

The State
vs.
The town of
Hampton.

waters, which are in law public highways, is an exercise of power very similar to that exercised in the present case. 2 *Mass. Rep.* 492.—10 *Mass. Rep.* 70, *Arundel vs. M. Cullough*.

The cases of *The Farmer's Turnpike vs. Coventry*, 10 *John.* 389, and of *The People vs. Denslow*, 1 *Caines* 117, expressly recognize a power in the legislature to grant permission to a turnpike corporation to erect their road upon a public highway ; and they further hold, that when the highway has thus been appropriated and obstructed by gates or otherwise, no prosecution lies for it against those acting under the turnpike corporation.

Let there be entered a noli prosequi.



HILLSBOROUGH, APRIL TERM, 1819.

BENJAMIN WHITTEMORE *versus* AMOS WHITTEMORE.

If an agreement be made by bond to submit all demands to arbitration, and only part of those existing between the parties are laid before the referees, an action lies for a breach of the agreement.

But the award on such demands as were actually laid before them is binding, and in a subsequent action at law for those not laid before them, the award is not a conclusive bar to a recovery.

This was assumpsit on an account annexed. The defendant pleaded, first, the general issue, and, secondly, in bar, for that the parties, after the date of the charges in the account annexed, agreed, by bond, to submit all demands to the arbitrament of certain referees, who, previous to the commencement of the present action, had awarded upon the premises. The plaintiff joined the first issue tendered, and to the second replied, that the charges in the account annexed were not laid before the referees, nor embraced in their award. To this replication, there was a general demurrer and joinder.

Noyes, counsel for the plaintiff.

R. Fletcher, for the defendant.

WOODBURY, J. In the consideration of this case, it is to be kept in constant remembrance, that the submission was

not a judicial proceeding, by a rule of court, or by an agreement signed and acknowledged before a magistrate; but by a private contract between the parties. The submission, also, was not special, but of all demands, generally.

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The first material question concerns the validity of the award. It has been held, that where a submission enumerates the specific subjects referred, and enjoins, that the arbitrators act *upon the premises*, and some of the subjects are not acted on, the award is bad. *Kyd on Awards* 181.—7 *East* 81.—*Cro. Eliz.* 839, *Risden vs. Inglet.*—14 *John.* 106.

The reasons seem to be, that a submission, when thus expressed, makes the decision of every item specified a condition precedent to the award; and, also, if not decided, when thus specially enumerated, there must have been such gross neglect, either in the parties or the arbitrators, as ought to avoid the award.

In the present case, however, the submission was not of this character, else, the whole award being void, there would, on the merits, be no bar to a recovery of every thing submitted, unless we adopted the less rigid chancery rule, that, if the omission of some of the subjects specified did not appear injurious to either party, the award should still be binding in respect to those subjects, whose consideration was not omitted. 7 *Cranch* 171, *Davy's Extors. vs. Faw.*

This submission was a general one; and, in such an one it has been held, even at law, that the award is not void, if it embrace all the subjects actually laid before the arbitrators, though other demands existed between the parties, which were not laid before them. *Kyd on Aw.* 176.—1 *Burr.* 274.—*Cro. Ja.* 200, 355.—8 *Coke* 195.—*Cro. El.* 839.—2 *Gallison* 77.—*Sed.* 16 *East* 53, *Mitchell vs. Stavely.*

The reasons seem to be, that in such case there is no enumerated item omitted, which, as a condition precedent, was to have been adjudicated; and though the agreement may in some sense be broken, as all demands are not actually laid before the arbitrators and settled; yet this does not arise from neglect in the arbitrators, who, in a general submission, are of course unacquainted with any demands not

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exhibited. It often happens, too, without neglect in either of the parties; because the demands, not being specified, some may be omitted by forgetfulness, mistake, or accident; and, indeed, some existing demands may be unknown to the party himself who is interested, as a recent and secret injury to his property by his antagonist; or a right, accrued to legacies in the hands of the latter, or from conditions just happened.

To prevent injustice in such cases and to give redress where one, by craft, conceals a secret cause of action so as to avoid the award afterwards, if not acceptable; (8 Coke 195, *Baspole's case*) the award may well be held good on all subjects actually adjudicated; and the parties be left to their actions at law for those not adjudicated. But whether, on principle and authority, such actions can be sustained, when the award is adjudged valid and is pleaded in bar, is the remaining question for consideration.

