother in possession of the premises, that on the 12th day of November the said Andrew H. departed this life in California leaving the Pltffs his only surviving heirs at law and upon whom said land descended.

That Pltffs with their Mother remained upon said land till some time in the year 1852 when their said Mother finding herself unable to support & educate her children upon the said land removed from the farm to Huston in Marion County, Pltffs further say that by their guardian they have requested and demanded of Deft a deed for said land in execution & fulfilment of the gift and sale aforesaid to their said Father: but the Deft has failed & refused & still fails & refuses to make execute and deliver same, that Deft is now in possession of said land & wrongfully withholds same from Pltffs that same is of the monthly value of dollars, Wherefore Pltffs pray the judgment of the Court for possession compelling Defts to make them a deed for said land, vesting in them a good and perfect title to same, And for general relief.

Edward B. & Delia McCullough
by their Guardian

(4)

Mrs Ann McCullough
by Atty Dryden & Lipscomb

Mrs Ann McCullough guardian of Pltffs on oath states that the matters in above petition as stated therein are true as she believes.

Subscribed to & sworn to before me this the 3rd day of July 1858

Ann McCullough

Thomas E. Thompson Clk.

Afterwards on the 4th day of July 1858 there was issued from the Office of the Clerk of the Court aforesaid a writ of summons in the words & figures following to wit

Summons

State of Missouri
County of Marion } ss

The State of Missouri to the Sheriff of Marion County Greeting. We command you to summon James McCullough that he be and appear in our Circuit Court at the Court House in the City of Palmyra within and for said County on the fourth Monday in July next then and there before the Judge of our said Court to answer a petition exhibited in our said Court against him by Edward P. McCullough & Delia McCullough who are infants under the age of 21 years by their guardian Mrs Ann McCullough of which the accompanying writing is a copy and this you shall in no wise omit And have you then there this writ.

(5)

Witness my hand as Clerk of said Circuit Court and the seal thereof. Done at Office in Palmyra at the County aforesaid on the 9th of July A.D. 1858

Wm C. Kempson Clerk

On which said writ appears the return of the Sheriff in the words & figures following to wit.

Summons — Executed this writ by delivering to within named James McCullough a true copy of the writ together with a true copy of the petition herein named. Done in Marion County July 11th 1858.

Shff $1.00

B. M. Hawkins Shff
By M. Yater Deputy

Afterwards to wit on the 19th day of August 1858 at a Circuit Court continued and held at the Court House within and for said County before the Hon John F. Redd Judge the following among other proceedings were had to wit

Leave to file answer next term — Edward & Delia McCullough, by guardian, Pltffs
vs
James McCullough Defts
Circ ca

At this day come the parties hereunto by their attorneys and on motion of defendant he has leave to file his answer to the petition of plaintiffs

(6) in this cause sixty days before the first day of the next term of this Court, and this cause is thereupon continued until next term of this Court,

Afterwards on the 9th October 1858 before the Clerk of said Court (the Vacation) the following proceedings were had in this case to wit

Answer filed

Edward T. Delia McCullough by Ann McCullough gdn Plaintiffs
vs
James McCullough defendant

At this day come the parties herein by their Attorneys, and thereupon the defendant files in vacation of Court with the Clerk his answer to the petition of plaintiffs filed in this cause

Which said answer filed as aforesaid is in the words and figures following to wit;

Answer

Edward T. McCullough & Delia McCullough infants by their Guardian Ann McCullough Plffs
vs
James McCullough Deft

In the Marion Circuit Court in Vacation 1858

Defendant answering says that it is true that in (or about) the month of May

(7) A.D. 1845, he places his son Andrew H. McCullough on a certain piece of land, the same described in the petition of Plaintiffs but that he never did in consideration of the natural love and affection which he bore his said son, or from consideration of work & labor done by his said son (now deceased) for Defts give and sell unto the said Andrew McCullough the land described in the Pltffs petition.

Deft denies that for the consideration above stated viz. natural love & affection & work & labor done & performed by the said Andrew for Defts, that he ever promised, or agreed to give him a title to the 100 acres of land mentioned in the petition. And further answering says that it is not true as alleged that for the consideration above named, or in further consideration "that if he would go upon & improve & make a farm upon said land, he Defts would execute & deliver to him a full & sufficient deed therefor" Nor is it true that the said Andrew Devs was in pursuance of any gift, or sale made by the Defts ever put into the possession of said promises or any part thereof.

Deft denies that the said Andrew deceased, relying on good faith on any promise understanding or agreement relative to a gift, grant or devise or conveyance of said land to him ever made the improvements mentioned in the petition of Plaintiff or any other improvement or improvements,

(8) Deft denies that the improvements put upon the premises by the said Andrew were put thereon in consequence of any agreement relative to a gift or conveyance of said land, or that the land mentioned was cleared, fenced & put in cultivation & pasture in consequence or by virtue of any agreement or consideration moving from the said Andrew to Deft;

Deft admits it to be true that the said Andrew continued to reside with his family upon the premises mentioned until the spring of 1849 when the said Andrew left for the Territory of California where he died on or about the 15th of November and says that the wife of the said Andrew the Pltff herein continued to reside upon the said premises with her children until she saw proper to remove therefrom, which she did some time in the year 1858.

And the Deft further answering says that the said Andrew McCullough did for the space of 17 months after his marriage to the Pltff reside with the Pltff his wife in the family of the Deft as members of his said family, that the said Andrew used & his wife the Pltff were kept & maintained by the Deft and that the Deft being far advanced in years & having then around him a large family deemed it prudent to settle his said son Andrew & the Pltff on the premises named, in order that by use of the land (of which the Deft at that time owned a large tract) they might procure a subsistence for themselves. That being desirous of

9 advancing the interest of his son & Daughter in law the Pltff he did with his own teams & hands with such assistance as his son Decd was capable of rendering put up construct and made convenient & comfortable the house described in the Pltffs petition,

That with his own hands & teams he did in like manner assist in building the Cistern, smoke house, Dairy, Hen House, Stable & Corn crib, together with the other improvements named,

That in like manner the land was cleared, fenced & put in cultivation & that he received such assistance from his said son Andrew Decd from time to time as he was capable of rendering him. And as the Deft says that all the improvements mentioned were made at the proper cost & charge of the Deft always excepting such labor as the said Andrew contributed & performed. Deft says that for & in consideration of this, his said son did for & during the time mentioned in the petition, use occupy & possess the premises that he received the produce thereof with all & singular the profits of the farm & dairy which was more than compensation for his labor. And he further says that the widow of his said son received the profits thereof from the time of his departure to California, until she voluntarily & with the expectation of bettering her condition left it in the spring of 1852.

And as the Deft denies that the said Andrew either entered upon the premises under any agreement on the part of this Deft to give or grant to him the said

(10) lands, or that he made the improvements mentioned therein under such an agreement or that he performed work & labor under such an agreement.

