

Lebanon
vs.
Olcott.

trespass on the case against this defendant. What he has done was warranted by an act of the legislature, and is not to be viewed as a tort. But the determination of the selectmen creates a debt, the payment of which may be enforced

(2) 7 Mass. R. 302, Bigelow vs. Cam. & Con. Turnp. Corporation.

in an action of debt at common law (2.)

It is the opinion of the court that there must be

Judgment for the defendant.

THE STATE *versus* JAMES SMITH.

An officer, for the purpose of serving a process in any criminal proceeding, may, after a demand and refusal to open the doors of a house, break them; and he may do this in the night as well as by day.

THIS was an indictment on two counts. One charged the prisoner with resisting an officer while in the execution of his official duties, and the other charged him with a common assault upon the same officer as a private citizen.

At the trial here, on the general issue, May term, 1818, the prisoner was found guilty upon both counts. His counsel moved for a new trial, on the ground of misdirection by the court, that an officer after a demand and refusal was justified in breaking in the night time the doors of a house, to arrest the owner on a complaint and warrant for a breach of the peace.

Sullivan for the state.

R. Fletcher and *P. Walker* for the prisoner.

WOODBURY, J. delivered the opinion of the court.

There is some contradiction in the ancient authorities as to the point, whether a sheriff can break the doors of a dwelling-house, to serve a process for a breach of the peace (1.)

(1) *Bulsh.* 146, *Foster*, 8 ch. 20 sec.—12 Co. 131.

But the principle seems never to have been doubted, that where a publick offence has been actually committed, any proceeding in the name of the publick for its punishment shall not be delayed by the privilege that every man's house is his castle (2.)

(2) 5 Co. 92, *Se-mayn's case*.—2 *Hawk. b. 2, ch. 14.*—*Bac. Sh. n. 2, & Extu. M.*

Some of the cases, supposed to be exceptions, are those where no crime had then been perpetrated; and the doctrine is occasionally laid down as to felonies alone, without particularizing breaches of the peace.

State
vs.
Smith.

But it is well explained by *East*(3) that "this privilege extends no further than as against arrests upon process in civil suits. For when a felony has been committed, or dangerous wound given, or even where a minister of justice comes armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; but the doors may be forced, after the notification, demand and refusal, after mentioned." (3) 1 East C. L. 324, ch. 5, sec. 88.

In respect to the other point: As civil process can be executed in the night as well as the day, no ground exists for a more rigorous rule of construction in relation to criminal process; and in 1 *East C. L.* 324, *ch. 5, sec. 88*, it is well observed, that such process may be executed "at night as well as by day; and therefore killing the bailiff or other officer, on pretence of his coming at an unseasonable hour, would be murder."

The motion cannot prevail.

BENJAMIN W. CHASE *versus* SAMUEL MOREY.

A circumstantial variance between a patent and the description of it in an assignment, does not indicate fraud, or prevent the right from passing.

A court cannot pronounce a patent void, without evidence that the principles of it had before been "known and used" in the manner described in the patent; nor can the patent be pronounced worthless, without evidence of experiments which have proved unsuccessful.

Where the title to a patent passes, the consideration money, if paid, cannot be recovered back, unless the contract has been rescinded, or was accompanied with fraud, or with an express warranty, not fulfilled.

THIS was an action of assumpsit in two counts; one for 700 dollars money loaned, and the other for so much money had and received.

At the trial here upon the general issue, May term, 1818, it appeared in evidence that the defendant, in consideration of 700 dollars paid him by the plaintiff, October 12, 1811,