It is admitted by the pleadings, that the demand in suit has not in fact been paid. It is, also, admitted, that it was not examined and allowed by the arbitrators; nor is there any pretence, that it has been discharged in any way except by the operation of a technical principle, rendering it, as contended by the defendant, *rem adjudicatam*. That technical principle is fully illustrated in the cases of *Tilton vs. Gordon—Robison vs. Crowninshield*, (1 *New-Hamp. Rep.* 35, 76) and the authorities there cited. See also, 1 *John. Cases* 436.—14 *John.* 63, 377, 466.—15 *Mass. Rep.* 207.—1 *Wm. Bl.* 221.—1 *Scho. & Lef.* 201.—1 *Wheaton Rep.* 452.—*Justin. Inst.* 594.*

It is not argued, that the demand in suit is, in fact, *rem adjudicatam*, but that it should have been; and, the presumption of law being that it was, this presumption cannot be rebutted. 2 *Hen. Bl.* 516.—*Philips Ev. (Apx.)* 15.

But we apprehend, that such a presumption arises only where the demand in suit has been the specific subject of a former action between the same parties; and, in all other cases, that it may be rebutted by evidence of the truth.

* 17 *John.* 400, 384.—18 ditto 534.

This demand, however, has not been the subject of any former *action* between these parties. No action has before been instituted or tried. A mere private agreement to refer, and an award in consequence of it, have none of the "incontrollable verity" and few of the legal presumptions, which belong to proceedings in courts of record.

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If the agreement be altogether broken by a neglect, or refusal, to submit any thing, no presumptions arise in bar of the demands, but an action lies on the agreement for such damage as may have been sustained by the breach. *Kyd on Aw.* 13, 14.—1 *Wils.* 129, *Hill vs. Hollister.*—8 *D. & E.* 139.—6 *Vez. Jr.* 815.—7 *East* 68.*

If the agreement be broken only in part, that is, by a neglect to submit a portion of the demands then existing, the remedy is similar; and is governed by the principles, which govern other remedies for breaches of other executory agreements.(1) The failure of analogy between such a reference and an action is well illustrated in the difference between the legal effect of an award and of a judgment on the subjects to be litigated.

(1) 5 Mass. R.
337 Semb.

Thus we have already seen, that, where the submission was special, and an item omitted before the arbitrators, the award is a mere nullity, and bars none of the claims; on the contrary, where the declaration was special and a part of the claim omitted before the jury, the judgment is incontrovertible and a bar to the whole.

Secondly, this demand has not been the *specific subject* of either a former reference or action. The former reference was general.

It will be seen, however, that in *Tilton vs. Gordon*; in *Brockway vs. Hurry*,(2) and in *Reed vs. Jackson*,(3) that the declaration in the former actions was special. 1 *Strange* 12, 59.

(2) 2 John. R.
210.
(3) 1 East 335.

And wherever the subject to be contested is thus set out, there is no peculiar harshness in a presumption, that, on trial, the whole of it was litigated, and is, therefore, barred. For if any part of it was in fact omitted, it probably hap-

* 16 John. Rep. 205.—18 ditto 228.

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pened by such gross carelessness, as ought to be punished by a loss, or by such accident, as leaves the sufferer entitled to redress by a new trial. 14 *John. Rep.* 63, *Simpson vs. Harper.*

(1) 1 Es. Cas.
401. & 6 D. &
E. 607.
(2) 2 John. R.
227.

On the contrary, in *Seddon vs. Tutop*,(1) and in *Snider et al. vs. Croy*,(2) the declaration in the former actions was general; and hence they were not held to bar subsequent ones for claims omitted. *Hale's Com. Law* 43.

Parol evidence was admitted to show, that the subject matter of the second suits was not actually litigated in the first ones; and this must of necessity be the practice so long as general declarations are used for money, or for labor performed, or for goods sold and delivered. Specifications are not always required; the dates and sums in the declaration are for the most part merely formal; and, when the party suing had two distinct claims of a like character, it is often impossible to determine, except by parol evidence, whether both claims were, or, if not both, which of the two was, litigated in the first action. 2 *Chitt. P.* 418 note.