And further answering the Deft says that at the time alleged in the petition as the date of the entry under the alleged agreement that the legal title to said lands were in one Stanton Buckner Trustee to secure a debt of $500 due to one Morrison,

And that after the month of May 1845 to wit in the month of September 1845 the Deft in order to discharge the trust & disencumber the said lands sold & conveyed the same together with other lands belonging to him by Deed of Mortgage to one Foster Ray to secure the payment of about $2500. That the said Andrew well knew of the execution & existence of said Mortgage & that the object of his said son going to California was to procure means whereby the Deft might discharge his lands of the liens then existing upon them;

That the said Andrew never in his life time claimed to be in possession under an agreement on the part of Deft to give, grant or convey to him the lands aforesaid but says that this claim is new & has been raised since the death of his son. Deft admits that he was solicitous for the welfare of his said son & his family & says that he was desirous to advance them in every way consistent with his obligations to his other children & that for the purpose of advancing his son & family he placed them on the premises claimed by the Pfff but denies that he ever

(11) promised or agreed in consideration either of natural love & affection or work & labor done & performed to give & sell to his said son the premises claimed.

And having fully answered he prays to be hence dismissed & that he may be allowed herein his costs.

James McCullough
By his Atty Frall & McCabe

James McCullough on his oath says that the matters as stated in the above answer he believes to be true,

Sworn to & subscribed before me this 9th day of October A.D. 1858.

James McCullough

Thos E. Thompson Clk

Afterwards on the 11th March 1859 (Feby Term) at the Court and before the Judge aforesaid the following among other proceedings were had to wit:

Contraction Edward and Delia McCullough
cf pltff Cab. by Ann McCullough their guardian Pltff civ. ac for title
Vs
James McCullough Deft

At this day comes the parties herein by their attornies and on the motion of plaintiff this cause is continued until next term of this Court at costs of said guardian. It is therefore considered by the Court that defendant have and recover of of

(12) said Ann McCullough the guardian of said plaintiffs his costs by him in this behalf expended at this term of the Court and have thereof his writ of execution,

Afterwards to wit on the 11th day of August 1827 (July Term) before the judge aforesaid the following among other proceedings were had to wit

Motion to add widow & admr. to petition granted

Edward & Delia McCullough by their guardian. Plaintiffs Civ or
v.
James McCullough Defendant

At this day come the parties herein by their Attorneys and thereupon the defendant files his motion that the Court make an order in this cause adding the name of Ann McCullough and the administrator of Andrew McCullough to the pleadings in the cause which motion being seen and examined by this Court is overruled thereupon comes the defendant and files his bill of exceptions to the overruling her said motion which being seen and examined by the Court is received sealed and signed and made a part of the record in this cause,

Bill Exceptions filed

Which said Bill of Exceptions is in the words and figures following to wit

(13) Edward & Delia McCullough
Rec of Exceptions by Guardian Ann McCullough — Plaintiff
vs
James McCullough — Defendant

Be it remembered that on the trial of this cause, plaintiff offered Ann McCullough as a witness in the cause to which Deft objected because she was the widow of Andrew McCullough and at the death of her husband was in possession of the property sued for, but the Court permitted her to be sworn to which opinion Deft excepted. Deft then filed the following motion.

Motion Edward & Delia McCullough by their gd Ann McCullough — In the Circuit Court
against — July Term 1839
James McCullough

Marion County ss

Deft moves the Court that an order may be made in this cause adding the name of Ann McCullough to the pleadings & of the Admr of Andrew McCullough because it appears to the Court from the alligations and testimony that she is the widow of Andrew McCullough under whom Pltffs claim & that at the death of their ancestor was living in the mansion house & on the lands by law [illegible] sued for & entitled thereto, to the full interest claimed by Pltffs & a necessary party to the complete determination of the controversy & also that the Admr of Andrew McCullough is a necessary party to this motion to

(24) enforce the contract.

Pratt & McCabe
Attys for Deft

Overruled

Which motion was also overruled to which decision of the Court in admitting the testimony of Ann McCullough & refusing to direct her & the admr of Andrew McCullough to be parties Deft excepted & prays this his bill of exceptions to be signed and sealed & made a part of the record which is done.

Pl. Exhibits fed.

John T. Read.

Afterwards on the 14th September 1859 during the adjourned July Term of the Court and before the Judge aforesaid the following among other proceedings were had to wit.

Judgment for plaintiff

Edward & Delia McCullough by their guardian Ann McCullough Pltff
vs
James McCullough Defr
Civil action

Now at this day come the parties herein the plaintiffs by their guardian Ann McCullough and the defendant in proper person, and this causeman coming on to be heard is submitted to the Court upon the petition, answer Exhibits and testimony of witnesses. And the Court doth find from the evidence that in the fall of 1859 or 1860 defendant commenced

(15) improving a tract of about fourteen thirty acres of land including tract in controversy. Andrew his son was then twenty one years of age and aided him and worked with him as a hand on the farm until his marriage in December 1845 defendant laboring force consisted of himself a negroman, and two sons younger than Andrew one in 1840 thirteen years of age and the other ten years of age and Andrew. Before the marriage of Andrew and afterwards defendant promised Andrew to convey to him the tract of land in controversy the consideration was mainly to advance him Andrew in life, and partly to remunerate him for labor then done and which it was understood he would afterwards do for defendant under this promise. Andrew labored for defendant on his farm, and under this promise, Andrew in good faith expecting the promise would be performed with possession of the tract in controversy as his own property, and with the aid of his father and others erected thereon a dwelling house, meat house, hen house, stable and dairy and reduced twenty or twenty-five acres to cultivation and enclosed the same and also enclosed a pasture and dug a cistern which improvements were of the value of six or seven hundred dollars that at the time of the gift in 1843 the tract in controversy was of the value of four or five hundred dollars. That Andrew resided on the premises until he left for California in 1850 when he left his family

(6) on the premises that he died in California intestate leaving plaintiffs his sole heirs at law. And that defendant is now in possession of the premises in dispute. And the Court now finds that plaintiffs are now entitled to the specific performance of said premise and agreement. It is therefore ordered adjudged and decreed by the Court that all the right title, interest and claim of the defendant in and to the following described land be vested absolutely in the plaintiffs Edward F. McCullough and Delia McCullough to wit. A part of section number ten in township number fifty nine of range number Eight lying in the County of Marion and bounded as follows Beginning at a point in the centre of the road leading from Houston alias Emerson in said County to New Ark in Knox County on the western line of said section running thence North to the North West corner [illegible] of said section, drawn South to the said road will give one hundred acres. It is further considered by the Court that plaintiffs recover against said defendant judgment for the possession of said land, and also that they have and recover of defendant their costs by them in this behalf expended, not otherwise adjudged. And that they have thereof their writ of execution.

(67) and afterwards on the day aforesaid at the Court aforesaid the following among other proceedings were had to wit

Motion filed for New Trial [illegible]

Edward & Delia McCullough
by their Guardian Plaintiff
vs
James McCullough Defendant

Cir ac

At this day come the parties herein by their attornies and thereupon the defendant files his motion to set aside the judgment herein and for a new trial of this cause which motion now coming on to be considered by the Court is overruled.

