

the objections which the defendants have thought proper to make, and have returned with the commission. It is objected, that the parol proof is inadmissible; first, under the peculiar provisions of the statute of frauds; and in the next place, on the ground, that by the general rules of evidence it should be excluded.

The first of these objections is not made to the competency of the witness, or to the regularity of the manner in which his deposition has been taken, but to the grade of testimony by which the plaintiffs have thus proposed to sustain their case. The statute to which this objection refers, allows a party who may be charged by a contract, like that upon which these plaintiffs rely, to shield himself from imposition and fraud, by requiring of his opponent some unerring *written* evidence of such contract. Consequently, in all cases to which the statute of frauds extends, where the defendant, in his pleadings, rests upon his right to have the contract, by which he is so proposed to be charged, authenticated by written evidence, the plaintiff cannot obtain relief, unless he sustains his case by such proof; mere parol or verbal testimony, however strong, will not be sufficient. But the statute of frauds was intended for the benefit and protection of a party against whom a claim might be made. It does no more than extend to such a person a privilege which he may altogether waive, and put his defence upon the merits of the case, as they may be shown by legal proof of any grade or description whatever. (b) And therefore it has been finally established, that if a defendant makes default, or makes his defence without expressly denying the whole contract, or in any other form, without relying upon the statute of frauds, he thereby tacitly waives its benefit, and cannot be permitted to take advantage of it afterwards or at the final hearing; so that if the contract should be sufficiently sustained by parol proof, the court will grant relief, although written evidence of no part of such contract may have been produced. (c) But these defendants have, none of them, in any form of pleading expressly denied the whole contract, and relied upon the statute of frauds. This objection cannot be considered as forming any part of those allegations upon which an issue between these parties has been or might have been joined. It is nothing more than a sort of exception to the testimony which has been improperly foisted in with the return of the commission,

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(b) *Buxton v. Marden*, 1 T. R. 81.—(c) *Cooth v. Jackson*, 6 Ves. 37; *Rowe v. Teed*, 15 Ves. 375; *Jones v. Slubey*, 5 H. & J. 383.