We think, also, that the general principles, adopted by us in the present case, are strengthened by the following authorities. 4 *D. & E.* 146, *Ravee vs. Farmer*, note.—5 *Mass. Rep.* 337, *Webster vs. Lee*.—7 *Mass. Rep.* 359.—1 *Root's Rep.* 458, 479.—*Digests b. 4, t. 8, s. 6.*

Opposed to them, is the case of *Wheeler vs. Van Houston*; (3) though, at the same time, it holds concerning actions, that “if a person sues upon several and distinct causes of action, and submits only a part of them to the jury, he is not precluded from suing again for such distinct cause of action as was not passed on.”

In respect to the last case, it deserves further remark, that the important principle seems to be overlooked, that courts of law possess no authority to enforce a specific performance of executory agreements.

Replication adjudged good.

CHARLES H. ATHERTON *versus* STEPHEN JOHNSON.

Where a town owns a lot of land, and, by vote, assents to a proposed exchange of it, the title to the land does not thereby pass, nor is the town afterwards estopped to claim the title.

Possession of land, by consent of the true owner, is not adverse possession; but whether the possession was taken and retained by such consent, or under any other circumstances, indicating a possession not adverse, is a question of fact.

If a widow and her minor children retain possession of land, which was occupied by their father, it is presumed to be in their behalf; but this presumption may be rebutted by other facts.

The confiscation acts, passed by the legislature during our revolution, are binding.

THIS was a writ of entry, in which the demandant counted on his own seisin of lot No. 9, in the 3d range of lots in Dunbarton.

The tenant entered a disclaimer as to part of the premises, and pleaded the general issue as to the residue.

At the trial here, April term, 1818, it appeared in evidence, that the premises were originally granted by the Masonian proprietors to Starkstown, now Dunbarton, for a school lot; that in A. D. 1761, *William Stark* proposed to exchange lot No. 12, in the same town, for these premises; and thereupon, that the proprietors of the town voted "to exchange the said lot No. 9 in the 3d range for lot No. 12 in the 4th range with *Wm. Stark*, provided he would purchase the said lot No. 12 for the proprietors, to lay for a school lot forever."

About this time *Wm. Stark* entered into possession of lot No. 9, cleared a portion of it, erected a log house, and resided there till, in A. D. 1776, he fled to the British troops, then waging war with the United States.

Wm. Stark did not purchase lot No. 12 till Aug. 26, 1765, when it was conveyed to him and his heirs by *John Stark*. In December of the same year, the Masonian proprietors voted to confirm the proposed exchange. But no other evidence whatever was offered of any conveyance of lot No. 9, by the proprietors of the town to *Wm. Stark*, or of lot No. 12, by *Wm. Stark*, to the town.

It further appeared, that when *Wm. Stark* fled to the enemy he left upon the premises his wife and five minor children, viz. *Mary, James, Stephen, Thomas, and William*; that in A. D. 1778, the legislature of New-Hampshire con-

2	31
66	632
2	31
67	59

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fiscated all the estate of *Stark*, on account of his being a refugee, and prohibited his return; that they inventoried and took possession of his estate, including therein lot No. 12, but not No. 9; that *Stark* died in A. D. 1779; that his widow and children, before mentioned, continued to reside on lot No. 9, till about A. D. 1780, when *Mary* married and removed; that *Thomas* and *Stephen* left it about A. D. 1786, and the younger children at a period still later; that the widow, though re-marrying, did not remove from the premises till A. D. 1812; that in A. D. 1795, the legislature passed an act to vest in *Thomas*, *William*, *Mary*, and *Stephen* all their father's estate, on condition they gave good security to pay his just debts; that *Stephen* took out letters of administration, and gave such security; and that he inventoried this lot No. 9, and in A. D. 1797, as well as in A. D. 1800, he and some of the other children, together with the mother, conveyed a part of this lot as if jointly interested in fee, though from other evidence it seemed she had often claimed a separate and sole interest in fee in the whole lot.

In 1797, the town of Dunbarton brought a writ of entry against her alone for the whole lot, and judgment was eventually rendered in her favor. In A. D. 1809, also, she was disturbed in her possession by *Thomas*, and having commenced a writ of entry against him, recovered judgment, Oct. term, 1810. But early as 1802, *Stephen* conveyed an undivided fifth of lot No. 9; and in 1808, *Thomas* conveyed another fifth, and the demandant claimed under those conveyances.