And afterwards to wit on the 15th September 1859 during the continuance of said adjourned July Term before said Judge the following among other proceedings were had to wit,

Bill of Exceptions

Edward & Delia McCullough
by Guardian Plaintiff
vs
James McCullough Defendant

Cir action

At this day come the parties herein by their attornies and thereupon the defendant files his Bill of Exceptions in this cause which being seen and Examined by the Court is received sealed and signed and made a part of the record herein

(18)

Which said Bill of Exceptions is in the words and figures following to wit

Bill of Exceptions

Edward & Delia McCullough Plffs
by guardian Ann McCullough
vs
James McCullough Deft

Marion Circuit Court

Be it remembered that in the trial of the above entitled cause the Deft demanded that the issue disclosed by the pleadings should be submitted to a jury to be by the jury passed upon but the Court being of opinion that there was nothing for a jury to try proceeded to determine the case

Hist by Jury asked by Deft & overruled

J Wiseman's testimony

The Plaintiff then introduced Jonathan Wiseman who sworn that he knew the improvements said improvements was Andrew (Andrew McCullough) that he had helped him make it. Dont know how much land there was in the tract & could not say whether the Deft said there was 120 or what 60 of acres, Deft said that Andrew McCullough had helped him deft & that he was helping Andrew, this was in the year 1843, the improvements I spoke of was the first I ever saw on the place claimed by the Plff. Knew Andrew McCullough before he was married and had seen him in the farm.

J McAfee's testimony

Samuel McAfee on the part of the Plff said I have seen Andrew at work on the land in controversy

(19) but I can not say of my own knowledge who made the improvements on the land. Andrew was married before the improvements were made. Andrew visited about a good deal. I heard the Deft say at one time before Andrew was married that Andrew had worked for him in opening his farm, and that Andrew was to continue to work for him until his farm was opened, that he had given or intended to give the land to Andrew. I heard him say after the marriage that the land was Andrews but that he had not given him a deed to the land. Andrew's father settled in a new place and every thing had to be done.

J. Atkinson's training

Joel Atkinson for the Pltff: I knew the land, have known it 22 years, the Deft came to live on it in 1841, I think Andrew was then about 18 or 20 years old. I think Andrew lived with his father most of the time until he went on to this land to live. I cant say who improved the farm in controversy. I have seen the Deft hands at work on the farm before & after Andrew went on it, remember of once having a conversation with Deft he wanted me to go his security in Bank and said that he had enough property besides Andrews or that which he intended for Andrew to make me safe, I was once present when Andrew pointed out where the line was to go when a road

(20) was about to be laid out, he claimed the land and exercised ownership I think the Deft was also present.

G. S. Smith testimony

George S. Smith: I am acquainted with the Deft have known him since the fall of 1837 when he first came to Mo I was present at the marriage of Andrew McCullough at his fathers house the Deft, I think Andrew was then 22 or 23 years old, the Deft expressed himself pleased with Andrew's choice & said that he Andrew has a good home to take his wife to said that Andrew has been a good boy to work & that he has given him a place, Not did not say what place, nor how much land, Andrew after his marriage improved the land in controversy, I saw him ploughing and making fence on the land, did not see any person helping him,

Wm Turpin testimony

William Turpin testified I was present when they were about laying out a road through the land in dispute, I was one of the chain carriers, when we came to the line between the tract in dispute and the defendants land McFike wanted to run the road through certain ground part of the tract in controversy, through an enclosure, defendant said that the land belonged to Andrew and he had nothing to do with it; deft and Andrew were both present. Andrew

(24) labored on Deft farm and was a good hand, I heard the Deft say there that he didnt care where the lines went for that was Andrews land, and he Andrew could speak for himself. Andrew said that is shouldnt run there in the place proposed, this was after Andrew went on the land.

W. Boulware testing

Wila Boulware testified that he knew who made the improvements used to see Andrew and the Defts negro man working on the land, I once had a conversation with the Deft when he pointed to a certain cross fence (dividing the land on which the improvements in dispute were from the land on which Deft resided) and said, that part of it, (the land in controversy in this suit) was Andrews, that he had given it to him, I cant say when this was, but think it was after Andrew went to California. I have seen Andrew working on the land in controversy.

Kelley testing

Kelley testified, Knew Andrew McCullough in 1841 he was then 12 or 20 years of age, dont know who made the improvements on the place he lived on, Andrew worked on defts farm up to the time of his marriage,

Th. Adams testing

Thomas Adams testified, I have seen Andrew McCullough with his fathers force at work at the house on the land claimed, was at the raising

(22) Andrew gave direction about the raising, all worked together under the direction of Andrew, Andrew took the control - said what he wanted done, how he wanted it done, and what he did not want done - his father, the deft, was present, I never saw Andrew at work there alone before he was married; and for some time after he lived mostly with his father (the Deft), he sometimes worked out for himself. I once heard the Deft say that he intended the farm for Andrew, that the title was in him the Deft yet, I was present when the road was about to be rent, the Deft was there and objected to a particular location of the road for Andrew; I heard him say when it was proposed to get a relinquishment of the right of way for the road from Andrew that it was not necessary to see Andrew about it as the title was in him, the Deft said that he had not made Andrew a deed, but that he intended to do so. This conversation and the survey of the road was in the year 1846. I knew Andrew McCullough well, my knowledge of him as a working man was that at and up to the time of his marriage he was about worth his board and clothes.

Ann McCullough offered as Witness of Pltffs. Objects to & objects connected

The Pltffs then offered as a witness Ann McCullough the widow of Andrew McCullough the mother and the guardian of the Pltffs by whom they sue the Deft at the time objected to her introduction as a witness

(23) which objection being heard by the Court is overruled.

[illegible] The Deft then filed his motion asking that the name of Ann McCullough be added to the pleadings and that the administrator of Andrew McCullough be made a party to the suit in words and figures following to wit,

McCal Edward & Delia McCullough
by their Pr Ann McCullough
against
James McCullough

In the Circuit Court
July Term 1859

Marion County ss

Deft moves the Court that an order may be made in this cause adding the name of Ann McCullough to the pleadings and of the administrator of Andrew McCullough because it appears to the Court from the allegations and testimony that she is the widow of Andrew McCullough under whom Pltffs claim and that at the death of their ancestor, was living in the mansion house and on the land sued for and entitled thereto by law, until dower assigned and therefore now entitled to the full interest claimed by Pltff and a necessary party to the complete determination of the controversy, and also that the administrator of Andrew McCullough is a necessary party to this motion to enforce the Contract.

Pratt & McCabe
Attys for Deft

(24) which being heard by the Court is sourceled,

Ann McCullough Sworn

Ann McCullough widow of Andrew deceased and guardian of the Pltffs was then sworn who said, She knew the Deft in 1840 or 41 was married to his son Andrew in Dec 1845. heard the Deft say before she was married that he had given Andrew that land lying on the west side of his farm when he got married, but said Andy couldnt marry yet, had to help Deft improve first, and when he Andy did go he Deft would help him and he might get married, Deft pointed out the land in controversy, I think this was in 1843. We, Andrew and myself moved on to the tract in controversy in 1845, when we went on to it the house had been raised and one shed room made, so that we could live in it. There was no chimney to the house when we went in to it, the house was pointed between the logs. I think the field on the place was broke up the year before. I dont know whether it was fenced in or not. there was one pasture enclosed when we went there. After we went there, there was a Stable, Smoke House, meat house, crib built, and sixteen dwg, and the yard around the main building enclosed. I dont think the Deft worked on the place more than 4 days after we went there. this was all the work the family did on the building after we went there.

(25) my husband had the rails made for a 10 acre lot and paid for them himself. he had a chimney built of stone it was made by Jackson Bohor. husband employed 2 or 3 other hands to help: my husband paid for the building of that chimney and he hired a black man to help him dig a cistern dont believe he had any help about it from his father. I often heard Deft say what he had done or what he intended to do for Andrew, said he had worked well and that he intended to help him. I think my husband was 22 or 23 years old when we were married;

J H Tatlow testimony Thomas H. Tatlow testified: Know the Deft had a conversation with him before Andrew was married. we were talking about advancing children. Deft said that he had given Andrew a piece of land that Andrew had worked for him faithfully or that he intended to give him a piece. I dont know which, the same in controversy that we were then walking over the land, that Andrew was the oldest of the sons and he wanted to help him first. I think the quantity of land he named was 120 or 160 acres or thereabouts, from my knowledge of the Defts land and the No of his children. I suppose he had about this much land for each of his children.

(26) Lamb E. McAfee recalled said that he knew the
E. McAfee rating value of lands in that vicinity from 1842 to 1845
that they were low, that they were worth in the
neighborhood of from $2.50 to $4.00 per acre there
was then some good land in the neighborhood.

W. Bohon Walter Bohon sworn that he knew the value
of lands, supposes this land in controversy was
worth about $2.00 per acre.

Deft Evidence

W. Bohon Walter Bohon. Knew Andrew and deft in
1842 and since - at time the improvements were
made I lived in the neighborhood - think Jeff
and Andrew commenced the improvements on
Defts farm in fall of 1837. As to improvements
on the tract claimed by Andrew, Defts hands
and Andrew made improvements so far as I
know. Deft had a Black boy and two sons
besides Andrew he had teams and wagon,
dont think Andrew at time improvements were
made had any team or wagon, deft worked
himself - I think Andrew's improvements were
commenced in 1843 my recollection of the
time is indistinct - I have frequently seen
Andrew and Deft and his hands at Andrew
working in making improvements. I dont recollect
of seeing Andrew at work on improvements alone

(27) I saw some of the rails hauled by Defts team and Black boy, dont know who hauled the balance, dont know who made them. saw Andrew cutting the timber and he may have split it. I think Andrew and wife lived with Deft 18 months after the marriage. I do not know of any pecuniary means he had during that time. When Andrew was making preparations to go to California, I asked him why he was going, he said that they had become involved and he wanted to make money to redeem their home. When I saw deft and his hands working on Defts farm Andrew generally worked with them and when Andrew worked making his improvement Defts hands were generally working with him, this was before Andrew moved.

On one occasion I helped deft to kill hogs I think but am not positive that Andrew took some of them to his house.

The improvement I spoke of on land claimed by Andrew. I refered to the hauling of provision before Andrew moved, and the hauling of rails. I did not notice the making of any other improvement on track that I accollect. I dont know what property Andrew got by his wife if any. He was a sharp, moral and industrious young man since I became acquainted with him, which was I think in fall of 1839. I think he was then 18 or 20 years of age.

28 There was not much timber on tract in question, I think the rails used were made mostly on Government land.

G. Bohon George Bohon Sworn. I had a conversation with Andrew before he went to California, he said they had become involved in debt, and that if he went, he thought he could make money and help to redeem their land.

J. McPike James McPike Sworn. I had a conversation with Andrew just before he went to California he said his object in going was to make money and pay off a debt, which his father owed to one Foster Ray, so that they might redeem their land.

Wm. McCullough Defendant introduced William McCullough who stated, I am a son of defendant and the brother of Andrew. I came with them to this state. The improvements on the land in question on this suit were made by Andrew, with the aid of the defendant, defendants black man, my brother Frederick, and myself. I was small and could not do much, part of the rails came off defendants land, some of them were made by Andrew. Defendants black man helped him make them. I hauled some of them. I dont recollect where the logs for the most house came from, nor who done the work on it. The logs for the dwelling were hauled by defendants land, by Andrew

29 and defendants hands, part of them came off of the tract, and a part off of defendants land. Defendants hands helped cut the logs for the dwelling and helped gearing the shore, and helped to make and hand the rails and helped to break the ground. All the improvements were made after Andrew marriage, part of them before he moved and the balance after. At the time Andrew was married, the dwelling house was raised, and a shed room. The shed room was roofed, and so far Carpeted that he could live on it. There was 20 or 25 acres of the land then enclosed, ploughed and sown in wheat, this was all the improvements that I now recollect done at that time, the other improvements were done afterwards. At first Andrew had two horses, and at the fall of 1846, he had two horses, a wagon, and one yoke of oxen.

A. Cardwell. Anthony Cardwell, was then sworn for the defendant. I know how the improvements were made, and made by Andrew and defendants hands, they worked together as one family. I could see no difference before and after the marriage, Matters about the building were arranged to suit Andrew, and he directed how they should be done. I had a conversation with Andrew first before he left for California. He said his reason for going was to raise money to redeem their

their land. he said we or ours, never said his
once. Said they were involved, and that if he did
not go, his father would go. I worked some on
the house, and the defendant paid me for it.
The land was not valuable, the 80 acres in the
prairie, was not flat land. I do not think it
could have been sold then for more than Anyone
price, at that time, by itself it would not have
brought that price. I live in the neighborhood and
know the value of land.

J. Chipman — John Chipman, sworn for plaintiff. I know the
land in controversy. as far as I know, Andrew
and the defendant hands made the improvement,
I often saw Andrew working on the improvement,
sometimes alone, sometimes defendant hands, were
helping him. Before he went to California
Andrew said that his father had promised to
give him the land, but had got into such a
situation that he could not do it, and that he
would have to go to California, to get money to
redeem their land. He said his father had
given him the land and agreed to make him
a deed, but had not got done it. Defendant
had opened a farm of considerable size
before Andrew's marriage. Andrew worked on it
with the defendant hands.

P. O. Vance — Peter O. Vance, for the defendant testified
that he had a conversation with Andrew. he
wanted me to do carpenters work on the house,

and [illegible] me to take a house or pay. I declined to take the house but afterwards Conducted to do it, and went and offered to [illegible] to do it. He said that the land was under mortgage. The land he lived on and his father, and if he had to lose the land, he did not want any more improvements on it. He said he was going to California to secure himself a home.

T. H. Vattery. Thomas H. Vattery Jr. I know the land, I examined the improvements in 1853. the [illegible] were set of the house, and the building were in a delapidated Condition. In the Condition in which they were they were in the 400 or 500 dollars.

The Defendant then offered in evidence the deed of trust from James McCullough the defendant to Stanton Buckner as follows.

Deed of Trust J. McCullough to S. Buckner Dated. This Deed of Trust made and entered into this twenty second day of July eighteen hundred and forty-five by and between James McCullough and Delia McCullough his wife of the first part and Stanton Buckner Esqr of the second part and Joseph S. Morrison of the third part Witnesseth, that the parties of the first part in consideration of the debt and trust hereinafter mentioned and expressed and of the sum of one dollar to them paid by the said party of the second part the receipt of

(82) which is hereby acknowledged, do by these presents grant, sell, alien, enfeoff convey and confirm unto the said party of the second part and to his heirs and assigns forever the following described tract of land in the County of Marion State of Missouri to wit: the West half of the South East quarter the North East quarter and the West half of Section Two Township Fifty nine north of the base line Range eight West of the fifth principal meridian containing five hundred and sixty acres together with all and singulars the hereditaments, rights, privileges appurtenances thereunto belonging. To have and to hold the same with the appurtenances unto the said party of the second part and to his heirs and assigns forever. In trust however for the following purpose Whereas the said James McCullough of the first part has this day executed and delivered unto the said Morrison of the third part his certain promissory note in words and figures as follows, $500. Marion County July 17th 18

On or before the twenty second day of July eighteen hundred and seventy seven I promise to pay to the order of Joseph A. Morrison five hundred Dollars Dollars with interest thereon from the date hereof until paid at the rate of ten per centum per annum payable annually for value received.