The tenant claimed under the town of Dunbarton, which, in April, A. D. 1812, having procured a guardian to be appointed over the widow as a spendthrift, obtained license and sold this lot as her property.

On these facts, a verdict for two-fifths of the premises in issue was by consent taken for the demandant, subject to further advisement. The cause having been continued nisi, judgment was rendered at Grafton, May Term, 1819.

Atherton, for himself.

J. Smith, for the tenant.

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WOODBURY, J. The tenant is in possession of the premises, and consequently the demandant cannot recover them without evidence of a better title in himself.

In A. D. 1761, the title is admitted to have been in the town of Dunbarton. The demandant contends, that, afterwards, the town either conveyed their title to *Wm. Stark*, under whose heirs the demandant claims; or that, afterwards, those heirs acquired a title to the premises by adverse possession.

As to the first point, we think, that the proposition by *Wm. Stark* to exchange lot No. 12, for these premises, and the acceptance of that proposition by the town, and the confirmation of it by the Masonian proprietors, did not change the title. These acts amounted merely to an executory agreement to exchange and not to an exchange itself. 2 *John. Cases* 223.—7 *John. Rep.* 285.—10 *John. Rep.* 246.—9 *John. Rep.* 35, 330.—13 *John.* 235.

Indeed, when the town entered into the agreement, *Wm. Stark* had not the power to make the exchange; he did not own lot No. 12 till some years after; and no deeds appear ever to have been executed by either party of either lot.

It is not necessary to decide, whether ancient proprietors of land in New-England cannot, by express vote, without any deed, either pass a title to the land, or estop themselves afterwards to claim one. 3 *Mass. Rep.* 352, *Adams vs. Frothingham*.—12 ditto 415, *Springfield vs. Millar*.—*Proprietors of Dunstable vs. Blood*, (*Hills. ss. Apr. 1804.*) Because the vote in this case was on the sole condition, that lot No. 12 should be conveyed to them by *Wm. Stark*, "as a school lot forever;" and hence, if the vote was intended as any thing more than a treaty for an exchange, it would not affect the title till the condition precedent was fulfilled.

It ought to be remarked, however, that we discover some facts in this case, which might warrant a jury in presuming, that a conveyance was in fact made by *Wm. Stark* to the town of lot No. 12, and has since been lost by time or accident; but, on the other hand, some facts appear of a con-

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tradictory character, and, on a new trial, it will be the province of the jury to weigh them as they bear upon this point.

In respect to the second point, the length and character of the possession by *Wm. Stark*, by his widow, and by his heirs, must all be determined before we can decide, whether any title was acquired under it.

Thus, if the possession and entry of *Wm. Stark* were not adverse, but by the consent of the town till the executory agreement should be executed, it amounted to a mere nullity, and neither the state, his widow, nor his heirs, could profit by it. 2 *D. & E.* 53.—*Justin. Inst. b. 2, t. 6, s. 2.*—3 *John. Cases* 119.—13 *Mass. Rep.* 243, and authorities *passim*.

Thus, too, if the possession, after his flight and death, were not adverse, the same result would follow. Whether, during either period, it were or were not adverse, is a question of fact.(1)

(1) 9 *John.*
102.—13 *John.*
495.—14 *Mass.*
Rep. 53.

If the possession after his death were adverse, it must then be determined by the jury, whether it were continued by the widow in her own right, or in behalf of her children, or as a joint disseisor with them. Under the circumstances preceding the death of *Stark*, a strong presumption would arise, that she continued the possession as guardian in socage to their minor children. 1 *John. Rep.* 163.—5 *John. Rep.* 66.—7 *John.* 157.—1 *John. Cases* 219.—3 *Wils.* 516.

But many circumstances appear in this case to rebut that presumption, and being in our opinion competent, they must be submitted to a jury.

If the confiscation act should be found hereafter to affect the title of either party, as is anticipated by counsel, we would now apprise them, that it is by us considered a valid act. It was passed before the formation of any of our constitutions, and was specially excepted from the operation of our present one.(2) Similar acts, too, passed in other states during the great conflict for our independence, have uniformly been held valid. 1 *Day's Rep.* 4.—2 *John. Cases* 237.—4 *Mass. Rep.* 304, *M'Niel vs. Bright et al.*—15 *Mass. Rep.*

(2) 1 *N. H.*
Laws, 22.