James McCullough

Now if the said James McCullough his heirs

(33) Executors or administrators shall well and truly pay the sum of money specified in said note and every part thereof together with all interest thereon if any when said note shall become due and payable according to the true tenor, meaning and effect thereof, then this deed shall be void and the property hereinbefore conveyed shall be released at the cost of the said party of the first part, but if the said James McCullough his heirs executors or administrators shall not well and truly pay the sum of money specified in said note and every part thereof together with all interest therein if any when said note shall become due and payable according to the true tenor, meaning and effect thereof, then this deed shall remain in force and the said party of the second part or his heirs may proceed to sell the fee simple title to the property hereinbefore described or any part thereof at public vendue to the highest and best bidder at the Court House of Marion County for cash first giving days public notice of the time, terms and place of said sale and of the property to be sold by advertisement in some newspaper printed in Marion County and upon such sale shall execute and deliver a deed or deeds in fee simple of the property sold to the purchaser or purchasers thereof and any statement or recital whatever of the said party of the second part or his heirs in such deed or deeds shall be received in all Courts of Justice as prima

facie evidence of the truth thereof, and receive the proceeds of said sale out of which he or they shall pay first the cost and expenses of this trust and next whatever may be in arrear and unpaid on said note whether of principal or interest and the balance if any shall be paid to the said James McCullough of the first part his heirs or legal representatives. And the said party of the second part covenant faithfully to perform and fulfil the trust herein created. In witness whereof the said parties have hereto set their hand and seals the day and year first above written.

Executed in presence of us

James McCullough [SEAL]
Delia McCullough [SEAL]
Stanton Burkhead [SEAL]

State of Missouri
County of Morgan } Be it remembered that James McCullough and Delia his wife who are personally known to the undersigned a Justice of the Peace within and for said County to be the persons whose names are subscribed to the foregoing deed as parties thereto this day appeared before me and acknowledged that they executed and delivered the same as their voluntary act and deed for the uses and purposes therein contained. And the said Delia being by me made acquainted with the contents of said deed acknowledged on examination apart from her husband that she executed the same and relinquishes her dower in the real estate therein

(35) mentioned freely and without compulsion or undue influence of her said husband. Given under my hand this 23d day of July eighteen hundred and forty-five.

Oliver Brown J.P.

Filed for record September 18th 1845.

John P. Rutter Recorder

Mortgage McCullough & F. Ray

The Deft also read in evidence the conveyance from James McCullough to Foster Ray as follows, This Indenture made this 4th day of November A.D. 1846 between James McCullough and Delia his wife of the first part and Foster Ray of the second part. Whereas the said James McCullough is justly indebted to the said Foster in the sum of three thousand dollars lawful money of the United States of America secured to be paid by certain promissory notes to wit, one note of six hundred and fifty dollars bearing date on the 29th day of September 1845 said note being payable in pine lumber at wholesale prices on or before the 29th day of September 1846, one note of six hundred dollars bearing date with and becoming due at the same time with the note of six hundred and fifty dollars, one note of twelve hundred and fifty dollars bearing even date with said notes and payable on or before the 29th day of March 1847, also one note of five hundred dollars bearing even date with these presents and payable on or before the first day of April 1847 said first three mentioned notes being executed jointly with James T. McCullough as principal

(36) and James Patterson as security and the last mentioned note being executed jointly with said Jas. T. McCullough as principal all of which will more fully and at large appear reference being had to said promissory notes. Now this indenture Witnesseth that the said James McCullough and wife for the better accuring the payment of the said sums of money with the interest thereon accruing according to the true intent and meaning of said promissory notes and also for and in consideration of the sum of one dollar to them in hand paid by said party of the second part at or before the ensealing or delivery of these presents the receipt whereof is hereby confessed and acknowledged have granted bargained sold aliened released conveyed and confirmed and by these presents do grant bargain sell alien release convey and confirm unto the said party of the second part his heirs and assigns forever the following described lands and tenements situate and lying in the County of Marion to wit the North East quarter of Section numbered ten (10) township numbered fifty nine (59) Range eight (8) west the East half of the North West quarter of the same section. Also the West half of the South East quarter and the south west quarter of the same section save and excepting twenty acres in the west half of the South West quarter of said Section lying north of the State road leading from Newark to Palmyra said land being a portion of the tract

(37) deeded to said James McCullough by Saml Bell also the following described real estate in the City of Hannibal and County aforesaid to wit: All the right title and interest of said party of the first paid in lots numbered six (6) seven (7) and eight (8) in Block numbered one hundred and one (101) the same being an undivided third part of the same with the improvements privileges and appurtenances to the same in anywise belonging or appertaining. To have and to hold the same to the said Foster Ray his heirs and assigns to his and their use and behoof forever, Provided nevertheless that if the said James McCullough Jas T. McCullough or James Patterson any or either of them their heirs executors or administrators shall pay or cause to be paid unto the said Foster Ray his executors administrators or assigns the said sums of money in said promissory notes mentioned with the interest due thereon according to the true intent and meaning of the same on or before the first day of April A.D. 1847 then this deed and the said notes shall be void otherwise shall remain absolute. In witness whereof we have hereunto set our hands and seals the day and year first above written,

The words interlined between the 12th and 13th lines from the bottom of the opposite page were added before the sealing and delivery of these presents.

James McCullough (Seal)
Delia McCullough (Seal)

(38) Stat. of Missouri
County of Marion } Be it remembered that James McCullough and Delia McCullough his wife both of whom are personally known to the undersigned Justice of the Peace to be the persons whose names are subscribed to the foregoing deed this day appeared before me in said County of Marion and the said James McCullough then and there acknowledged that he executed the said deed for the uses and purposes therein expressed, and the said Delia McCullough having been by me made acquainted with the contents of said deed and on examination apart from her husband acknowledged that she executed said deed and relinquished her dower in the real estate therein mentioned freely and without compulsion or undue influence of her said husband. In testimony whereof I have hereunto set my hand and seal this 4th day of November 1846.

Jas. T. McCullough (Seal)
Justice of the peace

Filed for record November 10th 1846.

John P. Rutter, Recorder

F. McCullough Ashley

Frisbee McCullough for the Deft testified that the lands of Deft on which he lived except about 196 acres which included the land in dispute was sold to Mr Davis. The debts of the Deft including the Ray debt were enough to abroad the whole amt rec'd of

(39) Davis for the sale of the lands. Deft had a tract in another body of which there was two or 300 acres. the money received from Davis paid all the Defts debts. the improvements on the land in question were made by Andrew with the aid of the defts and his hands. Andrew had no money that I knew of when he moved on the land, In 1846 deft moved to Hannibal, took his hands with him and remained about one year.

P. J. Sowers Peter J. Sowers testified that in 1844 & 1845 Andrew McCullough purchased goods from the Store in which he was partner, that the amount of his bill was some forty or $50, and that his father paid the bill up to the time Andrew was living in his father family and Andrew's account ceased to be mixed with his father bill after the 1st of January 1845

F. Ray to J. McCullough Deed The Pffs then offered in evidence a deed of reconveyance from Ray and wife to James McCullough as follows

Know all men by these presents that we Foster Ray and Marietta Ray wife of the said Foster Ray of the City of Hannibal in the County of Marion and State of Missouri for and in the consideration of five dollars received to our full satisfaction of James McCullough of the County and State aforesaid have remised, released and forever quit claimed and by these presents do remise, release and quit claim unto the said James McCullough all our rights, title interest and claim that we may have

(40)

in and to the following tracts or parcels of land lying & being in the County of Marion and State of Missouri and known and designated as being the West half of the South East quarter and the North East quarter and the West half of Section ten (No 10) and in township number fifty nine (59) range eight (8) west containing four hundred and sixty acres (being the same land heretofore conveyed by the said James McCullough to the said Foster Ray) together with all the appurtenances belonging thereto - to have and to hold the same unto the said James McCullough his heirs and assigns forever. In witness whereof we have hereunto set our hands and seals the 9th day of February A.D. 1852.

Foster Ray (Seal)
Marilla Ray (Seal)

State of Missouri }
County of Marion } I Charles K. Bowmer a Notary Public in and for the County of Marion in the State of Missouri and residing at the City of Hannibal in said County do certify that Foster Ray and his wife Mrs Marilla Ray who are personally known to me to be the persons whose names are subscribed as parties to the within and foregoing instrument of writing personally appeared before me this day in said City, and acknowledged that they executed the said instrument of writing as their voluntary act and deed for the uses and purposes

(41) therein mentioned. And the said Mrs Marietta Ray being by me made acquainted with the contents of the said instrument of writing acknowledged as an examination apart from her husband that she executed the same and relinquishes her dower in the real estate therein mentioned, freely and without compulsion or undue influence of her said husband.

In testimony whereof I have hereunto subscribed my name and affixed my Notarial Seal at Office in Hannibal the 9th day of February AD 1852

Chas. Bowne Notary public

Filed for record on the 19th of June 1852

Thos C. Thompson Recorder

T. H. Miller Tutorary

Thos H. Tallow recalled by the Plffs said that Jas McCullough applied to him endorse a note to Foster Ray stating that he wanted to get the money from Ray to pay Morrison, that he witness declined to endorse but afterwards understood from the deft that $500 of the debt due to Morrison he Deft paid with the money which he got of Ray.

This was all the evidence offered in the case whereupon the Court ordered a decree of specific performance to be entered up.

The Deft thereon filed his motion for a new trial in the words and figures following

(42) McCullough
Mr. Ralph vs
Mr. Reed McCullough

The Deft moves the Court to set aside the verdict in this case and grant him a new trial for the reasons following to wit.

1st Because the verdict is against the law.

2d Because it is against the evidence in the cause

3d Because there was a dispute in fact as disclosed by the pleadings which should have been submitted to a jury to be passed upon as demanded by the Deft.

4th Because there is a defect of parties the widow of Andrew McCullough being a necessary party.

5th Because the Court addmitted illegal and improper testimony.

Overruled. Which motion being heard by the Court is overruled to which ruling of the Court the Deft excepted as well as to all the rulings and instructions of the Court herein set forth. And asks that his

B/E. Bill of exceptions be signed and sealed and made a part of the record which is accordingly done.

John T. Redd (Seal)
Judge

State of Missouri
County of Marion ss. I Thomas E. Thompson Clerk of the Circuit Court in and for the said County of Marion Certify that the foregoing pages contain a full and complete transcript of the record and proceedings had in said Circuit Court, in relation to the Cause therein mentioned, and of all the original papers filed in said Cause, and properly forming a part of the record thereof, as fully and completely as the same remains of record and as filed in my said office. In testimony of which I have hereunto set my hand and affixed the seal of our said Court. Done at office at Palmyra this the 28 September 1869

T. E. Thompson Clk

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Thomas E. Thompson Clerk	16.95	
Fees to Supr. Court & Certificate	14.80	$ 31.75
Benj. M. Hawkins Sheriff		1.00
Robert Shacklett Sheriff		8.70
Thomas B. Vallier Witness		1.00
A. B. Vanpine "		1.80
George S. Smith "		4.30
Riley Boulware "		2.00
Jonathan Wiseman "		2.30
Anthony Cantrell "		5.70
George B. Bohm "		4.50
James Kelly "		2.40
John Chipman "		3.00
Samuel McCafee "		3.80
Walter S. Bohm "		3.80
Rufus L. Bohm "		3.00
Joel McKinnis "		2.40
Peter O. Vance "		3.30
Peter J. Somers "		1.00
Tot. McMurtrie		$ 85.75

(B) No. 57

October Term 1859

Edward Welch McCullough
by guardian Anne McCullough
Infant &c. Error

v.

James McCullough
Deft in Error

Error to Marion

Lysander Redfield [?]
attys for Deft in Error

Pratt & McCabe
attys for Pltff in Error

Filed 3 Oct. 1859
Wm S. Dinwiddie [?]
Clk.

[illegible] [illegible]

[illegible] [illegible] Damages [illegible] [illegible] [illegible] [illegible] [illegible] by pltff in [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] 1859
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
Affirmed 20 Dec. 1860.

Know all men by these presents that we James McCullough of the County of Marion in the State of Missouri, as principal, & F. H. McCullough & George Bohon (of the same County & State, as sureties) are held & firmly bound unto Edward McCullough & Delia McCullough, of the said County & State, who sue by their Guardian Ann McCullough, in the sum of Five Hundred Dollars, for which payment well & truly to be made, we hereby bind ourselves, our heirs executors, administrators & assigns, firmly by these presents, signed & sealed this 18th day of October AD 1859.

The condition of this obligation is such, that in case the above named James McCullough shall prosecute as plaintiff in Error his certain writ, wherein the above named Edward & Delia McCullough by their said Guardian are left with effect, and pay the money that shall therein be adjudged against him by the Supreme Court of the State of Missouri, or otherwise abide the judgment of such court therein, then this obligation shall be void else shall remain in full force & virtue at law.

James R. Cullough Seal
F. H. McCullough Seal
George Bohon Seal

Lupone [illegible]

55

McCullop
&
McCullop

Bond

Filed 15 Nov. 1859
[illegible]

Palmyra Mo Oct 29th 1859
the within Bond examined and
approved
John T. Redd
Judge of 16th Jud circuit

McCullogh
v.
McCullogh.

In the Supreme Court, October Term 1859.
Error to Marion.

The Pltf in Error James McCullogh comes & moves the Court to grant him an order to stay the execution in this cause, and brings herewith his Bond, signed by two sufficient sureties, and approved by the Judge of the Circuit Court in which the case was tried.

And he asks the Court to cause the said order to be endorsed on the writ of error herein under the hand of the clerk of the Court.

Pratt & McCabe
Attys for Pltf in Error.

McCullough
v.
McCullough

Motion for order
to stay exe. [illegible]

Filed 1 Nov. 1857.
W. S. Glamiss Ch.

Edward McCullough
& others

vs

James McCullough
Deft

In Supreme Court
of Missouri
Oct D 1860

The said James McCullough says this judgment is erroneous and must be reversed for their reasons —

1 — The court's finding was contrary to law

2 If was contrary to evidence

3 The petition was insufficient

4 The facts in evidence amended to nothing

5 judgment was for wrong party

6 The court admitted illegal [illegible]

the said Jones

7 The court refused legal evidence offered by Sd Jones

8 The judgment otherwise moving

S. T. Glover
for Jones
Md Cudd & Sgt

Jones in error
Dupen & Lipscomb
for defts in error

57
Oct T 1868

Edwd McCulloch
fel
v

Jones McCue
Coughr

Assignment
of Error

Filed 16 October 1868
W. T. Thornton Cl

Edward McCullough et al defts in Error

vs

James McCullough Plff in Error

Error to Monroe Circuit Court

Dryden & Lapscomb atty's for defts in Error, submit that, as for any ground of exception urged in the Motion for new trial, the Motion was properly overruled — that the evidence proved the agreement alleged. that there was no issue of fact which the Court was under any legal necessity to submit to a jury — that Mrs McCullough widow of the ancestor of defts was not a necessary Party - and her testimony and all the testimony offered by defts in Error and excepted to by Plff was legal and competent — the finding and judgment were for the right Party —

No question as to the sufficiency or insufficiency of the Petition can arise on

the case here because not raised in the lower Court - no motion in arrest. And so we say the judgment of the Circuit Court ought to be affirmed -

Dryden & Lips comb
for defty in Error

57

Edwd McCullough
et al. defts in Error
vs
James McCullough
pltff in Error

Brief of defts
Counsel —

Filed 25 Oct. 1860.
W. S. Glanville
C.A.

Submitted on brief

Edwin McCullock et al
v
James McCullough

In the Supreme Court
of the State of Missouri

This was an action brought by Edwin & Debra McCullough by their mother & guardian Ann McCullough against James McCullough praying to have the title to a tract of land then standing in the name of James McCullough decreed to them.

The plaintiffs are the children of Andrew McCullough a son of defendant who married in 1843 the said Ann & went in 1849 to California & died there in that year.

There was no pretense of any written contract between defendant & his son Andrew about the land but it was alleged that his father the defendant told Andrew that if he would go upon the land & improve it he should have it & that in faith of that agreement Andrew went on to the land & improved it & built a cabin upon it & resided there until he left for California leaving his wife & children in possession which they retained for some years after his death, when his widow moved to another County.

The answer denied any such agreement as alleged.

The petition also alleged that the promise to every son as well for payment of services rendered before his marriage as for love & affection —

On the trial Ann McCullough the mother & guardian was offered by the plaintiffs as a

witness who was objected to by Defendant & admitted by the Court which action of the Court was excepted to by Deft. Aun the Defendant also at the trial insisted that the case should be submitted to a Jury but the Court considering it a case in Equity refused them a trial by Jury.

It was proved on the trial that the Defendant moved out on the land of which the land in controversy forms a part in 1839 & proceeded to open a farm. That his son who at his marriage in Dec 1863 was about 22 years old assisted him that the son Andrew had no property whatever that for 18 months after he was married he & his wife lived at his fathers the defendants house. That in 1845 & after Andrew went to live on the land in controversy the Defendant with the full knowledge of his son Andrew mortgaged his whole land including this tract to secure a debt of the Defendant & that in 1846 the Defendant with the full knowledge of Andrew mortgaged the land to secure another & larger debt. Up to the time of his marriage the defendant supported Andrew & paid his debts.

It is also proved that the defendant his negro & his two other sons worked upon the land with Andrew & assisted him in putting up his improvements & the defendant paid for work done on the house and it was also proved that in order to pay off the mortgages the defendant had been obliged to sell a large part of his former leaving 196 acres including the land in controversy.

Evidence was given by the witnesses on both sides as to what Defendant said some stating that he said he intended to give Andrew the land & some stating that he said he had given it.

The Court gave the following decree in the case —

14 Now at this day come the parties herein the plaintiffs by their guardian Ann McCullough and the defendant in proper person, and this cause now coming on to be heard is submitted to the Court upon the petition, answer, exhibits and testimony of witnesses. And the Court doth find from the evidence that in the fall of
5 1839 or 1840 defendant commenced improving on tract of about five hundred and sixty acres of land, including tract in controversy. Andrew his son was then twenty one years of age and aided him and worked with him as a hand on the farm until his marriage in December 1843 defendant laboring force consisted of himself, a negro man, and two sons younger than Andrew, one in 1840, thirteen years of age, & the other ten years of age, and Andrew. Before the marriage of Andrew and afterwards defendant promised Andrew to convey to him the tract of land in controversy, the consideration was mainly to advance him Andrew, in life, and partly to remunerate him for labor then done, and which it was understood he would afterwards do for defendant under this promise. Andrew labored for defendant on his farm, and under this promise, Andrew in good faith expecting the promise would be performed with possession of the tract in controversy as his own property, and with the aid of his father & others erected thereon a dwelling house, meat house, hen house, stable and dairy, and reduced twenty or twenty five acres to cultivation and enclosed the same and also enclosed a pasture and dug a cistern which im-

promenade were of the value of six or seven hundred dollars that at the time of the gift in 1843 the tract in controversy was of the value of four or five hundred dollars; that Andrew resided on the premises until he left for California in 1850 when he left his family on the premises, that he died in California intestate leaving plaintiffs his sole heirs at law, and that defendant is now in possession of the premises in dispute, And the Court now finds that plaintiffs are now entitled to the specific performance of said premises and agreement. It is therefore ordered adjudged and decreed by the Court that all the rights, title interest and claim of the defendant in and to the following described land be vested absolutely in the plaintiff Edward P. McCullough and Delia McCullough to wit, A part of section number ten in township number fifty nine of range number Eight lying in the County of Marion and bounded as follows: Beginning at a point in the centre of the road leading from Houston alias Emerson in said County of New York in Knox County, on the western line of said section running thence North to the North west corner of said section ten, thence east with the northern line thereof to a point from which a line drawn south to the said road will give one hundred acres. It is further considered by the Court that the plaintiffs recover against said defendant judgment for the possession of said land and also that they have and recover of defendant their costs by them in this behalf expended, not otherwise adjudged, And that they have thereof their writ of execution.

In due time the Deft filed his motion for a new trial which was overruled.

The Defendant appellant submits the following points.

I The evidence did not warrant the finding of the facts stated in the decree

a. The Court find that Andrew was 21 when his father commenced improving the farm. As single witness sup-ports this on either side this life says that at marriage in Dec 1843 he was about 22 years old. and the other evidence goes to show that he had not been of age more than a year before his marriage

b The Court find that Defendant before the marriage of his son & afterwards promised Andrew to convey the Tract in controversy to him.
With the exception of the wrother & guardian of plaff there is no one who testifies about any conversation with Defendant about the matter before the marriage. On the part of plaff the only witnesses who spoke of conversations with the Defendant are Atkinson, Freeman & Adams & ~~they all~~ neither of them says that Defendant then he had given it to Andrew. They state that Defendant either said he had given it to Andrew or intended to give it to him.

c The Court find that the consideration was mainly to advance him, Andrew, his life & partly to remunerate him for labor he had done & which it was understood he would do under this promise

Now as part of the consideration being for labor done for him he had been of age only a year before he married. The only witness that his tifus about it (Mr) says that up to his marriage, his services were of no more value than the cost of his bed & board & clothing which his father furnished to him, He & his wife lived at defendants after his marriage & after the time of his marriage & certainly his services ~~at that time~~ were worth no more than the support of himself & wife after that time he did no work for the deft other than on the track in controversy

d.

II II Under any view of the facts the judgment is erroneous for

1st There is no valuable consideration passing from Andrew to the defendant.
The only consideration as alter fitted to be proved as we contend is the love & affection of the father for the son. Now this consideration though very good as supporting a conveyance when made cannot form the basis of a parol agreement in relation to land. The son has paid with nothing & the father has received nothing for the alienation of the land

2. The son never treated the land as having an absolute title to the land.

All his acts are consistent with the idea that the father intended in the distribution of his property that the son should have this particular piece of it, but are entirely inconsistent with any other hypothesis. The first attesting point in the plaintiff's case must be to prove that both father & son treated it as belonging to the son in the same manner; to the same extent as if a third person had bought it & paid his money; for it & went into possession & made improvements.

Now in this case the undisputed fact is that both the father & the son treated it as belonging to the father in fact. The father bought it after the improvements had been made & after the son had moved into the house, to secure a debt of his own with the knowledge of the son & without objection and again mortgaged it the same than & again after this for his own debts with the knowledge of the son & without objection.

5. The alleged contract is admitted to be within the Statute of frauds. Therefore the burden of proof is upon the plaintiff to show something to take it out of the Statute. In order to do that the contract as alleged must be proved to be clear, definite, unequivocal, unambiguous by evidence ~~by evidence~~ certain & uncontradictory.

Rankin v. Simpson 19 Penn 471.
Goodwin v. Lyon 4 Porter 297.
Reynolds v. Waring Younge 346
Clearwaly v. Hamburg 13 Penn 16.

Now is this so proved

a. As to the proof of whether the Daft gave it to his son. The proof leaves it in doubt as to whether the Daft said he had given the land to the son or intended to give it to him. Giving the loose conversations of the father with third persons having an interest in the matter their greatest force & this material fact remains improved.

b. As to the proof of improvements made. To render this efficient to take the case out of the Statute the evidence must be conclusive, that it was made & done by the party asking relief.

In this case it is just the contrary. The evidence shows that in all the improvements as made the work was done by Defendant

his negro men & sometimes his two younger sons working with the son Andrew. Andrew never employed a hand to work for him & in one instance we have proved that the defendant paid for work done on these rays improvements. The rails were cut on government land or on defendants land.

4th The contract is never enforced when it is doubtful whether it ~~rests~~ was meant to be absolutely binding or only rests upon honor.

Musendorf & wife v Hebborn & al. 4 My. 439
Traefoll v Oxford. 3 Vesey 402.

Ans This is a case where this rule has a particular application. The defendant has children in debt mortgages his farm for the debt, expects to be able to pay it off, wishes to provide a present support for his oldest son & his wife & if he shall be able to pay off his debts undoubtedly hopes to be able to make such a division of his estate as to bear that son the place he has put him upon. But all this is defendant upon preserving his whole farm

& of being able to give his son that portion of his farm, & give to his other children an equal portion.
It was to be an advancement to the son as will be seen by reference to the testimony

But if this decree is allowed to stand there is no advancement but the plaintiff, if the defendant should die intestate, can come in for their father's share of his estate equally with his other children

5th The Court may, if they find that an agreement was made & cannot certainly find out what it is but are satisfied that improvements were made in faith of some agreement decree that the plaintiff should be paid for the improvements made by him &
This furnishes a decisive test ~~and~~ in this case & shows that the Court can render no decree because the proof shows that the defendant made more of the improvements than plaintiff ~~did~~ father did
as to the principle see
Goodwin v Lyons 4 Porter 297 p 314 et

6th There has been such laches in this case that unless the proof be clear & convincing the Court should not give judgment in favor of plaintiff.
The son made no demand for a deed in his life time the widow & his children lose them about a year after his death & there leave & for almost ten years & until the land has risen in value 3 or 4 times over do no one hear of any demand for a conveyance or any pretense that their

was a right to have one

II II. The widow & guardian of the plaintiff was not a competent witness for the plaintiff

a. The suit is prosecuted for the immediate benefit of the witness. The decree of it be for the plaintiff gives her dower in the tract and she has only to produce such a decree & her rights are settled. It is difficult to imagine a case that comes within the provision of the statute if this be not one

b. She is a party to the record
This is directly decided in the case of Hoskins vs Van Doren 1 Ed Smith 411

c. She is made by the 7 Sec 3 Art. of the Practice act 2. Vol Rev Statutes page 1220 responsible for costs in this suit

Glover & Shepley
~~Att for Deft~~

P 2 att to McCarter
Attys for Deft

No 37

In the Supreme Court

McCullough ret

vs

McCullough

Statement & Brief
for Defts appellant

Glover & Shipley

Filed 26 Oct 1860.
W S Clarke Ck.

E & D. McCullough by guardian
Ann Mrs McCullough } Error to the
vs } Marion Cir-
James McCullough } cuit Court.

This was a suit to compel a specific performance of parol agreement to convey lands: The statute of frauds was not pleaded: There was a judgment for the plaintiffs: The point mainly relied on for a reversal of the judgment, is, that the evidence was insufficient to warrant it. We cannot weigh the evidence in this Court this court was constituted to determine questions of law & not to try matters of fact: This was a case required by law to be tried by the Court, and it was therefore in the discretion of the Court whether or not it would submit issues to a jury:

It is objected, that the Court erred, in permitting Ann McCullough the mother & guardian who conducted the suit in the name of the wards, to be sworn as a witness: It is said that she is a party to the suit: But is the guardian who carries on a suit in the name of his ward any more a party to the suit than the attorney who conducts a suit for an adult. A person of age, sues by attorney, a person ~~of age~~ not of age, sues by guardian. Why is the guardian any more a party

To the suit which he prosecutes, than an attorney is to that which he conducts. But it is said that the guardian is liable for the costs of the suit if it fails, no doubt he is and it was that, which disqualified him as a witness when the common law rule of evidence prevailed, but as now by statute interest does not incapacitate a witness a guardian is an competent a witness as an attorney. Murphy vs Murphy 24 Ala. 576.

But as the plaintiffs who are prosecuting this suit are the heirs & children of the husband of the guardian with whom the contract for the conveyance of the land was made, it is maintained that if the heirs succeed in this suit, then the mother & guardian will be entitled to dower in the land recovered & that the judgment will establish her right to it, then for the suit is prosecuted for her immediate benefit although the plaintiffs succeed in this action, another action will be necessary in order that the guardian may obtain her dower, it can scarcely be maintained that the suit in the ordinary prosecution of the phrase is maintained for her immediate benefit. The most that can be said, is, that she has an interest in the judgment, as it will be evidence for

her in a future action. The 7th section of the act concerning witnesses provides, that if any interested witness is offered and objected to, on the ground that the verdict or judgment in the action, in which it is proposed to examine him such witness shall nevertheless be examined; but ~~the verdict~~ in that case the verdict & judgment in that action, in favor of the party in whose behalf he shall be examined, shall not be admissible in evidence for him, or any one claiming under him.

The other judges concurring the judgment will be affirmed

M. Scott

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Mc Cullough

vs

Mc Cullough

Opinion

Filed 20 Decr 1860
W. F. Hamilton Clk